
Celotex

New Legal Protection for Volunteers

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Last year federal legislation called the Volunteer Protection Act of 1997 (VPA)[1] dramatically changed the potential liability of many volunteers for harm that they cause during volunteer service. Congress enacted the VPA in response to a perceived crisis in volunteerism—a belief that people were volunteering less often because of fear of lawsuits. According to supporters of the VPA, this fear began growing in the mid-1980s when the number of suits against volunteers and their organizations increased, as did the publicity that the suits received. Testimony before the House of Representatives Judiciary Committee cited the following examples:

- A woman who was hit by a ball that her own daughter failed to catch sued the sponsoring Little League organization. The Little League settled the case for $10,000.[2]
- A volunteer with "mountain rescue" in California helped paramedics rescue a man who had fallen from a boulder and injured his spine. The volunteer then coordinated a helicopter lift to the hospital. The fallen man's injuries rendered him a quadriplegic, and he sued the rescuers for $12 million.[3]
- A fly ball injured a young Little League player whom his coaches had placed in the outfield. The claimants sued the Little League organization, apparently alleging that the coaches knew the boy was a born infielder. The Little League settled this case for $25,000.[4]

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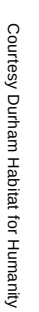
It is unclear whether the crisis in volunteerism was real or greatly exaggerated. There have been very few suits against volunteers in which reported judicial opinions have been issued, and the settlements and the verdicts that have garnered media attention—outrageous ones like the preceding examples—are about eight to ten years old. Suits that probably are more representative often are subject to confidential settlement agreements, and the insurance industry generally will not release figures on actual awards against the nonprofit organizations that they insure. So, to put it more briefly, no one seems to know which volunteers are really being sued, what they are being sued for, and what kinds of damages they are paying. This lack of hard data prompted critics of the VPA to question whether the number of suits against volunteers and their organizations has actually increased.[5]

Whatever the situation, most people seem to agree that fear of lawsuits, reasonable or not, has negatively affected the willingness of some people to perform volunteer services, as well as the willingness of some organizations to use volunteers to perform certain kinds of services and tasks.[6]

The VPA was enacted to prevent frivolous lawsuits or outrageous damage awards against volunteers for simple mistakes that occur during their volunteer service. This article discusses the VPA's basic provisions and some of the issues the act raises. Specifically the article addresses the following questions:

- How does the VPA protect volunteers?
- What does the VPA do for organizations that use volunteers?



Courtesy Durham Habitat for Humanity

(*Opposite*) Volunteers at work on a Habitat for Humanity construction site in Durham.

- How does the VPA affect the laws of North Carolina relating to volunteer liability?
- How does the VPA affect persons harmed by volunteers?

How Does the VPA Protect Volunteers?

In broad terms the VPA protects volunteers serving governmental entities and nonprofit organizations from liability for harm caused by negligent acts or omissions during their volunteer service.[7]

Which Volunteers Does the VPA Protect?

The VPA defines "volunteer" as someone who does not receive compensation (other than reasonable reimbursement for expenses incurred), or any other thing of value in place of compensation, in excess of $500 per year.[8] Under this definition a director, an officer, a trustee, or a direct-service provider for an organization may be a volunteer. Before the VPA, in states that had laws limiting volunteer liability, those laws most often protected only directors and board members, usually providing no coverage to direct-service volunteers.[9]

The VPA does not protect all volunteers, however. It covers only volunteers serving governmental entities and nonprofit organizations. The statute does not define governmental entities, presumably because they are easily identified. It defines nonprofit organizations primarily by reference to tax-exempt status under the Internal Revenue Code,[10] but it also may cover volunteers of nonprofit organizations that are not tax exempt as long as the organizations operate primarily for the public benefit.[11] A bar association or another trade organization might meet this last criterion.

If the volunteer serves a nonprofit group that practices activities constituting hate crimes, however, he or she will not qualify for the VPA's protection.[12] "Hate crimes" are crimes that show evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity. For example, if a volunteer for the Ku Klux Klan negligently causes harm to someone while he is driving supplies to a KKK cross-burning, the VPA will not protect him.

