Remember that all four elements of *prima facie* negligence must be demonstrated to sustain a claim of liability for negligence. If any one element is disproved, there was no negligence. The following defenses are available to leisure services professionals *acting within the scope of their professional employment*. Of the eight defenses, assumption of risk, contributory negligence, and governmental immunity are the most common.

1. **Contributory negligence** requires demonstrating that the participant contributed to her/his own injuries by carelessness, lack of foresight, inattention, use of faulty equipment, ignoring warnings, or disobeying safety rules. Warnings or safety rules must have been understandable by a reasonable participant. Other actions by the participant must have been such that a reasonable participant would have recognized the risk they posed and therefore not have engaged in them. There is a standard of care to which participants are expected to conform. Violations of that standard are regarded as proximate causes of any injuries that resulted, thus relieving the leisure services professional from any liability.

2. **Comparative negligence** is similar to contributory negligence except in one very important feature. In states where the contributory negligence defense is available, a finding that the participant contributed to her/his injuries removes *all* liability from the leisure services professional, even when the participant’s contribution is very small and the professional’s contribution very large. The unfairness of this outcome has led to the development of *comparative negligence* as a defense in which the relative responsibility of the participant and professional are compared, with any damages awarded being reduced by the proportion of responsibility borne by the participant. For example, if the participant is found to have been 40% responsible and the professional 60% responsible, the court will determine the total damages and then reduce the actual award by 40% to reflect the participant’s share of responsibility. Some states allow damages to be recovered even if the professional’s responsibility is very small and the participant’s very large. Most states, however, do not allow damages to be awarded if the participant is greater than 50%.

3. **Assumption of risk** is an extremely important defense against claims of negligence. A participant who *voluntarily* assumes the risk *inherent* to an activity, a facility, or a setting (e.g., a natural area) cannot sue if injuries result from those inherent risks.

   - The limitations of this defense must be clearly understood. It does not include conduct by other participants or leisure services professionals that unreasonably increases inherent risk or exposes the participant to additional risk. A risk may be inherent, but if the participant’s exposure to it is increased through the professional’s carelessness, error, inattentiveness, use of faulty equipment or technique, failure of judgment, lack of foresight or planning, and so on, then the professional can be held liable for any resulting injuries.

   - The levels and types of inherent risk will be determined by the court based on what a reasonable participant can be expected to know and understand about the specific activity, facility, or setting in which the incident occurred. The proper use of waivers and releases in creating *informed, voluntary assumption of risk* is vital here.

Assumption of risk may take one of two forms, express and implied.

   - **Express assumption of risk**: The participant openly waives in advance all or part of the duty owed to her/him by the professional. Such waivers often take the form of contracts, but this is not always
necessary. Express assumption of risk is summarized as follows in the *Restatement of Torts* (2d) sec. 496 (b) (1965):

A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from defendant’s negligence or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.

Any express assumption of risk must be voluntary and knowingly made by the participant. The question whether parents can assume risk for their children by waiving the right to recover damages is hotly debated in the legal community. There is some evidence that the courts are limiting parental assumption of risk for children who have their own knowledge of and experience with an activity to make an informed, independent decision.

- **Implied assumption of risk:** The participant’s conduct is evidence that the participant has assumed the risk inherent to an activity, a facility, or a setting. That is, the participant’s assumption of risk is implied by the participant’s conduct. Implied assumption of risk may initially appear to be a very broad defense against negligence claims, but it is subject to significant limitations. The doctrine is summarized as follows in *Restatement of Torts* (2d) sec. 496 (c) (1965): A person who fully understands a risk of harm to himself or his things caused by the defendant’s [professional’s] conduct or by the condition of the defendant’s land or chattels [property], and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or to remain within the area of that risk, under the circumstances that manifest his willingness to accept it [i.e., the risk of harm], is not entitled to recover for harm within that risk.

Commenting on this passage, Kaiser (1986, p. 69) points out that it imposes the following three tests for demonstrating implied assumption of risk:

- the consent to the risk itself must be clear.
- the risk must be voluntarily accepted.
- the participant must have “full knowledge and appreciation” of the risk.

Implied assumption of risk is important in leisure services because it has provided a defense against claims of negligence originating in two common circumstances.

First, assumption of risk may be implied if participants or spectators know the risks ordinarily inherent to an activity and voluntarily engage in it or voluntarily observe it. In oft-quoted words of Justice Cardoza (*Murphy v. Steeplehouse Amusement Company*, 250 N.Y. 479), whoever takes part in an activity “accepts the dangers that inhere in it so far as they [i.e., the dangers] are obvious and necessary. . . . The timorous may stay at home.” So long as the activity is managed according to current recognized professional standards, participants and spectators assume all known risks inherent to the activity simply by the fact of their participation or observation. They do not, however, assume risks that are not ordinarily part of the activity or that arise from the misconduct of the professional, other participants, or other spectators.

