

## Legal Liability in Adventure

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## The Legal System in Canada

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### Common Law

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- Records creating a foundation of cases useful as a source of common legal rulings.
- Operates on the rule of precedent, or *stare decisis*, which requires that "like cases be decided alike."
- Intended to evolve, accounting for society's current norms and values.

### Statute Law

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- Laws passed by federal or provincial legislatures as *statutes*, or *acts*.
- The body that originally passed the statute may amend it.
- May be used to make new laws or to codify a common law.
- Regulations add specifics to legislation.

## The Court System

- Generally, three levels:
  1. Less serious family, civil and criminal matters
  2. Superior courts deal with major civil and criminal matters and act as appeal courts for lower courts.
  3. Courts of appeal hear appeals from provincial superior courts.

## Civil Court Procedure

- |                                |                             |
|--------------------------------|-----------------------------|
| ■ Pleadings                    | ■ Examination for discovery |
| ■ Writ of summons              | ■ Summary trial             |
| ■ Appearance                   | ■ Trial                     |
| ■ Statement of claim           | ■ Summation                 |
| ■ Statement of defense         | ■ Ruling                    |
| ■ Amended statement of claim   |                             |
| ■ Amended statement of defense |                             |

## Assessment of Damages <sup>(35)</sup>

- |  |   |
|--|---|
| ■ Pain and suffering to the time of judgment | ■ Pain and suffering expected in the future |
| ■ Loss of amenities before the judgment      | ■ Loss of amenities after the judgment      |
| ■ Loss of earnings before the judgment       | ■ Loss of earnings after the judgment       |
| ■ Expenses incurred before the judgment      | ■ Cost of future care                       |
|  | ■ Costs of defending the case               |

## TORT LAW

### Tort Definition

- A civil wrong, other than a breach of contract, which the law will redress by an award of damages.
- May be intentional: assault, libel, slander, trespass, willful damage, deceit and fraud.
- May be unintentional: negligence, nuisance and manufacturer's liability.

### Fault-based Accident Compensation

- Tort law is concerned with "fault-based" accidents, where injuries to one person have been caused by the fault of another and this can be proved based on the facts of the case.
- Serve to clarify the appropriate standard of care, societal values and keep the market in check by making it bear the cost of its mishaps.

### Negligence Definition

- The "omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."
- Conduct that falls below the standard required by the industry (and society) in which it functions.

### Elements of a Negligent Action

- In order to establish negligence, five elements must be proved:
  1. There must be injury to the plaintiff.
  2. Defendant must have a duty to avoid injuring the plaintiff.
  3. Defendant's conduct must have breached the standard of care required by law.
  4. Defendant's conduct must be the proximate cause of the damage.
  5. The plaintiff's conduct must not justify a reduction or elimination of the damages awarded.

### Duty of Care

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- Duty of care refers to the responsibility of one party to take reasonable care for the protection of another.
- Only where a duty of care exists can a breach be proven.
- A duty of care is required only to reasonably foreseeable victims.

### When There Is a Duty to Others

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- Where there is an economic relationship.
- Where one party supervises or controls another.
- Where one party has created the dangerous situation.
- Where one party voluntarily assumes responsibility for another.
- Where one party is the occupier of land or premises.

### When There Is No Duty to Others

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- The law does not require a bystander who has not been a party to the creation of a dangerous situation, or who has not volunteered, to act to assist a person in danger.

### Standard of Care

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- The Reasonable Person
  - Measures the negligent person against another, hypothetical person who is in the same situation.
  - The law requires a minimum level of performance whether the person is capable of it or not.
  - The reasonable person acts prudently, exercises ordinary intelligence and decision making, is not required to display the highest skill possible and does not display unusual foresight.



## Standard of Care

- Expert knowledge:
  - "Even if one is not an expert, if there is representation that one is such, and if that representation is relied upon by the plaintiff, it can result in one being held to an expert's standard of care."
  - Generally, "*custom and approved practice*" will be determined by expert witnesses.

## Causation

- Negligent defendants are not liable unless their conduct is the *proximate cause* of the plaintiff's losses.
- The defendant's actions *must* have caused the injury to the plaintiff and the injury must not be too *remote*.
- This is the foundation of *fault-based* compensation.

## Remoteness

- Remoteness deals with the extent of a defendant's legal and financial responsibility.
- The thin-skull rule refers to the principle that a defendant must take a plaintiff as he or she is found (E.g., pre-existing conditions).
- A defendant may have a duty to rescuers who come to the assistance of someone in the defendant's care.

