

The American Bar Association
Commission on Law and Aging

The Aging-in-Place Village Concept: Addressing Liability Concerns




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The Aging-in-Place Village Concept: Addressing Liability Concerns

Adrienne Lyon Buenavista,¹ August 2012

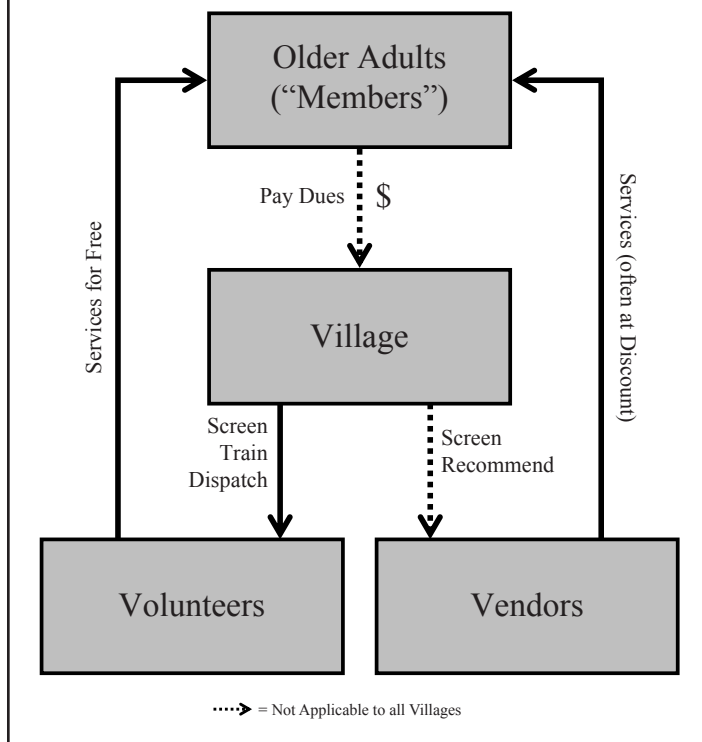
Older adults love their communities—they have spent decades building their current home and social life. Although some aging adults choose to move to a retirement community or an assisted living facility, the majority of older Americans would like to continue living in their own homes for as long as possible.² These older adults do not want to disrupt their lives; they do not want to lose contact with friends, give up pets, or sacrifice their independence. Grassroots organizations called “Villages” can make “aging-in-place” a viable option by easing the access to services without which older persons would often be forced to move from their homes.

The first Village, Beacon Hill Village in Boston, was founded in 2001 and has served as a model for community organizers across the nation.³ Today, there are ninety Villages in the United States,

with another thirty in development.⁴ Typically, Villages begin as community groups that enable older residents to stay in their neighborhood as they age. Eventually, the group formalizes the organization by becoming a nonprofit corporation. Day-to-day operations are carried out by volunteers or a combination of volunteers and paid employees. Although there is variety among individual Village models, all Villages exist to make daily living activities easier for people as they age in the community.

The basic Village structure is straightforward: Members (i.e., older residents) pay an annual fee of approximately \$600 in exchange for an unlimited number of services such as transportation, housecleaning, meal preparation, computer assistance, and home maintenance.⁵ Most of these services are

TYPICAL “VILLAGE” MODEL



provided by volunteers—able-bodied Village members, younger neighbors, or youths doing community service. However, if a requested service requires an expert, the Village provides contact information for government programs such as Meals on Wheels (home-delivered meals) or vendors such as plumbers, electricians, or home healthcare aides.⁶ Vendor services are not included in the Village membership, although Village members often benefit from negotiated discounts. The goal is that Village members only need to call one number, their Village, to access any service they might require.

The Village movement has tremendous potential, but one challenge to its growth involves liability concerns. Village organizers might wonder what the organization’s is for the actions of volunteers or recommended vendors. Based on exploratory research,⁷ this essay discusses the liability that might be incurred by a Village if a volunteer or vendor commits a tort—a private civil wrong resulting in an injury or loss to a person or property. After discussing the Village’s potential vicarious and direct liability, the essay reviews insurance, contracts, and other means of controlling tort liability. The article culminates with suggested action items for Villages to manage the risk of using volunteers and recommending vendors.

Threat of Tort Liability

No matter how good the intentions of nonprofit organizations and their agents (e.g., volunteers), organizations can be held legally responsible if their agents harm others. Village organizers may believe that they are covered under the concept of “charitable immunity,” a legal doctrine that protected nonprofit organizations from tort liability.⁸ However, because the doctrine failed to deter risky behavior and denied compensation to injured parties, states began abolishing charitable immunity in the 1940s, and today no state provides this protection.⁹

Organizations can be held accountable for torts that can occur in a variety of ways such as traffic accidents, dangerous structures, frauds, theft or violent employees. Thus, assault, battery, theft, property damage, misrepresentation, and negligence can result in tort liability. Torts are typically classified into two categories: Intentional wrongs and negligent wrongs. Intentional wrongs entail purposely engaging in harmful conduct.¹⁰ For example, if a defendant deliberately hits a plaintiff in the face, the defendant has committed the intentional tort of battery. Unlike intentional wrongs, negligent wrongs are characterized by unreasonably risky behavior akin to carelessness, foolishness, or selfishness.¹¹ Specifically, negligence is the failure to exercise the level of care that a reasonable, prudent person would have exercised under similar circumstances, resulting in a reasonably foreseeable loss or injury to another person.¹²

The biggest frustration for organizations regarding tort law is that, because the law is court-made, there are not black and white rules that instruct well-intentioned organizations whether conduct will never, sometimes, or always result in tort liability.¹³ An outcome depends on individual state laws as well as the interpretation of the judge or jury who consider the particular case. It is often difficult, if not impossible, to predict whether conduct will be found tortious and liability imposed.



Sources of Tort Law Liability

A. Vicarious Liability

Even if harm was not due to any fault on an organization's part, it can be held responsible for its agents' (e.g., volunteers') actions.¹⁴ Through the doctrine of vicarious liability, tort liability can be imputed to another party if he has sufficient control over the acts of the tortious party to justify that he should be held responsible for the harm.¹⁵ The most common type of vicarious liability is "respondeat superior"—a principle that holds a "master" legally responsible for the injurious acts of a "servant" occurring within the scope of the master-servant relationship, regardless of the fault of the master.¹⁶ This same concept applies to the Village-volunteer relationship.

It is not immediately clear whether organizations have control over their volunteers like employers have control over their employees.¹⁷ Nevertheless, it is likely Village volunteers will be

found to be servants of the Villages because most courts have concluded that volunteers are under the control of the nonprofits they work with.¹⁸ For example, in *Baxter v. Morningside*, a court found that a master-servant relationship existed between the volunteer and a nonprofit organization because the two parties agreed on the purpose, destination, and details of the volunteer's task.

Villages may also recommend vendors or outside service providers to members. It is improbable that a court would find recommended vendors to be sufficiently under the control of the Village to impose vicarious liability. Aside from providing the member with information, the Villages do not choose the appointment day or time, nor do they tell the vendor what actions he should take once he is at a member's home. Additionally, a Village cannot fire a vendor because the vendor is hired by the member, not the Village. The Village would only shoulder a risk of liability if it appears as though the vendor works for the organization.

In order to support a respondeat superior claim, the servant's tortious actions must fall within the scope of the master-servant relationship. In general, intentional torts (e.g., violent attacks or theft) are typically outside the scope of the master-servant relationship because such acts typically involve malice, personal gratification, and misappropriation and are rarely, if ever, for the benefit of the master.¹⁹ However, negligent acts can be found to be within the scope of the master-servant relationship as long as the agent is still acting for the benefit of the master, even if it is in a careless manner.²⁰

The imposition of vicarious liability on a Village due to a volunteer's harmful acts can be particularly worrisome for Villages because the organization may be the primary or only target for litigation. Theoretically, the volunteer who caused the injury should also be liable for damages, but, to promote volunteerism, nonprofit volunteers have been provided varying amounts of tort immunity under the federal Volunteer Protection Act (VPA) and under individual state laws.²¹ If a volunteer is immune from liability in a particular instance, the Village could be the only party from which the injured party could collect damages.



