

Selected Papers from the 2013 George Wright Society Conference on Parks, Protected Areas & Cultural Sites

Tort Liability in National Parks and How NPS Tracks, Manages, and Responds to Tortious Incidents

Scott Breen

SINCE THE ORGANIC ACT MANDATES THAT THE NATIONAL PARK SERVICE MISSION is to conserve the natural and cultural resources within its units, NPS cannot eliminate all dangers to visitors. As the 2006 NPS management policies state: “Park visitors must assume a substantial degree of risk and responsibility for their own safety when visiting areas that are managed and maintained as natural, cultural, or recreational environments” (NPS 2006). The risk is serious, as over 5,000 serious injuries occur among park visitors each year, with 98% of them occurring in 110 parks (NPS 2012). Due to Government Performance and Results Act requirements, NPS must report fatalities and serious injuries in the parks, but there is scant reporting of less serious claims. In terms of actual litigation, not all those who are harmed file claims and, of those who do file, not all have claims that are meritorious, mainly due to governmental immunity from many types of tortious incidents.

This paper first explores the extent of liability the government faces for tortious incidents that take place in national parks. Then the cost of legal actions stemming from tortious incidents, and government efforts to track such incidents, will be detailed. Last, public risk management efforts to reduce tortious incidents in national parks and a case study showing how proper tracking of tort claims can lead to more effective public risk management strategies will be presented.

A “tortious incident” is any civil wrong that occurs when one person’s action or inaction causes injury to another and from which a remedy may be obtained. Attorneys in the Department of the Interior’s Office of the Solicitor (DOI-OS) make the ultimate decision on whether to settle or litigate a claim made against NPS. While there is no database that keeps track of all tort claims against NPS, as will be detailed later, there is no doubt that in most claims, NPS is not liable for the incident.

The George Wright Forum, vol. 30, no. 3, pp. 247–252 (2013).

© 2013 The George Wright Society. All rights reserved.

(No copyright is claimed for previously published material reprinted herein.)

ISSN 0732-4715. Please direct all permissions requests to info@georgewright.org.

NPS is often not liable due to exceptions in the Federal Tort Claims Act (FTCA). The FTCA, passed in 1946, waived the government's general immunity and declared that tort actions against the US were authorized under circumstances "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The FTCA has a discretionary function exception that is a major restriction on claims allowed under the law, as it shields the NPS in many cases. The 1991 Supreme Court case *United States v. Gaubert* affirmed the two elements that must be met for the discretionary function to apply: (1) the act giving rise to the alleged injury involves an "element of judgment or choice"; and (2) The judgment must involve social, economic, or political policy of the kind that the discretionary function exception was designed to shield.

Several NPS officials were interviewed for this paper. One attorney at a DOI regional solicitor's office remarked, "In 22 years at the regional solicitor's office, I've only seen us lose once on the discretionary function exception." This makes sense considering the first prong is often satisfied since Congress rarely specifies to NPS that amenities like lights and handrails need to be put in specific places. NPS Director's Order 50C (NPS 2010) regarding the Public Risk Management Program bluntly states, "The means by which public safety concerns are to be addressed in each park falls under the discretion of the park's superintendent" (NPS 2010). The second prong is also often satisfied since the *Gaubert* court said that when a regulation allows for employee discretion, this creates a "strong presumption" that the discretion authorized by the regulation involves the same policies underlying the regulation's promulgation (Hyer 2007). In other words, if the regulation creates the opportunity for discretion, then the policy considerations required to satisfy the second prong exist.

Two cases from the U.S. Court of Appeals for the Third Circuit help illustrate what kinds of incidents are covered under the discretionary function exception. Note that while it seems to be a bright line test, at times the court may reason around the "strong presumption" to get the outcome it feels is best.

Merando v. U.S. is an instance where the discretionary function exception immunized the US from suit. A family was driving in Delaware Water Gap National Recreation Area (DWGNRA) when a 27-foot red oak fell on their car and killed the mother and a daughter. The court noted that there were no state regulations or agency guidelines specifically providing that if a tree inspection plan was developed, it would need to include particular inspection procedures (*Merando v. U.S.* 2008). Thus, NPS was free to balance safety objectives with practical considerations such as staffing and funding in deciding that low-traffic areas like where this accident occurred would only get windshield inspections. This is exactly the type of policy decision the court wants to avoid second-guessing.