Volunteers providing services to individuals, or to organizations that are not governmental entities or nonprofit organizations, qualify for no protection at all under the VPA. However, if a state has a law protecting these non–VPA volunteers, the VPA would not affect it. North Carolina has such a law, General Statute (hereinafter G.S.) 90-21.14, also known as the Good Samaritan statute. It provides that anyone rendering emergency health care to a person who is in danger of serious bodily injury or death will not be held liable for injuries sustained by the person during the emergency assistance, unless the injuries were caused by gross negligence, wanton conduct, or intentional wrongdoing on the part of the person giving assistance.

What Kinds of Volunteer Conduct Are Not Protected?

Even volunteers who qualify for the VPA's protection are not entirely shielded from liability for harm that they cause during volunteer service. The intention of the VPA, as stated by its supporters in Congress, is to protect qualified volunteers from liability when they cause harm as a result of simple negligence.[13] At the most general level, "negligence" is the failure to exercise the degree of care that a reasonable person in like circumstances would exercise—in other words, the failure to exercise due care. For example, a volunteer at a church day-care center falls asleep during the children's nap time for approximately two minutes. While she is asleep, one of the toddlers escapes the church's fenced yard and is bitten by the dog next door. This probably is a case of simple negligence, and the VPA will protect the volunteer from liability if the toddler's parents bring suit against her for negligently failing to supervise their child.

Although protection from liability for harm caused by simple negligence is a significant benefit to volunteers and seems to provide a fairly straightforward standard for volunteers to follow, volunteers should be aware of several conditions on, and exceptions to, this protection.

Simple Negligence in Certain Situations

The VPA does not protect four kinds of simple negligence. First, a volunteer can be held liable for harm that results from simple negligence during an activity that is not within the scope of the volunteer's duties. For example, if a volunteer for a meals-on-wheels program attempts to fix the broken oven of a meal recipient, the volunteer may be held liable for harm caused by negligence in performing the repair. Presumably the volunteer's duties extend to conversing with the meal recipient while she or he is dining and possibly to telephoning an appropriate person

for assistance if the meal recipient needs it, but surely the meals-on-wheels organization does not authorize its volunteers to perform home repair while they are on the job.

Second, and quite important, harm that occurs while a volunteer is operating a motor vehicle, a vessel, an aircraft, or another kind of vehicle for which the state requires a license or insurance also is excluded from the VPA's coverage.

Third, if the volunteer is engaged in an activity for which the state requires a license or a certificate, but the volunteer does not have the license or the certificate, he or she can be held liable for simple negligence.

Finally, if the volunteer causes harm while under the influence of drugs or alcohol, she or he can be held liable even if the harmful conduct amounts only to simple negligence.[14]

Gross Negligence

Next, harm caused by gross negligence is specifically excluded from the VPA's liability protection. A notoriously fuzzy concept, "gross negligence" signifies more than ordinary inattention but less than conscious indifference to consequences.[15] For instance, a local representative of the National Rifle Association volunteers to make a presentation on gun safety at an elementary school. He takes a gun that he believes to be unloaded; he firmly recalls that after he used it the last time, he emptied it. However, one cartridge remains in the gun. During the presentation the gun goes off, shooting a student in the foot. The volunteer had some reason to believe that the gun was not loaded, so he was not consciously indifferent to the danger. But he was going to give a presentation in a room full of students, so his not double-checking the gun may have represented more than ordinary negligence.

As this example shows, it is hard to determine beforehand where the line between simple and gross negligence lies. To some extent this uncertainty may frustrate the VPA's goal of giving volunteers comprehensible standards to guide their behavior. Also, exclusion of gross negligence from the VPA's protection may thwart the goal of reducing the number of lawsuits filed against volunteers. Whether conduct amounts to gross negligence often is not determined until a judge renders judgment or a jury reaches a verdict, and this fact may encourage a person injured by a volunteer to come up with an allegation of gross negligence.[16]

Intentional Torts

Finally, it is unclear whether the VPA restricts liability for harm that a volunteer causes as a result of an intentional tort, such as assault or battery. A "tort" is a negligent or intentional act (or omission) that causes harm, for which the person harmed may bring a civil—as opposed to a criminal—suit. An "intentional tort," as opposed to a negligent tort (simple negligence), is one in which harm results from an intentional act. For example, a volunteer hall monitor in a public school grabs a student to prevent her from running down the hall, and accidentally breaks her arm. This action is the intentional tort called battery. The action that causes the harm—the arm-grabbing—is specifically intended, even if the harm is not. Would the VPA protect the volunteer from liability in this case? The VPA and its legislative history leave the question unanswered.