VILLAGES' RISK OF DIRECT & VICARIOUS LIABILITY

DIRECT LIABILITY CLAIM

VICARIOUS LIABILITY CLAIM

		Village was <u>Negligent</u> in Screening, Training, or Referring	Village was <u>NOT Negligent</u> in Screening, Training, or Referring
VICARIOUS LIABILITY CLAIM	Volunteer or Vendor Commits a Tort	Risk of <u>Direct</u> Liability	No <u>Direct</u> Liability
	Volunteer or Vendor does NOT Commit a Tort	Risk of <u>Vicarious</u> Liability	Risk of <u>Vicarious</u> Liability
		Village was <u>Negligent</u> in Screening, Training, or Referring	Village was <u>NOT Negligent</u> in Screening, Training, or Referring
VICARIOUS LIABILITY CLAIM	Volunteer or Vendor Commits a Tort	Risk of <u>Direct</u> Liability	No <u>Direct</u> Liability
	Volunteer or Vendor does NOT Commit a Tort	No <u>Vicarious</u> Liability	No <u>Vicarious</u> Liability

property damage.²⁵ Thus, failing to call an applicant's references or failing to conduct a criminal record check could result in Village liability for negligent selection, especially since the research is relatively fast and inexpensive.²⁶

The required level of inquiry into a volunteer's background varies, depending on the extent to which the volunteer will be in contact with others. For instance, a higher degree of screening may be required if the nature of the volunteer position would facilitate the commission of wrongful acts against third parties, such as working inside a member's home, as opposed to working outside (e.g., pulling weeds).²⁷ Failure to conduct a reasonable screening, however, is not alone enough to trigger liability; the Village's failure to investigate the volunteer's qualifications must be a cause of the injury.²⁸ In other words, the nature of the negative information available about a volunteer must be related to the volunteer's position and misconduct.²⁹

Villages can be found liable for negligently training and supervising volunteers if they fail to prevent reasonably foreseeable harms through adequate direction.³⁰ In a negligent training or negligent supervision case, the primary issues are whether the Village knew or should have known harm could result from the volunteer's conduct and whether the Village had the opportunity to control the volunteer's conduct.³¹ Thus, a Village can be held liable for negligence in failing to adequately instruct volunteers or failing to assure that the Village's instructions are obeyed.³² Additionally, organizations can be held negligent by failing to respond to complaints about a volunteer's behavior.³³

B. Direct Liability

A Village can also be directly responsible for negligence by the Village staff or management. An organization's liability under its direct duty of care is separate from the organization's vicarious liability.²² However, these two paths to liability can overlap. For example, if an organization negligently selects, trains, or supervises a volunteer and the volunteer negligently injures a third party (e.g., a member or bystander), the organization could be liable to the third party on two counts—vicariously, through the doctrine of respondeat superior for the volunteer's negligence, and directly, through the organization's own fault or negligence.²³

1. Negligent Selection, Training, and Supervision of Volunteers

Organizations conducting activities through agents (e.g., volunteers) have a duty to take reasonable care in selecting, training, and supervising the agents.²⁴ So, if a Village knew or should have known that a volunteer posed an unreasonable risk of harm to others, the Village could be liable for the negligent selection of a volunteer that causes an injury or

2. Negligent Misrepresentation in Referring Vendors

Recommending vendors provides Village members with an invaluable service, but it can also put Villages at risk of liability. States do not recognize a cause of action specifically alleging "negligent referrals." Instead, cases involving negligent endorsement of products or vendors have been brought under "negligent misrepresentation"—a tort involving the defendant making inaccurate statement, honestly believing them to be true, but without reasonable grounds for such belief.³⁴ For example, a Village could be liable for making representations to

members that a particular vendor is well-qualified or “good,” but failing to check the accuracy of the information by calling references.³⁵

Whether a plaintiff can assert a negligent misrepresentation claim based on faulty vendor referrals depends on whether the defendant organization should have anticipated the plaintiff’s reliance and whether the plaintiff reasonably relied on the organization’s representation. If an organization provides information to another person and it knows or should realize that the other person is depending on the accuracy of this information, then the organization is required to use reasonable care in investigating and making recommendations. In the case of Villages, members join Villages for the purpose of providing pre-screened or well-recommended vendors to use.³⁶ Accordingly, it is likely that a court would find that the Village should have anticipated member reliance on vendor recommendations.

The plaintiff must prove that he reasonably relied on the information furnished to him by the organization before he can prove there was negligent misrepresentation.³⁷ One critical factor courts examine is whether the defendant organization had superior knowledge of the information it was providing.³⁸ When Villages have screened vendors prior to making recommendations to members, Villages have superior knowledge of the quality and fitness of the vendors and this is knowledge that is not readily available to members; although it is feasible that some members could review online comments about recommended vendors, it is not feasible for members to be able to do criminal screenings. Accordingly, members reasonably rely on vendor recommendations provided by Villages, thus exposing the organizations to liability for negligent referrals.

Unlike recommending privately-owned vendors, recommending government services such as paratransit services, home-delivered meals, or in-home care is unlikely to render Villages liable for negligent referrals. The service providers have been screened by the government, not the Village. The Village would be providing information to available public services, but it would not be making representations regarding the quality of these services. When there are no representations, there can be no cause of action for negligent misrepresentation.³⁹



Scenario #1: The Village recommends a vendor, Cathy Cleaner, to Mr. Member who is seeking household cleaning services. Mr. Member’s speech is impaired after suffering a stroke a few years ago so the Village suggests they call Cathy on a three-way phone call. The Village introduces Mr. Member to Cathy and then the Village arranges a day and time when Cathy will clean Mr. Member’s home. While Cathy is cleaning, she extends the vacuum cord across the hallway. Due to his bad eyesight, Mr. Member trips over the cord and injures himself.

Probable Result: Although the Village recommended Cathy and assisted Mr. Member in hiring her, the Village is unlikely to be vicariously liable for Cathy’s negligence because it did not retain the right to control Cathy—that is, the Village had no power to dismiss Cathy or manage how she cleaned Mr. Member’s home.

Scenario #2: Mrs. Member called the Village to request transportation to a luncheon date with friends. The Village tells Vivian Volunteer to pick up Mrs. Member from her house at 11:30 a.m. the next day and take her to Main Street Café. Vivian picks up Mrs. Member, but on the way to the restaurant, she negligently hit another car, resulting in serious injuries to Mrs. Member and the other driver.

Probable Result: Because the Village dispatched Vivian, telling her where and when to go, it is likely that the Village will be found vicariously liable for the injuries to Mrs. Member and the other driver. However, if Vivian got into the car accident after dropping Mrs. Member off at Main Street Café on her way to work, it is unlikely the Village would be found vicariously liable for Vivian’s negligence because Vivian would have been acting outside the scope of her role as a volunteer. That is, the task the Village requested of her was completed.

Risk Management

Nonprofits should employ various risk management techniques to minimize the probability and impact of liabilities. In addition to reallocating risk by incorporating, contracting, and using statutes, liability risks can be minimized by implementing procedures or by avoiding certain activities.

Risk Allocation

1. Incorporated Nonprofits

Nonprofits typically use one of two organizational options: nonprofit corporations and unincorporated associations.⁴⁰ Most, if not all Villages choose to operate as nonprofit corporations in order to isolate liability. An incorporated nonprofit enjoys limited liability so any debts are satisfied only out of the assets of the corporation.⁴¹ This means that Village members will not be held personally liable for a contract or tort claim against the organization.

