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LEGAL LIABILITY IN THE HUMANITARIAN SECTOR

Introduction

This paper provides a brief introduction to the legal issues regarding possible legal claims against international organizations for death or injury to their overseas staff.[1] As the seminar is taking place in Washington, D.C., the law discussed is largely that of the United States. The relevant laws of each country are different; the most protective course of action is to consult local legal counsel in every country in which you operate.

Despite the complexity of the underlying law due to the large number of possible legal claims, defenses and jurisdictions, there are several basic steps that NGOs can take to better protect themselves.

There is still very little reported case law in this area even though there is a definite sense in the NGO community that legal liability is rapidly increasing for injuries to humanitarian staff in hostile environments.[2] As more NGO employees are at risk of injury or death, it seems likely that such organizations are at an increased risk for lawsuits initiated on behalf of those staff members injured or killed during the course of their employment.

The absence of reported U.S. cases could be due to a number of factors including, (a) a relatively recent increase in injuries to staff members, (b) a general lag time in legal claims catching up with new sources of liability, (c) cases initiated outside the United States, and (d) the prevalence of confidential legal settlements to resolve these disputes. Even with a limited number of cases, the law does offer a general framework which can be used to analyze, defend and prevent potential claims.

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[1] This paper provides only a discussion on general legal issue and does not constitute legal advice. The law is different for each potential case and every possible defendant. If you have a question regarding a specific situation, please obtain the legal advice of an attorney.

[2] C. Bruderlien and P. Gassmann, *Managing Risks in Hazardous Missions: The Challenges of Securing United Nations Access to Vulnerable Groups,* 19 HARV. HUM. RTS. J., 63. 66 (Spring 2006) [hereinafter BRUDERLIEN & GASSMAN]; K. Van Brabant, *HPG Briefing: Mainstreaming Safety and Security Management in Aid Agencies,* 2 HUMANITARIAN POL. GROUP BRIEFING 1 (2001).

Legal Liability

There are a wide variety of legal theories and claims that injured staff members can use as the basis for potential lawsuits against humanitarian NGOs. The first one that will be discussed is a claim based on an assertion that the organization was in some way negligent (also called "tort" claims). Negligence claims are founded on the proposition that an employer has failed to meet a legal duty of care to its staff.[3] In the U.S., these types of cases are most commonly based on state law doctrines, which are in turn derived from British common law. Although there are some differences from one state to another, the basic elements are largely consistent across the different U.S. jurisdictions.

The elements of any successful negligence or tort claim must include the following three elements:

(1) The organization has a legal duty of care to conform to a certain standard,
(2) The organization fails to meet that standard, and
(3) The staff member is injured as a result of this failure.[4]

Employers are generally obligated to provide their staff members with (a) a reasonably safe working environment, and/or (b) a full warning of any dangers in the work environment which they (the employee) may not able to discover. [5]

The definition and application of these concepts varies from jurisdiction to jurisdiction and from court to court. Generally, negligence involves a "recognizable danger, based upon knowledge of existing facts, and some reasonable belief that harm may possibly follow."[6] It is essential that the NGO could have <u>foreseen</u> the potential danger. The employer's conduct is judged against the known options at the time that the decisions and actions were taken or not taken.[7]

One of the few cases analyzing the definition of a "safe working environment" with respect to work in potentially hostile environments overseas held that a simple U.S. State Department travel advisory could be used as evidence that an entire country was an "unsafe workplace."[8] This opinion

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[3] The word, "staff" in this paper includes both employees and consultants.
[4] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 at 164 (5th Ed. 1984) [hereinafter PROSSER & KEETON].
[5] *Id.*
[6] PROSSER & KEETON, *supra* note 9, § 30, at 170.
[7] *Id.* § 30, at 170.
[8] See *Parsons v. United Technologies Corporation,* 243 Conn 66 (Conn S.Ct, 1997); where a helicopter mechanic was transferred by his employer to work in Bahrain during Operation Desert Storm. After he refused to accept this assignment, alleging that working anywhere in the country posed a threat to his health and safety, his employer fired him. He argued that he was wrongfully terminated, based on the public policy doctrine that not even at-will employees should be required to work in unsafe environments. Connecticut's Supreme Court decided that this argument was potentially valid and he should be permitted to make it in front of a jury.

