

## ...AVOID LITIGATION

The following explanation is rooted in American tort law. Variations will exist outside the USA. If in doubt, check with your program lawyers.

### NEGLIGENCE

When a client is injured or dies and a claim for negligence is made, a court will evaluate these four questions or elements of negligence to determine whether the plaintiff (the injured client) is entitled to monetary damages.

1. Did the provider have a duty of care to the client? (the EE answer is usually “yes”)
2. Was that duty of care breached?
3. Was the client injured as a result of that breach? (known as “causation”)
4. Did the client actually suffer a compensable injury? (the EE answer is usually “yes”)

In lay terms, courts will generally scrutinize whether the provider satisfied their duty to appropriately inform and warn clients, to prepare staff, to mitigate known risks, and to properly respond to a critical incident or injury.

### DEFENSES

During a lawsuit, a defendant (provider) will typically defend itself against a lawsuit by attempting to present evidence showing that:

1. the plaintiff waived their right to sue for negligence by signing a liability waiver;
2. the plaintiff assumed the risk of injury or death inherent in the activities; and
3. the duty of care was satisfied because all of the defendant’s actions were appropriate and within the industry standard of care.

### FORMS / CONTRACTS

Liability waivers and assumption of risk forms (often combined into one contract) are critical tools to avoid and defend against a lawsuit. These critical components should be included as a fundamental liability protection investment:

1. a comprehensive list of the inherent risks of the activities and a clear clause indicating the client fully assumes those risks;
2. well drafted language releasing the provider from any future claims of negligence;
3. identification of state laws that apply and where any lawsuit must be filed; and
4. a paragraph plainly describing the client’s responsibilities and representations.

Additional components and important clauses should be added under the direction of a lawyer with a nuanced understanding of recreation law and experience drafting such documents. The signed contract informs and warns clients, acts as a deterrent to litigation, and actualizes the defenses against negligence (as listed opposite).

### INDUSTRY STANDARDS

Staff should understand the value to clients of risk taking, but also be alert for the dangers that can injure. The activity provider should make clients aware of the risks and dangers, expected rewards or consequences, and injury potential. Warning and informing is not limited to the signed contract and should be communicated in no-nonsense and real world language through websites, videos, signage, and medical forms.

Staff must be able to clearly disclose, accurately discuss, and honestly answer questions about risks and dangers. Staff should be prepared to manage and mitigate risks, avoid accidents, and respond to physical or emotional incidents. They should properly document any incidents (including all close-calls) and accurately record their observations, statements from witnesses, weather, environmental conditions, dangers or risk factors present and those absent, as well as photographs and diagrams of an incident scene. Maintaining a level of professionalism that is informed by a fundamental respect for life or death situations will go a long way towards avoiding litigation or prevailing in a lawsuit.

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# FURTHER RESOURCES

## READING

Corrigan, L. (n.d.). Common Waiver Errors – How to Implement Good Liability Waiver Procedures in Your Operation. Recreation Law Group. <https://outdoorlaw.com/common-waiver-errors-how-to-implement-good-liability-wavier-procedures-in-your-operation/>

Corrigan, L. (2016). The Value of Educating Your Customers About Inherent Risk. America Outdoors Summer Quarterly. <https://outdoorlaw.com/july-15-2016-the-value-of-educating-your-customers-about-inherent-risk/>.

Corrigan, L. (2019). A Lawyer’s Perspective on Incident Response. The Avalanche Review. <https://outdoorlaw.com/a-lawyers-perspective-on-incident-response/>

Corrigan, L. (2020). Choice of Law and Forum Selection Clauses in Waivers – Do They Matter? Waiver Sign. <https://www.waiversign.com/blog/choice-of-law-forum-selection-clauses-waivers>

Merithew, F. (2014). Importance of Industry Standards in Negligence Defense. Conatus Counsel Blog. <https://www.conatuscounsel.com/importance-of-industry-standards-in-negligence-defense/>

Van der Smissen, B. (1990). *Legal liability and risk management for public and private entities*. Anderson.

## VIEWING

An Overview of Tort Law - Intentional Torts, Negligence, and Strict Liability: <https://www.youtube.com/watch?v=f6TUiejBILE>

Law 101: How a Lawsuit Works: <https://www.youtube.com/watch?v=9tbL9424rHc>

What is Tort Law?: <https://www.youtube.com/watch?v= ds1fruLg3c>

## OTHER

Recreation Law Group newsletter: <http://eepurl.com/hURBSf>