Unincorporated associations, on the other hand, are typically formed by default when a group of people voluntarily join together to serve a common purpose.⁴² An unincorporated association is the most informal of the legal structures available to nonprofits and the danger is that lawsuits brought against an unincorporated association are actually against the members of the association, with each member running the risk of being held personally accountable.⁴³ Although unincorporated associations are sometimes used for their simplicity, this form is not recommended because of the risk of liability to its members.⁴⁴ Loosely organized community groups should consider becoming an incorporated nonprofit to protect its members from potential liability.

2. Insurance

Purchasing insurance has been the primary form of risk management of many nonprofits, including Villages.⁴⁵ In the event the Village is found liable for damages within the scope of the insurance coverage, the insurance would compensate third parties who have been injured or whose property has been damaged.⁴⁶ General liability insurance contracts for businesses and nonprofits are designed to be broad

Scenario #3: The Village selects Victor Volunteer to help Mrs. Member by moving her living room couch to make room for her Christmas tree. Having entered Mrs. Member's home to move the couch, Victor assaults Mrs. Member. Prior to retaining Victor, the Village conducted no background check. Had the Village done so, they would have discovered criminal convictions for assault. If the Village had known of Victor's criminal history, they would have never allowed Victor to volunteer.

Probable Result: The Village could be subject to liability to Mrs. Member.

Scenario #4: The Village assigns Valerie Volunteer to pick up Mr. Member from his home and take him to a doctor's appointment. However, on the way to the appointment, Valerie negligently rear-ends a truck and injures Mr. Member. The Village did not conduct a background check, but if they had they would have found that Valerie has a clean driving record, but that she was convicted of income-tax evasion.

Probable Result: Because Valerie's driving duties do not involve tax-compliance and the Village would have allowed Valerie to be a volunteer driver anyway, the Village is probably not liable for negligent selection of Valerie as a volunteer despite the car accident. Even if the Village acted carelessly in failing to check Valerie's record, the Village's failure to detect Valerie's tax evasion conviction was not a cause of harm to Mr. Member because it did not increase the risk of driving negligence by Valerie.





and they typically cover the liability of the organization for negligence.⁴⁷ For public policy reasons, liability policies exclude coverage for intentional injuries.⁴⁸ So, “slip and fall” (negligence) cases would be covered, but “push and fall” (intentional tort) cases would not.

Liability insurance purchased by volunteers, such as a volunteer’s homeowners’ policy or automobile insurance policy can help reduce the likelihood the Village will be sued. If a Village volunteer purchases homeowner’s insurance, the policy typically covers a certain extent of any negligence caused by the volunteer, regardless of whether the personal injury or property damage occurs on the volunteer’s property.⁴⁹ Additionally, a volunteer’s automobile insurance policy covers liability, vehicular damage, and medical expenses

incurred by the driver, passengers, and others.⁵⁰ So, if a volunteer transports a member and causes an accident resulting in physical injuries or automobile damage, the volunteer’s insurance will likely cover the damages, thereby shielding the Village from liability.⁵¹ Villages should require volunteer drivers to have personal automobile policies and to provide proof of insurance to the Village at the time of each renewal.⁵² Some general liability insurance companies will even require that the Village volunteer drivers have a certain minimum level of car insurance.

Villages should insist that private vendors or service providers also have commercial general liability insurance that covers a vendor’s negligence causing injury to third parties or their property.⁵³ The vendor will always be a named an “insured” party under the commercial general liability contract.⁵⁴ To further protect itself from potential vicarious liability for the vendor’s negligence, a Village can request that it be listed as an additional insured party under the vendor’s policy.⁵⁵ However, this may not be popular with vendors, and will likely only be done if the vendor does a large volume of business through the Village. At a minimum, Villages should verify that each vendor has liability insurance so that if something goes wrong, liability can be allocated between the Village and the vendor.

Liability insurance protects the assets of the Village and assures that money is available to compensate an injured party. Without liability insurance recovery of damages is limited to the assets of the Village or other party held responsible. Most non-profit Villages will have very limited assets and paying a judgment without insurance would take all of the assets of the Village. If the assets of an uninsured Village are less than the awarded damages, the injured party is left unable to collect. Liability insurance protects the Village from a financial loss and protects an injured party because he will be able to collect damages.

3. Waiver or Exculpatory Agreements

Another risk management tool that can shift liability away from Villages involves employing release contracts to waive or limit potential tort liability for the Village and volunteers. For example, a typical waiver provision would release the Village from all negligence, personal injury, or invasion of

privacy liability arising from employee, volunteer, or third-party vendor activities; this would exempt the Village from being held vicariously and directly liable for negligent acts. Some Villages already require members to sign waivers releasing the Villages from all liability before they can receive services.

A common misconception is that waivers are not enforceable. However, a plaintiff who expressly contracts to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.⁶¹ Generally, an agreement not to sue or an agreement excepting a party from liability for future damages will be upheld as long as any injuries were within the scope of injuries contemplated by the exculpatory clause.⁶² Two exceptions where public policy renders exculpatory clauses unenforceable are when they request releases for intentional torts or crimes and when they involve parties with grossly unequal bargaining power.⁶³

To possess a grossly unequal bargaining advantage, a provider must typically offer a service that is deemed "essential" in nature, such as schools or public utilities.⁶⁴ In determining whether a service is essential, courts will examine whether there are other competitors providing the same services and whether the plaintiff voluntarily applied for membership to a private organization.⁶⁵ Villages are unlikely to be deemed essential services because they are voluntary organizations and they are not the only provider of the services they offer. For instance, members could hire handymen for small maintenance issues around the house rather than using Village volunteers. Additionally, members could subscribe to a local guide that evaluates vendor services. Because Villages do not have a monopoly on the services they provide, it is likely a properly written waiver will be upheld.⁶⁶

Exculpatory agreements are frequently preprinted contracts, offered on a take-it-or-leave-it basis, so many courts find these contracts to be contracts of adhesion—a form contract drafted by one party and signed by another with little or no negotiation power.⁶⁷ The fact that a waiver is a "contract of adhesion" isn't enough to say the waiver is unenforceable.⁶⁸ Adhesion contracts are typically enforceable as long as they are not unconscionable and as long as their language is unequivocal and clear.⁶⁹

Scenario #5: The Village asks Vera Volunteer to drive Miss. Member to the grocery store. Miss. Member is mobile, but she uses a walker and needs assistance getting in and out of a car. The Village tells volunteers to assist members when they are entering and exiting cars, but the Village provides no training to its volunteers on proper lift techniques for older adults. When Vera goes to help Miss Member from the vehicle, she strains her back and drops Miss. Member. Miss Member suffers a hip fracture as a result of the fall.

Probable Result: The Village is likely to be found liable for negligent training of their volunteers because the risk of an older member falling while entering or exiting a car is foreseeable.

Scenario #6: Mr. Member, a housebound Village member with severe mobility impairments, asks the Village to have a volunteer visit him regularly. The Village assigns Vince Volunteer to check in on Mr. Member. Once or twice a week Vince will pick up Mr. Member's key from the Village office in order to gain entry to the house because Mr. Member finds it too difficult to answer the door. The Village supervises Vince only by conducting occasional spot checks where they call Mr. Member to verify that Vince came over. However, on a few occasions, Mr. Member was asleep when Vince entered the house and Vince seized the opportunity to steal valuable bottles of wine.



