

the plaintiff, prior to injury or harm, of the potential risks involved in participating in the event.

3. Last Clear Chance. This defense puts the burden of responsibility on the plaintiff as the plaintiff had the "last clear chance" to avoid the injury or harm. This defense was only held to be valid if the harm or injury was foreseeable by the plaintiff and the plaintiff could have taken action to avoid the harm or injury.
4. Contributory Negligence. This defense varies by state and prevents a cause of action in negligence if the plaintiff, even in the slightest degree, contributed to his or her own harm or injury. With this defense, courts will evaluate the standard of conduct required of the defendant based upon the age, physical capacity, sex and training of the plaintiff before making a decision as to fault.
5. Comparative Negligence. This is a relatively new defense and one that was established by state statute to offset the unfairness associated with the contributory negligence defense, which barred a plaintiff from recovery even though they may have been only 1% at fault. Under the comparative negligence doctrine, recovery for damages is pro-rated based upon the percentage of fault associated with the plaintiff. Unlike contributory negligence, a plaintiff may be 1-49% negligent and still recover damages from the defendant. The plaintiff's percentage of fault to recover under comparative negligence varies by state and 40 states have enacted some form of comparative negligence statute. Typically, a plaintiff with 50% or more of the fault will be barred from recovery.

## THE ELEMENTS OF NEGLIGENCE

The single factor that probably leads to more litigation as a result of participant or spectator injury is the limited knowledge coaches, trainers, administrators and Directors have concerning the elements constituting negligence. A better understanding of how civil law works will better prepare you to foresee potential negligence and thus take steps to minimize the loss that may result.

There are four key elements that must be present to bring a cause of action for negligence:

1. A "duty" of obligation must be owed to another, which requires one party to conform to a certain standard or conduct for the protection of the other party from unreasonable harm.
2. A breach of that duty to conform to the standards.
3. An injury must arise from the breach of duty. It must be shown that the breach of duty was the proximate cause of the injury.
4. Monetary damages are warranted as compensation for the injury.

The common law rule of thumb as respects an action of negligence is the "Reasonable and Prudent Person" doctrine. If an individual acted in a manner that was consistent with how a reasonable and prudent person, given the facts at hand, would have acted, a cause of action for negligence would be unfounded. With the increase in sports technology, medicine, and equipment, the foreseeability of injury or loss has been increased. Thus individuals involved in sporting activities have been held to a higher level of supervision and accountability.

There are no specific criteria for determining negligence. Every cause of action must stand on its own merits. Accidents do occur and in every instance, someone can be held negligent for that accident. It has always been incumbent upon the plaintiff to prove the elements of negligence. There must be sufficient evidence that alleged negligence was the proximate cause of the loss and than no other intervening factors contributed to the loss. Courts have not been holding defendants liable where substantial evidence proves that the defendant acted with prudence and caution in performing their duties.

## THE DEFENSES AGAINST NEGLIGENCE

Although eroded in effectiveness, there are generally accepted defenses against a cause of negligence. The following are the most widely used defenses:

1. Failure to prove one or more of the elements of negligence necessary to recover damages.
2. Assumption of Risk. This is one of the oldest defenses against a cause of action for negligence and is a defense that has probably eroded the most over the years. When an individual voluntarily assumes the risk of injury or harm arising from the conduct of others, he or she cannot recover if the harm or injury actually occurs. The erosion of this defense has occurred as a result of the higher standard of care required of a defendant in advising

## Rental Agreement Review

Yes

No

_____	_____	Does the agreement specify dates and times the Club/Region is responsible for venue?
_____	_____	Is there an indemnification clause?
_____	_____	Does the indemnification only favor the venue owner?
_____	_____	Is the Club/Region responsible for all loss or liability, regardless of fault?
_____	_____	Are there any insurance requirements?
_____	_____	Are limits required in excess of \$2,000,000 Each Occurrence?
_____	_____	Can rental agreement be amended?
_____	_____	Venue owner has been advised in writing of the defects, damage or portions of facility Club/Region will not take responsibility for.
_____	_____	Has the Indemnification Clause Addendum been added to the Agreement?
_____	_____	Are certificates of insurance required?
_____	_____	Does the agreement include signature of board authorized person?
_____	_____	Is a waiver of subrogation required per contract?
_____	_____	Are you responsible for business personal property of others?
_____	_____	Are there provisions, which make you responsible for "loss of use" of property?
_____	_____	Responsible for guests and spectators?
_____	_____	Is there any liquor liability exposure?
_____	_____	Any special wording required?
_____	_____	Warranties or representations about suitability or use of rental equipment?

