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When Good Intentions Go Wrong: Immunity under the Volunteer Protection Act

Abstract: The Volunteer Protection Act (VPA) was enacted in 1997 to encourage volunteerism by protecting individuals from liability for their negligent actions while volunteering. Proponents intended to provide legal safeguards for volunteers, whom they claimed were deterred from volunteering by fears of liability. Little attention has been paid to this legislation since its enactment, however. This article examines the implementation and interpretation of the VPA through the lens of case law to determine whether the act has had its intended effects for volunteers. Our analysis of all court cases in which the VPA has been cited shows that volunteers are at risk for lawsuits over a variety of actions during the course of their volunteer activities. This analysis also demonstrates that although volunteers can avail themselves of the VPA's protection, their success in invoking this defense is mixed.

Keywords: Volunteer Protection Act, nonprofit law, volunteer management, nonprofit management

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Introduction

Over the history of the United States, volunteerism has evolved from an informal responsibility to care for the needy to the multitude of formal organizations we now refer to as the nonprofit sector. Nonprofit organizations have long relied on volunteers (Eckstein 2001), but in recent years the nonprofit community expressed concerns regarding the possibility of lawsuits resulting from a volunteer causing harm while volunteering. State legislatures tried to help by enacting laws immunizing the charities themselves, then by setting out protections for

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specific types of volunteers (Smith 1999). Each state's laws were just a little different than the next, resulting in an inconsistent, crazy-quilt arrangement of legal provisions (Smith 1999).

The response of the U.S. Congress was the Volunteer Protection Act (VPA), adopted and signed into law in 1997. The act set a base level of protections for volunteers across the United States, while allowing individual states to add further protections if they so desired (42 USC §§14502, 14503). An examination of legal resources available to nonprofit managers reveals little attention devoted to this aspect of volunteer management (e.g. Brody 2006; Hopkins and Gross 2010).

This article asks, what has been the impact of this legislation? Did it have the results intended by its framers and supporters? What has been its impact in regard to the protection of volunteers? To answer these questions, we turn to the body of all court cases that have invoked the VPA.

Because this issue is grounded in statutory and case law, we carry out the research within the judicial construct. We examine the context in which the VPA was enacted in 1997 and how the court system has responded to the use of the VPA by the parties since. We begin by presenting background on liability protection for volunteers, follow with a discussion of the passage of the VPA and its major features, present the research questions, elaborate the methodology of our analysis of the legal cases, and detail the major findings. We conclude with the implications of our study and next steps.

Background

American volunteerism dates back before the colonies. The early colonists brought with them the principles of Great Britain's Elizabethan Poor Law, which included local responsibility for the care of the community's needy. As part of this responsibility, families often volunteered to care for a poor person for at least part of the year (Powell and Wrightson 2006). When this informal arrangement became insufficient, almshouses were formed. In the eighteenth century, Benjamin Franklin formed his Junto Club with a small number of tradespeople who gathered for meals and conversations on various topics (Isaacson 2004); in contemporary terms we might label these meetings networking events. Franklin used this group as the starting point for many of his community-focused organizations, such as a fire brigade and a lending library. These associations were designed to provide services that the government could not, much like modern nonprofit organizations (Isaacson 2004).

Labor organizations, mutual aid societies, and settlement houses sprang up in the nineteenth century (Powell and Wrightson 2006; Ellis and Campbell 2005). Government joined the volunteer movement in the twentieth century with such programs as President John F. Kennedy's Peace Corps, President Lyndon Johnson's Volunteers in Service to America (VISTA), and President George H.W. Bush's "Thousand Points of Light" (Light 2002; Brudney 1990). For his part, President Barack Obama saw to the passage of the largest increase in spending in the history of Americorps/National Service programs in the 2009 Serve America Act (Public Law 111-13, April 21, 2009; see Nesbit and Brudney 2010).

The scope of volunteering for nonprofit organizations has expanded to the point that four out of five charities use volunteers in an operational capacity (Urban Institute 2004). Volunteering can be found in informal activities (individual or alone) as well as in more formal involvement, such as working through the auspices of an organization (Mowrey and Epstein 2002). Both nonprofit and government agencies use volunteers (Brudney 1999, 1990).

Volunteers are part of the "third sector" of the American economy, which is otherwise composed of business and government (Hartmann 1989). The Bureau of Labor Statistics (BLS) reports that as of September 2013, over 62.6 million Americans age 16 or older, 25.4%, volunteered for an organization (BLS 2014). The BLS defines volunteering as "activities for which people are not paid, except perhaps expenses" for an organization (Technical note, BLS 2014). Nonprofits rely on volunteers for a significant part of their operations. The economic importance of the volunteer labor force is recognized worldwide. The International Labour Organization (2011) emphasized the economic impact in its *Manual on the Measurement of Volunteer Work*:

Volunteer work, often referred to simply as "volunteering," is a crucial renewable resource for social and environmental problem-solving the world over. The scale of such work is enormous and the contribution it makes to the quality of life in countries everywhere is greater still.