Although waivers hold much potential as a way for Villages to shift liability away from their own organization, waivers have their weaknesses. For instance, waivers will not protect the Village from all sources of liability. The Village will only be contracting with Village members, not other third parties like visitors in the member's home or bystanders. Some Villages also worry that prospective members will be discouraged by having to sign a waiver as a condition to becoming a Village member. However, Villages that require waivers have not noticed any apprehension by members signing the contracts.⁷⁰

4. Indemnification

Indemnity clauses are similar to exculpatory clauses in that they contractually reallocate liability. However, the exculpatory clause deprives an injured party of his right to recover damages whereas the indemnity clause simply shifts the burden of paying damages.⁷¹ To indemnify another party is to compensate that party for a loss that has occurred or to contractually agree to repay another party for future loss.⁷² Villages rarely contract with vendors, but in the rare instances they do, the organizations should require vendors to sign an indemnification clause. This would give Villages financial protection against expenses and liability incurred as a result of the vendor's fault. So, if the Village is found liable for negligently referring or endorsing the vendor, the Village could collect from the vendor.

Even when indemnification has not been contracted, an organization can sometimes sue responsible parties, demanding compensation. For example, an organization is legally entitled to indemnification if it was held liable for a tort, but only vicariously.⁷³ So, if a Village is found liable for a volunteer's tort under the doctrine of respondeat superior, the Village could sue the volunteer to recover the amount of damages it paid the plaintiff.

5. Statutory Protection

Some states have statutory protections that can limit a nonprofit's liability, either by capping the amount that may be awarded as damages or by granting partial immunity. These statutes can be a driving force for Villages because they often dictate



how much insurance coverage a Village needs to purchase and how large its liability risk is. For example, some states limit liability by limiting the amount of damages a liable organization will have to pay.⁷⁴ In Colorado, judgments against nonprofits are limited to the extent of existing insurance coverage.⁷⁵ Similarly, Massachusetts caps tort damages at \$20,000 for nonprofits if a tort was committed in the course of an activity that accomplished the charitable purposes of the organization.⁷⁶

While full charitable immunity has been abolished, vestiges of this doctrine remain, to some degree, in a few states including Alabama, Arkansas, Georgia, Maine, Maryland, New Jersey, Virginia, Utah, and Wyoming.⁷⁷ For instance, Georgia grants nonprofits immunity unless the nonprofit failed to exercise ordinary care in the selection of competent officers and employees, or where the plaintiff is a paying recipient of nonprofit services.⁷⁸ Similarly, Utah provides that a nonprofit is not liable for damage or injury caused by a volunteer's intentional harm unless the nonprofit should have known of the volunteer's unfitness.⁷⁹

Scenario #7: Nancy Neighbor tells the Village organizers that Paul Plumber is “great” and that the Village should recommend Paul to its members. Mrs. Member calls the Village for the name of a plumber because she believes she has a leak in her bathroom. The Village gives Mrs. Member Paul’s number and says he is “great” and “well-qualified.” However, the Village did not call Paul to ask for references or check to see if he has proper licensing. If the Village had requested references and certification, it would have found that Paul was not a qualified plumber. Mrs. Member calls Paul and has him work on the plumbing problem in her bathroom. Paul punctures a pipe which results in major water damage to Mrs. Member’s home.

Probable Result: The Village could face liability for the tort of negligent misrepresentation because the Village failed to adequately investigate that Paul was in fact a “great” plumber. The Village did not exercise reasonable care in recommending Paul Plumber, especially considering that members join the Village in part to obtain accurate information about vendors’ abilities.

Risk Minimization

1. Volunteers

a. Vicarious Liability

As a vital part of the Villages’ workforce, volunteers can be a major source of tort liability for these organizations.⁸⁰ Some Villages rely on volunteers as if they were staff, monitoring all of the work they do through a few key coordinating staff members. Other Villages may not have staff to track the details of how or when volunteers carry out their services. Since nonprofits can be held vicariously liable for the torts of their volunteers under respondeat superior, they should maintain the degree of control over volunteers that the law presumes exists.⁸¹ For example, a Village might limit a volunteer’s efforts to only the task he was assigned. So, if a volunteer is at a member’s home to perform a particular task, the volunteer is only permitted to perform that assigned task. Regardless of an individual Village’s policy, effective control over volunteers’ actions is directly linked with providing volunteers with proper training.⁸² Villages should write policy and procedure manuals and volunteer position descriptions that



define the Village mission, the volunteer duties, and the scope of those duties.⁸³

Requiring members to request services through the Village rather than directly through volunteers is also critical to minimizing vicarious liability. For instance, Villages could face liability if volunteers act on their own, without being dispatched by the Village to assist a member; if the Village cloaks the volunteer with the appearance of authority and the third party reasonably relies on this appearance of authority, then the Village can be held liable for volunteers’ actions, even if it did not expressly give the volunteer directions to do the act.⁸⁴ The Village must make it clear to members that if a volunteer assists them, but the member has not called the Village asking for the help, then the volunteer is not helping the member as a Village volunteer, but as an independent neighbor or friend.

b. Direct Liability

Village volunteers are typically neighbors or Village members, often already known to the Village board and members. However, since nonprofit organizations can be held liable for improper selection, training, and supervision of volunteers,

Villages should put the same amount of effort into screening volunteers as they do for paid employees. Specifically, Villages should investigate the criminal record, skills set, and temperament of each volunteer in order to minimize the risk of volunteer wrongdoing or inadequacy.⁸⁵ Per the requirement of their insurance companies, many Villages use “IntelliCorp” background check software to screen criminal records for all volunteer applicants and traffic records of volunteer application who will be driving members.

One of the best ways to implement a consistent screening process is to hire a volunteer coordinator to establish screening guidelines and perform criminal record, driving record, and character reference investigations.⁸⁶ The volunteer coordinator should examine the nature of the volunteer services, the anticipated extent of contact between the volunteer and member, the degree of supervision over the volunteer, and the vulnerability of the members.⁸⁷ For example, if a volunteer position involves unsupervised contact with frail individuals, the organization should use a more rigorous screening process. Likewise, screening volunteer driving records is more critical for volunteers that will be driving than it would be for volunteers doing office work.

The volunteer coordinator should make a file for every volunteer that includes the investigation materials.⁸⁸ The file should contain notes of conversations with references and interviews with the applicant to show due diligence in volunteer selection should a third party later sue the Village for negligently selecting a volunteer.⁸⁹ However the importance of investigating potential volunteers, there is a constant push-pull between wanting to respect volunteers’ privacy and needing to protect Village members. If Villages become too invasive with their screening techniques, volunteer interest might decrease.

In addition to screening volunteers, providing volunteers adequate training is critical in assuring volunteers safely perform activities. However, Villages vary in the amount of training they give their volunteers. Some give handbooks and have orientation sessions while others are more informal, giving lessons based on the volunteer’s task at hand. Training sessions might consist of educating a volunteer being dispatched to drive a frail member to the doctor or how to perform proper lifting techniques when assisting an older person in and out of a car so that the member is not injured. Handbooks can detail

policies such as wearing seat belts when driving and not speaking on a cell phone while assisting a Village member.⁹⁰ If a Village provides handbook materials, they must ensure that the materials are regularly updated.⁹¹ Some insurance companies provide personnel handbook reviews, driver trainings, and webinars if an organization purchases liability insurance with their company.⁹²

Providing training materials is critical to avoiding liability, but volunteer coordinators should also assess preexisting skills of volunteers prior to assigning tasks. This matching of skills to tasks can reduce the probability of accidents because the volunteers are already interested in the task and have spent time doing the task on other occasions. So, if a volunteer is good at computers, he should not be sent out to replace a light switch unless he also has those skills.

Villages have a duty to exercise care in supervising their volunteers, particularly because they will be interacting with some vulnerable members of the population.⁹³ Supervising volunteers may be problematic because of the variability of the volunteer’s time schedules and work sites.⁹⁴ Additionally, Village staff or board members cannot go with each volunteer to every house call to monitor their performance. Nonetheless, the Village can follow up with members after volunteer visits. Some Villages follow up after every visit with an email or phone call while others spot check or simply encourage members to inform the Village with comments about volunteers. The Village’s volunteer coordinator should develop complaint and follow-up procedures as this will enable the Village to identify reoccurring problems and careless or inattentive volunteers.