The VPA's legislative history gives little guidance on this question primarily because the issue of whether intentional torts were protected was never raised. Speakers at congressional hearings and in the *Congressional Record* stressed repeatedly that the VPA would protect only simple negligence, but, by way of explanation, they frequently followed up with the statement that volunteers should not be held liable for harm resulting from honest mistakes or good-faith errors. These statements can be read in (at least) two ways: (1) the standard is a legal one, focusing on whether the harmful conduct comes within the category of simple negligence; or (2) the standard is more commonsensical, focusing on the volunteer's mind-set when he or she acted in the way that caused harm. So, on the one hand, as a matter of strict legal doctrine, intentional torts are not the same as negligent torts: in determining whether an intentional tort has been committed, courts focus not on whether the defendant exercised due care but on whether the intentional act caused harm.[17] On the other hand, as the hall monitor example illustrates, harm caused by intentional torts may result from an honest mistake or a good-faith error, just as in cases of simple negligence.

The text of the VPA is slightly more helpful but still not conclusive. Although the VPA's supporters emphasized that volunteers should not be held liable when they cause harm while performing their services in "good faith," the text of the VPA does not contain that term. This may mean that the term "simple negligence" should be understood in its legal, rather than

moral, sense. And in terms of legal categories, intentional torts seem to fit within the range of conduct that the VPA excludes from its protection. The least-blameworthy (in the sense of having the intention to commit a bad act) conduct that the VPA excludes is *gross negligence*, which requires no specific intent—either to act or to cause harm. The most-blameworthy conduct that the VPA excludes is *willful* or *criminal misconduct*, which requires both intent to act and intent to cause harm. Intentional torts, requiring the intent to act but not the intent to cause harm, seem to fall somewhere between these two kinds of conduct and thus within the range of conduct excluded from the VPA's coverage.

Until a court of binding authority answers the question of whether volunteers can be held liable under the VPA for harm caused by intentional torts, North Carolina volunteers should presume that they can be held liable.

Other Exceptions

Although some clarity is lacking about what kinds of conduct the VPA protects, it flatly excludes from coverage several very clearly stated kinds of conduct. Most obviously, the VPA protects qualified volunteers from liability in certain civil suits, but it does not protect them from prosecution in criminal suits. Also, a volunteer still can be held fully liable for harm caused by an act that (1) constitutes a crime of violence[18] or an act of international terrorism for which the defendant has been convicted in any court;[19] (2) constitutes a hate crime;[20] (3) involves a sexual offense, as defined by applicable state law, for which the defendant has been convicted in any court; or (4) involves misconduct for which the defendant has been found to have violated a federal or state civil rights law.[21] If a volunteer's conduct meets the criteria under (1), (3), or (4), the injured person can sue that volunteer in civil court only if the volunteer already has been found guilty of such conduct in a separate judicial proceeding. Hate crimes may be an exception to the latter statement; the language of the statute seems to suggest that a guilty verdict in a separate proceeding is not necessary for a civil suit to proceed.

What Is the Nature of the VPA's Protection?

The VPA provides that no qualified volunteer shall be liable for harm caused by conduct protected by the VPA. Also, when a volunteer can be held liable, the VPA limits the circumstances in which she or he can be made to pay punitive damages and restricts the amount of noneconomic damages for which she or he can be held responsible. Limitations on damages are discussed in more detail later.

Volunteers should know what the VPA's protection means in real terms. Although it may have the practical effect of discouraging a person injured by a volunteer from filing suit, it does not legally prevent such a person from filing suit. Statements to the effect that the VPA protects volunteers from suit are therefore misleading. A court still must determine whether or not the VPA protects a volunteer from liability.

Another important point, also discussed in more detail later, is that the VPA does not limit a volunteer's liability in a case brought against the volunteer by the organization that he or she serves. This provision may seem like a backdoor way of significantly limiting the actual protection that the VPA affords volunteers. However, certain factors probably constrain governmental entities or nonprofit organizations from suing their own volunteers, factors that do not constrain injured plaintiffs—for example, the fear of scaring away all potential volunteers and the apparent unpopularity of punishing volunteers for "simple mistakes."

What Does the VPA Do for Organizations That Use Volunteers?