As scholars have noted, volunteer involvement generates financial costs to host organizations (Seel 2013; Connors 2012; Urban Institute 2004). Several elements are instrumental to the success of a volunteer program, including screening, training, and ongoing management and support, all of which impose costs to the organization, and an additional burden on staff and program resources (Grossman and Furano 2000). Another cost, which has received less attention in the literature, pertains to volunteer liability. With so many volunteers carrying out so many important tasks and jobs in the nonprofit sector, things can – and do – go wrong. And these acts of omission and commission have financial and other consequences for nonprofit organizations.

The liability challenge of volunteer involvement

Ill-conceived or careless behavior by volunteers contributes to these costs. With the vast number of volunteers, the potential for harm or injury or damage cannot be ignored. In the event of a lawsuit, the questions for the nonprofit organization become not who it can help, but who will pay, how, and how much. The result of charities and/or their volunteers incurring substantial costs for legal damages is that the organization may disband, and/or potential volunteers may be frightened away from assisting. In an empirical analysis, Dong (2013) finds that individuals who have a lower preference for risk in general are less likely to volunteer.

With nonprofit organizations needing them to take on ever more complex tasks (Seel 2013; Connors 2012; Grossman and Furano 2000), more agencies are calling on volunteers to serve in paid staff-like positions (Chum et al. 2013; Handy, Mook, and Quarter 2008). Such changes are especially prominent in the area of social services (Grossman and Furano 2000). Expectations regarding the behavior of volunteers are increasing, as organizations realize that their reputations rest on the conduct and performance of their volunteers (Grossman and Furano 2000). Yet, research by the Urban Institute (2004) shows that less than half of U.S. charities institute best practices in managing volunteers to a “large degree.” Moreover, the two best practices that nonprofits adopt least often are providing training for volunteers (25%) and training for paid staff in working with volunteers (19%). As a result, nonprofit organizations face a conundrum: volunteers are expected to behave in a manner befitting the professional image and reputation of the organization but may be inadequately prepared to do so.

Legal issues arise when volunteers are treated as if they were unpaid employees. Exposure to labor laws and employment law liability depends on how an organization treats its volunteers (Rubinstein 2006). Examples of legislation that could be applied to volunteers include: Title VII (42 U.S.C. § 2000(e) to 2000(e)(17), part of the Civil Rights Act of 1964, which makes it unlawful to discriminate on the basis of race, color, national origin, religion, or sex; the Americans with Disabilities Act (42 U.S.C. § 12101-12213), which prohibits discrimination “against a qualified individual with a disability”; and the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. §§ 621-634), which prohibits discrimination of individuals at least 40 years of age (Rubinstein 2006). These laws generally apply to employees, but if organizations do not clearly define the role of their volunteers vis-à-vis employees, volunteers might be considered *de facto* employees (Rubinstein 2006).

All of these laws are fairly recognizable. Not so well-known are the legal implications of careless volunteers or volunteers who behave badly so that someone is injured.

Under U.S. civil law individuals can bring lawsuits to recover monetary damages for injuries or property damage caused by another person's negligent or intentional misconduct (Martinez 2003). The basis of this right is the expectation that people adhere to a standard of care. Tort law is based on the individual's fear of the legal consequences of falling below that standard (Smith 1999). Recovery for injury caused by these actions can be in the form of a lawsuit or insurance claim. Both avenues of recourse can result in potential hardships for nonprofit organizations, imperiling not only their often meager budgets but also their sustainability.

Charitable immunity doctrine

States first sought to provide some measure of protection to charities by enacting the charitable immunity doctrine (Smith 1999). The first mention is found in the case of *McDonald v. Massachusetts General Hospital* in 1876 (120 Mass. 432 (1876)). The basis of this doctrine is that it is against public policy to hold a charity liable for tort damages because the benefits of a charity are greater than the detriment suffered by an injured party (Phelan 2013). Critics of the doctrine asserted that in states where charitable immunity did not exist, the public did not suffer from its absence (Johnson 1966). Eventually, state courts began attaching qualifications to the granting of immunity, and eventually the doctrine was abrogated (Johnson 1966). Since the charitable immunity laws did nothing for volunteers, the protection of volunteers became of greater concern to policy makers (Martinez 2003).

State law did not provide adequate protection for all volunteers. The House Judiciary Committee noted in 1997 that the “current hodgepodge of State laws has not provided the buffer against liability that volunteers need and deserve” (House Report No. 105-101 (Part I), 1997, 7). The Committee went on to point out that some state statutes provide little if any protection for volunteers and others protect only certain kinds of volunteers. It is against this backdrop that the federal VPA was first proposed.

Prior to the 1980s lawsuits against charitable organizations and their volunteers were rare (House Report No. 105-101 (Part I), 1997). But during the 1980s litigation fervor swept the nation, resulting in a call for limits on the amount of money that juries could award in civil cases, i.e. “tort reform.” Tort reform grew out of a concern that people were becoming “lawsuit happy” (House Report No.

105-101 (Part I)). State legislatures reacted to this so-called crisis by attempting to impose caps on monetary judgments (Horwitz and Mead 2009).

