
Liability and Volunteer Organizations: A Survey of the Law

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The question of how and when liability attaches is one of the most important issues facing volunteer organizations today. The liability issue has three related components: (1) whether the organization is liable to third parties for acts performed by volunteers, (2) whether the organization is liable to volunteers who are injured while performing their duties, and (3) whether an individual volunteer is liable for acts performed while working with a volunteer organization. This article explores each of these issues and suggests effective risk management practices that can reduce, although not eliminate, liability in most instances.

AS VOLUNTEER ORGANIZATIONS have been recognized as an integral part of the national economy, scholars have turned their attention toward studying these components of America's third sector, which have been valued at an estimated \$110 billion a year (Ellis and Noyes, 1990; Smith, 1999).¹ The focus of much of the literature has been on designing effective organizations to ensure that volunteers are used appropriately (Brudney, 1999). Determining the appropriate use of volunteers is a complex task that encompasses many issues, including the question of how and under what circumstances liability may be imposed for acts performed by volunteer organizations as well as their volunteers. On closer examination, the liability question comprises three interrelated issues. The first issue is whether the organization itself is liable to third parties for acts performed by volunteers and, if so, how the organization can reduce or eliminate its liability. A second issue is whether the organization is liable if a volunteer is injured during the performance of his or her duties. Finally, the question remains whether a volunteer is liable to third parties for his or her actions while working with a volunteer organization and, if so, how he or she can reduce or eliminate that

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liability. This article addresses each of the three issues and offers recommendations for implementing effective risk management practices and procedures.

Organizational Liability in General

In a variety of instances, organizations can incur liability owing to the actions of volunteers. The charitable immunity doctrine originally protected nonprofits from lawsuits in most jurisdictions, but the doctrine has been abrogated in recent years. As a result, organizations must find new methods of controlling liability exposure occasioned by volunteer activity.

The Charitable Immunity Doctrine

The idea of shielding nonprofit organizations and governmental entities deemed charitable organizations from liability arose from dicta in three nineteenth-century English common law cases that later were overruled: *Duncan v. Findlater* (1839), *Feoffees of Heriot's Hospital v. Ross* (1846), and *Holliday v. Parish of St. Leonard* (1861), overruled by *Mersey Docks and Harbour Board Trustees v. Gibbs* (1866).² When the precedent appeared across the Atlantic, however, U.S. courts failed to take notice of the English courts' later decision to abandon the dicta. Thus, in an indirect manner, the outdated English cases were the bases for a legal rule known as the charitable immunity doctrine. Although the reasoning eventually came to be regarded as specious, the intent was that organizations that did not "profit" from the actions of their agents should not be held liable for those actions. Because this concept was an exception to the ordinary assignment of liability for noncriminal conduct that harmed third parties—"tortious conduct," in legal parlance—courts had to find creative ways to excuse nonprofit organizations from the consequences of acts that otherwise would have been recompensed by the responsible party (Manley, 2000; "The Quality of Mercy," 1987).

The charitable immunity doctrine fit the bill nicely. By shielding charitable organizations from liability as a matter of law, this policy encouraged the development and maintenance of entities that otherwise might not have been created. If one accepts the contention that charitable, nonprofit organizations provide needed material goods or perform useful services that would not be provided by a for-profit firm competing in the marketplace, adopting the charitable immunity doctrine advances a desirable public policy goal. This reasoning was fairly persuasive during the late nineteenth and early twentieth centuries; accordingly, by the late 1930s, forty states had adopted a blanket doctrine, and most others had allowed for variations of the doctrine ("The Quality of Mercy," 1987).³

This exception to general principles of U.S. tort law resulted in a multitude of inequitable situations and gradually came under attack. For one thing, it considered only the perspective of a potential

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defendant in a lawsuit—the organization—and not the injured party. If a principal concept in the American rule of law is that like cases should be treated alike—the textbook definition of *equity*—then the charitable immunity doctrine from its inception was inherently inequitable from the point of view of a potential plaintiff (Black, 1979).⁴ With the doctrine in effect, the same fact pattern would result in different legal outcomes depending on the character of the offending party. Consequently, in the case of an employee who was acting negligently while working on behalf of a for-profit business, the employer would be forced to compensate the injured party, while the same damage caused by a volunteer working for a nonprofit organization would require the injured party to accept the damage with no recourse against the nonprofit organization. This kind of obvious inequity led courts to fashion exceptions to the charitable immunity doctrine. In some jurisdictions, a charity would be held liable for damage to “strangers” but not to “beneficiaries” (*Bougon v. Volunteers of America*, 1934). In other states, a charity was held liable when its officers and managing officials engaged in tortious conduct, but it was immune from suit when lower-level employees or volunteers engaged in the same or similar activities (*Old Folks’ and Orphan Children’s Home of Church v. Roberts*, 1930). Some state statutes carved out exceptions from liability depending on the types of activities undertaken by volunteers; thus, “recreational use” became a common exception that protected coaches and other volunteers overseeing sporting events and similar leisure activities (Benard, 1997; Brown, 1997; King, 1992; McMnamin, 1995; Sem, 1995).