explored the purpose of US State Department warnings at length and stated, "When a country is in the middle of a war, whether international or civil, and particularly when the United States in involved, any reasonably prudent United States citizen whose presence is not essential to the national interest … should not travel to that country…"

There are certain circumstances where the duty of an NGO will be enhanced or heightened. These factors include the following:

(1) the person harmed is an employee[9],
(2) the organization was in a better position to protect the victim than was the victim himself or herself, or
(3) the risk of the harm is particularly foreseeable or predictable.[10]

Although the law does not generally hold organizations responsible for the criminal acts of third parties, the presence of any of the above factors may change this general rule so that an NGO can in fact be held legally liable for the criminal acts of others that harm its staff.

The law requires U.S. organizations to protect its staff against any imminent danger that is known to exist.[11] Generally, any organization that should be aware of a dangerous condition will be potentially liable if it fails to exercise reasonable care to avert the threatened harm.[12]

Employers owe many duties of protection to their employees because employers are usually in a good (and oftentimes better) position to protect against harm and extend help if necessary.[13] Please note that consultants are in a different position than employees, and are thus owed a different standard of care from the employer. In the *Workman v. United Methodist Committee on Relief of the General Board of Global Ministries of the United Methodist Church* ("UMCOR") case, the U.S. Court of Appeals for the District of Columbia found that UMCOR was not liable for the death of its consultant in Somalia in part because she was tasked by the organization to assess the relevant security considerations and to make her own decisions about how and when to best carry out her mission.

Another factor in the court's decision in *Workman* was that consultant's death was caused by the criminal act of a third party. This criminal act of a third party can be an intervening or supervening cause for which a defendant will not be judged responsible absent special circumstances. These circumstances are generally either (a) a special duty to protect the class of persons to which the plaintiff belongs[14] or (b) some type of heightened foreseeability.[15] In Workman, the

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[9] *RESTATEMENT (SECOND) OF TORTS* § 302B and § 314A.
[10] *See Workman v. UMCOR, 320 F.3d 259, 264 (2003).*
[11] *RESTATEMENT (SECOND) OF AGENCY* § 512 (1958).
[12] *Id.*
[13] *RESTATEMENT (SECOND) OF AGENCY* § 512 (1958).
[14] *See Buel v. ASSE International* 233 F.3d 441(2000).

court ruled that because UMCOR could not have foreseen that its consultant would be in danger, it had no duty to protect her from that danger. The court in one case, however, noted that this "supervening cause" defense should not be applied "when the duty of care claimed to have been violated is precisely a duty to protect against ordinarily unforeseeable conduct."[16] In this case, the court found a international exchange program liable for the rape of an exchange student because it failed to reasonably monitor the student's living situation. The judge who wrote this opinion also challenged the supervening cause defense in another case. Writing in dicta in the *Shaddy v. Omni Hotels Management Corporation* case, Judge Richard Posner argued that the proper concern of the courts should be "whether the defendant knows or should know that the risk is great enough, in relation to the cost of averting it, to warrant the defendant's incurring the costs" associated with protecting against the possible injury.[17] Even the Workman court agreed that the relationship of the plaintiff and the defendant can suggest that there are circumstances under which the defendant should be liable as a matter of policy; the opinion noted that a defendant landlord was held to have a duty to protect against third party criminal acts when it was in a better position to both know about security threats and to protect against them.[18]

If a duty is owed, the standard of care is generally determined by what a reasonable and prudent organization under similar circumstances would do. When looking at the reasonableness of an NGO's action, a court will consider whether a general standard of care common to the business activity exists. Thus, for most U.S. NGOs, the relevant standard of care relates to general security standards used by the international development community as a whole.

