



Adventure Activity Standards (AAS) Guidelines for Dependent Groups

Legal aspects (Version 3 • May 2009)

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1. Adventure Activity Standards - Why Have Standards?

AAS are voluntary guidelines for undertaking potentially risky activities in a manner designed to promote:

1. Safety for both participants and providers,
2. Protection for providers against legal liability claims and criminal penalties, and
3. Assistance in obtaining insurance cover.

These AAS are NOT statutory standards imposed by law.

2. Disclaimer

The comments below on legal liability in Contract and Negligence and defences and limitations thereto, including recent legislative changes, do not purport to be a complete and accurate description of the law on these topics. The comments contain general information only and are not a substitute for obtaining legal advice.

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3. Basis of Legal Liability

Legal liability for personal injuries or property damage is primarily governed by the law of:

1. Contract; and
2. Negligence.

Although provisions of statutes such as the Trade Practices Act (Cth) and the Fair Trading Act (Vic) are also relevant.

3.1 Claims in Contract

For there to be a claim in contract there must be a legally enforceable agreement (i.e. a contract) between the person who has suffered injury or loss and the provider against whom the claim is being made. For example, there is a contract between a provider and a client, where the provider agrees to provide services for payment. The contract can be in writing or oral, or both. The claim in contract can only be made by one party to the contract against the other party, unlike a claim in negligence, which is not so limited.

Apart from the express terms of the contract, the law will usually imply certain terms into a contract that require a service provider to do a number of things when providing that service. Those implied terms might include a requirement to provide competent guides and instruction, safe equipment, and a general requirement to exercise the degree of reasonable skill and care which is to be expected of a competent provider. Some of these terms will be implied by sections of the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1999* (Vic).

If injury or damage occurs because the provider did not exercise reasonable care in the provision of the service a court will find there was a breach of the contract entitling a party to claim compensation (damages) for the loss or injury suffered.

3.2 Claims in Negligence

Over recent years the Law of Negligence has undergone substantial legislative change in Victoria. These changes are set out in the *Wrongs Act 1958* (Vic) (as amended).

The essential elements of a claim in negligence are:

1. a duty of care being owed by the provider to take reasonable measures for the safety of their clients / participants;
2. a breach of this duty of care, and
3. the breach of the duty of care being a cause of the harm suffered by the participant.

A successful claim in negligence against a provider will result in an award of damages against that provider to compensate for the loss or injury thereby suffered.

Although the law does not automatically impose a duty of care, it is likely such a duty will be imposed when one party (the provider) assumes responsibility for another in the provision of adventure activities.

The duty of care is a legal requirement imposed by the courts on a provider to take reasonable care to protect a client or participant from foreseeable harm or loss.

If a claim is made and a court finds that a duty of care is owed, the court must then decide what is the appropriate level or standard of that duty of care, to determine if the provider has acted reasonably or alternatively has breached the duty of care. The standard of care is determined by all the relevant circumstances and the particular facts of each case. A court will have regard to the experience of the providers and the clients, the conditions at the time, and ultimately may seek the guidance from experts in the field. A court will find that the standard of care has not been met, (i.e. there has been a breach of the duty of care) if the evidence, on the balance of probabilities, establishes that the provider has not acted reasonably in the circumstances. If that conduct has caused loss and damage the provider will be liable to pay damages to compensate the party who has been injured or has suffered a loss.

For example, in an outdoor recreation activity some participants could find themselves in a situation suited to more advanced participants. There may be persons in the group who have been lead to believe by the provider that a certain skill level was not required and enrolled to join a group mis-described as being for “beginners”.

If, an accident occurred due to their inexperience, and these “novice” participants were injured, it is possible that a legal action to recover damages might be based as follows:

- in the law of contract, against the provider, if it can be demonstrated that the provider incorrectly described the group as being for “beginners”; and
- in the law of negligence, against the leader and guide, as well as the provider because of a failure to adequately instruct, advise and perhaps supervise the group.

The duty of care of the provider is higher than that placed on the ordinary citizen because the provider has agreed to provide services for a reward or assumed a responsibility of care for others e.g. by holding him/herself out as experts or specialists who have agreed to take participants into potentially dangerous or remote situations.

Whilst not an exclusive list the following is a guide to the standards that must be met by an provider, guide, instructor, teacher or staff member:

- ensure the activity is appropriate for the skills and experience of the intended participants;
- ensure the intended activity is appropriate given the known, expected and forecasted conditions;
- provide adequate staff/leader supervision;
- provide competent and appropriately trained staff/leaders;
- provide safe and properly functioning and adjusted equipment;
- provide reasonable food and safe shelter (if relevant to the activity);
- provide reasonable guidance, instruction and direction to participants; and
- depending on the activity, have an adequate knowledge of the area in which it is to take place and be able to provide reasonable first aid, emergency backup and rescue.

The law will require the provider to protect participants from known hazards, but also from those risks that could arise (that is, those that the provider, instructor, teacher or staff member guide should reasonably have foreseen) against which reasonable preventative measures could be taken.

In these circumstances, in order to limit potential for legal liability and to minimize the risk of injury, each organisation needs to implement risk and safety management processes, which have identified foreseeable risks and put in place measures to control such hazards. For the same reasons, all providers, leaders or guides ought, as a minimum, to have completed appropriate first aid and activity specific training.