Piecemeal exceptions to the charitable immunity doctrine created a confusing area of the law where courts tried to balance the needs of the charity to exist unencumbered by potentially crippling lawsuits against the needs of plaintiffs to recover for damages. Unfortunately, ambiguous and contradictory exceptions created more problems than they solved. In some jurisdictions, officers of a nonprofit organization could not clearly identify their liability exposure with a reasonable degree of certainty because they could not discern whether they fit the requisite definition or category to qualify for the grant of immunity. As lawmakers recognized the multitude of problems, especially the obvious inequities for plaintiffs when the doctrine applied, they began enacting measures to reduce or completely eliminate charitable immunity (McMenamin, 1995).

Controlling Volunteers: Respondeat Superior

With the charitable immunity doctrine abrogated in a majority of states by 1992, the question of avoiding or at least minimizing liability became much more important for volunteer organizations during the 1990s (Kurtz, 1988, 1990, 2001; Manley, 2000; Nonprofits’ Risk Management and Insurance Institute, 1992). Unfortunately, no matter how well an organization trains volunteers and prepares specific plans for achieving its objectives in a thoughtful, legally responsible

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manner, the potential for liability always exists. In the absence of charitable immunity, the doctrine of respondeat superior applies. This agency-principal maxim, which literally means “let the master answer,” holds a principal (a “master”) liable for the acts of an agent (a “servant”) provided that the agent was acting negligently and at the time was also acting within the scope of his employment. The question of whether, or how much, the agent is paid does not alter the responsibilities of principal or agent; therefore, even volunteer organizations are potentially liable for the torts of their agents. Remuneration is not the paramount consideration; the existence of a principal-agent relationship is the key (Black, 1979; Ellis, 1996; Kahn, 1985; Manley, 2000).

The crucial issues concern when and how the principal exercises control over the agent. The courts in all jurisdictions have been divided on this point. Cases generally depend on the facts, so a hard-and-fast rule that applies in substantially all situations is difficult to articulate. In determining liability, the initial inquiry is to delineate which duties lie within the scope of employment for a volunteer and which do not, but this determination can be difficult when the volunteer’s general activities are not clearly defined but depend on the organization’s needs at the time. This difficulty is one of the reasons that it is extremely important for an organization to prepare job descriptions for all employees, including volunteers. When a job description clearly and unambiguously lists a volunteer’s responsibilities, it is much easier to determine which activities fall within the scope of “employment” and which ones do not (Kimery, 1997; Manley, 2000; Nonprofits’ Risk Management and Insurance Institute, 1992; Tremper and Kahn, 1992).

An additional challenge occurs because the respondeat superior doctrine applies not only in cases of negligence. As early as the 1930s, the doctrine was expanded to encompass intentional torts as well. If an employer knew or should have known that the employee or volunteer was “unstable” or had a history of behaving inappropriately—as defined in dozens of cases—the organization may be held liable if it failed to take action that would have prevented the behavior. Foreseeability becomes the focus of these cases, although in some situations, organizations have been held liable when specific conduct was not reasonably foreseeable but the type of conduct was nonetheless the kind of behavior that sometimes occurs in such settings. Leaving a vulnerable population—for example, young children, the elderly, or the mentally infirm—in the care of a volunteer without adequately supervising the situation may lead to the imposition of liability even if the principal had no reason to know that the agent would abuse a person under his or her care (Kimery, 1997; Manley, 2000).

With tort liability becoming a major concern in the absence of the charitable immunity doctrine, organizations that use volunteers have found themselves facing the same kind of liability exposure that

traditional, employee-based, for-profit corporations face. In the 1990s, as nonprofits became more business-like and the differences between the for-profit and nonprofit sectors began to blur, these organizations began to express concerns about the general expansion of tort liability, especially the large damage amounts imposed by juries and the increasingly burdensome cost of liability insurance premiums (Barfield, 1995; "Developments in the Law," 1992; Lewis, 1995, p. 1773). Whether a tort liability crisis actually exists as a result of more lawsuits and prohibitively expensive insurance premiums—and this is a debatable point—it seems reasonably clear that uncertainty of outcomes in the tort system has created a greater perception of financial risk for nonprofits and insurers, as well as cases of higher liability insurance rates for nonprofit organizations, their directors and officers, and their volunteers (Abraham, 1987; Apelbaum and Ryder, 1999; Schwartz, Behrens, and Lorber, 2000; Tremper and Kahn, 1992; Williams, 1977).