Because NGOs will be judged by a community standard, it is important to both know what other organizations are doing and to conform to the standards that are adopted, formally and informally. Formal standards are evolving and must be continually monitored. The United Nations has been developing, implementing and revising minimum operating security standards over the last 20 years. InterAction is requiring that all of its 168 members adopt and conform to its "Minimum Operating Standards for Security" ("MOSS") in the year 2008. As these are leading organizations striving to set minimum standards for international humanitarian organizations, any organization that falls substantially behind these standards risks being considered unreasonable, imprudent or unsafe by a court of law.

NGOs also have several more legal responsibilities to their staff to provide a safe working environment. In addition to being subject to general tort liability for inadequate security, U.S. organizations can also face legal action for a variety of things including the following:

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[15] *See Workman, supra* note 10
[16] *See Buell, supra* note 14 at 447
[17] *Shaddy v. Omni Hotels Management* 477 F.3d 511 (2007).
[18] *Workman, supra* note 10 at 263

(1) Failure to follow applicable health and safety laws,
(2) Failure to care adequately for a staff member who has been injured,[19]
(3) Discrimination on the basis of race, sex, nationality, religion, age or disability,[20]
(4) Failure to purchase workers' compensation or Defense Base Act insurance,[21] or
(5) Commission of fraud or misrepresentation.

A notable case alleging fraud and misrepresentation with regard to security is *Nordan v. Blackwater Security Consulting*.[22] In this case, the estates of four contractors who were murdered in Fallujah in 2004, sued Blackwater for intentional misrepresentation, fraud and knowingly sending them into harm's way without necessary and promised security protection. The contractors' families allege that the contractors were promised certain security protections, including a minimum number of security team members, armored vehicles, stated notice periods, an opportunity to gather intelligence, and an appropriate risk assessment. Although Blackwater has expended significant resources and effort in attempting to get this case dismissed, they have not yet succeeded in doing so.[23]

Available Defenses

Fortunately, there are several ways that a US NGO can lessen the chances that it will be held legally responsible if a US NGO staff member is injured overseas.

1. Full Warning of Possible Danger

US organizations are often able to prevail in litigation solely by providing a detailed warning to staff of the possible danger of working in and traveling to a specific country or region. In some cases, such a warning may be sufficient to meeting the required standard of care.[24] Even if this is not a complete defense to

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[19] US NGOs are legally obligated to provide some aid to any employee who becomes injured during the course of his employment. If an employee is hurt and becomes helpless during the scope of his employment, the employer will be subject to liability for negligent failure to give aid to the employee. See *RESTATEMENT (SECOND) OF AGENCY* § 512 (1958).
[20] Title VII of the Civil Rights Act of 1964.
[21] Section 4(a) of the Defense Base Act (DBA), 42 § U.S.C. 1651, et seq. (2007), requires most US government contactors with civilian employees working overseas to purchase DBA insurance.
[22] Nordan v. Blackwater Security Consulting, 460 F.3d 576 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (February 26, 2007) (No. 06-857).
[23] Blackwater sought to have the case removed to federal court on procedural grounds, arguing among other things, that the Defense Base Act does not permit the contractors any remedy other than the statutory damages available under the Act. The federal district court and federal appellate court both rejected this argument and the Supreme Court declined to hear an appeal. See 460 F.3d 576 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (February 26, 2007) (No. 06-857).
[24] *RESTATEMENT (SECOND) OF AGENCY* § 492 (1958).

future legal action, it should serve as good evidence that US NGO took a necessary action to fulfill its duty of care.