The VPA has no effect on the liability of any governmental entity or nonprofit organization for harm caused by one of its volunteers.[22] So if under state law an entity or an organization can be held "vicariously liable" for the actions of its volunteers (that is, if it can be held liable because of its relationship to the volunteer, not because it behaved negligently itself), the VPA does nothing to change this state of affairs. Further, if a governmental entity or a nonprofit organization is immune from suit under state law, the VPA makes no change (except as far as the injured parties are concerned, a point discussed in "How Does the VPA Affect Persons Harmed by Volunteers?" page 9).

On the other hand, the VPA specifically states that it does not affect any civil action brought by a governmental entity or a nonprofit organization against any of its volunteers.[23] Therefore, if an entity or an organization is sued for harm caused by one of its volunteers and is ordered to pay damages, it still may turn around and sue the volunteer, seeking either partial or complete reimbursement.

Why Preemption?

"Preemption" means that the federal government enacts a law that then replaces state laws inconsistent with it. The fact that the VPA preempts inconsistent state laws may be one of the statute's most interesting features. The legislative history of the VPA began in 1986. In its initial form the bill did not involve a federal mandate. Instead, it used Congress's power to impose conditions on federal money given to states.[1] Until 1991 this bill encouraged states to enact laws offering volunteers protection from liability by requiring the secretary of health and human services to *reduce* a state's federal social services grant by 1 percent if the state did not enact such legislation.[2] After 1991 and until 1997, the bill required the secretary to *increase* the grant by 1 percent for any state that did enact legislation giving liability protection to volunteers.[3]

In light of the VPA's long legislative history as a permissive rather than a mandatory measure, the sudden, late change in approach is striking. It is even more striking when one considers that it occurred in a Republican-dominated Congress. As the party traditionally known for vigorous support of states' rights, why would the Republicans pass legislation that so significantly restrains the states from tailoring their tort systems to fit their own volunteer situations?[4] A possible explanation is money: as enacted, the VPA costs the federal government nothing, whereas its earlier (post-1991) versions might have required significant expenditures in increased social services grants. As noted in the main article (note 34), the stated explanation (not entirely persuasive because the facts have been known since 1986) was the need to protect organizations that use volunteers on a nationwide basis.

Another interesting feature of the VPA's mandatory form is that now it probably is open to a constitutional challenge that it would not have faced in its permissive form. The authority cited for the VPA's preemption of inconsistent state laws is the Commerce Clause of the United States Constitution,[5] which gives Congress the power to regulate products and services that flow in or affect interstate commerce. According to the VPA's findings, volunteer service affects interstate commerce because volunteers provide services that paid employees or government social service programs would offer; suits against volunteers dissuade volunteers from serving, thus requiring expenditures to support what otherwise would be free. Critics of the VPA's preemption approach argue that there are few, if any, findings to support this assertion and that if the VPA is challenged as an unconstitutional exercise of Congress's power to regulate interstate commerce, it will be found unconstitutional.

This argument has some merit. In *U.S. v. Lopez*,[6] the United States Supreme Court found that the Gun Free School Zones Act, which made it a federal offense for a person to possess a firearm on school premises, was an unconstitutional exercise of Congress's Commerce Clause power because possessing a firearm on school premises was neither a commercial activity nor an activity in any way connected to interstate commerce. The *Lopez* opinion demonstrated a new willingness on the Court's part to question congressional findings in the Commerce Clause arena. However, the VPA probably is on sounder factual footing than the Gun Free School Zones Act. Also, it has one crucial provision that the Gun Free School Zones Act did not have: it allows states to opt out when the parties are engaged in activities that do not affect more than one state (as discussed in the last paragraph of the section in the main article entitled "What Kinds of Laws May the State Enact?").

Whether or not the anticipated constitutional challenge will occur and be successful, it raises the point that there are people who, with some cause, are not happy with the VPA's protection of volunteers.

Notes

1. U.S. Const. art. I, § 8, cl. 1.

2. *See, e.g.*, H.R. 5196, 99th Cong., 2d Sess. (1986); H.R. 911, 100th Cong., 1st Sess. (1987).

3. *See, e.g.*, H.R. 911, 102d Cong., 1st Sess. (1991). *See also* John Porter, *Essays on Issues: Volunteer Protection: The Time Is Now*, found at http://www.house.gov/porter/essay_hr911.htm.