Does this increasing fear of tort liability mean that volunteer organizations are being sued in increasing numbers? The data are mixed, but nonprofits do not seem to be sued in any greater numbers than other organizations, and the frequency of filings is not increasing. Moreover, few nonprofits, and even fewer volunteers, are sued (Kurtz, 1992).⁵ The problem for nonprofits, however, is that these organizations tend to be undercapitalized, at least when compared with for-profit corporations. Accordingly, even a minor or frivolous lawsuit—say, one aimed at recovering nuisance value—may be enough to drive the nonprofit out of business. In addition, because many nonprofits are funded by donations—and donors expect that their contributions will be used to advance the organization's mission, not to meet overhead expenses or settle lawsuits—few funds may be available to settle lawsuits or pay attorney fees. A "lawsuit-prone" organization, no matter how noble its original mission, may be viewed in the public eye as poorly managed and contaminated, regardless of the underlying merits of the claim, so that volunteers as well as contributors will want to distance themselves from the organization. In the words of one commentator, "Many nonprofit organizations have reported that the threat of complete financial ruin created by the specter of personal liability has dissuaded individuals from contributing their services" ("Developments in the Law," 1992, p. 1692; Williams, 1977).

Clearly, an organization that relies on a volunteer labor force has a strong incentive to minimize its liability through effective risk management practices and procedures—perhaps even more so than a for-profit corporation, which can pass some costs on to its customers (Graff, 2003; McCurley and Lynch, 1996; Safritt, Merrill, and Nester, 1995; Tremper and Kostin, 1993). The irony is that although a volunteer organization may have a greater incentive to limit its liability exposure, it may have fewer resources than a for-profit organization for accomplishing this objective. A for-profit organization can

control its employees by reprimanding them, withholding compensation, or employing a wide range of other financial and managerial tools. An organization that relies on volunteers generally cannot use these incentives. If it hopes to retain its volunteers, it must use punitive measures sparingly. Nonetheless, a method for controlling the behavior of volunteers must be found, or the organization may be required to curtail or discontinue its activities altogether (Kimery, 1997).

To forestall problems associated with liability under the respondeat superior doctrine, volunteer organizations are well advised to purchase liability insurance, when it is affordable, as well as ask volunteers to sign exculpatory agreements and liability waivers. In the case of liability insurance, nonprofit organizations often can find reasonably priced errors and omissions policies for directors' and officers' liability through group plans covered by professional or trade associations. These policies insure against costs and losses associated with being sued for the actions of board members. In most cases, the policies make direct payments to covered officers and directors, unless they are protected by corporate indemnity agreements, and reimburse the organization for any indemnification payments to directors and officers. Unfortunately, these policies generally do not cover actions performed by lower-level employees and volunteers who do not serve on the board of directors; therefore, even these policies do not guarantee that an organization will avoid liability (Kurtz, 1990; Nonprofits' Risk Management and Insurance Institute, 1992; Safritt, Merrill, and Nester, 1995; Williams, 1977).

Exculpatory agreements—that is, provisions that volunteers sign so that the organization will not be held liable for any actions undertaken by volunteers if they result in lawsuits—raise almost as many issues as they resolve. These agreements shift the assumption of the risk from the organization to the volunteer by, in effect, requiring the volunteer to indemnify the organization. Program participants also may be asked to execute an exculpatory agreement to protect the organization in cases where damage occurs owing to the actions of the participants themselves (King, 1992; Lear, 1997; McMenamin, 1995).⁶

Several problems arise with the use of exculpatory agreements. First, not all volunteers or program participants may be comfortable executing such agreements; a volunteer may be wary of donating his or her time only to be held liable for tortious conduct. Similarly, program participants may believe that any activity requiring the execution of such an agreement is fraught with peril and should not be undertaken, even if the realistic risk of a lawsuit is extremely remote. In addition, exculpatory agreements generally do not cover intentional injuries, which means that a significant source of liability is excluded. As a result, exculpatory agreements may not prevent liability in the major areas in which nonprofit organizations are sued. Finally, judges generally do not favor exculpatory agreements because

they believe that they shift the risk to parties who cannot control or foresee risk as well as an organization can; therefore, legislative approval in the form of statutory authorization may be required if exculpatory agreements are to provide adequate protection for volunteer organizations (King, 1992).