2. Staff Assumption of the Risk

If an organization can demonstrate that its staff voluntarily assumed a known risk inherent in traveling to and working in a hostile environment, this can be either a full or partial defense to many causes of action. Employers who can demonstrate that employees openly consented to a risk, voluntarily participated in it, and had full knowledge of the risk can have a valid and full defense.[25] Many "comparative jurisdictions" may refuse to use the "assumption of risk" rationale for barring negligence lawsuits. In some jurisdictions, such as the District of Columbia, assumption of risk is a valid defense which bars a plaintiff's claim so long as the plaintiff engaged in the activity (a) with knowledge of the risk and full appreciation of the danger and (b) the decision to do so was free and voluntary.[26]

For this argument to be successful, an organization must demonstrate that all staff who expose themselves to risk do so voluntarily. Legally, this means that staff should not be taking a risk to "protect an established right or privilege."[27] In an employment context, this has been interpreted to mean that an employer cannot require a person to assume a risk in order to protect his job.[28] In addition to providing verbal assurances, it is legally protective for an organization to maintain written documentation that the organization has assured staff members that their jobs or benefits will not be affected by their decision not to travel into a hostile environment.

The best way to demonstrate that staff members are entering a dangerous place voluntarily and knowingly is to have them sign a document similar to the attached Acknowledgement of Risk document (Appendix A). It is best to have this document thoroughly describe the risk as it is known to the NGO.

4. Legal Promise Not to Sue for Negligence

A U.S. NGO *can only rely* upon the attached Acknowledgement of Risk document as a contractual promise not to bring legal action against the U.S. NGO if the individual in question is an independent contractor, rather than an employee.

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[25] PROSSER & KEETON, *supra* note 9, § 68 at 480. However, please also see *RESTATEMENT (SECOND) OF TORTS* § 496B, Comment f, (2004) (noting that courts will not generally give effect to "express" assumption of risk by employees as evidenced by a legal document when employees are injured on the job); See also *See, e.g.*, L. Ellis, *Talking About My Generation: Assumption of Risk and the Rights of Injured Concert Fans in the Twenty-First Century*, 80 TEX. L. REV 607, 618 (Feb. 2002) (discussing the different approaches to assumption of risk doctrine and stating that "Implied assumption of risk … means that plaintiff's conduct may imply consent to relieve another from liability for negligence.").

[26] *See Breheny v. Catholic Univ., Civil Action No. 88-3328-OG (D.Ct, D.C., 1989), 1989 U.S. Dist. LEXIS 14029.*

[27] *RESTATEMENT (SECOND) OF TORTS* § 496E, Comment c (2004).

[28] *See Staub v. Toy Factory, Inc., 2000 PA Super 87 (Pa. Super. Ct. 2000).*

Although the law does permit persons to sign waivers (or exculpatory agreements) that effectively exempt persons and organizations from negligence liability, such waivers are not effective if (a) the accused organization was grossly negligent, reckless or intentionally created harm, or (b) the agreement is between an employer and an employee.[29]

5. Defense Base Act Statute Preemption of Negligence Claims

Workers' compensation statutes generally preempt negligence claims by employees and are intended to be the sole remedy for employees injured in the course of their work. This legal scheme allows workers to be compensated for their injuries, regardless of who is at fault, but it also limits the amount of compensation that will be paid.

Defense Base Act (or DBA) insurance is a type of workers' compensation insurance and functions as an exclusive remedy for employees of U.S. government contractors injured on the job in some overseas locations. Obtaining and maintaining this insurance should significantly limit a U.S. NGO's liability.

This insurance does not, however, offer a U.S. NGO complete protection from liability. DBA insurance is generally only available for work done pursuant to a government contract, rather than a government grant.[30] In addition, there are certain limited circumstances that courts will determine that workers' compensation or DBA rules do not bar a negligence suit.

6. Charitable Immunity

Generally, the doctrine of charitable immunity provides that charities shall be immune from suits for negligence. While abolished in the majority of states, the common law doctrine of charitable immunity still exists, in varying degree, in the following states: Alabama, Arkansas, Georgia, Maine, Maryland, New Jersey, Virginia, Utah and Wyoming. Charitable immunity is based on the trust fund theory that "because funds of the organization are impressed with a trust for charitable purposes, those funds should not be diverted to pay tort damage awards."