4. Indeed, the Republicans did not just vote to approve the measure. A Republican representative from South Carolina, Bob Inglis, proposed the amendment that made the VPA a federal mandate. *See* H.R. 1167, 105th Cong., 1st Sess. (1997).

5. U.S. Const. art. I, § 8, cl. 3.

6. U.S. v. Lopez, 514 U.S. 549 (1995).

How Does the VPA Affect the Laws of North Carolina?

The VPA "preempts" (replaces) the laws of North Carolina (and all other states) to the extent that they are inconsistent with the VPA's provisions.[24] (For a discussion of preemption, see above.) North Carolina had a fairly small body of statutory law granting limited immunity to certain volunteers. These laws often granted less protection than the VPA does, although sometimes they granted similar protection. For example, as discussed later, G.S. 1-539.10 granted certain volunteers immunity when their conduct was not negligent. This law clearly offered less protection than the

Courtesy Girl Scout Troop 946

A volunteer (center) guides members of a Girl Scout troop in an activity.

VPA does. On the other hand, the Good Samaritan statute, discussed earlier, affords protection similar to the VPA's. The state has no laws that provide volunteers *more* protection from liability than the VPA does.

The result, then, is that volunteers who qualify for the VPA's protection are not governed by any of the state immunity laws that were enacted before the VPA. As is discussed later, the state may enact new laws that are not inconsistent with the VPA, but these laws may not reduce the level of protection to which a volunteer is currently entitled under the VPA. Further, there are state laws related to the issue of volunteer liability that are not touched on by the VPA. These probably remain good law.

Which State Laws Are Preempted?

Before the VPA most volunteers in North Carolina could be held fully liable for harm caused by negligence or intentional wrongdoing during their volunteer service. Although at first glance G.S. 1-539.10 seemed to grant volunteers of charitable organizations immunity from suit, it did so only when they were acting in good faith and providing services that were "reasonable under the circumstances." That phrase is the legal definition of behavior that is not negligent. G.S. 1-539.10, then, granted volunteers of charitable organizations immunity from suit when they least needed it—that is, when they would not have been liable for negligence anyway.

This lack of effective statutory law governing volunteer liability meant that the issue was governed by the common law (that is, judge-made law). Under the common law, a volunteer could be held liable if her or his behavior was negligent. Even though volunteer service was a freely given, uncompensated activity, a volunteer had a duty to exercise a reasonable degree of skill and care in performing it. The common law no longer applies to volunteers covered by the VPA.

North Carolina had several other laws that granted liability protection to specific groups of volunteers—for example, volunteer firefighters[25] and guardians ad litem[26]—but the protection was limited, as the VPA's is, to cases in which the conduct causing injury did not involve gross negligence, wanton conduct, or intentional wrongdoing. Although these laws did not conflict with the VPA, they added nothing to its provisions, and the volunteers in question now are covered by the VPA.

Which State Laws Remain Valid?

A North Carolina law gives sovereign immunity to governmental entities, and this law remains good. Under the doctrine of sovereign immunity (also known as "governmental immunity"), a governmental body such as a school board or a board of county commissioners may not be sued for harm resulting from its own negligence or the negligence of its officers or employees if the negligence occurs during the performance of a governmental function.[27] A governmental entity may waive this immunity, and thus consent to suit, by purchasing liability insurance.[28] Purchasing liability insurance waives immunity only for the *kinds* of claims covered by the policy and only up to the *amount* of coverage provided by it.

Laws that protect volunteers who are not covered by the VPA, such as G.S. 90-21.14, also remain valid.

What Kinds of Laws May the State Enact?

Although the VPA has replaced most North Carolina laws governing volunteers, the state may enact new ones consistent with the VPA. By VPA definition, certain kinds of laws are not inconsistent. The first category includes laws that provide additional protection from liability for "volunteers or [for] any category of volunteers in the performance of services for a nonprofit or governmental entity."[29] Laws fitting into this

category might expand the protection granted to *all* volunteers of governmental entities or nonprofit organizations. For example, the state might enact a statute providing that "no volunteer of a qualified entity shall be held liable for harm resulting from the performance of acts or omissions within the scope of his or her duties for the entity, provided that such acts or omissions do not amount to willful or wanton misconduct." Such action would expand the range of protected conduct from simple negligence to gross negligence. Laws fitting into this category also might expand the protection granted to *certain* volunteers of these organizations. Using the preceding example, a state statute might expand protection for volunteers serving on the board of directors but leave the standard where it is for direct-service volunteers. What is not clear about the "additional protection" category is whether a state may use it to protect volunteers serving entities that are not nonprofit or governmental. Most probably a state may.