## Occupier Liability

- The potential liability of those who control land towards those who enter the property.
- Those who enter on lawful grounds and those who are trespassers.
- An occupier of premises owes a duty to take reasonable care to ensure that a person, while on the premises, will be reasonably safe.

## DEFENSES TO NEGLIGENCE

### Contributory Negligence

- Conduct on the part of the plaintiff which is deemed by the courts to have been unreasonable and contributed to his or her own harm.
- A plaintiff has a duty to look after themselves.
- If proved, the plaintiff's compensation will be reduced.
- Scurfield case example.

### Gregorowicz v. James Lee

- The incident revolves around the collision of an infant skier (Patrick Gregorowicz) and 18 year old snowboarder (James Lee) on Grouse Mountain, February 9, 2002.
- Gregorowicz was 5 weeks shy of 5 years old at the time.
- Gregorowicz was snowplowing behind his father.
- Lee hit Gregorowicz as they were going over a rise in the slope. Gregorowicz suffered fracture of the tibia and fibula. No long term damage.
- \$40,000 damages. Father 25% contributory negligence and Lee 75%. Lee pays \$30,000.
- Date of Judgement - April 2010

### Voluntary Assumption of Risk

- *Volenti non fit injuria*
- Agreement that the client will participate in an activity involving risk and will give up his or her right to sue in the event an accident resulting from that risk.
- The agreement can be made in writing, words or conduct of the plaintiff.
- Implied and express agreements.

### Apportionment

- Is the ability of a court to divide liability among those parties at fault.
- "...the liability to make good the damage is in proportion to the degree the person was at fault."
- Canadian apportionment law format
- U.S. apportionment law formats state by state (49/1, 51/49...)

### Vicarious Liability

- When the liability is not based on wrongdoing by the party itself but on the conduct of someone else.
- The liability arises from the relationship between the party and the person who is involved in conduct that creates the liability.
- Contract or employee?

### Legislation

- Examples:
  - Hotel Keepers Act
  - Hotel Tax Act
  - Travel Agents Act
  - Human Rights Act
  - Employment Standards Act
  - Worker's Compensation Act
  - Yukon Wilderness Tourism Licensing Act
  - Young Persons Safety Act – U.K.
  - No-fault Insurance Schemes – Europe and New Zealand

### CONTRACT LAW

### **Agreement**

- Parties need to be able to demonstrate that the agreement is intended to be taken seriously.
- This is usually done through some form of "consideration." i.e., deposit.
- With no written contract, everything that occurs between the parties is considered by the court.

### **Capacity to Enter a Contract**

- Minors
  - Two types of contract: those that are not valid and those that allow the minor to opt out.
  - "Minor's contracts should not be enforceable against them but should be enforceable by them..."

### **Capacity to Enter a Contract**

- Corporations may contract
- Unincorporated associations may not. Officers and members may be "jointly and severally" liable.
- The principals in partnerships and proprietorships may contract.

### **Contract Terms**

- Express terms are those specifically listed in the contract.
- *Contra preferentum rule* ensures the meaning least favorable to the author will prevail.
- *Contrat d'adhésion* is where the signing party does not have the opportunity to negotiate its terms.



### **Performance and Breach**

- Anything less than complete performance is a breach of contract.
- Exclusion Clauses
  - Clauses for the purpose of protecting one party from liability to the other.
    - E.g., negligence clauses, occupier liability
  - Due to their onerous nature, courts adopt a strict attitude toward them.

### **Damages**

- Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, as if the contract had been performed.
- Loss of profits, earnings, business...
- Also, reputation, insult, annoyance, aggravation, shock, mental distress...

### **Jurisdiction**

- Where the contract is enforceable
- Jurisdiction arguments
- Web sales have the potential to confuse jurisdiction
- Electronic transaction legislation

### **WAIVERS**

### When the release is not binding

- The document is signed in "circumstances which make it not her act" (*non est factum*)
- The agreement has been induced by fraud or misrepresentation.
- The party seeking to enforce the doc knew or had reason to know of the other's mistake as to its terms.