# Rental Agreement Checklist

Prior to signing a rental agreement or facilities use agreement has the following been reviewed:

\_\_\_\_\_ Facility Walk Through

Yes

No

- |       |       |   |
|-------|-------|---|
| _____ | _____ | Facility suitable for volleyball practice and tournament play                             |
| _____ | _____ | Checked floor surfaces for defects or trip and fall hazards                               |
| _____ | _____ | Checked low hanging lights, heating units, plumbing and basketball backboards             |
| _____ | _____ | Adequate seating - bleacher seating in good repair  |
| _____ | _____ | Men's and Women's Restrooms in good repair  |
| _____ | _____ | Men's and Women's Locker Rooms in good repair   |
| _____ | _____ | Limited access to balance of school or facility   |
| _____ | _____ | Limited access to wrestling mats and gymnastics equipment                                 |
| _____ | _____ | Volleyball standards padded and in good repair  |
| _____ | _____ | Is there a school official or facility representative on premises during use of facility? |
| _____ | _____ | Are there procedures for advising venue owner of problems?                                |
| _____ | _____ | Quick access to phone in the event of emergencies?  |
| _____ | _____ | Have maintenance/security personnel been advised of your rental of the facility?          |
| _____ | _____ | Is a key required to gain access to the facility?   |
| _____ | _____ | Are exits marked and doors unlocked? (No chains securing double doors)                    |
| _____ | _____ | Rental Agreement required   |
| _____ | _____ | Are there well-lit and monitored parking spaces?  |
| _____ | _____ | Are there secure "team" parking areas?  |
| _____ | _____ | Is there an Emergency Response plan at facility for evacuation and medical emergencies?   |
| _____ | _____ | Is there a responsible party for removing unruly spectators?                              |
| _____ | _____ | Are lighting and electrical systems checked at facility? Any emergency lighting?          |

2. Indemnification Clause Addendum

Agreement between \_\_\_\_\_ (Venue Owner) and  
\_\_\_\_\_ (Volleyball Club or Region).

It is agreed that this Addendum replaces entirely Section # \_\_\_\_\_ in the foregoing facilities use agreement and is hereby made a permanent addendum for the length of the agreement.

- A. USA Volleyball shall defend, indemnify and hold Venue Owner, its officers, employees, and agents harmless from and against any and all liability, loss, expense (including reasonable attorney fees), or claims for injury or damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorney fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of USA Volleyball, its Regional Associations, Clubs, its officers, employees or agents.
- B. Venue Owner shall defend, indemnify and hold USA Volleyball, its Regional Associations, Clubs, officers, employees, and agents harmless from and against any and all liability, loss, expense (including reasonable attorney fees), or claims for injury or damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorney fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of Venue Owner, its officers, employees or agents.

\_\_\_\_\_ Date: \_\_\_\_/\_\_\_\_/\_\_\_\_  
(Signature of USA Volleyball Representative)

\_\_\_\_\_ Date: \_\_\_\_/\_\_\_\_/\_\_\_\_  
(Signature of Venue Owner)

There are a wide variety of Indemnification clauses used in rental agreements. Most are written to favor the Lessor (municipal, school district, or venue owner) and require the Lessee (USA Volleyball) to incur more responsibility than necessary. Whenever possible, the indemnification provision should allocate the responsibilities of each party clearly and equitably. Indemnification provisions that appear to be one sided (in favor of the Lessor only) should be avoided or amended. The following is an example of an ACCEPTABLE Indemnification provision:

*USA Volleyball shall defend and hold Lessor, its officers, employees and agents harmless from and against any and all liability, loss, expense (including reasonable attorney fees), or claims for injury or damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorney's fees or claims for injury or damages are caused by or result from the negligence or intentional acts or omissions of USA Volleyball, its Regional Associations, Clubs, officers, employees, or agents.*

*The Lessor shall defend and hold USA Volleyball, its Regional Associations, Clubs, officers, employees, or agents harmless from and against any and all liability, loss, expense (including reasonable attorney fees), or claims for injury or damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorney fees or claims from injury or damages are caused by or result from the negligence or intentional acts or omissions of the Lessor, its officers, employees or agents.*

The reason the wording of this Indemnification provision is acceptable is that each party to the agreement is only responsible for their own negligence. Often times we rent a facility that has inherent hazards (unsafe floor conditions or equipment) that are clearly the responsibility of the venue owner. If a loss occurs resulting from unsafe premises, USA Volleyball should not incur this responsibility or loss. Attached to this document is a "checklist" that should be used and completed prior to final signing of any rental agreement. The checklist will assist in identifying exposures to loss that can be identified and dealt with prior to renting the facility.