Organizational Liability for Injuries to Volunteers

Aside from the question of whether an organization can be held liable for damage to third parties occasioned by volunteers, an issue sometimes arises about whether a volunteer can sue the organization when he or she is injured while performing his or her duties. As is the case with paid employees, an organization has a duty to protect its volunteers from harm arising from the workplace, assuming that such harm is reasonably foreseeable. Eliminating workplace risks is the most efficacious manner of ensuring that volunteers will not be harmed. Training volunteers on appropriate ways to avoid incidents and ensuring that they understand how to respond in emergency situations also serve to minimize liability. In short, just as the courts generally do not differentiate between paid staff and volunteers in assigning liability when third parties are injured, neither do they relieve organizations from liability to volunteers on the basis of whether remuneration is paid to someone lawfully engaged in work on the premises of the organization (McCurley and Lynch, 1996; Satterfield and Gower, 1993).

Organizations also can limit their exposure to lawsuits by insisting that volunteers waive their right to sue for personal injury and property damage. Similar to exculpatory agreements, a liability waiver is designed to shift the risk of harm so that liability does not attach to the organization. Whereas an exculpatory agreement protects the organization from liability when the volunteer damages third parties, a liability waiver protects the organization when the volunteer is injured. To ensure maximal protection, the organization also can ask a program participant to waive liability. Thus, the parents of a child participating in a youth program or an elderly person's legal guardian might sign a waiver so that the organization can continue to support the activity without fear of lawsuits.

Just as exculpatory agreements may discourage signatories from participating in a volunteer activity, liability waivers may dissuade volunteers or participants from engaging in activities for which they bear the burden of damage or injury. In addition, the waiver must be fairly specific and detailed to be enforceable; waivers that seek to protect organizations from innumerable open-ended, extraordinary risks that easily could have been minimized or eliminated generally will not be enforced (Black, 1979; King, 1992; McMenamin, 1995; Olson, 1982).

Discrimination is another area where a volunteer may have a cause of action against an organization. Although salary and wage

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laws obviously do not apply to volunteers, in most other cases the laws protecting volunteers are similar to laws applicable to paid employees. For example, volunteers have a legally enforceable right to expect fair treatment, just as paid employees cannot be discriminated against owing to race, creed, national origin, or gender. Although some state laws make exceptions to this general rule, organizations are well advised to treat volunteers in the same equitable manner in which they treat paid staff (Ellis, 1996; McCurley and Lynch, 1996).⁷

Volunteer Liability

Thus far, the focus has been on preventing liability for an organization. The next step in the inquiry is to determine how an individual volunteer can be protected from liability separate and apart from the organization. Many state statutes address this issue directly by granting immunity to volunteers as long as volunteers act in good faith within the scope of their official duties and do not cause damage owing to gross negligence or willful misconduct. In some states, exceptions to the immunity provision include liability incurred while the volunteer operates a motor vehicle, watercraft, or aircraft. Because these activities require operators to exercise due care and diligence in accordance with applicable safety and maintenance rules, states have reasoned that they are not activities limited to service on behalf of the volunteer organization. It does not make sense to immunize operators for an injury caused by the failure to exercise a standard of care that is only tangentially related to services provided by the volunteer organization (Kimery, 1997).

The standard of care depends in no small measure on volunteers' duties within an organization. For example, volunteer board members generally are held to a higher standard of care than volunteers who are not integrally involved in a decision-making role within the organization. In most jurisdictions, board members are obliged to act with the care that an ordinarily prudent person would exercise in a similar position under similar circumstances. Moreover, board members are obliged to put the interests of the organization over and above their own personal or professional interests. Finally, volunteer board members are obliged to act pursuant to the organization's mission, by-laws, and applicable state and federal laws (Barrett, 1996; Cherry, 1999; McMenam, 1995; Tremper, 1991).

As for volunteers aside from board members, by the 1990s every state and the District of Columbia had laws in place limiting volunteer liability. The problem then—and now—is that laws vary widely from state to state. Some state laws limit liability only if the volunteer works with an organization that meets the section 501(c)(3) definition of a "public charity, educational institution and religious organization." Other state laws apply broadly to any legally recognized tax-exempt nonprofit organization (Gustafsson, 1996). Sometimes

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the laws specify some categories of covered volunteers, such as firefighters, medical service providers, and sports volunteers—while implicitly leaving other categories subject to liability under the respondeat superior doctrine. Still other state laws limit volunteer liability only if certain safety, training, or educational conditions are met or if the organization first purchases liability insurance. Suffice it to say that the variety of state laws governing the definition of a “charitable” or “volunteer” organization and volunteer liability is remarkably inconsistent (Chisholm and Young, 1988; McMenamain, 1995).