In Maryland, charitable immunity applies to charities that have no liability insurance.[31] In addition, if a Maryland charity carries insurance, recovery is generally restricted to the policy limits.[32] In Virginia, nonprofits are immune only from lawsuit by *beneficiaries* alleging negligence.[33] However, nonprofits are not immune for the negligence of their employees if they fail to exercise ordinary care

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[29] *See* J. Perillo and H. Bender, *Corbin on Contracts* §85.18 at 455 - 464 (2003).
[30] *See Raciborski v. CHF, Int. et al, 1999-LHC-01576 (May 2001).*
[31] *James v. Prince George's County*, 418 A.2d 1173 (1980).
[32] *Eliason v. Funk*, 233 Md. 351 (1964).
[33] *Radiosevic v. Virginia Intermont College*, 633 F.Supp. 1080 (W.D. Va. 1986).

in the selection and retention of those employees.[34] The Virginia Supreme Court recently reaffirmed the doctrine of charitable immunity, if the charity is organized for a recognized charitable purpose and actually operates in accord with that purpose.[35] Although beyond the scope of this paper, complicated choice of law issues are likely to arise in the context of NGOs incorporated in the United States but involved in operations overseas. For this reason, an NGO should not rely too heavily on this doctrine.

SUGGESTIONS AND RECOMMENDATIONS

(1) Structure your organization's security program so that it conforms with the evolving community standard of NGOs working internationally. The best way to avoid a possible claim is to prevent staff members from being injured or killed. Careful security planning, holistic and comprehensive security policies, reasonable training, adequate protective resources and information sharing can all accomplish this. If injuries or death cannot be avoided, be sure that the organization can demonstrate that it does at least adhere to the minimum standards of the NGO community in order to keep its staff safe. InterAction's Minimum Operating Security Standards ("MOSS") are likely to be considered an important standard by which U.S. NGOs working overseas will be judged in the U.S. courts.

(2) Ensure that your organization's risk assessments are up to date and specific to where the organization operates. Legal liability is generally predicated on the theory that the organization should have known that its people would be injured, but did nothing to protect them. The more the organization knows about the potential risks and communicates these risks to its employees, the more effective the organization will be at preventing harm and warning of specific danger. As long as no staff members are compelled to stay in unsafe environments, adequate and specific warning usually constitutes a full legal defense.

(3) Carefully document all actions taken to protect your overseas staff. NGOs benefit tremendously from having written proof of the ways in which they protect their staff. The organization does not want to find itself in a position where staff turnover or missing records result in the loss of a good defense.

(4) Do not promise more than your organization will or can deliver. The organization will not benefit from promising staff policies or resources which it cannot always deliver. While it is great to aspire to do more than is required by the basic legal doctrines, failure to deliver on a written promise can result in a new source of legal liability. Employee handbooks are frequently interpreted to be legally binding contracts.

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[34] *Infant C. v. Boy Scouts of America*, 239 Va. 572 (1990).
[35] *Ola v. YMCA of South Hampton Roads, Inc.*, 270 Va. 550 (2005),

(5) Maintain adequate insurance. In addition to purchasing any insurance required by law, such as workers' compensation or Defense Base Act insurance, proper insurance can help humanitarian agencies protect their employees. Insurance can be used to provide care to injured staff, evacuate at-risk staff, and compensate the families of staff members who have been killed.

(6) Make a plan to deal with harm to your employees. Legal liability is increased by inadequate preparation to handle crises. Working crisis management teams, adequate crisis management policies, good insurance coverage and expert professional advice all help to protect NGOs from allegations of insufficient care of at-risk or harmed staff members.

(7) Continually compare the benefit of working in a hostile environment to the risk of harm to staff in helping the organization pursue its mission in such a place. If the hostile environment's risks outweigh its benefits, be prepared to pull out of the environment if necessary.