Liability Aspects of BDSM Clubs and Presenters regarding "Do Try This At Home" Presentations, Jay Wiseman (2007)

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I presented in April of 2007 at the Leather Leadership Conference in Minneapolis on the civil liability aspects of both the presenter and the organization that sponsored the presenter regarding teaching "do try this at home" presentations. I spent time in the law library researching this issue prior to going to the conference, and cross-checked my conclusions with other attorneys prior to giving my talk.

Below is a summary of my LLC presentation with some newer material included, including some information on the issue of club and presenter criminal liability.

POINT ONE: CIVIL LIABILITY

Question One: If Club A books Presenter B to present on an activity that involves a material degree of risk of harm, and Attendee C then goes home and engages in that activity with Partner D, and Partner D ends up in the intensive care unit as a result of that activity being done to them and with both huge and rapidly raising medical expenses, who will likely sued?

Answer: Attendee C, Presenter B, and Club A

(Note: The sports adage of "no harm, no foul" can be useful to keep in mind here. In law, the comparable saying would be "no damages, no case." In the legal instance, "damages" commonly refers to bills for medical care, damaged property, and suchlike. In other words, if nobody gets seriously hurt, then nobody can get seriously sued.)

Question Two: Of those who get sued, who can raise a legally valid defense?

Answer: It depends.

In brief: in somewhat simplified terms of liability for damages, there are four basic categories of activity and they make up a sort of spectrum -- pure accident, simple negligence, gross negligence, and willful misconduct.

What about taking personal responsibility for the consequences of your actions?

If somebody gets harmed by another person, and sues that person for damages, one of the legally valid defenses that the sued person can raise is "assumption of risk." In other words, the injured person took personal responsibility for the possible results of exposing themselves to the risk involved. Provided such assumption of risk was "knowing and voluntary" to a legally sufficient degree, this can be a complete defense and a complete bar to recovery. (In other words, if you validly assumed the risk, then nobody else is responsible for your injuries.)

However, as a matter of public policy, an assumption of risk defense can _only_ be raised for pure accident and simple negligence. It _cannot_ be raised for gross negligence or willful misconduct. Further, if the harm is found to result from gross negligence or willful misconduct, then punitive damages can be awarded, and these cannot be erased in bankruptcy.

Additionally, if the harm is perceived as resulting from conduct that rises to the level of gross negligence or willful misconduct, any insurance coverage for resulting damage will likely be denied by the insurance company on the grounds that the company never agreed to cover such an extreme risk. This being the case, if an organization wants to present on a topic that might be ruled grossly negligent, then the organization would be wise to get written documentation from the insurance company that they have agreed to cover this specific risk -- and that the person signing for the insurance company is indisputably authorized to make this guarantee. (What this could mean in real-world terms is that at the same time that the club is being sued by the person who is alleging that the club's misconduct is liable for their damages, the club may also have to sue its insurance company, at the club's expense, to force the company to provide coverage for the harmed person's claim.)

Additionally, as a matter of public policy, damage resulting from gross negligence (and/or willful misconduct) _cannot_ be eliminated by the signing of a waiver. Waivers are, in essence, documentation that the person signing the waiver assumed the risk of the activity involved.

Waivers can be an effective defense for damage claims resulting from pure accident and simple negligence, but waivers are _not_ effective defenses for claims resulting from gross negligence or willful misconduct. (See references at the end of this article for more info.)

In brief summary, the dividing line between legally defensible conduct and legally indefensible conduct is the line between simple negligence and gross negligence.

The exact nature of the conduct that caused the harm -- pure accident, simple negligence, gross negligence, or willful misconduct -- is what's called a "jury question" and gets decided by twelve jurors in a room.

One useful definition of gross negligence is: exposing another person to a material risk of death or great bodily injury without a legally acceptable justification or excuse.

My "Black's Law Dictionary" (abridged, 7th) defines "material" in relevant part as: "Of such a nature that knowledge of the item would affect a person's decision-making process; significant; essential."

"I acted the way I did because doing so gave me and/or the person I did it to a sex thrill" is not a legally acceptable justification or excuse for behavior that is grossly negligent.

Also, and of particular relevance to BDSM practitioners, is the legal reality that a risk of very great damage occurring from the act can outweigh a very low probability of the act occurring. To quote from my Torts hornbook: "As the gravity of possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution." -- William Prosser, "Prosser and Keaton on Torts" 5th edition, page 171.