Another set of laws that the state may enact consistent with the VPA focuses on balancing the protection the VPA grants to volunteers with safeguards to reduce the risk of harm and loss to persons who may be injured by volunteers.[30] For example, the state might enact laws requiring a governmental entity or a nonprofit organization to follow procedures for risk management, including mandatory training of volunteers.

Further, the state may enact laws that make governmental entities or nonprofit organizations liable for the acts or the omissions of their volunteers to the same extent that an employer is liable for the acts or the omissions of its employees. This kind of liability, also known as "vicarious" or "respondeat superior" liability, allows a third person to be held legally responsible for harm caused by a person who stands in a master-servant relationship with her or him, as long as the harm occurs within the course and the scope of that relationship. The most common example of a master-servant relationship is the employer-employee relationship. No North Carolina court has specifically addressed whether a volunteer can have a master-servant relationship with the organization she or he serves, but neither has any North Carolina court held that a volunteer *may not* stand in such a relation to the organization. Under general common law principles, it seems likely that the organization-volunteer relationship can be a master-servant relationship in some circumstances. Therefore, in all probability, governmental entities and nonprofit organizations already may be held vicariously liable for harm caused by their volunteers, and an official statute is not strictly necessary.[31]

Finally, the state may require a governmental entity or a nonprofit organization to provide a financially secure source of recovery for persons who suffer harm as a result of actions taken by a volunteer on behalf of the entity or the organization. This source of recovery may be an insurance policy, a risk-pooling mechanism, equivalent assets, or alternative arrangements that satisfy the state.[32]

The VPA also allows states to enact laws opting out of compliance with the VPA for civil actions in state courts against volunteers, when all parties are citizens of the state.[33] The North Carolina General Assembly has not enacted such legislation. Presumably this choice to opt out would not apply if the injured party named the volunteer's organization as a defendant and that organization was a multistate or nationwide organization.[34]

How Does the VPA Affect Persons Harmed by Volunteers?

The VPA may have considerable effect on persons injured by volunteers. By limiting their potential for recovering damages from volunteers who cause harm, the VPA may create a situation in which they cannot recover damages at all for their injuries. Furthermore, even when they can recover damages, the VPA limits the kind and the amount available.

The VPA completely eliminates a claimant's ability to recover damages in some circumstances. As discussed earlier, the VPA prevents a person injured by a volunteer serving a governmental entity or a nonprofit organization from recovering damages from the volunteer as long as the injury occurs under circumstances meeting the statutory criteria. If the volunteer is serving a governmental entity that is immune from suit, the injured person has no source of recovery. Although many governmental entities in North Carolina have waived their immunity by purchasing liability insurance, not all have (and recovery under the liability policy of those that have is restricted, subject to a set of rules that are not discussed here). Further, although nonprofit organizations are not currently immune from suit under state law, nothing in the VPA prevents the state from enacting a law to grant them immunity.[35]

Even when the organization served by the volunteer causing harm is not immune from suit, nothing in the

language of the VPA *requires* states to enact laws limiting liability only for volunteers who serve organizations that possess a secure source of financial recovery (although states are allowed to enact such laws). Thus, in states without such laws, a victim might bring suit against an organization whose volunteer has caused injury, only to find that the organization has no money with which to compensate him or her.

In addition to limiting (and sometimes eliminating) the opportunities for an injured person to recover damages, the VPA limits the amount that a victim may recover when she or he can bring suit against an individual volunteer. The VPA limits punitive damage awards against volunteers to cases in which the claimant establishes by clear and convincing evidence that the harm was caused by an action of the volunteer that constituted willful or criminal misconduct, or a conscious, flagrant indifference to the rights or the safety of the individual harmed.[36]

More important, the VPA limits recovery of noneconomic damages in cases against volunteers. "Noneconomic damages" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (as when a husband and a wife, for example, are no longer able to be together sexually), injury to reputation, and all other nonfinancial losses of any kind or nature.[37] In other words, the VPA limits the potential recovery for damages that are intangible—harder to measure than a week's worth of wages, for example. The VPA provides that a volunteer shall be liable only for an amount of noneconomic loss in direct proportion to the percentage of responsibility he or she bears for the harm to the claimant. (The court will render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.) This provision abolishes "joint and several liability," which allows an injured claimant to recover the entire amount of his or her damage award from one defendant if another of the defendants is incapable of paying.