The Volunteer Protection Act

It was in this atmosphere that the VPA was first introduced. The VPA is considered by scholars to be part of a series of “tort reform” acts passed by Congress (Horwitz and Mead 2009). At that time, the federal government was under pressure to provide limits on what were seen by many as unnecessarily large jury damage awards. The House Judiciary Committee cited this pressure as evidence of the need for specific legislation to protect volunteers (House Report No. 105-101 (Part I), 1997). The Committee noted the rapid increase in lawsuits against charities and the ensuing publicity. The result, it claimed, was to dampen people’s willingness to volunteer their time (House Report No. 105-101 (Part I), 1997). Another detrimental effect on nonprofits was increased insurance costs to the point that, at the time of the report, insurance premiums accounted for the largest item in some nonprofit organizations’ budgets (House Report No. 105-101 (Part I), 1997). After several unsuccessful attempts to bring the legislation to Congress, the VPA was finally passed in 1997.

The VPA defines “volunteer” as an individual who performs a service for a nonprofit organization or government entity and does not receive compensation (42 USC 14505(6)). Title or function does not seem to matter: The VPA encompasses board members, trustees, and even officers, as long as no compensation is received. Three types of liability can arise from the organization–volunteer relationship: (1) the organization’s liability to a third party for the acts of its volunteers, (2) the organization’s liability to a volunteer for injuries sustained while volunteering, and (3) a volunteer’s liability to third party for his or her actions while volunteering. The VPA covers the last of these areas, volunteer liability for acts performed within the scope of the organization’s mission or purpose. The intent of the legislation is to protect volunteers of nonprofit organizations and government agencies from liabilities due to ordinary negligence when the volunteers are acting for the organization (Mowrey and Epstein 2002–2003) to promote the interests and sustainability of social service programs (42 USC 14501(b)).

Congress gave several reasons for determining that volunteers required protection at the federal level. First, it noted that the willingness of volunteers to help was often offset by their fears of possible lawsuits. Volunteers’ contributions to nonprofit social services are critical, because social services programs are often funded through federal monies and depend on volunteer participation. Withdrawal of volunteers’ services has a detrimental effect on the programs they

serve, which in turn means that those services and programs could end up being replaced by commercial organizations at a higher cost to individuals and to society as a whole. The goods and services provided by those programs would otherwise be provided by private enterprises operating in interstate commerce. Limiting the risk to help keep the insurance costs of nonprofit organizations down was, thus, an appropriate subject for federal legislation (42 USC 14501(a)).

The VPA is comparatively short legislation, consisting of just seven sections. Two sections are important to our discussion: Section 4 provides that a volunteer of a nonprofit organization or governmental entity shall not be held liable for harm caused by an act or omission of the volunteer on behalf of the organization if (1) the volunteer was acting within the scope of the volunteer's responsibilities at the time, (2) the volunteer was properly licensed or certified, if appropriate, (3) the harm was not caused by willful or criminal misconduct, gross negligence, or recklessness, and (4) the volunteer was not operating a motor or other type of vehicle for which a State-issued license and/or insurance is required (42 USC 14503(a)). Exceptions include criminal conduct, hate crimes, violations of Federal or State civil rights laws, and actions taken while under the influence of alcohol or drugs (42 USC 14503(f)). The immunity offered to volunteers by this provision is for simple or ordinary negligence, not for "willful or criminal conduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer" (Cohen 1997). It should be noted that this provision does not provide immunity to an organization; the organization can still be held vicariously liable for the acts of its volunteers (the first area of organization-volunteer liability noted above) (Cohen 1997).

The second section relevant to our discussion describes the state's prerogative to "opt-out" of the VPA. Labeled "pre-emption" in the act, the VPA will not preempt any state law that provides liability protection beyond that which is provided in the VPA. Under the Supremacy Clause of the Constitution federal laws take supremacy over state laws (U.S. Const. Article VI). In this case, if a state does not enact a statute that meets or exceeds the protections granted in the VPA, the federal law will automatically supersede the state law, even in state courts (42 USC §14502).¹

¹ The pre-emption provision in the VPA is grounded on the Commerce Clause of the U.S. Constitution (U.S. Const. art. I, §8, cl. 3; Johanson 1998). Johanson speculated that this clause would prove to be a weakness in a constitutional challenge. She based this assertion on the case of *U.S. v. Lopez*, in which the U.S. Supreme Court held the Gun Free School Zones Act unconstitutional (*U.S. v. Lopez*, 514 U.S. 549 (1995)). That legislation was also based on Congress' power to regulate commerce (Johanson 1998). This speculation has so far proved to be incorrect. As of this writing no constitutional challenge to the VPA has been made.

Research questions

A review of the literature reveals little research on the implications of the VPA or on its application in the courts. The research on law as related to nonprofit organizations fails to address the consequences of the VPA for nonprofit organizations (e.g. Brody 2006; Hopkins and Gross 2010). Instead, many articles are informational in nature, providing summaries of various laws and published as guides to members and boards of nonprofit organizations (see, e.g. Johanson 1998; Nonprofit Risk Management Center 2001).

Two exceptions occur. Horwitz and Mead (2009) found a positive relationship between the existence of state and federal immunity laws and volunteering. Second, Martinez's survey of liability and nonprofit law (2003) focuses mainly on the impact of these laws on organizations. He contends that the facts do not support proponents' claims that the VPA was necessary to encourage volunteers to continue their activities in the face of increasing lawsuits. He also points out that immunity laws such as the VPA may only serve to shift the costs to the organization (Martinez 2003).