In the event that a rental agreement does not have a mutually favorable Indemnification agreement, it is recommended that we negotiate to have the attached "Indemnification Clause Addendum" added to the agreement. In most cases, the attachment of this Addendum should not be a major obstacle in securing a favorable rental agreement. When it is an issue and securing gym space is in jeopardy, some tough business decisions have to be made. If we can identify and control inherent hazards that are clearly the responsibility of the venue owner or the owner works with USA Volleyball to control such hazards, signing an agreement with an unfavorable indemnification provision may be permissible. When in doubt, always seek the opinion of legal counsel, ESIX or the National Office. Continued claims activity resulting from USA Volleyball's assumption of negligence by contract that could have been prevented or minimized will have a tremendous impact on the cost of insurance paid by the Association. The exposure to loss resulting from the assumption of liability by contract is controllable and every effort should be made to control such loss. Failure to do so affects everyone. Great care should be exercised in controlling potential damage to property in your care, custody, and control.

## Arizona Region of USA Volleyball Rental Facility Contractual Agreements

The following information should be reviewed prior to securing a gym for an Arizona Region event. This information is from ESIX – our insurance agent – and is their recommendations in regards to risk management. Following this information and guidelines will help keep the Arizona Region from paying for repairs to facilities that are not the result of our rental and keeping our insurance costs down.

### Contractual Agreements

A “risk management” concern that is beginning to pose serious threats to USA Volleyball, as well as all other sports National Governing Bodies providing a “master” insurance program is that of liability assumed under a contract. There is a definite trend by municipalities, school districts and other owners of sports venues to try and transfer all responsibility of loss to the individual or organization renting or using the venue facility. We have seen numerous instances in which coaches or clubs have been required to assume “all risks of loss” to a gym or facility as a prerequisite to securing a rental agreement. What is most disturbing about this trend is that the coach or club manager signing the rental agreement is often times unaware of the extent of responsibility assumed by the rental contract.

A rental contract or agreement is a legally binding document that needs to be read closely before signing. As a matter of law or public policy in most jurisdictions, one individual or entity cannot transfer their negligent activity to another by contract. What is deemed to be negligent activity can vary dramatically from court to court and circumstance to circumstance and, irrespective of any laws, people or entities continually try to transfer as much responsibility as possible via a contract or agreement. (Refer to the articles titled THE ELEMENTS OF NEGLIGENCE and THE DEFENSES AGAINST NEGLIGENCE following) Even though there may be favorable laws or public policy protecting against unfair transfer of negligence, a “signed” agreement between two legally responsible individuals or entities providing for proper consideration may require arbitration or legal assistance to resolve “responsibility” issues. Arbitration or legal assistance requires time and money, both of which would be better spent on the sport of volleyball. For this reason, we believe it better to spend a little more time reading, understanding and amending a rental contract prior to signing rather than disputing legal issues at the time of loss.

The following information is a guide to help you in better understanding issues related to the assumption of risk by contract. You are not expected to understand all the legal jargon or issues relating to a contract, but a little knowledge may prevent the Association from incurring a great deal of risk that would not otherwise be accepted in the absence of such knowledge. When in doubt, ESIX or the National Office of USA Volleyball can assist in the evaluating a rental agreement or any other contract in which there is HOLD HARMLESS and INDEMNIFICATION provision.

#### 1. Liability Assumed by Contract

You will find that most municipalities, schools, or venue owners will require USA Volleyball to hold them harmless and cover all legal expenses as a requirement of using their facility. This contractual liability is covered under USA Volleyball insurance program and the degree of responsibility will be determined by the wording of the agreement. From a risk management perspective, the two most important sections of any contract to review are the Indemnification and Insurance sections. These two sections can often times be amended so as not to adversely affect USA Volleyball.