2. Vendors

Vendors are unlikely to be considered Village agents or “servants” so vicarious liability is less of a risk with vendors than it is for volunteers. However, Villages can be found liable of negligently endorsing an unqualified vendor. There are two primary ways of minimizing this type of referral liability—Villages can either thoroughly screen vendors prior to recommending them to members or decline to formally recommend any vendors at all.

For Villages that prefer to formally recommend vendors to Village members, there should

be a structured vetting process that maps out how a Village will select and investigate vendors. Member recommendations can be useful for Villages seeking vendors to add to their list, but Villages should also perform an independent vendor investigation. Villages can begin by checking opinions in local guides like Washington, DC's Consumer's Checkbook, national guides like Better Business Bureau, or online review websites such as Yelp.com.

Once a Village determines that a vendor has potential, it should contact the prospective provider to determine if they are interested in becoming part of the Village referral list. A follow up interview would then occur.⁹⁵ The Village ought to check references, perform a criminal check, and verify insurance, certification, and bonding documents (if applicable).⁹⁶ Villages should also search the local public court records to see if the service provider has had civil suits such as contracts or tort cases.⁹⁷ As with screening volunteers, it is important for Villages to maintain records on all vendor screenings so that, if sued, the Village can prove due diligence.

After a vendor has been added to the Village's referral list, the Village should periodically review the vendor's information. For example, insurance and bonding need to be verified on an ongoing basis, based on the expiration dates of policies.⁹⁸ In addition, the Village should conduct follow-up interviews with members after a vendor has performed services. These vendor assessments allow the Village to make

sure vendors are qualified and that they have not taken advantage of Village members.

There is some argument that Villages should always refer more than one vendor in order to force the member to share in the burden of vendor selection.⁹⁹ However, this would seem to defeat the purpose of screened vendor referrals, which is to take the stress and work out of vendor selection for aging Village members. Additionally, Beacon Hill Village has found that providing vendor referrals that have been vetted by the Village is a key factor in drawing members to the Village.¹⁰⁰

Although vendor screening is a big draw, some Villages may decide that they do not have the resources to adequately screen vendors. Instead, these Villages might decide to keep an informal neighborhood list or provide members with an online subscription to consumer rating services. To protect themselves, these Villages must make it clear to members that they offer no endorsements or opinions regarding vendors and that they merely pass along information provided by third parties such as other Village members or rating services.¹⁰¹ To emphasize the fact that the Villages make no representations regarding the quality of vendors, Villages should orally inform members that they do not screen or recommend vendors. And, to eliminate confusion, the Village should also include a clause in any member waivers that states that the Village does not screen service providers or make formal referrals.

What if a volunteer is injured on the job?

Sometimes when organizations think of "volunteer liability," they forget about liability to volunteers if they are injured while providing services for the organization. The primary protection for volunteer injuries should be either "accident insurance" or "workers' compensation" policies.⁵⁶ Accident insurance policies pay for the cost of medical treatment of volunteers who are injured while engaged in activities for the benefit of the organization.⁵⁷ These policies only pay for medical bills after the volunteer's personal health insurance is exhausted.⁵⁸ Some states allow organizations to include volunteers in a nonprofit's workers' compensation policy.⁵⁹ Organizations are required to carry workers' compensation coverage for their paid employees so it may be administratively less cumbersome to simply add volunteers to an existing policy.⁶⁰



Conclusion

Villages serve a vital role in the lives of older Americans. By enabling aging adults to remain in their own homes for longer, these organizations can prevent people from having to prematurely enter nursing homes or assisted living facilities. Additionally, by encouraging aging-in-place, Villages can have a positive impact on an older individual's physical and emotional wellbeing.¹⁰² Volunteers help Village members so they do not have to strain to do physically exhausting tasks. Many Villages also assist members socially by providing friendly visits from volunteers and community events such as book club meetings, restaurant visits, and fitness classes. Additionally, recent studies have shown that older adults who age-in-place have lower Medicare and Medicaid costs as well as lower rates of depression and higher levels of cognition than their nursing home resident counterparts.¹⁰³

Despite these benefits, the threat of tort liability impacts Villages' viability. Villages fear tort lawsuits because of the potential for monetary loss, but also the loss of reputation or funding and the loss of the volunteer or client base that can result from a tort allegation.¹⁰⁴ Even if an organization is ultimately not found liable for the damage or injury claimed, the worry is that nonprofits may not be able to absorb costs related to litigation—the expense of a legal

defense, the disruption of services, and the negative publicity.¹⁰⁵ However, liability concerns should not prevent the progress in the Village movement. Consistent risk management should be able to shield Village organizers, members, and volunteers from fear of liability.

To safeguard in case it is ever held liable for personal injuries or property damage, Villages should become incorporated nonprofits and maintain liability insurance within reasonable limits based on state law. Additionally, Villages should verify the insurance of their volunteers as well as any recommended vendors. As further protection against liability, Villages may choose to require members to sign exculpatory waivers and vendors to sign indemnification clauses. However useful, these risk management techniques only help nonprofits once a loss has occurred; they are not designed to prevent losses. Thus, Villages should preemptively reduce the risks of liability by screening, training, and supervising volunteers as well as screening vendors. Villages should also setup a system to receive feedback from members on volunteer and vendor activities.

About this Essay:

Any attempt to summarize tort liability is inherently uncertain because the United States has fifty sets of laws and even more courts making the determinations as to whether tort liability exists in a particular instance. This essay is part of initial exploratory research and is meant to flag key liability issues. This essay does not replace legal, insurance, or any other risk management advice.

Useful resource for Villages may include...

- [Volunteer Management](#) (2010) by Steve McCurley
- [The Volunteer Management Handbook: Leadership Strategies for Success](#) (2011) edited by Tracy Connors
- [No Surprises: Harmonizing Risk and Reward in Volunteer Management](#) (2009) by Nonprofit Risk Management Center
- [Staff Screening Tool Kit](#) (2004) by Nonprofit Risk Management Center
- [Exposed: A Legal Field Guide for Nonprofit Executives](#) (2009) by Nonprofit Risk Management Center

Future Steps for Village Advocates...

Villages and their advocates should encourage legislative entities to pass statutes granting qualified immunity to Villages based on the beneficial services they provide older adults. Such a specific statute may seem narrow and hard to imagine, but states have provided various special interest groups immunity, especially if they are considered philanthropic.¹⁰⁶ For example, some states have statutes that encourage organizations to donate goods such as food to needy populations by granting them limited immunity for negligence.¹⁰⁷

Appendix: Village Research Summaries

Between May 28, 2012 and June 25, 2012 the author spoke to Village organizers from three Washington, DC Villages. She spoke with a variety of Village participants including executive directors, board presidents, and pro bono attorneys. In order to protect the privacy of the Villages, the interview summaries do not identify Villages by name.

I. Village Organization Structure

All three Villages are incorporated nonprofits with IRS non-profit 501(c)(3) status and were established by neighbors. These Villages rely heavily on volunteers to assist in organization administration. One Village has no paid employees, another Village has one paid employee, and a third Village has two full-time employees and two half-time employees.

One Village does not charge member dues in order to receive services. The two other Villages charge an annual fee in exchange for services and social activities. One of these Villages charges \$750 for a household and \$500 for an individual. The other Village charges \$800 for a household and \$530 for an individual. For older persons with a household income below \$50,000, memberships are significantly discounted. One Village also offers a special associate membership that allows members to only partake in Village social activities (e.g., book clubs, museum tours, or restaurant visits).

One Village has 370 members and a second Village has 120 members. A third Village does not have “members” who pay a fee, but instead has 20 “service recipients” who can request services as needed. Recipients and members are generally 70 and 80 years old.