### Waiver Content

- Title
- Names
- Definitions
- Activity description
- Warning of risks
- Assumption of risk
- Release of liability
- Indemnity
- Binding on heirs
- Jurisdiction agreement
- Reliance agreement
- Legal age
- Waive right to sue
- Signature
- Witness

### Delivering a waiver

- Provide advance notice
- If possible, send the form in advance
- Educate the guest as to contents
- Write in clear easy to understand terms
- Provide time to read it
- Explain the terms clearly
- Conducive atmosphere
- Do not confuse with other signings required
- Ensure correct signature
- Do not allow guest to cross out/delete sections
- Sign in front of witness
- Have witness sign
- Don't witness if guest is intoxicated
- Provide a copy to guests
- Keep signed copies 7 yrs
- Don't interpret/explain
- No guest participation without signed waiver

### Waivers By and on Behalf of Minors

- Contracts signed by minors are unenforceable.
- Some have minors and parents both sign but this does not make it enforceable.
- Parents cannot sign away the rights of their child.

### Waivers By and on Behalf of Minors

- Draws the attention to the possibility of injury.
- Creates evidence that both are aware of and assume inherent risk.
- Cases must be won based upon the business not being negligent.<sup>32</sup>

### Wong v. Lok's Martial Arts Centre Inc. & Ramin Asgare Nik

- Victor Wong started martial arts at Lok's at 12 years old
- Wong suffered injury when thrown to the ground by Nik
- Claim was that the plaintiffs were negligent in failing to take preventative measures to ensure that injuries did not occur
- Defense upon a waiver with the following wording:

"It is expressly agreed that all exercises and treatments, and use of all facilities shall be undertaken by the student's sole risk, LOK'S HAPKIDO SCHOOL and its affiliated studios... shall not be liable for any injuries, past/future medical complications, any claims, demand, injury, damages, actions or cause of actions whatsoever, including without limitation, those resulting from acts of active or passive negligence on the part of Lok's Hapkido School.

YOU ARE RESPONSIBLE FOR ALL INJURIES!"

- Judgement - October 2009

### Wong v. Lok's Martial Arts Centre Inc. & Ramin Asgare Nik

- Two issues:
  - Whether a child's parent can effectively execute a release on behalf of a minor, and
  - If so, whether the release executed is sufficiently broad to require the plaintiff's claim to be dismissed
- At question is the application of the BC *Infants Act*.
- Judgement:
 

"The Act does not permit a parent or guardian to bind an infant to an agreement waiving the infant's right to bring action in damages in Tort. The Defendant's application is therefore dismissed.

### The Principle of Notice

- Did the party seeking protection bring the contract sufficiently to the notice of the other party? *Karroll v. Silver Star Mtn. Resort* <sup>pg 61</sup>

### Unconscionability of Waivers

- "So manifestly unfair and unreasonable as to be unenforceable."
- The argument is that "the waiver clause diverges sufficiently from community standards of commercial morality that it should be unenforceable as unfair and unreasonable."
- "Waivers should be enforced unless unconscionable." pg 63

### Reading the Waiver Before Signing It 12

- "Where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read its contents." *Karroll v. Silver Star* pg 64

### Reading the Waiver Before Signing It

- Three exceptions: *L'Estrange v. Graucob Ltd.*
  1. *Non est factum*. Circumstances which made it not her act.
  2. Fraud or misrepresentation.
  3. Where the party seeking to have it enforced knew or had reason to know of the other's mistake as to its terms (3<sup>rd</sup> exception).

### Translating Waivers to Foreign Clients

- A business must be able to prove the guest knew and understood the release, and it should make every effort to provide a waiver in the guest's first language.
- *Ochoa v. CMH* is an exceptional circumstance.

### Witnessing the Waiver

- Waivers should be witnessed
- Gather a contact address
- Employee may witness a waiver

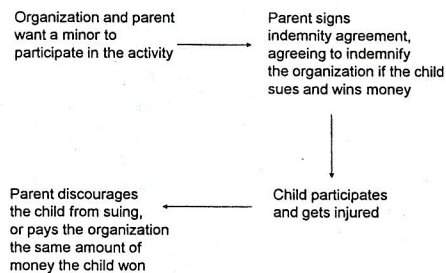
### Waivers and Negligence

- Waivers cover negligence
- Do not cover gross-negligence or criminal negligence, defined as wanton or reckless acts
- "Carrying out the activity in a dangerous fashion or when in all the circumstances it is dangerous to do so."