In contrast, "economic damages" means any financial loss resulting from harm, including loss of earnings or other benefits related to employment, medical expense, costs for replacement services, loss due to death, burial costs, and loss of business or employment opportunities (to the extent that recovery for such loss is allowed under applicable state law).[38] Unlike recovery of noneconomic damages, recovery of economic damages is not limited, meaning that joint and several liability remains in effect for volunteers.

By limiting noneconomic but not economic damages, the VPA is likely to have the biggest effect on the most needy and vulnerable populations receiving volunteer services—unemployed persons, immigrants, persons with disabilities, children, and elderly persons—because these people most often will be unable to show damage to earning capacity, lost wages, or other financial elements.

Conclusion

Whether the VPA will achieve its desired result of limiting suits against volunteers and creating an atmosphere in which volunteers feel reasonably safe to provide services remains to be seen. Its critics dispute that fear of lawsuits causes people to refrain from volunteering, and they point to the lack of factual support for the proposition that limiting liability will increase volunteerism.[39] Critics also question the wisdom of removing the incentive—fear of liability—for volunteers to observe a standard of due care (the negligence standard). They argue that the VPA may create disincentives to observe risk-reducing behavior: volunteers will demand less training, be more willing to take unnecessary risks, or just plain care less about the risks they take. This pattern is encouraged, they continue, by the fact that the VPA does not *require* states to enact laws mandating risk-reduction techniques or imposing vicarious liability on organizations that use untrained volunteers.

On the other hand, as at least one supporter of the VPA notes, incentives for risk-reduction mechanisms always have been more effective at the institutional level than at the individual level. That is, generally volunteers do not demand training; the organization requires it.[40] And the reasons that the organization does so remain: many insurers make training a condition of purchasing liability insurance or specify it as a way of keeping premiums lower; the organization itself still is subject to suit for negligently employing unqualified volunteers; and the fewer the injuries caused by its volunteers, the smaller the chance that the organization will be held vicariously liable.

Notes

1. Volunteer Protection Act of 1997, 42 U.S.C.A. §§ 14501–14505 (1997).

2. Statement of Hon. Newt Gingrich, representative from Georgia, in *Volunteer Liability Legislation: Hearings*

on H.R. 911 and H.R. 1167 before the House of Representatives Committee on the Judiciary (hereinafter *Hearings*), 105th Cong., 1st Sess. (1997), 8.

3. Statement of Hon. Paul Coverdell, senator from Georgia, in *Hearings*, 1st Sess., 11.

4. Prepared statement of Hon. John Edward Porter, representative from Illinois, in *Hearings*, 1st Sess., 21.

5. *See, e.g.*, testimony of Rep. John Conyers (D-Mich.), in *Hearings*, 1st Sess., 41–43; testimony of Rep. Sheila Jackson-Lee (D-Texas), in *Hearings*, 1st Sess., 54; testimony of Andrew J. Popper, professor, American University College of Law, in *Hearings*, 1st Sess., 85–86.

6. VPA supporters most often cited a 1989 Gallup poll showing that (1) 1 in 10 nonprofit organizations reported volunteers resigning over concerns about liability, and 1 in 6 volunteers withheld their services because they feared exposure to a liability lawsuit; and (2) approximately 1 in 20 nonprofit organizations reported changing the structure of their board of directors and eliminating committees because of potential liability, and 1 in 7 reported eliminating programs and services that they believed were high-liability risks. *See, e.g.*, Anna Marie Kukec, "Volunteer Protection Act: Is Coverage Worth the Wait or Just a Constitutional Landmine?" (American Bar Association), found at http://dev.abanet.org/barserv/22-4vol.html.

7. 42 U.S.C.A. § 14503(a).

8. 42 U.S.C.A. § 14505(6).