II. Volunteers

a. Role of Volunteers

Volunteers provide direct services, assist in the office management, serve on the board and committees, and help out at social activities. Typical volunteer services include transportation to appointments, friendly

telephone calls or visits, book-reading, shopping errands, and yard work. All three Villages said that transportation is the most popular service provided. Household services and computer services are also in demand.

One Village stated that their volunteers also assist older residents with sorting and discarding household items. Another Village offers a unique volunteer-provided service—medical advocacy. Volunteers go to medical appointments with older members with memory issues and record notes and ask questions. Then, the volunteers often communicate this information back to the member’s family members.

Volunteers are often able-bodied Village members. Younger neighbors in their thirties or forties also provide services. All three Villages use youth volunteers to some extent, but in a restricted fashion. One Village allows middle school volunteers to help with yard work, but only with the supervision of a teacher; students are not permitted to enter member houses. Similarly, another Village receives assistance from a Boy Scout troop, but the troop is only permitted to work on a specific project or task. The third Village said that youth volunteers are typically restricted to providing yard work and computer assistance.

b. Screening of Volunteers

Per the requirement of their insurance companies, all three Villages use IntelliCorp background check software to screen criminal records for all volunteer applicants. If a volunteer is going to drive, the Villages also run a traffic record screening. At least one Village also requires a volunteer to show proof of his personal car insurance coverage.

One Village president commented that he believes the IntelliCorp screening process seems to work well; he noted two instances where volunteer applicants had poor driving records and the Village was able to tell them that they were not permitted to drive. Another Village mentioned an instance when an applicant’s background check showed she had a theft charge pending against her. The Village called the prospective volunteer to ask her about the incident, but she never returned their call.

Overall, the Villages do not seem to have a hard and fast rule about what sort of traffic violations disqualify a volunteer from driving. One Village noted that minor traffic violations (e.g., a parking ticket or one speeding ticket) do not prevent a volunteer from driving.

c. Training and Supervision of Volunteers

One Village does not require formal training of volunteers. However, this Village has all prospective volunteers speak to one of the board members, a retired psychologist, so she can assess their interests and skills as well as identify unusual personality problems.

In another Village the executive director individually orients volunteers; there is no handbook and the training mostly consists of simple suggestions (e.g., park on a level surface, help the member to the door). However, this Village does conduct training sessions on how to interact with persons with memory problems or dementia.

The third Village has a formal handbook for volunteer reference. In the future, it will require volunteers to sign a statement that they have read and understood the Village training handbook. The Village also schedules an orientation introducing both volunteers and members to Village procedures. Village volunteers are then individually directed regarding the particular services they will provide.

Follow-up after volunteers have provided services varies. One Village has no formal follow-up procedure. The two other Villages actively seek feedback from members; one Village follows-up with members via email after each volunteer service provided.

Villages have different organizational structures for handling volunteer activities. One Village assigns volunteers tasks and limits volunteer efforts to this task. For instance, if a volunteer is at a member's home to perform a particular task, the volunteer is only permitted to perform that assigned task (i.e., the volunteer should not be drawn into more tasks). The volunteers are trained to tell the member that the

Village will send someone else over for any other task requested. The other two Villages, on the other hand, want to keep interactions between volunteers and members flexible; if a volunteer helps a member with one task, they may also perform an additional unrelated task.

All three of the Villages require their members to request services through the Village. That is, the member should not call volunteers directly. Not only do the Villages want to prevent volunteer "burnout," but the Villages also want to keep track of all the services provided. The Village that offers a joint volunteer-member orientation has found that this mode of training decreases the likelihood of members requesting too much of a volunteer—both groups are aware of the boundaries of the volunteer-member relationship.

III. Vendors

a. Role of Vendors

Most services are delivered by volunteers living in the Village neighborhood. However, when members request services that volunteers cannot provide, the Villages provide access to a list of local vendors, such as plumbers, carpenters, or electricians. The goal is that Village members only need to call one number, their Village, to access any service they might require.

Two Villages do not formally recommend or endorse any vendors. One of these Villages has an informal neighborhood list that is available for members to look at. The other Village maintains a list of vendors that members recommend and also provides members with an online subscription to Washington Consumer's Checkbook, a nonprofit rating service for local service firms and health care providers. If a member calls the Village for a recommendation, the Village will either give him listings from Checkbook or member-recommended providers (including the member name and comments)—whichever the inquiring member prefers. Then, the member contacts the vendor. The only vendors that the Village personally reviewed were home health aide providers. Currently this Village recommends three medical care providers and one non-healthcare provider.

The third Village has an extensive list of recommended vendors (about 100 vendors). This list is only available to the Village staff and it is not given to members. The list consists of one vendor per category. If a member requests a service where no vendor is identified, the Village will vet providers and find a vendor to add to the ever-growing list.

b. Vetting Process of Vendors

None of the Villages interviewed request vendors to provide evidence of licensing, bonding, or insurance. The two Villages that do not formally recommend vendors do no quality screening. For the third Village that has a long list of vetted vendors, there is a screening process before a vendor can be placed on the list. The first step is reaching out to community members and asking for any of their recommendations. Then, the office manager reviews the Washington Consumer's Checkbook and Better Business Bureau evaluations of service providers. Third, the office manager phones promising vendors and asks for references. Then, the office manager checks the references. If these references prove to be satisfactory, then the vendor can be added to the list.

c. Relationship with Vendors

Two Villages have no relationship with any vendors. One Village says they would like to foster relationships with vendors in order to obtain discounts for members. This Village keeps track of the number of referrals they make and they make this information available to vendors. The Village also has a three-way conference call (Village, member, and vendor), telling the vendor that they are referring them to the member on the line. Generally, this Village does not have contracts with vendors, since they do not want to have long-term commitments to vendors. However, this Village does have a contract with a home healthcare provider. The contract states that the Village will only refer this particular provider and the provider will give Village members a substantial discount.

IV. Complaints about Volunteers or Vendors

One Village reported that there have been no complaints about volunteers or vendors. Another Village said that there have been no accidents, but one

member did complain about a volunteer's driving. The Village dealt with the problem by shifting the volunteer into office management volunteer work.

The third Village has dealt with three complaints. The first issue occurred when a member accused a vetted house cleaner of stealing. The Village started the process of interviewing both the member and the house cleaner. However, the member later found the items she thought had been stolen. The second issue involved younger volunteers who broke a member's vase after entering a member's home while she was out. The Village staff interviewed both parties, but the member decided not to pursue the complaint further. The third incident occurred when a volunteer made a member uncomfortable by asking inappropriate questions. For instance, the volunteer asked the member if he wanted to move-in with her. The Village asked this volunteer to leave the organization.

V. Waivers

Two Villages require members requesting services to sign waivers. One Village has a waiver provision that releases the Village from all negligence, personal injury, or invasion of privacy liability arising from employee, volunteer, or third-party vendor activities. Additionally, the release provision states that the member understands that the Village is not affiliated with any third-party vendors. The second Village that requires members to sign a release form includes a similar waiver that releases the Village from all liability stemming from negligence of its volunteers, employees, preferred or recommended vendors, or agents.

The third Village does not require members to sign a waiver because they do not want to discourage membership. This Village prides itself on its ability to provide services with a personal touch and they feel asking members to sign release forms runs against that goal.

¹ Adrienne Lyon Buenavista is a law student at the Catholic University Columbus School of Law. She served as the 2012 Coleman Summer Intern at the American Bar Association Commission on Law and Aging.

² Jon Pynoos et al., Aging in Place, Housing, and the Law, 16 Elder L.J. 77, 79 (2008) (citing a 2000 AARP survey that found that 80% of respondents aged forty-five and over would like to stay in their current residences for as long as possible).

³ Villages: Helping People Age in Place, AARP, <http://www.aarp.org/home-garden/livable-communities/info-04-2011/villages-real-social-network.html> (last visited July 25, 2012).

