

LIABILITY ON COMMERCIAL EXPEDITIONS

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Question: Is it possible to sue an organizer of a commercial expedition by law, if one can prove that the team physician is not equipped with the essential knowledge and capability to care for the group in extreme situations? I'm wondering whether there have been any malpractice suits on expeditions yet?

Urs Wiget, Switzerland

Answer: The simple answer is yes and there is absolutely no difference from any other medical negligence case in that the pursuer will require to establish that he was owed a duty of care by the doctor; secondly that duty was breached and thirdly that the breach caused or materially contributed to his injuries.

In the case "Wilsher-v-Essex Health Authority" 1986 3 All ER page 812; Mustill LJ said that "Full allowance must be made for the fact that certain aspects of treatment may have to be carried out on what one witness called battle conditions. An emergency may overburden the available resources, and if an individual is forced by circumstances to do too many things at once, the fact that he does one of them incorrectly, should not lightly be taken as negligence."

However, this does not mean that a different standard of care is applied in an emergency situation, simply that reasonable care takes into account the circumstances in which a doctor has to operate. If the error is one which a reasonably competent doctor could have made in the circumstances, the defendant is not negligent. Conversely, if a reasonably competent doctor would not have made that error, the defendant will be liable notwithstanding the fact that it occurred in the course of an emergency.

On the face of it, it is accepted that the team physician is not equipped with the essential knowledge and capability to care for a group in extreme conditions, it would appear negligence could be established. The key question is then "Is the commercial expedition vicariously liable for the actings of the team physician?" In simple terms, an employer, whether a corporation, firm, association, or other group, is always liable for the actons of its employees in the course of their employment, but normally speaking an employer is not liable for the actings of an independent contractor (Munkman on Employers liability, 12th Edition pages 80-84).

However, if the independent contractor is fully under the control of the employer and, for insatnce, has to take orders from them, they will possibly be liable. This is generally known as the control test and other factors can also be relevant.

However, an employer is always under a duty to take care to appoint a competent independent contractor who is qualified and apparently capable and possessed of the experience and resources necessary for the safe execution of the operation. Consequently, the employer is certainly liable if the harm which has befallen is

attributable to the incompetence or inexperience of the contractor. (This should be of great concern to a commercial expedition!)

It is believed that certainly in the United States there have been malpractice suits relating to expeditions, but certainly in Britain, as of April 1997, the writer was not aware of any such court actions and the Medical Defence Union (a large medical insurance company) also confirmed that they had no evidence of claims that had arisen against doctors as a result of their involvement with high altitude trekking.

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