Given the context in which the VPA was enacted, and the lack of follow-up research on its consequences, this article seeks to answer the following questions:

1. Organizations hosting volunteers expect them to take on more tasks, and more complex tasks, than in the past. What are the factual circumstances in which the VPA is used in the courts? What types of claims are made against volunteers?
2. The VPA's definition of volunteer includes both service-delivery volunteers and board members. Are service volunteers and board members the targets of lawsuits with equal frequency?
3. Board members are held to higher expectations and are subject to fiduciary duties (care, loyalty, and obedience) (Renz 2010). Is this distinction reflected in the way the courts have applied the act? That is, does the application of the VPA differ depending on the type of defendant?
4. To what extent have the courts' interpretations of the VPA achieved its underlying goal of promoting the interests of social service program beneficiaries by protecting those volunteers serving nonprofit organizations and governmental entities from liability when acting within the scope of their duties?

These questions call for an examination of the outcomes in the courts to determine if the act protected the volunteer in the way its proponents publicly announced.

Methodology

To address these research questions, we look within the context of the judicial system and examine the official court opinions of cases in which the VPA played a role. We first collected the cases by searching Google Scholar and Westlaw, using the search query “Volunteer Protection Act,” the full title of the act. The use of the complete title ensures that if the court mentioned the VPA even in passing, the case will be included in our compendium. The lists overlapped to a large extent, but the Westlaw search resulted in 28 more cases than the Google Scholar search (which netted 36 opinions). Only two cases appeared in Google Scholar and not Westlaw. Altogether, we collected 65 different court opinions.

We made modifications to enrich our listing of court cases citing the VPA. Because our focus is on the federal VPA, we eliminated four cases tried solely on the basis of state immunity statute.² In instances where one case resulted in several written opinions, we included the opinion of the highest court and eliminated the rest. Ultimately, we examined 51 cases meeting these search criteria. The Appendix enumerates all cases in our analysis.

We analyzed all opinions, categorizing them by types of plaintiffs (such as organizations, individuals), defendants (board members, volunteers, officers, organizations), the underlying statute(s), the court (trial or appellate, state or federal), the cause of action, the basic legal issue at stake, and a summary of the holding. By necessity, this data set of court opinions does not include any cases settled before the case reached the litigation stage.

Due to the nature of the litigation process, availability of and access to written judicial opinions can be limited. Cases often get settled before reaching the trial stage, and as a result, any written record of the cases can be difficult, if not impossible to obtain. Many of the cases, especially those at trial court level, are unpublished. Because unpublished opinions are not useful as precedent, they too are often difficult to obtain. In our compilation 23 of the 53 cases were unpublished. As a result, there may be some non-random distribution of results. We also acknowledge that the number of cases is small, but our purpose is to determine how the courts have dealt with the federal VPA, and how their decisions inform nonprofit organizations and their managers about avoiding situations that might result in lawsuits, and otherwise treating volunteers under the law. To accomplish that goal, we must look at the court opinions that are readily available to persons unfamiliar with the intricacies of legal research, particularly nonprofit leaders and managers.

2 For a list and discussion of state immunity laws, see Horwitz and Mead (2009).

One purpose of the VPA was to prevent lawsuits against volunteers from being filed in the first place. Decisions regarding whether to file a lawsuit or not, or which party or parties to name as defendant in a lawsuit, rest on a number of factors that are specific to each fact situation and are made on a case-by-case basis. There is no record of who was not sued in any given case. We acknowledge that as with those cases which were settled out of court, we can only include in our analysis those actions which were brought to trial.

Findings

We begin by examining the underlying causes of action or claims in the cases. As noted above, our findings are limited to those judicial opinions made available through research databases or other published court reports. A cause of action is a group of facts that give rise to a basis for one person to sue another; it is the legal theory of the lawsuit (Black's 2010). We review the factual circumstances that gave rise to the lawsuit. Next, we look to see if board members and service volunteers are sued in equal numbers by analyzing the types of defendants in each case. Then, we ask if the fact that board members are held to higher expectations regarding their behavior, given their fiduciary duties to the organization, is reflected in the way the courts have applied the VPA to them. Finally, we examine how the courts interpreted the act through the outcomes of the cases. A complete list of these cases appears as an appendix.

We organized the fact situations in the cases into four categories to classify the actions in which the defendants had engaged:

Business related: This category applies to any activity between a member of the organization and a person or persons outside the organization. These situations include antitrust, banking, fraud, consumer law, contract issues, open meetings act violations, etc. Members of the organization include board members and service volunteers.

Civil Rights: This category encompasses acts that were alleged to be a violation of one's federal civil rights. These acts include retaliation for inquiring into the organization's finances, discrimination based on race, harassment based on race, denial of right to speak at a school board meeting, violation of religious rights, and ejection from a site of a presidential speech based on the content of a bumper sticker. While civil rights violations are expressly excluded from immunity coverage (42 USC §14053(f)(1)(D)), several cases involved the VPA; therefore, we included those cases in this study.

Governance: This category covers any action involving the operation of the organization, including internal disputes, such as breach of duty, retaliation for request for accounting, derivative actions, and employment issues.

Personal injury/death: This category includes any fact situation resulting in bodily injuries or deaths. Examples include injuries arising from automobile accidents, drowning, medical malpractice, sexual assault, premises liability, and slip and fall cases.