⁴ E-mail from Natalie Galucia, Project Coordinator, Vill. to Vill. Network, to Adrienne Lyon Buenavista, Coleman Intern, Am. Bar Ass'n, Comm'n on Law and Aging (Jun. 27, 2012, 11:22 EST) (on file with author).

⁵ In addition to providing services, some Villages organize social events for members such as book clubs, restaurant outings, and yoga classes.

⁶ AARP, *supra* note 3.

⁷ The author researched basic tort principles, examined relevant statutory and case law, reviewed the Beacon Hill Village Founder's Manual, and conducted informational interview with a small sample of Villages with varying structures.

⁸ James D. DeWitt, A Legal Handbook for Nonprofit Corporation Volunteers, ch. 3 (2010) (unpublished manuscript), <http://www.iciclesoftware.com/vlh7/VLH9Torts.html> (last visited July 31, 2012).

⁹ Liability Basics for Nonprofit Organizations, PERI—Public Entity Risk Institute, https://www.riskinstitute.org/peri/index.php?option=com_bookmarks&task=detail&id=560, (last visited July 31, 2012); Brenda Kimery, Tort Liability of Nonprofit Corporations and Their Volunteers, Directors, and Officers: Focus on Oklahoma, 33 Tulsa L.J. 683, 686 (1997-98).

¹⁰ Dan B. Dobbs, The Law of Torts 2 (2000).

¹¹ Kenneth S. Abraham, The Forms and Functions of Tort Law 60-61 (6th ed. 2012).

¹² Restatement (Second) of Torts § 281-82 (1965); Abraham, *supra* note 11, at 67; Dobbs, *supra* note 10, at 335-36. Note that the requisite foreseeability entails more than a mere possibility of harm since, in hindsight, everything is foreseeable, even “freak accidents.” Nicole M. v. Sears, Roebuck & Co., 76 Cal.App.4th 1238, 1244 (Cal.App.6.Dist. 1999).

¹³ Melanie L. Herman, Ready in Defense: A Liability, Litigation, and Legal Guide for Nonprofits 1 (2003).

¹⁴ Dobbs, *supra* note 10, at 906.

¹⁵ Amoco Oil Co. v. EPA, 543 F.2d 270, 276 (D.C.Cir. 1976).

¹⁶ Restatement (Second) of Agency §219(1) (1957).

¹⁷ Jeffrey D. Kahn, Organizations' Liability for Torts of Volunteers, 133 U. Pa. L. Rev. 1433, 1440 (1985).

¹⁸ *Id.*

¹⁹ J. Dennis Hynes & Mark J. Loewenstein, Agency, Partnership, and the LLC 96 (1997).

²⁰ *Id.*

²¹ Unless otherwise provided, no volunteer of a nonprofit organization or governmental entity shall be liable for harm

caused by an act or omission of the volunteer if: (1) the volunteer was acting within the scope of his responsibilities, (2) the volunteer was properly licensed, certified, or authorized, as needed, (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the harmed individual, (4) the harm was not caused by the volunteer operating a motor vehicle. 42 U.S.C.A. § 14503 (West, Westlaw through P.L. 112-142 (excluding P.L. 112-140 and 112-141)).

²² Dobbs, *supra* note 10, at 906.

²³ *Id.*

²⁴ Restatement (Third) of Agency § 7.05(1) (2006).

²⁵ Herman, *supra* note 13, at 50.

²⁶ When determining whether the volunteer selection process created an unreasonable risk, a court will consider whether information of a volunteer's incompetence was reasonably accessible to the organization, taking into account the time, effort, and expense burden of screening volunteer applicants. Mark C. Lear, Just Perfect for Pedophiles? Charitable Organizations That Work with Children and Their Duty To Screen Volunteers, 76 Tex. L. Rev. 143, 172 (1998).

²⁷ 30 C.J. S. Employer § 203 (2012). This differentiation is discussed in Williams v. Feather Sound, in which the occupant of a townhouse sued a developer for injuries she sustained when assaulted by one of the developer's employees who had been given access to the townhouses. Williams v. Feather Sound, Inc., 386 So.2d 1238, 1240 (Fla.App., 1980). The court discussed how a company had no duty to inquire beyond the information supplied by the job applicant if he is being hired to do only outside work, but that a company did have a duty to perform an independent inquiry or screening of the job applicant if he will have easy access to the inside of homes. *Id.*

²⁸ 30 C.J. S. Employer § 201 (2012).

²⁹ Herman, *supra* note 13, at 50. For instance, the court in Doe v. Boys Clubs of Greater Dallas found that a nonprofit Boys Club breached its duty to exercise reasonable in selecting its volunteer workers. Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 476 (Tex. 1995). However, the court found that the Boys Club could not have reasonably foreseen that the volunteer would assault the boys because, if the club had investigated the volunteer's criminal record, the information would have revealed one prior DWI, nothing to indicate the volunteer would assault the children. *Id.*

³⁰ See Restatement (Third) of Agency § 7.05(1) (2006); 30 C.J. S. Employer § 205 (2012).

³¹ 30 C.J. S. Employer § 205 (2012).

³² *Id.*

³³ Negligence in Employment Law 53 (Alfred G. Felio & Weyman T. Johnson eds., 2002).

³⁴ 8 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 69:28 (4th ed. 2012). In a classic case, Hanberry v. Hearst, a plaintiff purchased a pair of shoes that she read about in the magazine, “Good Housekeeping.” Hanberry v. Hearst Corp., 276 Cal.App.2d 680, 683-86 (Cal.App.4.Dist. 1969). The magazine advertised that the shoes were “good ones” and gave the shoes their seal of approval. The Hanberry court found that a company may be liable if the company endorses a product for its

own gain and a purchaser, relying on the endorsement, buys and then is injured by the product because it is not as represented in the endorsement. *Id.*

³⁵ *Dobbs*, *supra* note 10, at 1353.

³⁶ *See Id.* at 1350-51.

³⁷ *Id.* at 1358; Restatement (Second) of Torts § 311 (1965).

³⁸ Alissa J. Strong, “But He Told Me it Was Safe!”: The Expanding Tort of Negligent Misrepresentation, 40 U. Mem. L. Rev. 105, 151-52 (2009). For example, in *Virginia Dare Stores v. Schuman*, a store manager told a window washer that a display case would hold the washer’s weight, but it did not and the washer fell and was injured. *Virginia Dare Stores v. Schuman*, 175 Md. 287, 298 (Md. 1938). The court found that the store manager was liable for negligent misrepresentation because the store owned the display case, the washer could not have otherwise reasonably ascertained the information, and the store manager knew the washer was relying on him to convey accurate information. *Id.* at 291-92.

³⁹ *See Yanase v. Automobile Club of So. Cal.*, 212 Cal.App.3d 468 (Cal.App.4.Dist. 1989) (finding that there can be no cause of action for negligent misrepresentation when there was in fact no representation made).

⁴⁰ Eugene Garfinkle, *Liability of Members and Officers of Nonprofit Unincorporated Associations for Contracts and Torts*, 42 Cal. L. Rev. 812, 812-13 (1954).

⁴¹ *Hynes*, *supra* note 19, at 195.

⁴² Sarah J. Hastings, *Cinderella’s New Dress: A Better Organizational Option for churches and Other Small Nonprofits*, 55 Drake L. Rev. 813, 820 (2007).

⁴³ *Id.* at 829; Harry G. Henn & Michael George Pfeifer, *Nonprofit Groups: Factors Influencing Choice of Form*, 11 Wake Forest L. Rev. 181, 195-6 (1975).

⁴⁴ *Hastings*, *supra* 42.

⁴⁵ *Myths of Volunteer Risk Management—Part 2*, Nonprofit Risk Management Center, <http://www.nonprofitrisk.org/library/articles/volunteer09001998.shtml>, (last visited July 31, 2012). For instance, Beacon Hill Village spends \$1,000 annually for a \$1,000,000 coverage policy. Beacon Hill Village, *The Village Concept: Learning from Experience* 25 (2009).

