

THE EMERGENCE OF RESORT TORTS: A BASIC PRIMER

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I. Introduction

Recreational activities are now a crucial aspect of everyday travel. The competition for travelers' dollars among resorts and other "fun" destinations is extremely fierce. As a result, resorts offer more and more activities for their guests, many of which did not exist 20 or 30 years ago. There are adventure, entertainment, and amusement recreations. Activities seem to grow exponentially with zip lining, outdoor hiking, rafting, jet and water skiing, bungee jumping, mountain climbing, caving, spelunking, wall and rock climbing, various types of racing, paintball, petting zoos, and many more as options.

The pressure to entertain mounts as vendors work hard to convince resorts to list or sponsor them as a possible excursion for guests. Resorts often encourage specific entertainment options when guests inquire at the concierge desk as to how they can use their holiday time.

II. What Is a Resort?

According to various dictionaries and the industry itself, a resort is a place used for relaxation or recreation, attracting visitors for vacations or tourism. Resorts are places, towns, or sometimes commercial establishments operated by a single company or multinational corporations. In North America, the term "resort" is also used for a self-contained commercial establishment which attempts to provide many activities for guests.

III. Where Are Resorts?

Resorts can exist anywhere and are often in places one might not expect or think of initially. Here are just a few illustrations:

- *Ohio: The Wilds.* The Wilds is a private, nonprofit safari park and conservation center that combines cutting-edge conservation science and education programs with hands-on experiences and one-of-a-kind adventures that include zip lining, horseback riding, fishing, and more. Located in Cumberland, Ohio, The Wilds is home to rare and

endangered species from across the globe living in natural, open-range habitats. It is the largest resort of its kind in North America.

- *West Virginia: The Greenbrier.* The Greenbrier is a Forbes four-star and AAA Five Diamond Award luxury resort located just outside the town of White Sulphur Springs in Greenbrier County, West Virginia.
- *Indiana: The French Lick Resort.* The French Lick Resort has AAA Four-Diamond accommodations and is known for its staff's charm. Nestled in the Indiana countryside, it is the winner of the 2015 *USA Today* 10 Best Readers' Choice Award for Best Historic Hotel. It is an easy drive from Indianapolis and Louisville, and this upscale destination features championship golf courses, world-class spas, Vegas-style gaming, horseback riding, and activities for kids.
- *Michigan: The Grand Hotel.* The Grand Hotel is located on northern Michigan's Mackinac Island. It has spectacular views from rocking chairs overlooking the Straits of Mackinac from the world's longest porch. Owned by the Musser family for three generations, The Grand Hotel is rich in history, a place where time moves at the pace of horse-drawn carriages and bicycles.

IV. Types of Resort Torts

The three main tort categories (with overlaps, of course) entail:

- *Public accommodations and hotels:* Here we are dealing with torts involving hotels, resorts, and often package deals. Think amusement parks such as Disney, SeaWorld, Universal Studios, and so forth.
- *Recreational activities:* This rubric is quite extensive and entails outdoor, water, and indoor activities, whether they be aquatic, camping, or a multitude of variations of these themes. Did you know that Michigan has more boating than Florida?
- *General travel activities:* This category encompasses vans, buses, tours, and excursions. As a rule, this is how one gets from place to place, such as hiking, biking, or taking that mountain climbing trip for \$120.

Many may not realize that negligent security and sexual abuse attacks claims are on the rise as resort torts grow. These serious problems that, in addition to product liability and negligent, gross, or reckless instruction cases, cause catastrophic injuries.

V. Who May Be Liable?

When there is a serious injury or a wrongful death, a salient question is, who may be liable? Due diligence entails investigating numerous factors, such as:

- What activity representations were made and by whom? This includes what was noted on the Internet and what was promised in writing or orally.
- What did the resort representative indicate? What was the involvement or relationship with the company or industry where the injury occurred? Who sponsored the event? Who inspected or controlled the activity? Were words such as “safe and secure” used in the marketing, advertising, or enticement to engage in the amusement?

One should ascertain whether there is a joint venture situation or an apparent agency scenario. The elements of a joint venture are:

- A common purpose
- Joint interest in the subject matter
- Right to share in the profits and duty to share the losses
- Joint control or right of control

The elements of apparent agency are:

- The principal states that the agent is acting on its behalf
 - The agent accepts the undertaking
 - The principal controls the agent’s acts
- Did any product fail and was the failure a proximate cause of the injury? Was there a maintenance problem?
 - Did someone fail to properly educate, teach, or instruct? If so, who?

VI. Choice of Law and Statutes of Limitation

When an injury occurs, an important query is, where should the lawsuit be filed? Generally, such as with traditional torts, the lawyer brings the claim where the cause of action arose or where the defendants reside or are doing business. If there are multiple defendants in different venues, then filing in federal court may be necessary. As a rule, state court is the better selection. A cruise claim may entail a federal court action.

Naturally, one must determine the applicable statute for the claim. One must discover as soon as possible, when setting up the file or even beforehand, the relevant statute of limitations in the state where the event occurred. Contact local counsel you can trust and learn this crucial date.

VII. Contending with Various Standard Defenses

As one scrutinizes the potential case, one must expect to confront multiple defenses: open and obvious, a signed release, finger pointing, assumption of risk, state laws on recreational users and

immunity issues, and comparative or contributory negligence, to name a few traditional defense positions.

Let us review one typical defense: releases. When reading the release, consider these fundamental issues:

- Was the release properly signed or executed and dated?
- Was the wording ambiguous? (If so, it should be interpreted against whoever wrote it.)
- Was the risk that caused the injury set forth in the release?
- Did the conduct involve gross negligence or wanton or reckless conduct?

With signed releases, in addition to the basics above, the release is likely *not* valid if it is:

- Against public policy
- Against a statute or state laws
- The conduct was reckless or wanton or involved gross negligence (depending on state law)

Other aspects one must consider are:

- Was there an appropriate warning?
- Was the instruction given appropriate and reasonable? Consider who gave the instructions, how long the instructions took, what was involved in any practice sessions, and so forth.
- Was the equipment in good repair or condition? When was the equipment last inspected or replaced? Was the equipment preserved?
- What documents were provided before, during, or after the activities?
- How open and obvious was the condition? Remember, with many attendees and depending on the location and lighting conditions, defects may not be so open or obvious.

VII. Final Reflections

One purpose of this introductory discussion is to help open one's mind to these types of claims to better protect victims. If the case is not in your jurisdiction, consult with local counsel. By doing so, one quickly learns the relevant statute, the state laws, the judges, insurance companies and their adjusters, and so on. Most defense lawyers and insurance adjusters know who handles these cases. Generally, an out-of-state lawyer trying to resolve an injury claim in another state will not get the same level of respect or the best offer compared to someone in the state where the injury happened who handles such cases regularly. While it seems like common sense, many lawyers forget this reality.

The next time someone calls or comes in with a situation involving a resort tort, hopefully this primer will open your mind to possibly taking the case. Do not be so quick to dismiss the possible case. What might not be a case in Ohio might be a terrific claim in Florida, or vice versa.

As this area of law grows and vendors and entertainment companies create new and different ways to entertain and compete, this is an important legal arena we can become acquainted with to better protect claimants and victims.