



Steven Indig, B.Rec., LL.B
WWW.SPORTLAW.CA



AGENDA

*Negligence and
Liability*

*Risk
Management*

*Management
by Values*

Waivers

Screening



NEGLIGENCE

Negligence occurs only when:

- a duty of care is owed,
- and the standard imposed by this duty is breached,
- and harm or loss is suffered,
- and the breach of the standard causes or substantially contributes to the harm or loss



DUTY OF CARE

To whom do you owe a duty
of care?

*"To anyone who you ought to know could be affected by your
actions"*

Instructor /Leader → Participant



STANDARD OF CARE



- **Written/published standards**
 - ✓ Equipment standards
 - ✓ Organization policies & rules
 - ✓ Facility rules
 - ✓ Code of Conduct
 - ✓ Instructor/teaching/leadership manuals

- **Unwritten/unpublished standards**
 - ✓ Common Practices
 - ✓ New developments and Trends
 - ✓ Network
 - ✓ HIGH FIVE

- **Case law**

- **Common sense**
 - ✓ Intuition
 - ✓ Knowledge
 - ✓ Experience
 - ✓ Gut



Myers v. Peel Country Board of Education (1981)

- ✓ Fifteen year old boy suffers broken neck while dismounting rings in a gymnastic class.
- ✓ Supervision of the rings by the teacher was impossible from the main floor.

Myers Continued

- ✓ Defendant liable on two bases:
 - ✓ Failure to provide adequate matting and to supervise
- ✓ Standard of Care required is that of a careful parent.
- ✓ A careful parent would not:
 - ✓ Use substandard mats when more protective mats available.
 - ✓ Permit a his/her child to practice dangerous maneuvers without adult supervision.



What we learned from *Myers*

- ✓ The potential for accidents will be reduced if the following four tests are met:
 1. Activity is suitable to the participant's age and condition (mental and physical);
 2. Participant is progressively trained to do activity properly;
 3. Equipment is adequate and suitably arranged; and
 4. The performance is properly supervised.



STANDARD OF CARE

*Behaviour is
not negligent*

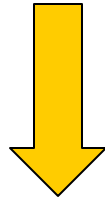
*Behaviour is
negligent*

Highest possible level of care
- risk is eliminated

**Reasonable standard of care in the
circumstances** - risk is appropriately
managed

Failure to exercise any care
- risk is ignored

Do the circumstances impose a duty of care?

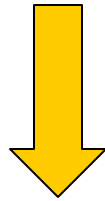


YES



NO

Has the standard of care imposed by this duty been breached?

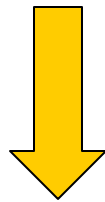


YES



NO

Is there resulting harm or loss?

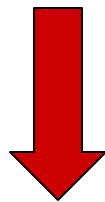


YES



NO

Did the breach of the standard cause or substantially contribute to the harm or loss?



YES



NO

Negligence! Is there liability? → maybe YES, maybe NO

YOU BE THE JUDGE

St. John's School – 1978

- School group participates in a canoe trip.
- During the trip 12 boys and 1 teacher die.



YOU BE THE JUDGE

Strathcona Tweedsmuir School – 2003

- Outdoor course for 10th graders partakes in a ski trip.
- An avalanche occurs and 17 people are buried and 1 survive.

Risk Management



TERMS

RISK →

- ✓ “The chance of something happening that will have an impact on objectives”

RISK MANAGEMENT →

- ✓ “The culture, processes and structures that are directed towards the effective management of potential risk”

EVOLUTION IN RISK MANAGEMENT

- ✓ Traditional approach (1980s and 90's)
 - ✓ Preventing injury and liability
 - ✓ Avoiding legal issues and loss exposure
- ✓ Organizational Performance (today)
 - ✓ Approach to improve organizational performance: effective governance, efficient planning, relevant programs, safe, welcoming and rewarding environment

WHY MANAGE RISKS?