Table 1 presents the distribution of the court cases across the different classifications of fact situation. The results show that a wide range of activities can create the basis for a lawsuit, thus putting more volunteers’ activities into the “risky” category. Nearly half the cases ($n = 21$) involved personal injury/death, while business-related ($n = 12$), governance ($n = 9$), and civil rights ($n = 8$) cases each accounted for about 15–20%.

Table 1: Fact situation by court cases involving the Volunteer Protection Act

Fact situation	Number of court cases
Personal injury/death	21
Business related	12
Governance	9
Civil rights	8
Property damage	1
Total	51

To determine the frequencies with which board members and service volunteers were named defendants in lawsuits, we classified the defendants in our collection of cases into four categories. The descriptions used in the written opinions form the basis for these categories.

Board members. This category includes those individuals described as a board member as well as those persons described as a “trustee,” fitting the definition of a nonprofit board member. This category includes board members of governmental agencies as well as nonprofit organizations, as the VPA includes such agencies within the scope of its coverage. Board members were named as defendants most frequently in cases involving operations such as corporate accounting (*Foss v. Nadeau*), wrongful termination (*Galindo v. Board of Directors of Latin American Civic Association*), and unpaid wages (*Armendarez v. Glendale Youth Center, Inc.*).

Officers and employees. Defendants were included in this category if the facts of the case indicated that they were paid for their services. They are not

considered in our analysis because the VPA specifically excludes them. Not all officers fell under this category, however. Those who were described as “volunteer” officers were classified as volunteers (see, e.g. *Morgan v. Mississippi*).

Volunteers and members. This category includes all parties who fall within the VPA’s definition of volunteer, no matter what their title. “Members” are included here as many nonprofit organizations are member based and were described in similar terms as volunteers, therefore fitting the definition of volunteer. Like the board members category, this category includes individuals who volunteer for governmental agencies as well as nonprofit organizations. Volunteers and members were named in actions involving, among others, drowning (*Elliot v. La Quinta Corporation*), sexual assault (*Entler v. Koch*), and injuries resulting from the collapse of a ticket sales booth (*Gaudet v. Braca*).

Organizations. In a few cases only the organization was named as a defendant.

Our analysis excludes organizations (as exclusive defendants), because the VPA states that it does not preclude liability on the part of the organization. Nevertheless, the organization may be named in a case in addition to other defendants.

Table 2 shows the breakdown of the cases by category of defendant. Lawsuits often have multiple parties on each side, especially when they arise out of complex fact situations. Our set of cases proved no different. In many cases, the pattern of named defendants was similar: the organization and one or more members/volunteers were listed as defendants. In almost all cases (41 total) the organization was a named defendant, no matter who else was being sued.

Table 2: Defendants in court cases involving the Volunteer Protection Act

Defendant	Number of cases
Officers and employees	9
Board members	14
Volunteers/members	37
Organizations	41

Volunteers/members made up the largest category of defendants, more than board members and officers and employees combined. The distribution of categories of defendants confirms the expectations of the VPA’s backers, who claimed that the risk of lawsuits fell mostly on those who could least afford it.

Close examination of these cases reveals that lawsuits can be brought based on activities that are not normally considered risky. One example is the case of

an action brought by a parent against members of a school board because the parent was not allowed to introduce a topic outside of the published agenda (Gelinass v. Boisselle). Although the case was ultimately decided on grounds other than the VPA, it offers an example of the uncertainty of even seemingly ordinary activities.

Next we consider the relationship between the cause of action and whether the defendant was a volunteer or board member. Board members are generally held to a higher standard of conduct, including the fiduciary duties of care, loyalty, and obedience to the organization (Renz 2010). We sought to evaluate if this distinction was reflected in the outcomes of our cases. We expected that lawsuits against board members would be resolved more often against a board member than against a volunteer. Accordingly, we compared cases in which the defendants were volunteers/members versus board members (We eliminated the categories of officers and employees and organizations from this analysis, because this research is not concerned with their exposure to lawsuits). Table 3 presents the results of this assessment.

Table 3: Fact situation by type of defendant

Fact situation	Total cases	Volunteers	Board member
Personal injury/death	21	21	0
Business related	12	9	3
Governance	9	2	7
Civil rights	8	4	4
Property damage	1	1	0
Total	51	37	14

Like their for-profit counterparts, board members of nonprofit organizations are held to higher fiduciary duties (Phelan 2013). We sought to determine whether this expectation extended to the court room by looking at the types of cases which resulted in liability on the part of board members. Table 3 demonstrates that service volunteers ($n = 37$) were made a party to lawsuits much more often than board members ($n = 14$) across a wide range of activities. The data show that board members were named as defendants in three out of five categories. These situations were those in which they took action on behalf of the organization, for example, in the enforcement of homeowners’ association rules or where employment issues arose. No board member in our data was sued in a case where a volunteer injured a third party. But service volunteers are named as defendants in all five categories of cases, including those involving personal

injuries to third parties ($n = 21$), compared to three categories for board members. This difference in liability may be the result of the difference in duties between service volunteers and board members.³ Board members' duties tend to be more focused on governance activities, while volunteers' duties are more likely to require interaction with agency clients or others outside the organization. The result of a volunteer's negligent conduct (e.g. accidentally hitting a passerby with a baseball) would have different consequences than the negligence of a board member in making a business decision for the organization.

