

LEGAL DUTY OF CARE

Traveler Safety



THE MENT LAW GROUP, P.C.

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PROLOGUE

The COVID-19 pandemic has made leaving home more dangerous for everyone whether they're traveling on business, for pleasure, for education, or, indeed any other reason. This has only served to sharpen the duty of care responsibilities that businesses and tour operators have to travelers. While the primer you are about to read is not pandemic-specific, its

guidance is more relevant than ever and serves as an overview of the liabilities organizations face when taking people out into the world regardless of what dangers they are likely to face. The rules of the game are the same but the dangers and the stakes are higher and better preparation is now a consumer expectation that you must meet or exceed.

A DUTY OF CARE

All corporations, sellers of travel, and educational institutions have a duty of care to protect their travelers from unreasonable risk of harm. A claim against an organization for a travel-related injury or fatality will invariably include negligence

or breach of contract. For a plaintiff to be successful in a lawsuit, it must be established that a duty of care was owed; the duty of care was breached; and the breach caused a loss of life or harm to the traveler's quality of life after the trip.

A duty also arises from the type of relationship and expectations of the traveler, the destination, and type of activity—conditions in which harm might have been anticipated, representations by the organization, protection that was not provided, or inadequate response to an incident.

Additional factors in the establishment of a duty of care include federal and state laws and policy, as well as court decisions.

International travelers are exposed to medical, accident, natural disaster, and security risks on every continent—

incidents that can result in shortand long-term illnesses, injuries, criminal and terrorist acts, and fatalities. What is the probability of a traveler experiencing a foreseeable or unforeseeable event on an international trip?

The U.S. State Department Bureau of Consular Affairs reports that 9,302 U.S. citizens suffered fatalities from non-natural causes between July 2008 and June 2019.¹ (The department does not track natural causes of death.)

Sixty-five percent of travelers to the developing world report a medical problem during their trip, according to the 2019 International Travel Health Guide.² Eight percent of these travelers seek medical care at an incountry facility or shortly after returning home. Overall, the quality of care in the developing world is significantly lower than that of accredited U.S. and European medical facilities.

Natural disasters and disease outbreaks can lead to injuries and fatalities. The Whakaari Island eruption in 2019 caused 23 fatalities and 26 injuries. Most of the injured or killed were travelers, and it is not known whether

they were forewarned of the risks associated with their tour. In the Indian Ocean tsunami of 2004, there were 2,783 tourist fatalities, thirty-three of whom were U.S. citizens, and hundreds of travelers were injured.³ A majority of the travelers and expatriate workers had either no or inadequate medical evacuation and assistance coverage.

Terrorism and security incidents represent a small percentage of U.S. citizen traveler fatalities. That said, in 2017, terrorist incidents worldwide numbered 8,584, and 15 U.S. citizens were injured or killed. In that same year, three U.S. citizens were victims of terrorist-related kidnappings.⁴

During the 2011 Arab Spring uprising, approximately 2,400 U.S. citizens requested assistance to evacuate Egypt, including many corporate, leisure, and student travelers.⁵ Only a small percentage of travelers were evacuated by private security extraction teams on chartered aircraft.

An organization's duty of care may vary, depending on the type of organization, its relationship with the traveler, and the type of activity.

NOTES

- 1 U.S. State Department Bureau of Consular Affairs, <https://travel.state.gov/content/travel/en/international-travel/while-abroad/death-abroad1/death-statistics.html>.
- 2 Stuart Rose, M.D., and Jay S. Keystone, M.D., 2019 International Travel Health Guide Online Edition, <https://www.travmed.com/pages/health-guide-chapter-1-overview-of-travelers-health>.
- 3 JSTOR, 2017, https://en.wikipedia.org/wiki/Countries_affected_by_the_2004_Indian_Ocean_earthquake_and_tsunami#Countries_that_lost_citizens_while_abroad.
- 4 National Consortium for the Study of Terrorism and Responses to Terrorism, a Department of Homeland Security Science and Technology Center of Excellence Based at the University of Maryland in Its Annex for Statistical Information: Country Reports on Terrorism 2017 reports.
- 5 *New York Times*, 2011, <https://www.nytimes.com/2011/02/01/world/middleeast/01exodus.html>.

BUSINESS TRAVEL

The duty of care for corporations is generally defined as follows:

Every employer shall furnish employment that shall be safe for the employees therein, supplying and using safeguards and devices and doing every reasonable thing necessary to protect the life, health, and safety of such employees. For the duty of care to exist, the harm suffered must be reasonably foreseeable. Generally, if a reasonable person would find that the corporation should have taken a different course of action, the corporation will be found liable, and it will be subject to a financial judgment based on significant loss of life, loss of enjoyment of life, and the defense costs outside of the limits of the corporation's insurance policy.

A common assumption is that workers' compensation insurance covers work-related travel. However, this may not always be the case. Some types of workers are not covered under workers' compensation law. Depending upon a company's policy, independent contractors, volunteers, executive officers, and even owners may not be covered. Furthermore,

while most workers' compensation does cover employees who are working overseas temporarily, interpretations of what constitutes a temporary work assignment differ; nor is "temporarily" clearly defined in most policy language or by state statute.