To address the problem of conflicting and confusing state laws in this area, Congress enacted the Volunteer Protection Act (VPA) of 1997. The U.S. House of Representatives passed the measure by a wide margin—390 to 35—on May 21, and the Senate provided a unanimous voice vote that same evening. President Clinton signed it into law on June 18, 1997 (Constantine, 1997). The stated purpose of the statute was to “promote the interests of social service organizations, and governmental entities that depend on volunteer contributions.” As it has been applied, the act protects volunteers from individual liability for ordinary negligence, although it allows an organization to be held liable for acts of a volunteer pursuant to the doctrine of vicarious liability (Black, 1979; “Senate Passes Liability Bill,” 1997; Smith, 1999; “Volunteer Liability Limit Heads to President,” 1997).⁸

In his statement on signing the bill, the president remarked that the legislation “is a limited and targeted bill that deals with the specific concerns of individuals serving our communities without compensation. It preserves for the states, the traditional source of tort law, not only the ability to opt out of the bill’s provisions in most cases, but also the right to require proper licensing and evidence of financial responsibility” (Clinton, 1997, p. 911). According to Clinton, the VPA protected federalism principles by providing flexibility for states to opt out of the statutory requirements when a state law was at least as stringent as—or more stringent than—the federal law.

As promising as the VPA seemed to be, Clinton (1997) expressed some reservations. “I remain concerned, however, that S. 543 contains both an absolute prohibition on joint and several liability of volunteers for non-economic damages and elements of one-way preemption of state law. These are both modifications of tort law that make it harder for innocent parties to recover” (p. 911). The president’s concerns reflected his belief that by interfering with state law, the VPA might unconscionably harm third parties because plaintiffs would have more difficulty receiving compensation for certain types of injuries. Still, Clinton agreed not to veto the measure. “On balance,” he concluded, “S. 543 will encourage volunteer citizen service without unduly affecting the rights of citizens who benefit from such service. I am pleased to have signed the bill” (p. 911; see also “Acts Approved by the President,” 1997; Kadlec, 1998).

The VPA provides, among other things, that a volunteer working with a nonprofit organization or a governmental entity is immune

from liability for the harm occasioned by his or her acts or omissions if he or she was acting within the scope of his or her responsibilities when the harm was caused. According to the VPA, the harm must not be caused by willful, criminal, or reckless misconduct, echoing the overwhelming majority of state statutes on this point. Assuming that a volunteer's activities do not fall under the definition of intentional torts, the grant of immunity is fairly broad (Biedzynski, 1999; Charles, 1997; Henderson, 1997; Poppa, 1997; Tindall, 1997; Volunteer Protection Act of 1997).

The bill had been a long time—more than a decade—in coming. Congressman John Porter (R, Illinois) originally introduced the first volunteer protection bill into the U.S. House of Representatives in 1987 as H.R. 911 (deliberately numbered that way to highlight a sense of urgency). The measure failed to pass (Biedzynski, 1999; Kurtz, 1992). Around that same time, two highly publicized studies concluded that many would-be volunteers declined to participate in activities owing to concerns about potential liability. The first study, conducted by Peat Marwick in 1986, found that 79 percent of executives surveyed were worried that fear of liability had a negative effect on volunteer recruitment. A 1988 study conducted by the Gallup Organization determined that one in ten nonprofit organizations had experienced at least one resignation by a volunteer because of liability concerns. One in six volunteers withheld their services to avoid potential lawsuits (Constantine, 1997). Other commentators also called for federal reforms designed to clear up the variety and ambiguity found in state laws (Boyd 1987; Chisholm and Young, 1988; Fishman, 1985).

Despite the 1987 defeat, Porter and his colleagues were indefatigable in their efforts to shield volunteers from liability. They continually championed volunteer protection until they gained support beginning in the mid-1990s, especially as the call for tort reform gained momentum (Apelbaum and Ryder, 1999). Other events contributed to the timing of the 1997 legislation. During the spring of 1997, the President's Summit for America's Future in Philadelphia cast unprecedented attention on volunteerism, and the three hundred-member National Coalition for Volunteer Protection used the heightened media attention to spur volunteer efforts. Moreover, on April 9, 1997, Senator Paul Coverdell (R, Georgia) introduced a volunteer protection bill that went directly onto the legislative calendar, thereby bypassing committee hearings that might have changed the measure significantly. Later that month, Congressman Porter, suffering from a severe back injury, pulled himself from his hospital bed to hold a press conference urging passage of the bill. The rest, in the words of the old adage, is history (Constantine, 1997).