- Reduce injuries to participants
- Improve your defense against litigation
- Reduce insurance costs/meet requirements of insurers
- Meet requirements of funding agencies
- Protect your volunteers
- Improve customer service and public image
- Help you to govern more effectively
- Practice good business management (“bottom line”)



Forgetting Responsibilities

- May result in a lawsuit
- Will cost you/your organization money (legal costs, damages, future insurance costs)
- Will take up your valuable time
- Will “turn off” your volunteers
- Will harm your public image



RISK MANAGEMENT 101

- ✓ **Identify risks** – ask, what are the things that can go wrong?
- ✓ **Measure risks** – ask, what is the chance it will go wrong, what are the consequences if it does?
- ✓ **Control risks** – ask, what can I do about it?

IDENTIFY RISKS – obvious, foreseeable....



IDENTIFY RISKS – not obvious, not foreseeable....



IDENTIFY RISKS – foreseeable perhaps – but to this severity?



IDENTIFYING RISKS

Sources of risk:

- **Facilities** (courses, water, buildings)
- **Equipment** (belonging to club or to participants)
- **People** (participants, staff, volunteers, spectators)
- **Program** (the activity itself)

MEASURING RISKS

The magnitude of a risk is a function of its frequency (likelihood of occurrence) and its severity (seriousness of resulting harm)

It is usually adequate to assess the magnitude of risk in terms of

- Low
- Moderate
- high

CONTROLLING THE RISK

- **Retain** the risks → you don't do anything because the risk is inherent in the sport
- **Reduce** the risks → you take steps to reduce the likelihood of occurrence, and/or the consequences, largely by changing human behavior
- **Transfer** the risks → you accept the level of risk but you transfer this risk to others through contracts (insurance, waivers, other business contracts)
- **Avoid** the risks → you decide simply to NOT do something

RISK TRANSFER METHODS

WAIVERS

- have all participants in program sign a waiver agreement

INSURANCE

- review all insurance needs and renew policies appropriately

CONTRACT MANAGEMENT

- include proper indemnification provisions in all contracts signed by the organization

CONTRACT FOR SERVICES

- contract out work to other parties (instructional clinics, event management, security, catering/bartending, transportation)

JOINT VENTURES

- create separate corporate entity to host major events







PARTICIPANT CHECKLIST

Participants

- Carefully monitor participants' skill levels and skill development
- Group your participants appropriately
- Demonstrate a "safety attitude" in all your interactions with participants

PROGRAM CHECKLIST

Program

- Ensure that you have up-to-date manuals, policies, regulations, rule books
- Take every opportunity to advise your participants about risks -- verbally, during instruction, with signage



PERSONAL CHECKLIST

Facilities and Equipment

- Keep a written inventory of equipment, and develop a system to ensure all equipment is regularly inspected and repaired/replaced
- Develop your own routine for inspecting a facility prior to every practice or training session
- Document all deficiencies in writing and provide promptly to the facility owner/operator
- Ensure the facility has a phone or carry a cell phone with you at all times
- Know what instructions to give to emergency vehicles



RISK MANAGEMENT PLAN

Step 1 – Use brainstorming techniques to identify risks (use best judgment)

Step 2 - Measure risks using the low, moderate, high categories (use best judgment)

Step 3 - Identify appropriate measures to control risks

Step 4 - Implement measures

Step 5 - Review and adjust your plan on a regular basis



STRENGTH BASED APPROACH

- ✓ Make a commitment
- ✓ Assign resources (people, time)
- ✓ Assess risks
- ✓ Develop the risk management plan
- ✓ Implement, communicate and educate
- ✓ Share results through a sport-wide 'risk registry'
- ✓ Monitor and report on progress

WORDS OF CAUTION

- A lack of standards may be viewed as condoning inappropriate behavior
- If governing organization adopts or recommends certain standards, you should too
- Make sure that you have the ability to enforce standard
- Don't make your standards so strict that they cannot be enforced
- ... or so slack that the court will impose a higher standard on you
- Ignoring a written standard will only bring you trouble!