These data, combined with the way the VPA was applied (see Table 4 and discussion below), suggest that board members are held to a different, but not necessarily higher, standard than service volunteers, at least when the lawsuit arises out of their assigned duties. The cases in which defendant board members were denied VPA immunity include disputes over internal control over the organization (*Owen v. Board of Dir. of Washington City Orphan Asylum*), an action brought on behalf of a nonprofit organization (called a derivative action) against the remaining board members after its chairman was found guilty of violating federal law (*Memphis Health Center, Inc. v. Grant*), and an action against the board members of a military academy claiming that board members of the school willfully misrepresented the success rate of its students (*Momans v. St. John's Northwestern Military Academy*). The common issue in all three cases was the scope of the VPA: In *Owen*, the actions of the trustees were held to be outside the scope of the VPA; in *Memphis Health Center, Inc.*, the court ruled that derivative actions were outside the VPA; and in the *Momans* case, the issue was also whether board members' actions fell outside the scope of the VPA, but at the time of that decision, too many disputed facts were at issue for the court to make a definitive ruling.

Table 4: Court case disposition by type of defendant

Defendant	VPA applied; immunity granted	VPA did not apply; immunity denied	Court case decided on other issue
All defendants	11	13	28
Volunteer	8	10	19
Board members	3	3	9

³ In addition, many states have immunity laws aimed specifically at directors, often exceeding the immunity provided by the VPA. This may account for some of the differences in expectations.

The biggest difference in the potential liability for volunteers lies in the personal injury/death category. The variety of fact situations appearing in that category shows the extent to which the duties of service volunteers and board members differ. Injuries in this category range from tripping and/or falling during organization events (*Avenoso v. Mangan*) to accidental drowning (*Eliot v. La Quinta Corp.*) to medical malpractice (*Lomando v. U.S.*). Volunteers were accused of failure to inspect and maintain premises (*McGeorge v. Town of Hamden*), irresponsible service of alcohol (*Shafer v. Sullivan*), and negligent construction of a ticket sales booth at an athletic event (*Gaudet v. Braca*). Allegations of sexual assault also appear (*Doe v. Corp. of Church of Jesus Christ of Latter Day Saints*; *Entler v. Koch*), as well as an attack by a dog (*Shanta v. U.S.*).

Finally, an examination of the outcome of these cases in the courts is necessary to determine how the determination of immunity under the VPA. The terms of the VPA create a defense of “being a volunteer” (*Neighborhood Assistance Corporation of America v. First One Lending Corporation*). It is incumbent on the defendant to assert any available defenses after the lawsuit is filed. This assertion is accomplished primarily by a motion to dismiss or motion for summary judgment.⁴ Accordingly, we examined the frequency with which VPA-based immunity was granted or denied within the context of these motions. If the court finds that the defendant was not a volunteer according to the definition in the VPA, immunity will not be granted. If the facts show that the defendant met the conditions set forth in the VPA, then immunity will be granted. No matter how the court decides the issue, it may not mean the end of the case, as there may be other procedural opportunities for both sides to pursue. Nevertheless, we are using decisions on these motions to grant or deny immunity as a means of indicating outcomes.

The courts used the VPA as the basis for their decisions in less than half the cases ($n = 23$). In fewer than one-third ($n = 11$) of the total number of cases the court found that the defendant was a volunteer and was therefore entitled to immunity under the VPA. In 13 cases, the court ruled that the defendant was not entitled to immunity under the law. The reasons for this ruling rested mainly on evidence of the “volunteer” receiving compensation from the organization, or a finding that the volunteer went beyond the scope of his or her authority.

⁴ A motion to dismiss contends that even if facts are true, there is no remedy available. It can be made before evidence gathering is completed. A motion for summary judgment states that no genuine issue of material fact exists and therefore the moving party is entitled to judgment as a matter of law. In federal courts, this motion can be made at any time during the proceedings (Federal Rule of Civil Procedure 56(b)). In state courts, the rules vary from state to state.

Immunity was denied more often than it was granted, whether the defendant was a board member or service volunteer.

The courts decided the overriding majority of the cases without considering the application of the VPA. More than one claim was set forth in the pleadings in these cases, a common occurrence; in fact, even in the cases in which the VPA was the basis for the court's holding, there were multiple claims. In the 28 cases decided on other grounds, the court relied on one or more of the other claims, another statute, or the facts themselves as the basis for its decision. The existence of these multiple claims and multiple bases for decisions raises the implication that the VPA may be just another weapon in the litigator's arsenal, rather than the "savior" or protector of the volunteer that its proponents trumpeted it to be at its enactment. This interpretation would help explain why the VPA is raised in cases based on facts that should be excluded from the VPA's coverage, such as the eight civil rights cases in our study. Table 4 summarizes the data regarding the application of the VPA to the court cases by type of case.

Although the number of cases decided on grounds other than the VPA is high for both service volunteers and board members, volunteers in this set of cases were found ineligible for the liability protection of the VPA ($n = 10$ cases) more frequently than they were found eligible ($n = 8$). Board members were denied that protection in three cases and were granted it in three cases.