⁴⁶ *Insurance*, Britannica Online Encyclopedia, <http://www.britannica.com/EBchecked/topic/289537/insurance> (last visited July 31, 2012).

⁴⁷ *Id.*

⁴⁸ 43 Am. Jur. 2d Insurance § 672 (2012).

⁴⁹ *Does Homeowners’ Insurance Cover Personal Liability?*, 360 Degrees of Financial Literacy, <http://www.360financialliteracy.org/Topics/Home-Ownership/Homeowners-Insurance/Does-homeowners-insurance-cover-personal-liability> (last visited July 31, 2012).

⁵⁰ Britannica, *supra* note 46.

⁵¹ *Id.*

⁵² Certificates of Insurance issued by the insurance company summarize essential information such as the types of coverage, the amounts of coverage, the property protected, the insured parties protected, and any other agreements such as waivers or cancellation notices. Billie J. Ellis, Michael S. Goodrich &

Alan D. Hegi, *Insurance Issues in the Owner/Contractor Relationship*, 5 Prac. Real Est. Law. 43, 48 (1989).

⁵³ *Id.* at 45.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Insuring Volunteers*, PERI—Public Entity Risk Institute, https://www.riskinstitute.org/peri/index.php?option=com_bookmarks&task=detail&id=559 (last visited July 31, 2012).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Restatement (Second) of Torts § 496B (1965).

⁶² Patricia C. Kussmann, Annotation, *Validity, Construction, and Effect of Agreement Exempting Operator of Fitness or Health Club or Gym from Liability for Personal Injury or Death of Patron*, 61 A.L.R. 147, § 3 (2011).

⁶³ *See Seigneur v. National Fitness Institute, Inc.*, 752 A.2d 631 (Md.App. 2000).

⁶⁴ *Prosser, Wade and Schwartz’s Torts: Cases and Materials* 629 (Victor E. Schwartz, Kathryn Kelly, David F. Partlett, eds., 12th ed. 2010).

⁶⁵ *Id.*

⁶⁶ Restatement (Second) of Torts § 496B cmt. j, (1965).

⁶⁷ *Williston*, *supra* note 34, at § 19:22.

⁶⁸ *Prosser*, *supra* not 64.

⁶⁹ *Kussmann*, *supra* note 62, at § 2. Although not required, the language of the waiver should be broad and explicit.

Additionally, it is best for a waiver to be conspicuous, legible, and in large type. *Id.* at § 3.

⁷⁰ These Villages do worry that members signing waivers do not fully understand the agreement. Signing the contract without understanding its contents does not exempt a member from the agreement—unless the member is found to have been incapacitated at the time he signed the exculpatory agreement. *Id.* at § 2.

⁷¹ K. A. Drechsler, Annotation, *Validity of Contractual Provision by One Other Than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence*, 175 A.L.R. 8, § 14 (1948).

⁷² *See Hercules Inc. v. U.S.*, 516 U.S. 417, 418 (1996); *See Restatement (Third) of Torts: Apportionment Liab. § 22* (2000). A typical example of indemnification is when a construction subcontractor agrees to indemnify the general contractor for any losses occurring due to the subcontractor’s work. Thus, if the general contractor is found liable for damage resulting from the subcontractor’s work, the subcontractor will have to reimburse the general contractor for the damages paid.

⁷³ *See Restatement (Third) of Torts: Apportionment Liab. § 22* (2000).

⁷⁴ Nonprofit Risk Management Center, *State Liability Laws for Charitable Organizations and Volunteers* 9 (2009).

⁷⁵ *Id.*; *See Colo. Rev. Stat. Ann § 7-123-105* (2006).

⁷⁶ Nonprofit Risk Management Center, *supra* note 74; *See Mass. Gen. Laws Ann. Ch. 231 § 85K* (2009)

⁷⁷ Nonprofit Risk Management Center, *supra* note 74, at 8.

⁷⁸ Id.; See Bagley v. Fulton-DeKalb Hosp. Autho., 455 S.E. 2d 325 (Ga. App. 1995).

⁷⁹ Nonprofit Risk Management Center, supra note 74, at 8; See Utah Code Ann. § 78B-4-103 (2012).

⁸⁰ Kimery, supra note 9, at 703.

⁸¹ Id.

⁸² Id.

⁸³ Id.

⁸⁴ PERI, supra note 9.

⁸⁵ Kimery, supra note 9, at 703.

⁸⁶ Herman, supra note 13, at 51.

⁸⁷ Id. at 52.

⁸⁸ Id. at 51.

⁸⁹ Id. at 51.

⁹⁰ Workplace Safety Toolkit, Nonprofit Risk Management Center, <http://nonprofitrisk.org/tools/workplace-safety/public-sector/wsp-ps.htm> (last visited July 31, 2012).

⁹¹ Kimery, supra note 9, at 703.

⁹² FREE Services Available to Member-Insureds, Nonprofit Insurance Alliance Group, <http://www.insurancefor nonprofits.org/Insurance-for-Nonprofits-Resources.cfm> (last visited July 25, 2012).

⁹³ Kimery, supra note 9, at 703.

⁹⁴ Id.

⁹⁵ Beacon Hill Village, supra note 45, at 27.

⁹⁶ Id.

⁹⁷ These free public records are typically available online or in local courthouses and can be searched by party name. See Court Cases Online, District of Columbia Courts, <http://www.dccourts.gov/internet/CCO.jsf> (last visited July 25, 2012).

⁹⁸ The Village could even maintain a tracking system with expiration or renewal dates of all policies to verify that continuing coverage is maintained by the vendor.

⁹⁹ See Referrals, NASW Assurance Servs., <http://www.naswassurance.org/referrals.php> (last visited July 25, 2012).

¹⁰⁰ Beacon Hill Village, supra note 45, at 27.

¹⁰¹ By telling members that it only passively provides information, the Village can hope to deflect liability for negligent misrepresentation in vendor referrals; members have no reason to rely that vendors provided to them are “good” or “qualified.” This is supported by Yanase v. Automobile Club of Southern California in which the court found that when a tour book stated that it only rated hotel accommodations, there was no negligent misrepresentation regarding the safety of hotel neighborhoods; the tour book was clear that it did not rate neighborhood safety. Yanase v. Automobile Club of So. Cal., 212 Cal.App.3d 468, 473 (Cal.App.4.Dist. 1989). In fact, the court held that there was no safety representation of any kind. Id.

¹⁰² Karen D. Marek et al., Aging in Place Versus Nursing Home Care: Comparison of Costs to Medicare and Medicaid, 4 Res. Gerontol. Nurs. 1 (2011) (finding that the Medicare and Medicaid costs of residents that aged in place were approximately \$1,600 lower than their nursing home counterparts); Karen D. Marek et al., Clinical Outcomes of Aging in Place, 54 Nurs. Res. 202 (2005) (finding that seniors who age-in-place had lower rates of

depression and incontinence, as well as higher levels of cognition than their nursing home counterparts).

¹⁰³ Id.

¹⁰⁴ Kimery, supra note 9, at 687.

¹⁰⁵ Id.

¹⁰⁶ See Terrence J. Centner, Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunity for Protected Classes and Activities, 26 J. Legis. 1 (2000).

¹⁰⁷ Id. at 9-10.





About the Commission on Law and Aging...

The mission of the ABA Commission on Law and Aging is to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training. The Commission consists of legal professional staff and a 15-member interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates. The Commission examines a wide range of law-related issues, including:

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- Health and Long-Term Care
- Housing Needs
- Professional Ethical Issues
- Social Security, Medicare, Medicaid
- Planning for Incapacity
- Guardianship
- Elder Abuse
- Pain Management and End-of-Life Care
- Dispute Resolution
- Court-Related Needs of Older
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