

HUMAN-LARGE CARNIVORE CONFLICTS: EFFECTIVE POLICY DEVELOPMENT AND IMPLEMENTATION

Policy Development: Legal &
Liability Considerations
A Case Study

CASE STUDY APPROACH

- ◉ Factual basis for alleged liability
- ◉ Legal defenses to liability
- ◉ Negligence
- ◉ Policy considerations and development

FACTUAL BASIS

- ⦿ Large black bear mauled teenage girl.
- ⦿ Suffered severe disfiguring injuries.
- ⦿ Occurred at campsite on the national forest.
- ⦿ AGFD responded to complaints of nuisance wildlife.
- ⦿ AGFD personnel captured and released bear that allegedly mauled girl.
- ⦿ AGFD personnel followed nuisance wildlife policy.

LEGAL DEFENSES TO LIABILITY

- ◉ Sovereign Immunity
- ◉ Statutory Immunity
- ◉ Ferae Naturae

SOVEREIGN IMMUNITY

- Cannot sue the sovereign unless the sovereign consents.
- States are immune from lawsuits unless immunity is waived by statute.
- Many states, including Arizona, have waived sovereign immunity.
- Governmental entities are liable for tortious acts and omissions in the same manner as private parties.

STATUTORY IMMUNITY

- ◉ Restores some immunity in certain circumstances.
- ◉ Absolute or qualified immunity.
- ◉ Fundamental or Discretionary Function/Policy exception.
- ◉ Recreational use immunity.

FUNCTIONAL OR DISCRETIONARY FUNCTION/POLICY EXCEPTION

- Conduct that involves determination of fundamental governmental policy and is essential to the realization of that policy and requires the exercise of basic policy evaluation, judgment and expertise.
- Usually characterized by the exercise of a high degree of official judgment or discretion.

EXAMPLES

- ◉ Decision to allow a bear population to grow.
- ◉ Decisions whether to transplant wildlife.
- ◉ General policy considerations about the handling of wildlife.
- ◉ Decisions whether to monitor wildlife.
- ◉ Decisions whether generally to provide warnings of aggressive or dangerous wildlife.

EXCEPTIONS TO FUNDAMENTAL FUNCTION IMMUNITY

- ◉ Immunity does not extend to operational decisions implementing agency policy.
- ◉ How to distinguish between discretionary function decisions and operational decision.

FERAE NATURAE

- ◉ State is not liable for injuries caused by wild animals—no strict liability.
- ◉ Cannot reasonably foresee an injury or protect against it (animal attacks are rare; whereas animals on highway common).
- ◉ Most plaintiffs do not allege injury due to wild animals but focus on alleged negligence of the government actor (e.g., state failed to keep road safe when motorist hit an animal).

TORTIOUS LIABILITY OR NEGLIGENCE

- ◉ Duty to protect against harm.
- ◉ Breach of duty (negligent).
- ◉ Causation.
- ◉ Injury.

DUTY TO PROTECT AGAINST HARM

- Does a special relationship exist between the government and members of the public.
- Duty established in statutes, common law or by defendant's actions.
 - A party that renders services to another has a duty of reasonable care (policy directed at public safety). Must increase risk of harm.
 - The possessor of wild animals has a duty to exercise reasonable care (capture of bear 166).
 - Landowner has duty to invitees, licensees and trespassers

BREACH OF DUTY

- Failure to exercise reasonable care:
 - Failure to follow existing policy.
 - Failure to warn public of dangers.
 - Failure to investigate about bear incidents.
 - Failure to respond to reports.
 - Failure to close campground (control property).
 - Failure to relocate or euthanize bear.
 - Failure to communicate report of aggressive bear.
 - Failure to properly categorize bear.

CAUSATION AND INJURY

- The negligent acts or omissions resulted in injury or damage.
 - Failure to close campground or warn of potential harm.
 - Failure to relocate or euthanize.
- Was injury reasonably foreseeable (proximate cause).

POLICY DEVELOPMENT

- ◉ Focus policy on wildlife management and minimize or eliminate focus on public safety.
- ◉ Limit the number of mandates on agency personnel (limit use of terms “shall be removed” or “shall be destroyed”).
- ◉ If action is required, insure the policy is absolutely clear when action is required (e.g., clearly define/describe an “aggressive” bear if employee must euthanize an aggressive bear).

POLICY DEVELOPMENT

- To reduce claims of failure to follow policy, generally use discretionary language:
 - “May attempt to”; “may consider the following actions”; “may not require”; “as soon as practicable”; “may issue a press release.”
- Use mandates when actions have direct link to causation (i.e., a failure to act will cause injury).
 - Shall relocate or euthanize an aggressive bear.
 - Shall notify public of dangerous animal or shall close campground.

POLICY DEVELOPMENT

- ◉ Establish a reporting mechanism such that all personnel have timely information on bear incidents.
- ◉ Use clear, precise definitions for categorizing bears—any vague or overbroad definitions allows for allegation of misclassification. For example, the term “aggressive” alone is overbroad and will lead personnel to varying interpretations.
- ◉ Base classifications on best available science as well as experience for understanding bear behavior (what traits characterize a dangerous bear).

POLICY DEVELOPMENT

- In developing policy, consider public expectations and opinions regarding the inherent dangers of wildlife and the State's duty of care. If the public believes the State should protect people from dangerous animals, does it make sense to adopt a policy of passive response to incidents.