Cestonaro v. U.S. is an instance where the discretionary function exception was deemed not to apply. While vacationing with his family, Daniele Cestonaro was shot and killed in the parking lot of Christiansted National Historic Site. The court reasoned that NPS failed to show how providing some parking lot lighting, but not more, was grounded in its management policy objectives, specifically to maintain the area's historic appearance. There was no "rational nexus" between the lighting decisions of NPS and social, economic, and political concerns (*Cestonaro v. U.S.* 2000). The court declared that NPS cannot make decisions unrelated to policy and then seek shelter under the discretionary function exception. One could

make a strong argument, though, that this case is similar to *Merando* in that there were no guidelines stating how much light needed to be provided in parking lots, and NPS officials made a policy decision regarding how much to provide.

Notwithstanding *Cestonaro*, the court often does not scrutinize the policy decision for such a “rational nexus” but rather makes the presumption, detailed in *Gaubert*, that if discretion is given, it involves the policy considerations underlying the governing regulation. Still, even with immunization from most tort claims, millions of dollars are spent each year in settling and litigating such claims stemming from incidents in the national parks. NPS does not know how much in total is paid to deal with tort claims in any given year. For any case that costs more than \$2,500, the money comes from the Judgment Fund, a permanent, infinite fund that Congress created to pay compromise settlements and judgments against the United States. For such cases, the cost does not come out of any park unit’s budget. This may actually lead to less of an incentive for parks to take steps to prevent tortious incidents as the parks often do not directly pay for the damages. In the last ten years, \$39,232,921.71 was spent for NPS administrative payments (settled by agencies without Department of Justice assistance) and NPS litigative payments (payments for claims where Department of Justice was the defendant agency) (Department of the Treasury 2013). This figure does not include payments made by individual parks or NPS staff time to help handle cases.

There may not be much of a financial incentive, but Director’s Order 50C does say, “The NPS must strive to prevent visitor injuries and fatalities within the limits of available resources” (NPS 2010). This directive is much harder to comply with considering NPS officials have had no way to track tort claims. While NPS has had an electronic database for tortious incidents involving workers called the Safety Management Information System for more than a decade, it was not until January 2013 that the Department of the Interior as a whole adopted a system to electronically track visitor incidents: the Incident Management Analysis and Reporting System (IMARS). IMARS has been over budget and behind schedule as DOI’s FY2008 budget justification actually called for IMARS to be implemented department-wide in 2008 (Department of the Interior 2008). One NPS safety officer remarked, “IMARS became a running joke: IMARS is coming, IMARS is coming, the sky is falling.”

Jokes aside, IMARS holds a lot of promise. It will allow NPS staff at all park units across the country to query the system for a variety of factors that are filled in with each incident report. For example, one could look at how many 20-to-30-year-old, black-haired, white males had a certain type of injury/illness. Further, now those in Shenandoah National Park can see if some type of incident is also occurring in parks out west. As one NPS park ranger said, “The main power of IMARS is sharing amongst all these disparate park units.” While several previous vendors failed to deliver, the operating system used for IMARS has a track record of success as it has now been used worldwide for the past 15 years, including in Canada, the United Kingdom, Alaska, and Missouri. Still, the system is only as powerful as the information put into it. There may be some push-back from park rangers regarding learning a new system. Also, the current requirement is all “significant injuries” must be inputted into the system, but there is no bright line as to what constitutes a significant injury. Further, the system will not pick up near-misses: incidents that almost resulted in a serious injury.

If IMARS is utilized to its full potential, it will be a rich source of data that NPS pub-

lic risk managers can then utilize to adequately respond to the new servicewide emphasis established in Director's Order 50C in 2010 on *prevention* of visitor incidents rather than just *responding* to them (NPS 2010). The Director's Order 50C does include some specific guidelines and recommendations, such as calling for tort claims officers and safety officers at the park level (NPS 2010). Unfortunately, due to funding restrictions only the major parks have such employees. Much more common is that a park ranger has safety or tort claims officer as a collateral duty, which means it is officially only supposed to take 20% of his/her time. NPS's Office of Risk Management does not know how many parks have some sort of safety officer since roles and jobs change so rapidly. As one Office of Risk Management employee put it: "I learn of a new point of contact almost ever day."

Aside from staffing issues, even if there were an employee who wanted to try to implement a program to reduce risk to the public, there is a lack of funds to accomplish such programs. Aside from the small amount in park budgets for risk management programs, NPS employees may be able to get money from the NPS's Problem Management Information System, but these grants are given out once every two years and must be applied for well in advance. For some time prior to 2013, there was money made available for a summer internship program jointly run by the NPS Public Risk Management Program and the Student Conservation Association that provided opportunities for students to support park injury-prevention efforts and provide parks with a cost-effective way to enhance visitor and employee safety. The program did not run in 2013 since no funding was made available.