Cases regarding overseas injuries and illnesses of employees can result in substantial economic and reputational harm to a corporation. The family of Hung M. Duong, a Lucent Technologies/AT&T employee, filed a duty of care lawsuit in 2002 after Mr. Duong died during a surgical procedure in Saudi Arabia. Mr. Duong had contacted Lucent and ERISA providers for medical assistance and potential evacuation. Lucent advised him that evacuation would present more risk than staying and undergoing the procedure. Mr. Duong then sought advice from the physician retained by Lucent/AT&T, who also advised him to remain in Saudi Arabia for the procedure. Lucent misinformed Mr. Duong that the return of his passport would take one to two weeks without telling him that this process could have

been expedited for an emergency. Mr. Duong sought further advice from his employer and ERISA provider and received no response. He then underwent the procedure, which had never been performed at the facility. Mr. Duong suffered two myocardial infarctions and died. The court upheld claims that Lucent breached their duty of care when they provided substandard medical advice, inadequate access to medical evacuation, and incorrect information regarding the processing of his passport. Failure to protect their employee with a reasonable safety net resulted in substantial legal costs, an undisclosed settlement, and damage to the company's reputation.

Nonprofit and government organizations can also suffer serious financial loss for failing in their duty of care. In 2014, the Estate of Nicholas

Castle brought a \$15 million claim against the U.S. Peace Corps. Nicholas had complained for months about weight loss and was hospitalized briefly; Peace Corps doctors told him to eat more. When the situation became dire, Nicholas again sought treatment from Peace Corps doctors, who failed to meet even minimal levels of care by providing intravenous fluids. Nicholas was found lying in his vomit and unresponsive in the medical office. He later died from cerebral edema and acute pneumonia, the result of severe dehydration and multi-organ failure. In this instance, the negligence resulted in not only a multi-million-dollar claim but also major reform. In 2018, the Sam Farr and Nick Castle Peace Corps Reform Act was passed to avoid such inattention to duty of care in the future.

EDUCATIONAL TRAVEL

When a traveler is a minor or a student, there may be a special duty of care, which some courts might require to be of the highest level. In *Cara Munn, et al., v. the Hotchkiss School* (2014 U.S. District Lexis 76594), a federal court awarded \$41.5 million to a student who contracted encephalitis due to a tick bite while on a school-sponsored trip to China.

The jury found that the school breached its duty of care owed by failing to inform parents and students of the risk of insect-borne diseases, to provide pre-trip clothing and repellent, and to supply instructions about prevention during the trip. On appeal, the Connecticut Supreme Court upheld the verdict, holding that public policy required duty to warn students about and protect them from tick-borne illness in the destination. The duty of care standard that the

court applied required the school to exercise such care over students in its care and charge that a parent of ordinary prudence would exercise under comparable circumstances. Additionally, the court determined that the school did not fulfill its duty of care by failing to have a comprehensive risk management plan, a protocol to assess and communicate the risks associated with the trip, and an operational crisis response plan.

LEISURE TRAVEL

Tour Operators, Cruise Lines, Hotels, Safari Camps, and Lodges

Laws and regulations pertaining to the type of travel company, industry standards/practices, and internal policies may influence the extent of a company's duty of care. Some risks may be deemed to be reasonable and inherent in an activity's value and appeal to travelers. It is incumbent upon travel companies to assess risks associated with an activity, a destination, transportation, and lodging; consider the practices/standards of professional organizations and

companies that specialize in the type of activity; and warn and protect their travelers from foreseeable risks.

Another type of risk is those that cannot be foreseen. Travel companies and their travelers can agree to reduce the duty owed through an assumption of risk and release of claims for losses. It should be noted that such waivers and release of liability do not protect a company from reckless or wrongful conduct.

SPECIFICS OF DUTY OF CARE POLICY

All corporations and government agencies that require employee travel, educational institutions, and sellers of travel should have a duty of care policy and risk management plan. As noted earlier, a duty of care is the moral and legal obligation to protect travelers from unreasonable risk of harm. A travel risk management plan is the course of action to fulfill the organization's duty. The elements of a duty of care policy include:

- Identifying and assigning employees responsible for fulfilling the organization's duty of care
- Assessing the organization's travel risk profile
- Creating a risk management plan
- Developing a crisis response plan
- Educating employees and travel service providers
- Tracking and assessing incidents
- Refining risk management and crisis response plans

Corporations, government agencies, educational institutions, and sellers of travel often lack the knowl-

edge and staff to fulfill their duty of care responsibilities. Dedicated travel risk planning, medical/security assistance, evacuation providers, and outside travel legal counsel are available to supplement organizations' resources. The best outcomes are often achieved by those with a familiarity of the destination, knowledge of in-country resources (or lack thereof), and specific experience with travel laws and regulations in each destination.

In summary, it is advisable that an organization learn the travel laws, regulations, standards, and prevailing practices that are relevant to the organization, type of traveler, activities, and destinations. Assess the inherent, foreseeable risks. And create a duty of care and risk management plan. The organization's duty of care might best be served by transferring some responsibilities to companies that specialize in providing travel risk management services and counsel. Doing so can insulate the organization from multi-million-dollar judgments and significant harm to the organization's reputation and brand.

With a passion for providing honest and forward-thinking legal guidance for every client, the attorneys of THE MENT LAW GROUP, P.C. strive to be industry leaders and zealous advocates for those we represent.

JEFFREY MENT, *Managing Partner* Admitted to the Connecticut and New York bars, Attorney Jeffrey L. Ment has 28 years of practical experience in the travel industry with crisis management, travel contracts, litigation, and compliance with national and international laws that enables him to effectively represent tour operators, travel agents, and hospitality groups in a wide range of cases. Prior to his legal career, Jeff worked as a travel advisor, tour guide, and sales manager for two airlines.

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With offices located in Hartford, Connecticut; Westport, Connecticut; and New York City, New York, The Ment Law Group, P.C. serves clients throughout Connecticut and New York, in addition to some of the most well-known names in the domestic and international travel industry.

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