There is no "bright line test" that sorts damage resulting from acting on a presenter's advice into the legally defensible/legally non-defensible categories. (As I mentioned, that decision will be decided by twelve vanilla jurors who have never done something like read "Screw the Roses" or attended a munch.) That said, were I an SM club's attorney, I can think of five topics that I believe that I would find extremely difficult to defend in court. They are:

1. Breath play
2. Gun play
3. Self-bondage
4. Chest punching
5. Ball kicking

All of these activities would be very difficult to defend in court because all of these activities have an inherent risk of death or great bodily injury that cannot be meaningfully mitigated and there is no legally adequate justification or excuse for engaging in them. (See the "sex thrill" paragraph, above.)

The life-threatening dangers of breath play and gun play are, I would hope, self-evident. Self-bondage is problematic because according to case reports the single most common cause of BDSM-related fatalities is being in bondage and alone -- and this does _not_ include cases of auto-erotic asphyxiation. Chest punching is problematic because of the risk of sudden cardiac arrest secondary to commotio cordis. Ball kicking is problematic due to the risk of testicular rupture and due to the risk of sudden cardiac arrest secondary to the vagal effects on the heart resulting from sudden severe pain to the testicles.

On the other hand, certain high-risk BDSM practices such as knife play, fire play, and suspension bondage are legally defensible under an assumption of risk theory because while there is a material risk of death or great bodily injury associated with such practices, there are also reasonable precautions which can be taken that reduce this risk to essentially a background noise level.

I should note that activities such as express disclaimers of lack of safety ("there is no safe way to do this") and/or express disclaimers of advocacy ("I'm not saying that you should go home and do this") are not at all likely to be found to be effective defenses if the presenter presents specific how-to information regarding the practices involved and/or advocates on how wonderful engaging in the activity is. If, under the "totality of circumstances" test the presenter "walks, talks, and looks" like they are educating on the techniques of and/or advocating for the activity, then such "fig leaf defenses" are all but guaranteed to both a) fail and b) insult the intelligence of the judge and/or jury.

Sexualization Of Strangulation

What about “they’re going to do it anyway”?

Under the ”they’re going to do this anyway so we may as well show them how to do this as safely as possible” argument -- this can actually work _if_ (repeat: IF) the instruction on how to do it ”as safely as possible” is supported by credible, objectively verifiable evidence that doing something ”as safely as possible” reduces the risk from the level of gross negligence to the level of simple negligence. Again, this is a ”jury question” and the person raising this defense would have the burden of producing legally admissible, credible, and sufficient proof of their claim. (Expert witness testimony would help rather a lot here.) On the other hand, if the defendant could not support this argument by legally sufficient evidence, then this argument would fail and the defendants would be held liable.

What about a “talk only/no demo” program?

The lack of any props would not be enough to avoid liability if the presentation, taken as a whole, was a how-to in nature. Thus, the lack of any actual guns in a ”gun play” class or ropes in a self-bondage class -- in other words, putting on a ”talk only” class -- would _not_ be sufficient to shield the club and the presenter from liability for subsequent damage if the class were nonetheless a how-to class.

Let them sue me. I’m judgment-proof.

Being “judgment proof” can serve as at least something of a defense, provided that its limitations are kept in mind. For example, in both California and federal courts, judgments are good for ten years. Further, they can be renewed indefinitely. Also, in California, judgments earn 10% interest per year. Other states have generally similar laws. What this means in practical terms is that being judgment proof will protect a defendant only if that defendant plans on being judgment proof for the rest of their life. If in the future they come into any significant assets - by their earnings, by inheritance, by winning the lottery, or by any other means - then those assets can be gone after by the plaintiff.

About the only legally valid defense that might be raised is the statute of limitations. If ”enough” time has elapsed between the giving of the presentation and the occurrence of the injury, then that passage of time would cut off liability. A question arises as to how such time would be measured. Would it be measured from the time the presentation was given or would it be measured from the time Attendee C began to act on the content of Presenter B’s presentation? Further research is needed on this point.

In summary, most of what we do (and present) can be vigorously defended under the ”assumption of risk” defense because most of what we do (and present) has no inherent, unmitigatable risk of death or great bodily injury. Alternatively, if there is such a risk then this risk can be greatly reduced by the taking of reasonable precautions. That said, if the presenter instructs on and/or advocates on a practice that a vanilla jury finds to rise to the level of gross negligence, then there is a strong likelihood that there is no legally valid defense other than (possibly) the statute of limitations and therefore the presenter, the club who booked them, and the attendee who acted on the content of the presentation all face liability for the resulting harm.

POINT TWO: CRIMINAL LIABILITY

There is a crime called ”solicitation.” While precisely how solicitation is defined can vary, a good ”lowest common denominator” source can be found in the Model Penal Code. Under that code:

Section 5.02 Criminal Solicitation

(1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, requests, or encourages another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

The seminal case on solicitation is State v. Mann, Supreme Court of North Carolina, 317 N.C. 164, 345 S.E. 2d 365 (1986) in which the court observed: ”Solicitation involves the asking, enticing, inducing, or counseling or another to commit a crime. The solicitor conceives the criminal idea and furthers its commission via another person by suggesting to, inducing, or manipulating that person.”