### Indemnifications

- "I agree to hold harmless and indemnify the company from any and all liability for any property damage, or personal injury to any third party, resulting from my participation in..."
- Indemnifications signed by or on behalf of minors.
- Court opinion that you are trying to do something indirectly that you cannot do directly.

### Indemnification Process





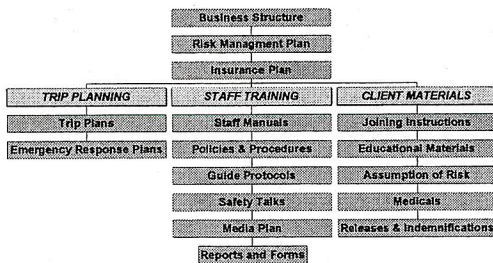
## Risk Management

## What Risk Management Is

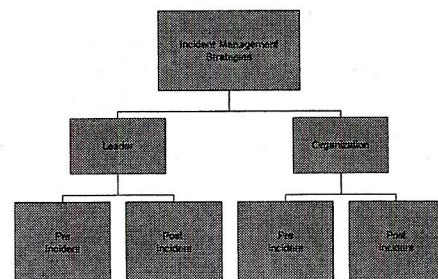
- Risk management should be looked on as a *complete* loss control program, not as any one technique, action or document. A well rounded approach to risk management needs to be taken and is comprised of the following:

1. Identifying the hazards in the business's activities
2. Evaluating these hazards
3. Implementing loss control strategies to reduce the frequency and severity of accidents
4. Adequately informing participants of the risks involved in the activities
5. Pre-planning appropriate responses to incidents
6. Responding appropriately when incidents occur
7. Maintaining appropriate records and documentation

## Commercial Risk Management Basics As a Starting Point



## Incident Management Strategies



## RISK MANAGEMENT IS:

- **RISK CONTROL**
  - Exposure Avoidance
    - (not engaging)
  - Loss Prevention
    - (frequency)
  - Loss Reduction
    - (severity)
  - Loss Segregation
    - (separation)
- **RISK FINANCING**
  - Risk Transfer
    - (insurance)
  - Risk Transfer
    - (contracted workers)
    - (volenti)
  - Risk Retention
    - (absorb)

## A Complete Risk Management Program

- Risk management is comprised of the application of risk control and risk finance techniques at five key stages. These are:
  1. Prevention
  2. Preparedness
  3. Operations
  4. Response
  5. Recovery



## Dynamics of Accidents

### Environmental Hazards

- \*Terrain
- \*Weather
- \*Darkness
- \*Road conditions

### Human Factor Hazards

- \*Physical condition
- \*Experience
- \*Judgment
- \*Cultural differences

### Accident Potential



## Dynamics of Accidents

### Environmental Hazards

- \*Avalanche
- \*Crevasse
- \*Cold temperature
- \*Darkness
- \*Sun exposure
- \*Bee stings
- \*Bad road conditions
- \*Bad flying conditions
- \*Other erratic drivers
- \*Mechanical breakdown

## Dynamics of Accidents

### Human Factor Hazards

#### **Participants**

- \*Unaware of hazard
- \*No skills to avoid hazards
- \*Resistance to instructions
- \*Irresponsible/careless
- \*Macho attitude
- \*Poor strength/stamina
- \*Fear/anxiety

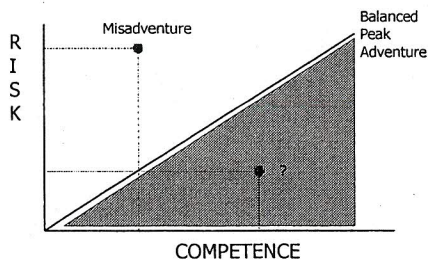
#### **Leaders**

- \*Lack of knowledge
- \*Poor safety judgment
- \*Poor teacher
- \*Poor control
- \*Stress ineffective
- \*Poor safety attitude
- \*Cultural perspective & values

#### **Group**

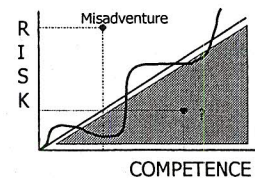
- \*Non-cooperative
- \*Interpersonal friction
- \*Excessive competition
- \*Pressure to perform
- \*Lack of tone
- \*Sub-group splinters

## Risk and Competence



## Risk and Competence

How does culture, knowledge, experience, and the length of time a guide does the job affect their tolerance for risk, how they guide and what they take the clients into?



