

Where No Man Has Gone Before: Adventure Obstacle Racing and Liability, Insurance, and Tort Claims

Obstacle course runs and challenges are not a new construct. Dating as far back as 1819 for school boys and 1867 as an adult sport, obstacle courses have been used in military training, team building exercises, and physical education in schools (Young, Keiper, Fried, Seidler, & Eickhoff-Shemek, 2014). However, the extreme obstacle course mud runs/races (OCMR) such as Tough Mudder, Spartan Races, and Warrior Dash, have evolved from the original concept into an event for thrill seekers where death is entirely possible and injury is probable. OCMRs have experienced an 85% increase in participation from 2006 to 2010 (Young et al., 2014) and could be described as the "fastest-growing participatory sport in American history" (Young et al., 2014, p. 31).

Obstacle course mud runs are breaking new grounds in the legal areas of liabilities, waivers, assumption of risk, fraudulent inducement, justifiable reliance, duty of care, negligence--a tort nightmare.

A problem with OCMRs is that it is difficult to accurately gauge and quantify an obstacle course's risk. Besides the inherent risks posed in the design, construction, and intent of use, one must include variables such as the environment/weather issues and the risks that other competitors pose to each other (Young et al., 2014). Participants often do not know the full extent of risks when they sign a waiver, and therefore how can "assumption of risk" be valid (Young et al., 2014)?

Avishek Sengupta was the first casualty of Tough Mudder in West Virginia. Sengupta's family attorney Robert J. Gilbert stated, "Lines have to be drawn between what the participants are signing up for and what they're actually getting. Participants sign up for the challenge, but it's less clear that they sign up for the dangers--particularly the undisclosed dangers or gratuitous dangers" (Etter, 2013, para. 10).

Public risks are magnified when as opposed to other sports and athletic events where the participant may be reasonably successful at training and preparing for a physical challenge, OCMRs appeal to and are open to anyone from trained athletes down to untrained persons and the so-called "weekend warriors" (Greenberg et al., 2014).

At a two day OCMR event, there were more than 100 incidences that required advanced life support responses by the local EMS. As noted by Greenberg et al. (2014), even "training might not have prevented many of the injuries that occurred in this event" (p. 365). Greenberg et al. (2014) also noted that "it is unlikely that participants comprehend[ed] risks" as a consequence of their participation including stroke, heart injury, brain injuries, among many others. With extreme obstacles such as the Electroshock Therapy and Electric Eel (Greenberg et al., 2014), the dangers that might apply to one participant may vary greatly to another due to individual differences in health and medical status. Other common risks include heat exhaustion/stroke, hypothermia, infections, rashes, bacteria, drowning, paralysis, and severe burns from fire obstacles (Young et al., 2014).

With the risks largely being unpredictable at OCMRs, it is difficult to write waivers, liability disclaimers, and similar documents as part of a risk management package. In fact as Etter (2014) noted, "the inherent risks aren't always obvious; indeed, they are often intentionally magnified to titillate participants and crowds" (para. 6) which tests the limits of the current tort laws. Generally for other extreme sports (e.g. white-water rafting, snowboarding, and bungee jumping) waivers are the most commonly used (Etter, 2014). However in gross/criminal negligence or reckless actions, waivers may be voided (Etter, 2014). At many OCMRs, there are signs like "Remember you signed a death waiver" (Etter, 2014, para. 35) that try to add a bit of dark humor to play down the obvious real risks/dangers thus encouraging participants to push past what may be logically comfortable to accepting dangers they are not prepared for (Etter, 2014). This kind of "endorsement" or "misrepresentation" of real risks/dangers brings into the legal issue justifiable reliance and fraudulent inducement which could very likely nullify any waiver (Moss, 2014).

Future insurance coverage and policies regarding OCMRs will dictate how these types of races will be structured (Peterie, 2012) even with the development of the United States Obstacle Course Racing (USOCR) as a sanctioning body (Woods, 2014). Insurance is needed before an OCMR event can obtain a permit (Peterie, 2012). However, this does not mean the event is regulated and checked to make sure it complies to the terms on the insurance especially if last minute changes are made (Allen, 2012). Allen (2012) also reported that permits are concerned with how an event uses the land on which it is held. Permits do not usually have conditions written in as to how an event will safeguard the public and how the participants will be provided for (Allen, 2012).

With the newly formed USOCR, it will be interesting to see how risk management plans develop regarding OCMRs and how OCMRs affect tort law, event insurance, and life insurance policies.

References

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