Second, assumption of risk may be implied if after being made aware of the risk caused by the possible negligence of another person, participants and spectators nonetheless continue to participate in an activity or observe it. Once knowing that a risk falling outside those ordinarily and inherently present in an activity, any further participation or spectatorship suggests the acceptance of that additional risk even though it may result from misconduct by another person (e.g., the failure to maintain equipment or a facility in safe working order).

Implied assumption of risk is not allowed as a defense in all jurisdictions, particularly those in which the comparative negligence doctrine is used.
Governmental immunity (also often referred to as sovereign immunity) is an ancient defense against negligence claims. It was once nearly an absolute defense, but has been weakened in recent years. In general, governmental immunity applies to government employees engaged in authorized work activities on the assumption that the community at large derives benefits from such activities. Government employees whose actions result in injuries to persons or property have thus historically been protected.

Over the years the courts successively narrowed the scope of government immunity, often against the wishes of legislative bodies. Here remains considerable disagreement on when and how it should be applied, but it seems clear that discretionary activities like planning, policy-making, and budgeting are protected. Just how far one should push this discretionary exclusion is uncertain: A public leisure services employee should not assume that he/she is protected by government immunity because he/she exercises professional discretion in planning activities or programs. Routine jobs or routine aspects of jobs are most likely unprotected.

The states have responded to the erosion of the governmental immunity doctrine by enacting general immunity and general liability laws. These laws provide immunity for some job activities, primarily discretionary, while identifying (often in considerable detail) which governmental activities may be subjected to claims of negligence.

The statute of limitations defense is based on traditions from common law that are now written into statutory law. Statutes of limitations specify the time limits within which a legal action must be initiated, usually two years for negligence liability. When the time limits for a particular type of action have expired, the courts will reject it automatically. Statutes of limitations are intended to protect the public and the courts from frivolous and even fraudulent lawsuits brought long after memories have faded or evidence lost. These statutes are also a practical means for the courts to control the already humongous flow of cases they must hear.

Notice of claim refers to the requirement that a claim for damages be filed within a certain number of days after the injuries are said to have occurred. This requirement is established by state law or local ordinances to give an agency sufficient time for investigating the incident and settling legitimate claims before the start of formal legal proceedings, thus saving time and money. Where notice of claim laws or ordinances apply, failure to file such notice can be grounds for dismissing a case from court.

Failure of proof is a fancy way of saying that the plaintiff, who always bears the burden of proof, has failed to make her/his case. At specific moments during a court proceeding, the defendant’s attorney can move for dismissal of the case on the ground that the plaintiff has failed to meet her/his burden of proof. Almost every defendant’s attorney will make such motions; they are usually rejected by the court.

Waivers, releases, consent forms, and permission forms are a standard feature of all leisure services programs (“waivers” is the term used here for all of these). Their original purpose was to establish a record that the participant has agreed to the terms of participation, one of which is usually to waive the right to sue an agency for negligence.

The courts have held as a matter of public policy that public leisure services agencies cannot use waivers to escape the consequences of failing to fulfill their duties to participants or clients. On the other hand, the courts have said consistently that waivers can be used by private leisure services organizations to escape liability to customers.

The courts will refuse to accept waivers that are overly general, written in vague or confusing language, or lack specific reference to the type of incident that occurred. Further, although a parent may sign a waiver for her/his child, the waiver applies only to the parent’s right to sue. It does not apply to the child’s independent legal right to sue.

Despite their limitations, waivers have two valuable purposes.
First, having signed a waiver often discourages participants from filing a lawsuit. Ethically, this is a double-edged sword. Legitimate lawsuits should not be discouraged, but some frivolous or fraudulent suits might be avoided.

Second, and much more importantly, waivers are vital element to demonstrating the participant’s informed, voluntary assumption of risk. Well-designed waivers are written in clear, nontechnical language that is readily understood by members of the community (this is part of the reasonable person doctrine). Participants should also be given time to read the release carefully and to ask questions and receive answers. The following should be included in a waiver:

- name, date, time, location, purpose, and description of the activity
- how the participant was informed about an activity’s ordinary inherent risks (including those associated with specific settings, conditions, and equipment), with reference to any information brochures, training sessions, and the like.
- how the participant was informed about any unusual risks that might arise (the participant does not necessarily consent to these, but it is good practice anyway).
- how the participant was informed about any requirements for the activity, e.g., physical condition, medical conditions precluding participation, equipment to be supplied by the participant and by the agency, specific levels of knowledge, skill, or experience (when possible, state requirements in both performance terms and using technical classification systems)
- acknowledgements by the participant that he/she has been informed about the above, that he/she understands the program, its requirements, and its ordinary inherent risks; that he/she was given opportunity to ask questions about any of the above, and that these questions were answered satisfactorily.

In addition to the standard signature and date at the bottom of the waiver, it is good practice to ask the participant to initial acceptance of each of the elements above.