Before being defunded, the internship program was instrumental to the success of a public risk management program at DWGNRA. In 2011, there were eight drownings in the park, and the years preceding it were not much better. NPS wanted a program to curb this high number of drownings. Luckily, in 2008 a ranger had been directed to go through drowning incidents since 1961 with the result being a rich dataset that DWGNRA used to determine where, when, and to whom most drownings took place. The data revealed that Saturdays and Sundays between 12 p.m. and 6 p.m. were the most common times for drownings, and that victims were most likely male and between 18 and 33 years old, with Hispanics increasingly being victims. Incidents were also charted by location, revealing that the canoe access area by the Kittatinny Point Visitor Center was a frequent site of drownings.

Over the course of three years and several funding sources, DWGNRA was able to implement a targeted program to address the drownings issue. In 2009, the park applied for and received a public risk management intern. This intern did some observational studies to see how people reacted to various warning signs. For instance, the intern noted what percentage of visitors would stop and read the different types of signs. The following year, DWGNRA applied for and got \$30,000 from the NPS Youth Internship Program. This allowed for the hiring of another public risk management intern and a full-time GS-5 park interpreter to work together to launch a volunteer corps to talk to visitors and to have more eyes on the busy areas that the data identified as posing a high risk for drownings. The money was also used to purchase ten new signs as the old signs were only in English and a paragraph long (Figures 1 and 2). In 2011, the volunteer water safety ambassador corps was launched. Ultimately, 18 dedicated volunteers were trained to go out on kayaks with staff every Saturday and Sunday targeting the busiest areas. The volunteers would model safe behavior, talk with visitors



Figure 1 (left). An old sign warning visitors of the dangers of swimming in the Delaware River. Note how it is in English only and consists of one long paragraph.

Figure 2 (right). A new sign installed in areas where park officials knew drownings frequently occurred after analyzing data going back more than 40 years. The signs were developed knowing what type of visitor was most at risk and after studying what type of signs to which visitors are most responsive. Note how the sign is bilingual and to the point. Photos courtesy of Kathleen Sandt, Delaware Water Gap National Recreation Area.

about water safety, and as positive reinforcement give out safety equipment such as whistles and water bottles. The result of all these efforts: no drownings in 2012.

This case study from DWGNRA exemplifies the utility of data and the need to make funding available for public risk management programs aside from and including those addressing fatalities. Without the data, those leading the risk management program would not have known to whom to target the message or where to put the messaging to reach those most at risk. Further, without the internship program and grants, DWGNRA would not have had the money or the resources to address the drownings issue and launch the volunteer water safety ambassador program.

NPS may be on the cusp of major strides in public risk management. It is possible that IMARS may empower other park units to take similar proactive, data-driven action as did DWGNRA, but it is imperative that park employees on the ground actually input information into the system. Such action could lead to less injuries in our parks, thereby reducing the number of tort claims filed against NPS. While NPS often avoids liability with the FTCA's discretionary function exception, and much of the money paid litigating or settling claims does not come out of NPS's budget, it is still a major goal of the agency to provide safe experiences for visitors, and it is still important for the government in general to cut costs where it can. The National Parks are quite possibly "America's best idea," and the best way to reduce tortious incidents in our parks is with data-driven approaches that can be implemented with adequate funding and staffing.

References

- Cestonaro v. U.S.*, 211 F.3d 749, 759 (3rd Cir. 2000).
- Cheng-Dobson, Jennifer [NPS Office of Strategic Planning]. 2013. Performance Management Data System, FY2007–2011. E-mail to author, February 4.
- Department of the Interior. 2008. *Budget Justifications and Performance Information, Fiscal Year 2008, National Park Service*. Online at http://www.nps.gov/aboutus/upload/FY_2008_greenbook.pdf.
- Hyer, Andrew. 2007. The discretionary function exception to the Federal Tort Claims Act: A proposal for a workable analysis. *Brigham Young University Law Review* 2007(4): 1091–1150. Online at <http://lawreview.byu.edu/archives/2007/4/7HYER.FIN.pdf>.
- Department of the Treasury. 2013. Judgment Fund payment search. Accessed February 20, 2013. Online at <https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do>.
- Merando v. U.S.*, 517 F.3d 160, 166 (3rd Cir. 2008).
- NPS [National Park Service]. 2006. *Management Policies 2006*. Online at <http://www.nps.gov/policy/mp2006.pdf>.
- . 2010. *Director's Order 50C*. May 7. Online at <http://www.nps.gov/policy/DOrders/DO-50C.pdf>.

Scott Breen, 316 East University Street, Apartment #30, Bloomington, IN 47401; sbreen@indiana.edu