Like almost any other new law, the VPA had its share of supporters and detractors. Proponents praised the statute as an effective mechanism for allowing volunteers to “breathe easier” in undertaking their duties on behalf of a nonprofit organization. Without some

kind of congressional action designed to clarify the varied, complex, and sometimes conflicting multitude of state laws, volunteers might be dissuaded from participating in many worthwhile activities owing to the fear of legal liability, just as the earlier studies concluded. According to this perspective, the VPA served an important social purpose: to encourage volunteers to continue their support for programs that would not otherwise exist (Benard, 1997; Biedzynski, 1999). According to Daniel W. Merenda, president of the National Association of Partners in Education, "Overall, I think the bill is going to be very beneficial. It will remove one more barrier to getting people involved in schools" as volunteers (Sack, 1997, p. 17).

In a prepared statement praising the new law, Senator Mitch McConnell (R, Kentucky) said, "The litigation craze is hurting the spirit of volunteerism that is an integral part of American society." Lamenting the "sue-happy" attitude of many Americans, McConnell heralded the VPA as another effective weapon in the fight against litigiousness and a step in the right direction toward nationwide tort reform. "How do we thank our volunteers?" he asked. "All too often, we drag them into court and subject them to needless and unfair lawsuits." The new law would obviate such inequities (Constantine, 1997, p. 38; see also Sack, 1997).

Not everyone agreed that the VPA was based on efficacious public policy. The conclusions reached in the studies published in the 1980s were faulty, critics contended. One commentator, Philip Buchan, associate director of Public Affairs for the Association of Trial Lawyers of America, argued that "people are volunteering, and in rising numbers. During the debate on the volunteer liability bill, the *Wall Street Journal* trumpeted a new study that showed volunteerism was up. About 80 million people volunteered in 1987, and that number rose to some 90 million in 1996" (Buchan, 1997, p. 12).

Opponents also argued once again that the risk of damage from volunteer activities had been shifted from the party that might foresee and possibly prevent the damage to the innocent victims who were unable to prevent the damage beforehand or effectively mitigate the effects afterward. To opponents, this was an unconscionable attempt to change a large and well-developed body of state tort law. This objection was essentially based on the same reasoning used to attack the charitable immunity doctrine. Moreover, the core argument propounded by VPA supporters—that the law was necessary to continue volunteer activities in the face of the increasing likelihood of volunteer liability—was not supported by the facts. The idea that fear of liability would severely retard the flow of willing volunteers was, in a best-case scenario, needless posturing based on nothing but histrionic rumor and innuendo. In a worst-case scenario, it was deliberately duplicitous—a cynical effort to ram the VPA through Congress with little regard for the negative consequences to state tort laws. Although few critics were willing to argue that volunteer organizations were unworthy of protection, they argued that better ways

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could be found to protect volunteers than by enacting a flawed statute like the VPA. When pressed, they generally offered few alternate measures apart from a call for tort reform and a cap on damage awards (Brown, 1997; Carp, 1998; Schwartz, Behrens, and Lorber, 2000).

Some critics contended that the VPA “in its current form is more trouble than it is worth” (Light, 2000, p. 60). Because the statute did not create a federal cause of action against volunteers and thereafter provide liability standards clearly delineating cases when liability protection would be appropriate and when it would not, the statute was “really a national policy direction rather than a national standard that encourages uniform treatment of volunteers under state tort law.” Such “incomplete preemption”—that is, partial federal intervention into an issue previously handled by a state—creates more problems than it solves, according to commentator Alfred R. Light, an attorney and VPA critic. “The statute’s mandate that courts use several statutory ‘rules of construction’ to blend state law concepts confuses the application of preemption doctrines in cases where the statute applies,” he wrote (pp. 62–63).