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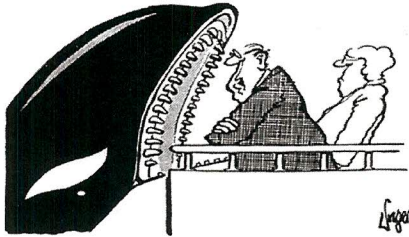
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## Introduction



"They wouldn't let people stand here if it was dangerous."

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## Agenda - Insurance 101

1. General Liability Insurance
2. Directors & Officers Insurance
3. Accident Insurance
4. Other Insurance Coverage
5. Claims Procedures
6. Risk Management
7. Actual Liability Claims

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### General Liability Insurance

"PAYS COMPENSATORY DAMAGES FOR WHICH YOU ARE LEGALLY LIABLE"

- Bodily injury or damage to property of others
- Spectators, passersby, property owners
- Includes injury to participants
- Duty to defend and indemnify

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### General Liability Terms & Conditions

- Compensatory Damages
- Punitive Damages
- Description of Operations
- Cross Liability Clause
- Independent Contractor / Contract Employee

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### Who is Insured?

- Directors
- Executives
- Employees
- Managers
- Members of Organization
- Volunteers

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## Board of Directors Who and Why

### WHO

- Directors are elected or appointed volunteers
- Officers are usually directors that are appointed for specific functions such as President, Secretary or Treasurer
- Staff can also be Officers

### WHY

- Purpose of the Board is to provide leadership and direction for the organization

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## Board of Directors Legal Duties

**Directors & Officers have three basic fiduciary duties to the non-profit association:**

1. **Obedience** – must comply with federal and provincial laws and act within the constitution and bylaws of the association
2. **Loyalty** – must act in good faith and must not allow their personal interests to prevail over the interests of the association
3. **Diligence** – must be diligent and prudent in managing the association's affairs and possess a duty of care that an ordinary prudent person would use under similar circumstances

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## Board of Directors Board Protection

### Board Protection

- Most associations "indemnify" their board members in the bylaws
- The promise of the association to indemnify its board members is only as good as the financial resources available to fulfill the promise

### General Liability Insurance

- Provides coverage for "negligent acts"

### Directors & Officers Insurance

- Provides coverage for "intentional acts".
- Protection against a breach of a "duty" by the directors or officers

Bodily injury and property damages are excluded by a Director & Officers policy.

### A D & O policy pays for actual or alleged decisions – "wrongful acts"

- usually defined as "any actual or alleged act or omission, error, misstatement, or misleading statement, neglect or breach of duty by and Insured"

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### Accident Insurance

- Coverage is on a "No Fault" basis
- Coverage is excess to provincial plans and employee benefit programs
- Coverage does not include loss of wages
- This coverage is usually purchased by associations as a "member benefit"

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### Other Types of Insurance Coverage

- Property Insurance – buildings, equipment
- Out of Country Excess Medical
- Crime Insurance – employee theft
- Visitor to Canada Medical
- Event Cancellation
- Prize Indemnity

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### Risk Management

1. Inspect the facility / premises / grounds prior to every activity to verify the condition
2. Follow your written rules and regulations

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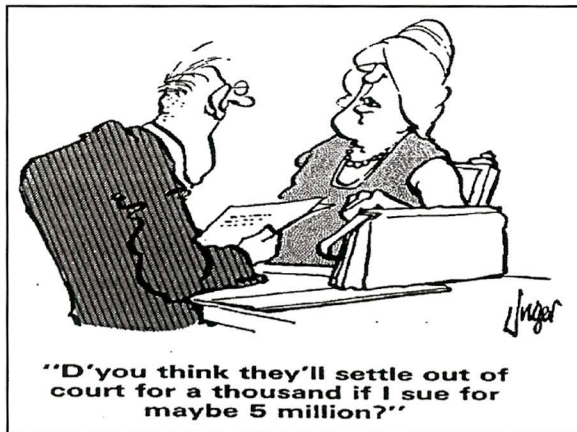
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### 8 Reasons for Higher \$\$

1. Increased participation
2. Changed attitudes
3. Influence of the media
4. The American Experience
5. Increased awareness of liability & legal rights
6. More lawyers
7. Presence of insurance

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### Claim Examples

- Canoe upset
- Fall while carrying a kayak
- Cycling
- Equipment failure
- Fell while hiking
- Tent damaged vehicle
- Fire to a building

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