Overall, these findings suggest that the VPA may not be as effective as it was intended, at least with respect to cases that have reached the litigation stage. Our study shows that the VPA was the basis for the court's decision in less than half of the cases. Volunteers or board members often prevailed in these cases even when the issue of immunity under the VPA was not considered.

But the findings run contrary to the discourse leading up to its enactment and the resulting expectations for the VPA and seem to indicate a continuing vulnerability of volunteers (board or service) to lawsuits.

Conclusion

The VPA was enacted in 1997, during the height of tort reform fervor, amid public pressure on government to restrict jury award amounts. In the more than 17 years since, little research has been conducted to ascertain what, if any, effects this act has had. Our research examined the case law resulting from the VPA and asked the following four questions: (1) What activities have resulted in lawsuits in which immunity was sought under the VPA? (2) Are service volunteers and board members the target of lawsuits with the same frequency? (3) Do

the outcomes of the cases suggest a difference in the treatment of board members and service volunteers (i.e. do they hold board members to their fiduciary duties of care, loyalty, and obedience)? (4) Has the courts' application of the VPA achieved the goal of protecting volunteers from liability when acting within the scope of their duties?

First, our analysis found a variety of activities that resulted in lawsuits in which the VPA was cited. They ranged from governance-related activity to actions which resulted in injuries or death. These findings suggest that seemingly any kind of activity can put an organization's volunteers at risk for a lawsuit, not just those usually considered risky or hazardous.

Second, we found a disparity in how often service volunteers and board members were sued. Individuals in the volunteers/members category were sued more often than other individuals associated with nonprofit organizations. In our set of cases, volunteers made up more than twice the number of defendants than board members.

Third, board members were most often sued for activities involving the operational aspects of organizations: governance issues, business relationships, and civil rights based claims. This finding is consistent with their fiduciary duties as board members. No lawsuits against board members were based on personal injuries or death. Service volunteers, however, are at risk for all types of lawsuits, even those associated with board responsibilities.

Finally, we found some inequality in the outcomes of the cases when comparing service volunteers with board members. In the court cases examined, board members had a 50-50 chance of prevailing on their claims of immunity under the VPA. Service volunteers were less likely to be held immune. This finding is crucial because, as stated above, the VPA constitutes a defense, but the responsibility for asserting that defense in court rests with the defendant. The likely result is that volunteers will incur legal expenses to avail themselves of the protections afforded by the VPA. And even when they do assert the protections of the VPA, they do not always prevail. These findings also fly in the face of any expectations (reasonable or otherwise) that the VPA would eliminate lawsuits against volunteers. As a result, it is still not clear whether the VPA offers much help for volunteers.

We also noted that service volunteers and board members were not defendants in the same cases, even in fact situations where board members might be expected to bear some responsibility, such as governance issues. It is also noteworthy that board members were not named as defendants in cases involving personal injury, despite the fact the board has overall responsibility for the organization. This last fact may be explained by the presence of the organization as defendant in almost all of those cases.

As noted earlier, we have no access to those cases settled out of court, or any information on whether the VPA acted as a deterrent to cases that were never filed. These decisions are usually made on the advice of an attorney. Our purpose is to examine the cases that did make it to court and to use this knowledge to assist volunteers, board members, and nonprofit managers on potential courses of action to avoid the necessity of seeking legal counsel in the first place.

Because the VPA does not offer any legal protection to organizations, nonprofit and government agencies remain at risk for the behavior of their volunteers. Hence, some organizations have adopted the practice of using exculpatory contracts and waivers of liability. These measures have been criticized as denying individuals the right to recover for injuries that were caused by another (Smith 1999), the basic premise of tort laws (Martinez 2003). The use of these measures, and the legal implications, are subjects for future research, as they have important consequences for volunteer management practices. We also seek to examine the effects of the VPA and the resulting case law on volunteer management. Further research is needed, including discussions with and surveys of administrators of volunteers regarding their understanding of the VPA, their management practices, and whether the former informs the latter.

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Appendix: List of Court Decisions

- American Produce LLC v Harvest Sharing LLC, 2013 WL 1164403 (D.Colo. March 20, 2013).
- Armendarez v. Glendale Youth Center, Inc., 265 F.Supp.2d 1136 (D.Ariz. 2003).
- Atlanta Cas. Ins. Co., Inc. v. River Hills Antique Tractor Club, Inc., 2012 WL 40467(E.D.Mo. January 9, 2012).
- Ayala v. Birecki, 2003 WL 23147174 (Mass.Super. December 22, 2003).
- Bisby v. Garza, 2008 WL 2403714 (S.D.Tex. June 10, 2008).
- Campbell v. Kessler, 848 So.2d 369 (Fla.App. 2003)
- Caron v. Waterford Sports Center, Inc., 2002 WL 31898081 (Conn.Super. December 13, 2002).
- Churchill Downs v. Thoroughbred Horsemen's Group, 605 F.Supp.2d 870 (W.D. Ky. 2009).