Two other commentators have concluded that the VPA typifies the “third wave of federal tort reform” in the United States.⁹ In their view, the problem is not merely that the act was inexpertly drafted, albeit that may have been the case. Instead, these critics argue that the act may be an unnecessary intrusion into state law. Reformers in this third wave generally have tried to isolate a particular area of tort law, carve out a set of protections that clarify the muddled state of conflicting state laws, and use the new federal law to encourage certain social and economic activities deemed to be beneficial. Although observers might applaud the social goals, statutes such as the VPA create many federalism problems because they do not adequately address congressional authority under the commerce clause of the U.S. Constitution and state authority under the Tenth Amendment. In the wake of several high-profile cases that expanded state authority during the 1990s, the question remains how, and to what extent, the VPA affects federalism (Apelbaum and Ryder, 1999).¹⁰

Risk Management Practices and Procedures

The question of whether volunteer organizations and the individuals who donate their time and services to those organizations should be held liable for tortious conduct is, and will remain, a controversial subject. On the one hand, volunteer organizations serve many purposes that advance important public policy goals. In an era of increasing concern about liability for all kinds of acts, volunteers may hesitate to continue participating if they believe that they may have to hire an attorney and defend themselves in court. Statutes like the VPA therefore serve a crucial role in ensuring that volunteer activities are not severely curtailed or eliminated. On the other hand, from

the perspective of a third party, immunizing organizations or individuals for the acts performed by volunteers shifts the risk of damage to a third party. This assumption of the risk may be inequitable in situations where the organization or the volunteer could have exercised due care to prevent the damage or could have mitigated the effects. To an aggrieved party, the identity of the tortfeasor is less important than the possibility of being made whole again, or at least recovering damages for the injuries suffered.

In any event, despite state and federal liability protections, volunteer organizations are not completely immune to lawsuits (Nonprofits' Risk Management and Insurance Institute, 1992; Olson, 1982; Safritt, Merrill, and Nester, 1995; Satterfield and Gower, 1993). Volunteers may sue if an organization failed to provide a safe or nondiscriminatory workplace, or third parties may file suit, in some instances, owing to damage caused by volunteers. Accordingly, such organizations are wise to minimize liability whenever possible (Graff, 2003; Olson, 1982; Satterfield and Gower, 1993).

Efforts to minimize or eliminate liability generally require organizations to develop a risk management plan. The scope of the plan depends on the nature of the organization's work, its size and budget, its tolerance for accepting risk, and, to some extent, its makeup (that is, whether it relies on a paid or volunteer labor force and how it manages those resources). For any organization, the first step in developing an effective risk management plan is to develop a risk management team. In a small organization, everyone in a management position may be part of the team. In larger organizations, a subset of the management group may serve on a risk management committee or task force. However it is selected, the team's initial responsibility is to identify appreciable risks by developing a rank-ordered list of potential sources of liability. Although the list can—and should—include unlikely scenarios, the operative concern is to identify appreciable risk. Developing a list of infinitesimally small risks is unwise; it ensures that the organization's time, attention, and resources will be devoted to addressing minuscule problems. A list that includes every conceivable risk imaginable is almost as useless as having no list at all (Safritt, Merrill, and Nester, 1995; Tremper and Kostin, 1993).

As part of the process of identifying and ranking appreciable risks, the team must evaluate the likelihood of occurrence against the magnitude of the harm. If one risk occurs frequently but has minimal consequences and another risk occurs infrequently but has potentially calamitous consequences, the team must determine which risks the organization will reduce or eliminate. Different organizations will choose to manage risks in different ways (Graff, 2003; McCurley and Lynch, 1996).

After risks have been identified and evaluated, the management team faces four possibilities: (1) immediately halt the activity and thereby, for all practical purposes, eliminate risks associated with that

A list that includes every conceivable risk imaginable is almost as useless as having no list at all

activity; (2) redesign the way the activity is conducted so that the risk is eliminated or reduced to the extent possible; (3) continue operating as before, but minimize the risk through a number of means, especially by training the labor force in emergency response procedures and other measures designed to mitigate damage; or (4) operate as before but transfer liability to the labor force or to third parties. As with the initial decision to develop a risk management plan, an organization must choose the means to control risk that best fits the its purpose, structure, goals, and organizational culture (Graff, 2003; McCurley and Lynch, 1996).

The days when an organization could blithely corral volunteers into a spare office and put them to work with little or no training, supervision, guidance, or feedback are—and should be—long gone. At a minimum, an organization must adopt effective internal policies that call for developing specific job descriptions, carefully screening and supervising volunteers, and providing adequate insurance coverage. Moreover, establishing a safe and nondiscriminatory workplace as well as providing adequate training of volunteers is a crucial component of any program that relies wholly or partially on volunteer labor. Asking volunteers and clients to sign exculpatory agreements and liability waivers relieving the organization of liability also provides a measure of protection in instances where the organization believes that such agreements can and will be executed. For their part, volunteers should exercise ordinary care and follow all applicable safety precautions appropriate to the activities in which they are engaged. Staying within the scope of their duties and avoiding grossly negligent or willful conduct generally will ensure that volunteers are not hauled into court to answer for their actions. Both organizations and volunteers can minimize, if not completely eliminate, their liability by adopting effective risk management procedures, but it takes no small amount of planning and diligence to do so (McCurley and Lynch, 1996; Safritt, Merrill, and Nester, 1995; Satterfield and Gower, 1993; Tremper and Kostin, 1993).