Clubs and presenters should pay particular attention to the words “encourages” and “suggests” in the above paragraphs because it would be fairly easy for a criminal prosecutor to argue to a jury that by sponsoring and putting on the presentation both the club and the presenter “encouraged and/or suggested” that attendees engage in the actions that led to the harm and that the club and presenter are therefore, on a solicitation t

heory, as equally guilty as the attendee for the resultant harm.

Further, under the legal doctrine of _merger_, if the solicited crime is attempted or actually completed, the person who solicited the crime is just as guilty as the person who engaged in the criminal act. In "Case Materials on Criminal Law" 2nd edition, by Joshua Dressler, under the case notes in "Mann" above, it is noted on page 760: The offense of solicitation merges into the crime solicited if the latter offense is committed or attempted by the solicited party. For example, if Agnes solicits Ben to murder Camille, and Ben refuses, Agnes is guilty of solicitation; if Ben agrees and kills or attempts to murder Camille, Agnes is guilty of murder or attempted murder, respectively, under the complicity principles (see Chapter 11 infra), rather than the offense of solicitation.

(Note: A criminal defense lawyer who read this essay prior to its wide publication observed that "aiding and abetting" could be an alternative theory of prosecution.)

What this means in terms of presenter liability is that if the action advocated by Presenter B is found by a vanilla jury to be a criminal solicitation (or aiding and abetting), and if Attendee C is charged with a crime for acting on Presenter B's program (for example, second degree murder from a breath play scene gone wrong on a reckless endangerment theory) then Presenter B can also be charged with this crime. Given that Club A invited Presenter B to put on this program, Club A – particularly Club A's officers – may be looking at being charged with the crime as well.

To put it bluntly, both the presenter and the club officers could be charged with murder.

What about freedom of speech?

In the United States, we generally enjoy a relatively high freedom of speech, however, there are limits. Defamation, blackmail, criminal solicitation, disclosing government secrets, and false advertising are not valid forms of free speech. Another form of speech that is not free is speech that advocates criminal conduct. In particular, in the case of Brandenburg v. Ohio, 394. U.S. 444 (1969) the U.S. Supreme Court held that speech is not protected if it 1) is "directing to inciting or producing imminent lawless action," and 2) is also "likely to incite or produce such action."

This being the case, if Club A brings in "Master Dragonbreath" to teach a class in "safe Russian roulette play" in which he demonstrates to attendees how to do Russian roulette "safely" and encourages the attendees to go home and try it, and a death or serious injury results, then both Master Dragonbreath and the officers of Club A are looking at criminal liability and cannot raise a valid freedom of speech defense See also Rice v. Paladin Press, 128 F.3d 233 (1997) to see how this reasoning was applied by the federal courts in a civil case.

Summary

In summary, while most of what we do and/or present on can be vigorously defended, there are liability aspects, both civil and criminal, that both clubs and presenters would be well-advised to consider, especially if it's reasonably foreseeable that a vanilla jury might find that the presentation rose to the level of gross negligence.

Further Legal References

Hulsey v. Elsinore Parachute Center, 168 Cal.App 3d 333, 214 Cal Rptr 194
(Good “start here” case. Negligent instruction; valid waiver upheld. Whether or not an activity is ultrahazardous is a question of law. An ultrahazardous activity “necessarily involves serious risk and is not a matter of common usage.”)

Diedrich v. Wright, 550 F.Supp 805, (1982)
(Liability for failure to provide adequate instruction.)

Gross v. Sweet, 49 NY 2nd 102, 400 NE 2nd 306 (1979)
(Waivers upheld except for gross negligence.)

Poskozim v. Monnacep, 131 Ill.App.3d 446, 475 N.E.2d 1042, 86 Ill.Dec. 663, 23 Ed. Law Rep. 982 (Valid waivers extend to sponsors.)

Wheelock v. Sport Kites Inc., 839 F.Supp. 730D.Hawaii,1993
(Waiver for gross negligence ruled invalid.)

Assumption of Risk Defense – 30 Proof of Facts 3rd 161

Assumption of Risk versus Comparative Negligence – 16 ALR 4th 700

Consent as defense to charge of criminal assault and battery – 58 ALR 3rd 662 (History and discussion of cases in which the consent defense was or was not allowed.)

Solicitation to crime as substantive common law offense – 35 ALR 961

Tort Liability Arising From Skydiving, Parachuting, or Parasailing Accident -- 92 ALR 5th 473 (Good article on the law of assumption of risk and waivers.)