- City of Postville v. Upper Explorerland Regional Planning Commission, 834 N. W.2d 1 (Iowa. 2013).
- City of Santa Barbara v. Superior Court, 41 Cal.4th 747, 161 P.3d 1095, 62 Cal. Rptr.3d 527 (2007).
- Collier v. Clayton County Community Service Bd., 236 F.Supp.2d 1345 (N.D.Ga. 2002).
- Curley v. Philo and Bd. of Ed. of the South Glens Falls School District, 2009 WL 2152323 (N.D.N.Y. July 14, 2009).
- Davis v. American Society of Civil Engineers, 330 F.Supp.2d 647(E.D.Va. 2004).
- Doe v. Corporation of President of Church Of Jesus Christ of Latter Day Saints, 81 Mass.App.Ct. 1126, 964 N.E.2d 370 (2012).
- Elliot v. La Quinta Corporation, 2007 WL 757891 (N.D.Miss. 2007).
- Entler v. Koch, 85 A.D.3d 1098, 928 N.Y.S.2d 297 (2011).
- Estate of Brennan v. Church of Scientology Flag Service Organization, Inc., 832 F.Supp.2d 1370 (2011).
- Foss v. Nadeau, 2003 WL 22853695 (Conn.Super. November 14, 2003).
- Galindo v. Board of Directors Of Latin American Civic Ass'n, 2006 WL 93287 (Cal. App. 2 Dist. January 17, 2006).
- Gaudet v. Signore, 29 Conn. L. Rptr. 744 (2001).
- Gelinas v. Boisselle, 2011 WL 5041497 (D.Mass. October 17, 2011).
- General Steel Domestic Sales LLC v. Denver/Boulder Better Business Bureau, 2009 WL 535780 (D.Colo. March 2, 2009).
- Gillet v. Watchtower Bible & Tract Soc., 913 So.2d 618 (Fla.App. 2005).
- Grant v. Phillips, 2013 WL 4585661(Cal App. 1st Dist., August 28, 2013).
- Hall v. Bean, 2013 WL 3086820 (D38Tex.App.-Hous. (14 Dist., June 20, 2013).
- Howeth Investments, Inc. v. City of Hedwig Vill., 259 S.W.3d 877 (Tex.App. 2008).
- Howeth Investments, Inc. v. White, 227 S.W.3d 205 (Tex.App. 2007).
- Jean-Charles v. Perlitz, 2013 WL 1335657 (D.Conn. March 31, 2013).
- Johnson v. Black Equity Alliance, Inc., 26 Misc.3d 1219(A), 907 N.Y.S.2d 100 (2010).
- Kashani v. Rochman, 2013 WL 635962 (Cal.App. 2 Dist., February 21, 2013).
- Koenig v. USA Hockey, Inc., 2010 WL 4642923 (S.D.Ohio. November 9, 2010).
- Levy v. Clayton Downey Worthington, 2011 WL 5240442 (D.Colo. October 31, 2011).
- Lomando v. US, 667 F.3d 363, 2011 WL 6849063 (3d Cir. 2011).
- Maisano v. Congregation or Shalom, 2009 WL 4852207 (Conn.Super. November 19, 2009).
- McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876).
- McGeorge v. Town of Hamden, 2012 WL 1434904 (Conn.Super. March 29, 2012).

- Melucci v. Sackman, 37 Misc.3d 1212(A), 961 N.Y.S.2d 359 (2012).
- Memphis Health Center, Inc. v. Grant, 2006 WL 2088407 (Tenn.Ct.App. July, 28, 2006).
- Moldenhauer v. Tazewell-Pekin Consolidated Communications Center, 2006 WL 3842086 (C.D.Ill., December 29, 2006).
- Momans v. St. John's NW Military Academy, 2000 WL 33976543 (N.D. Ill. April 20, 2000).
- Mooring v. Virginia Wesleyan College, 44 Va. Cir. 41(1997).
- Morgan v. Mississippi, 2008 WL 449861 (S.D.Miss. February 14, 2008).
- Neighborhood Assistance Corporation of America v. First One Lending Corporation, 2012 WL 1698368 (C.D.Cal. May 15, 2012).
- Nunez v. Duncan, 2004 WL 1274402 (D.Or. June 9, 2004).
- Owen v. Bd. of Directors of Washington City Orphan Asylum, 888 A.2d 255 (D.C. December 22, 2005).
- Shafer v. Sullivan, 41 Conn. L. Rptr. 403 (Conn.Super. 2006).
- Shaheen v. Yonts, 2009 WL 87458 (W.D.Ky. January 13, 2009).
- Shanta v. United States, No. Civ 03-0537 RB/RHS (D. New Mexico January 29, 2004).
- Singletary v. Poynton, 38 Conn. L. Rptr. 705 (2005).
- Smith ex rel. Rodela v. Parents & Teachers Together, 2003 WL 21480716 (Mich. App. June 26, 2003).
- Spiteri v. Bisson, 2013 NY Slip Op 31023(U) (N.Y. Sup. Ct. April 29, 2013).
- Sweeney v. Friends of Hammonasset, 140 Conn.App. 40, 58 A.3d 293 (2013).
- Trinkaus v. Mohawk Mountain Ski Area, 35 Conn. L. Rptr. 121 (2003).
- Ventres v. Goodspeed Airport, LLC, 2008 WL 2426790 (Conn.Super. May 27, 2008).
- Weise v. Casper, 131 S.Ct. 7, 178 L.Ed.2d 314 (2010).

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