Notes

1. The question of what constitutes a volunteer organization is not easily answered. A *volunteer* generally is defined as a person who engages in activities or provides services without receiving an express or implied promise of remuneration. An *organization* is any group of individuals engaged in a common activity or purpose—whether formally joined together through a corporation or partnership or informally through a loose association of friendship or faction. Combining these two definitions, a *volunteer organization* can be defined as a group sharing a common purpose and relying predominantly on a labor force that does not receive remuneration for services (Black, 1979; McCurley and Lynch, 1996).

2. A charitable organization is an institution that provides goods or services to third parties but does not expect to receive, and does not in fact receive, a profit in return. Generally, a charitable organization can receive tax exempt status as a section 501(c)(3) entity from the U.S. Internal Revenue Service (IRS) if it meets several IRS criteria. A charitable organization often can be recognized by one or more

indicators in addition to its IRS tax status: it does not issue stock, it provides no dividends to shareholders, and it derives funds primarily from contributions and other gratuitous transfers from public and private sources (Black, 1979; Chisholm and Young, 1988; Gustafsson, 1996).

3. A note on terminology is in order here. An organization that relies on a volunteer labor force need not be a nonprofit or a charitable organization, although often that is the case. For-profit organizations occasionally rely on volunteers; however, the charitable immunity doctrine is limited to nonprofit organizations that meet the IRS definition of *charitable organization* (Manley, 2000; "The Quality of Mercy," 1987).

4. According to *Black's Law Dictionary* (Black, 1979), equity "denotes the spirit of and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men" (pp. 484–485).

5. A 1988 Gallup survey concluded that "while there is a great deal of concern for the risk of liability, only one in twenty organizations report being sued on a directors and officers liability question in the past five years." Insurance claims experience indicates that losses sustained by nonprofit organizations are below average and that claims against volunteers are rare (Constantine, 1997).

6. Legal terms sometimes are used interchangeably, which can result in confusion. In this article, I am deliberately employing two separate but related terms in a manner that presumably will avoid confusion. An *exculpatory agreement* in this context is a formal legal agreement signed by a volunteer or a program participant promising to indemnify, or hold harmless, a volunteer organization for actions undertaken by the volunteer or the program participant that damage third parties and cause the organization to defend a lawsuit filed by the third party. By contrast, in this context, a *liability waiver* is a formal legal agreement signed by a volunteer or a program participant agreeing not to sue the organization if the volunteer or program participant is injured while performing an activity on behalf of, or in connection with, the volunteer organization. Legal purists might argue that either term would suffice to cover both situations, but in the interests of ensuring clarity, I have chosen to use separate terms to describe separate scenarios (Black, 1979).

7. A volunteer alleging discrimination has a much more difficult time proving damages than a paid employee does, but intangible damage such as loss of reputation may allow for a recovery. Again, a general trend is difficult to discern. In any event, organizations that rely on volunteer labor would be well advised to assume that liability attaches and plan accordingly.

8. *Vicarious liability* is defined as "indirect legal responsibility; for example, the liability of an employer for the acts of an employee, or, a principal for the torts and contracts of an agent" (Black, 1979, p. 1404).

9. In the 1980s and 1990s, as states struggled to improve their laws for handling tort claims—that is, "civil wrongs" such as automobile accidents and noncriminal injuries to persons and property—they attempted to reform their legal systems in a variety of ways: capping damage awards, providing for no-fault insurance, and simplifying complex court rules for filing lawsuits, among other things. Some legal analysts saw the "first wave" of new state tort laws in the 1980s, followed by a "second wave" of reform in the 1990s. The "third wave" arguably may be taking place in the first years of the twenty-first century (Abraham, 1987; Apelbaum and Ryder, 1999; Light, 2000; Schwartz, Behrens, and Lorber, 2000).

10. Preemption cases involving the commerce clause and the Tenth Amendment are invariably complex and fact determinative. Because a detailed discussion of the tension between the plenary power of Congress to regulate interstate commerce and the Tenth Amendment limitation on federal authority to regulate is beyond the scope of this article, suffice it to say that this is an area that continues to evince great change. See, for example, several landmark court cases: *Hodel v. Indiana* (1981), *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.* (1981), *New York v. United States* (1992), *United States v. Lopez* (1995), and *Printz v. United States* (1997).

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