REALITY CHECK

The law does not cut you slack because you are 'volunteer-based' or 'volunteer-led'. The law is quite clear that for-profit organizations and non-profit organizations, as well as employees and volunteers, will be held to similar standards.

RISK MANAGEMENT IS...

**ORGANIZED
COMMON SENSE**

(where common sense =
knowledge + experience)



to ski and snowboard responsibly. www.boeritana.com



Management by Values



Values matter

“People have a fundamental need for guiding values and sense of purpose that give their life and work meaning. More than any time in the past, employees will demand that the organizations they’re connected to stand for something.”

Professors James Collins and Jerry Porras in Built to Last (1994)



Values Matter

- ✓ Clarifies what matters most
- ✓ Connects people to a common purpose
- ✓ Communicates the organization's intentionality to live its values
- ✓ Commits people to the organization
- ✓ Creates a dynamic, adaptable and progressive culture



Applying Management By Values



- **Vision**

Stretches your imagination

- **Mission**

Clear sense of purpose

- **Values**

That are known and shared by all

One final comment

"People can fully realize their potential when their work is meaningful and when their individual values and needs can be integrated with the objectives of the company."

D. McGregor, The Human Side of Enterprise(1957)



WAIVERS

A close-up photograph of a hand holding a dark pen with a gold nib, signing a document. The document has a red horizontal line and some faint, illegible text. The background is slightly blurred, focusing on the pen and the signature.

*An intentional, informed and
voluntary agreement to give up a
known legal right*

WHAT IS A WAIVER?

It is a contract by which a participant agrees to *accept the risks* involved in an activity in exchange for the opportunity to *participate* in the activity



2 TYPES OF RISK IN SPORT

PHYSICAL RISK

The risks, dangers and hazards that are inherent in the sport activity. These risks are unavoidable, reasonable and in many cases, desirable

LEGAL RISK

The risk that the organizers of the sport activity will behave negligently. This risk is not inherent in the sport, nor is it desirable, reasonable or acceptable



WHAT IS A WAIVER?

A waiver is a *written contract* in which a participant agrees not to hold the program organizers responsible for the *legal risk of their negligence* in exchange for the opportunity to participate in their program.



CONSENTING TO RISKS

PHYSICAL RISK

A participant can consent to physical risks by the act of participating or by verbal or written agreement.

LEGAL RISK

A participant can consent to legal risks ONLY by means of a written agreement. This is a “waiver of liability” agreement



WAIVERS

CONTEXT – is the waiver being used in a setting that is appropriate for such use

WORDING - is the waiver easy to read and understand?

CONTENT - are all activities, all parties, all risks covered (including negligence)?

EXECUTION - does person have authority to sign a contract, did they have an opportunity to read and understand the contract, did they sign the contract voluntarily?



Screening



GROWING CONSENSUS

Debate is not on whether we must screen (as it is widely accepted that we must) but on how it should be done, given the need to find a practical balance between the duty of an organization to provide a safe environment and the practical limits of what an organization can afford to do, or has time and resources to do.



TEN "SAFE STEPS" PROGRAM

1. Determine the risk
2. Write a clear position description
3. Establish a formal recruitment process
4. Use an application form
5. Conduct interviews
6. Follow up on references
7. Request a Police Records Check
8. Conduct orientation and training sessions
9. Supervise and evaluate
10. Follow up with program participants

POLICE CHECKS

- ✓ Deciding who should be screened
- ✓ Deciding what sort of record to obtain
- ✓ Deciding what offense you are screening for
- ✓ Deciding who looks at records and decides
- ✓ Deciding how often to collect a PRC
- ✓ Managing confidentiality and privacy
- ✓ The administrative burden of all of the above



CONCLUDING THOUGHTS

- ✓ Screening is far more than police checks
- ✓ The process of screening is a process of managing risks
- ✓ Your screening procedures will be specific to your organization and circumstances



QUESTIONS?





Steven Indig

sji@sportlaw.ca

647-348-3080

www.sportlaw.ca

