

## Liability Basics for Nonprofit Organizations

This brief from the Nonprofit Risk Management Center provides an overview of key concepts in nonprofit liability.

At one time, nonprofit organizations operated without the fear of liability for the injuries they caused under the doctrine of "charitable immunity." The erosion of charitable immunity beginning some thirty years ago has required nonprofit organizations to assume legal and financial responsibility for their activities. The advent of limited immunity for volunteers at the state level - and most recently at the federal level - has created additional confusion about the potential liability of a nonprofit for wrongdoing caused by its actions or by its failure to act.

A basic understanding of the key concepts in nonprofit liability is an appropriate starting point for nonprofit managers and board members considering their agency's potential liability for harm. Many nonprofit managers and volunteers do not fully understand the extent of their potential liability for injuries occurring in the operation of their organizations. Under tort law, an injured person may recover monetary damages from the person(s) and/or organization(s) that caused or contributed to the harm.

### What is a tort?

Simply stated, a **tort** is a private or civil wrong or injury other than a breach of contract for which the law provides damages. The principal objectives of the tort system are to:

- \* compensate injured parties; and
- \* foster due care and diligence by requiring the party causing the harm to pay for the damage.

To achieve these objectives, damages are based on the extent of loss, including such non-economic aspects of the loss as pain and suffering. When an injury becomes the basis for a legal claim, the tort system places the parties in an adversarial relationship which is governed by highly formal rules. The "plaintiff" seeking recovery and the "defendant" contesting the claim square off with the assistance of their lawyers.

### Categories of liability under tort law

Liability may be classified as **direct** (the organization is held responsible for its actions or failure to act), **vicarious** (the organization is held responsible for harm caused by persons acting on its behalf), or **strict** (responsibility is automatic and a finding of negligence or misconduct is not required).

Most tort cases involving nonprofit organizations and volunteers generally concern one of the following categories within the realm of torts: negligence, strict liability, or intentional misconduct.

### Negligence

Negligence is defined in a number of ways, including the failure to do an act which a reasonable person would do or the doing of something a reasonable and prudent person would not do. Gross negligence includes, among other things: carelessness which is in reckless disregard for the safety or lives of others.

While organizations and individuals have a duty to take reasonable steps to deliver services and perform their functions in a safe and responsible manner, the law does not require perfection. To prevail in a tort

case alleging negligence, the plaintiff must establish the following:

- \* Duty - that the individual or organization had an obligation to act with a certain standard of care.
- \* Breach - that the organization or an individual acting on its behalf breached a duty owed (was the defendant negligent in meeting its duty of care?).
- \* Direct or proximate cause - that the violation of the duty resulted in the injury at issue, either directly or through a chain of events made possible by the breach of duty (did the defendant's negligence cause the injury in question?).
- \* Injury- that the incident caused a compensable loss (were there damages to property, medical expenses, loss of wages or significant psychological trauma?).

If a claim is made against someone acting in a professional capacity - even as a volunteer - a higher standard of care based on the proper practices of the profession may apply. In such cases, the individual's qualifications may influence the standard of care applied. To determine the proper standard, the parties may call expert witnesses to testify about prevailing practices.

Little about the tort system is automatic or invariable. At the outset, causing harm or failing to prevent harm does not necessarily result in legal liability. In most instances, tort law imposes liability only if the party who caused the harm was negligent, that is, failed to act with the care that a reasonable person would have exercised in the same situation.

The nature of the required standard of care in a nonprofit organization depends on the interaction of settled law and ad hoc determinations about what is reasonable. Furthermore, none of these factors is static: courts render literally hundreds of new decisions each day, legislatures enact new laws every year, and programs continually improve their practices. Community standards of what is "reasonable" vary over time.

### **Strict Liability**

Strict liability results in the imposition of liability regardless of whether negligence has occurred. It arises principally when an organization has a duty to make an inherently unsafe or ultra-hazardous condition safe and to protect persons who may come into contact with the condition.

Under workers' compensation laws, an employer is responsible for injuries to a worker even though the worker's negligence may have caused the injury. Other areas of strict liability include, for example, child abuse reporting laws that make organizations liable for harm to a child if the organization fails to comply with laws mandating the reporting of suspected abuse.

### **Direct vs. Vicarious Liability**

A nonprofit is liable for its own actions (direct liability) and may be responsible for the actions of an employee or volunteer acting within the scope of employment by or service on behalf of the organization (vicarious or indirect liability). The latter form of liability is justified on the grounds that the entity that directs and benefits from an individual's actions should bear the costs of any resulting harm, and is based on the legal doctrine of respondeat superior ("the master will respond"). Under the doctrine of respondeat superior, if a "servant" acts negligently and causes some damage while performing his or her assigned work, then the "master" is legally liable for that damage.

Things to remember:

- \* Volunteers' authority may be granted or merely apparent (to third parties).
- \* The fact that an action taken by an agent is expressly forbidden by the nonprofit or contrary to

organizational procedures will not necessarily allow the nonprofit to escape responsibility.

- \* Nonprofits may be held liable even when an agent was clearly acting outside the scope of his or her duties (although this is not always the case).

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