This is particularly so where the activity is a specialised one. In these circumstances, as a participant will be seen as relying on the expertise of the provider, leader or guide, a high duty of care will be imposed because they will be considered as having a responsibility for the control, guidance and protection of the participant.

All of the elements of any claim must be proved by the claimant on the balance of probabilities. (i.e. more probable than not.)

4. Defences Against Claims By Participants

4.1 Establish No Negligence

The most obvious defence to a claim in negligence is for the operator to establish that he / she acted with all reasonable care in the circumstances – that is, was not negligent.

In attempting to do so the following questions must be considered:

- was the risk of harm foreseeable?

- was the risk not insignificant? and
- would a reasonable operator have taken additional precautions that would have prevented the harm?

In determining whether a reasonable operator would have taken additional precautions a court will consider the following (amongst other relevant things):

- the probability that harm would occur if care were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions to avoid the risk of harm, and
- the social utility of the activity that creates the risk of harm.

4.2 Voluntary Assumption of Risk

If it can be proved, on the balance of probabilities, that a participant was fully aware of and freely accepted the risk of suffering injury in an activity then this will be a defence to a claim in negligence. It will not be a defence, however, if the injury was caused by the inexperience or incompetence of the provider, defective equipment, inadequate supervision or instruction as it is highly unlikely that any participant would have consented to accept such risks.

If the risk of harm was an obvious one then there is a rebuttable presumption that the person who suffered the harm was aware of the risk.

4.3 Duty to Warn

A person who owes a duty of care to another person to give a warning, or other information in respect of a risk, satisfies that duty if reasonable care is taken to give that warning, or other information. This is potentially very important in the context of an Adventure Activity where it may be prudent for the provider to give all participants printed instructions and warnings (where appropriate) and obtain signed acknowledgements.

4.4 Contributory Negligence

If the accident was caused or contributed to by lack of reasonable care on the part of the participant then this will be a partial defence, according to the apportionment of responsibility made by the court between the provider and the participant. In cases of extreme acts of negligence by the participant, contributory negligence can be very high (e.g. 80 / 90%) and sometimes a complete defence.

4.5 Inherent Risks

A person is not liable in negligence for harm suffered by another person as a result of an inherent risk. An inherent risk is a risk of something occurring that cannot be avoided by the exercise of reasonable care.

4.6 Waiver to Sue / Exclusion of Liability Agreements

Amendments to the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1999* (Vic) now enable the suppliers of “recreational services” to limit their legal liability to their customers, who are 18 years of age or over for death or personal injury. This is done by having a written Waiver to Sue signed by each customer prior to the supply of the services

The use of a signed Waiver to Sue under this Act enables suppliers of recreational services to exclude their liability for negligence resulting in death or injury. However, suppliers will be liable if the death or injury suffered by a customer is caused by the supplier’s **reckless conduct** (described in the Fair Trading Act s “**Gross Negligence**”)

The Waivers must be carefully drafted and, in Victoria, must comply with the wording set out in the Fair Trading Act. The use of a signed Waiver to Sue under this Act enables suppliers of recreational services to exclude their liability for negligence and to limit their liability to injury or death suffered by a customer caused by reckless conduct described in the Fair Trading Act as “Gross Negligence.”

To qualify for this legislative protection the service provided must come within the meaning of “recreational services” as defined in the *Trade Practices Act* and the *Fair Trading Act*.

Pursuant to these Acts “recreational services” mean services that consist of participation in: -

- (a) sporting activity or a similar leisure - time pursuit, or
- (b) any other activity that involves a significant degree of physical exertion or physical risk and is undertaken for the purposes of recreation, enjoyment or leisure.

For further information about consumer waiver under the *Fair Trading Act 1999* see the Consumers Affairs factsheet entitled ‘Consumer Waivers’ dated June 2004, available at www.consumer.vic.gov.au

4.7 Good Samaritans, Volunteers, Apologies

4.7.1 Good Samaritans

Under the *Wrongs Act 1958* (Vic) (as amended) an individual who provides assistance, advice or care to another person in an emergency or accident, where there is no expectation of payment by money or other means, will not be liable for any injury or harm he / she causes.

4.7.2 Volunteers

Volunteers are also protected by this Act from liability for injury to another when they are providing a community service within the scope of the work provided by their community organisation.

4.7.3 Apologies

This Act also provides that a person by saying that they are “Sorry” or apologising for causing injury or harm to another does not constitute an admission of liability provided it does not include a clear acknowledgement of fault. Likewise, a reduction or waiver of fees payable for a service is not an admission of fault or liability.

4.8 Limitation on Claims for Personal Injury Damages

The *Wrongs Act* provides that an injured person cannot obtain damages for pain and suffering unless they suffer permanent whole person physical impairment of greater than 5%. If the injury is psychological / psychiatric the impairment must be greater than 10%.

The Act also imposes a cap on damages for pain or suffering. In 2002 this cap was set at \$371,380. The amount is increased annually in line with the Consumer Price Index. The Act also contains other limitations on claims for both past and future economic loss.

4.9 Applying The Adventure Activity Standards

Having suitable risk management programs and strategies in place, and ensuring the AAS are met, will minimise the likelihood of injury or loss. However, evidence of compliance with such programs and the AAS will also assist in the legal defence of claims and in proving that a provider and its leaders have acted reasonably in the circumstances (i.e. were not negligent). It is also likely such programs will assist providers in obtaining more favourable insurance arrangements.