9. Steve McCurley, "The Volunteer Protection Act of 1997," *Grapevine* (CAHHS, Sacramento, Calif.) (July/Aug. 1997): 10.

10. 42 U.S.C.A. § 14505(4)(a). The Internal Revenue Code defines tax-exempt nonprofit organizations as "corporations, and any community chests, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C.A. § 501(c)(3).

11. 42 U.S.C.A. § 14505(4)(b).

12. The report from the House Judiciary Committee gives a cryptic qualification of this condition: "In order to fall within this exclusion, it would not be sufficient that the organization practice the conduct that forms the predicate of a crime referenced in that statute. That is, the organization's action must rise to the level of a crime." H.R. Rep. No. 101, 105th Cong., 1st Sess. (1997), *reprinted in* 1997 U.S.C.C.A.N. 152, 163.

13. Statements of Coverdell and Porter, in *Hearings*, 1st Sess., 11, 23.

14. 42 U.S.C.A. §§ 14503(a)(1)–(4), 14503(f)(1)(E).

15. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984), 212, sec. 34.

16. Testimony of Charles Tremper, J.D., Ph.D., senior vice-president, American Association of Homes and Services for the Aging, in *Hearings*, 1st Sess., 118–19.

17. The reasonableness of an action may come into the analysis in determining whether the volunteer has a defense. In the example of the hall monitor, the volunteer might explain that the student whom he stopped was running during a fire evacuation and thus was causing severe danger to the orderly evacuation of the building and that he used only as much force as was necessary to stop her from running.

18. "Crime of violence" is defined by reference to 18 U.S.C.A. § 16 as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

19. "International terrorism" is defined by reference to 18 U.S.C.A. § 2331 as "activities that (a) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (b) appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping; and (c) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum."

20. "Hate crimes" is defined by reference to the notes to 28 U.S.C.A. § 534 as "crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property."

21. 42 U.S.C.A. § 14503(f)(1).

22. 42 U.S.C.A. § 14503(c).

23. 42 U.S.C.A. § 14503(b).

24. 42 U.S.C.A. § 14502(a).

25. G.S. 58-82-5(c).

26. G.S. 7A-492.

27. Minneman v. Martin, 114 N.C. App. 616, 442 S.E.2d 564 (1994).

28. G.S. 115C-42, -47(25).

29. 42 U.S.C.A. § 14502(a).

30. 42 U.S.C.A. § 14503(d).

31. For a more detailed discussion of the potential *respondeat superior* liability of an organization for harm caused by its volunteers, *see* Ingrid M. Johansen, "Legal Issues in School Volunteer Programs: Part III: Vicarious Liability of School Boards," *School Law Bulletin* 29 (Winter 1998): 1.

32. 42 U.S.C.A. § 14503(d).

33. The statute must declare the election of the state that the VPA will not apply, as of a date certain, to such civil action in the state; and contain no other provisions. 42 U.S.C.A. § 14502(b).

34. The reasoning behind this presumption is based on the VPA's legislative history. The primary reason given for making the VPA a federal mandate to the states rather than a permissive measure was that many organizations that use volunteers are national organizations (Big Brother/Big Sister, Boy Scouts, Girl Scouts, Red Cross, etc.) that do not have the time or the other resources to determine the standards of liability to which their volunteers will be held in each of the fifty states; to protect these organizations, a law that sets a uniform national floor for volunteer liability is necessary. *See, e.g.,* statement of Robert K. Goodwin, president and chief executive officer, The Points of Light Foundation, in *Hearings,* 1st Sess., 62; statement of Tremper, in *Hearings*, 1st Sess., 97–100; statement of Sen. Paul Coverdell, *Congressional Record* (daily ed. April 30, 1997), 143, S3827–30. Thus, allowing a state to opt out when both the injured person and the volunteer are residents of the state but the volunteer is providing services for a national organization, would make nonsense of the mandate's purpose.

35. Such legislative efforts seem unlikely, however, given the statutory abrogation of the doctrine of charitable immunity contained in G.S. 1-539.9.

36. 42 U.S.C.A. § 14503(e)(1).

37. 42 U.S.C.A. § 14505(3).

38. 42 U.S.C.A. § 14505(1).

39. H.R. Rep. No. 101, 105th Cong., 1st Sess. (1997), *reprinted in* 1997 U.S.C.C.A.N. 152, 164–65.

40. Testimony of Tremper, in *Hearings,* 1st Sess.,117. ▨