

MANAGING THE RISK OF LEGAL LIABILITY

The risk of liability to an outdoor recreation service provider, its board and staff usually will be only moderate, assuming a well-trained and supervised staff and students, operating in a, relatively speaking, controlled environment, and engaged in activities with predictable parameters, and with reliable agency partners.

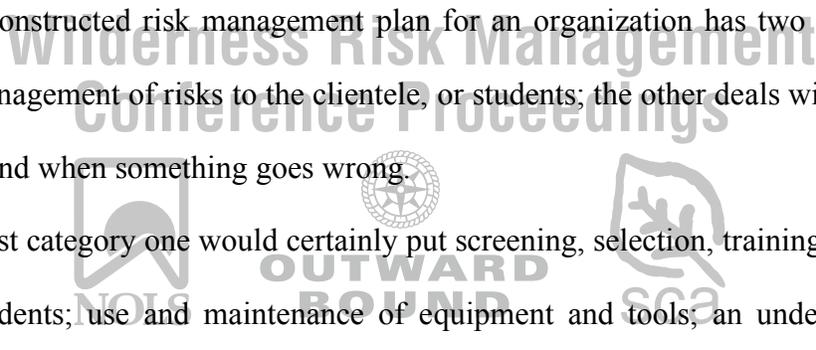
However, people are unpredictable. We are exposed to their judgments, and to lapses in supervision, training and selection; environments can surprise us, whether outdoors or in a gymnasium or a conference room; and the tools with which we work can, of course, cause harm.

A well-constructed risk management plan for an organization has two categories. One concerns the management of risks to the clientele, or students; the other deals with protecting the organization if and when something goes wrong.

In the first category one would certainly put screening, selection, training and supervision of staff and students; use and maintenance of equipment and tools; an understanding of the environment and its risks; emergency protocols; records and other documentation; and an effective exchange of information among student, staff and the organization.

In the second category one would find, again, a good risk management plan; insurance; reliable contracts, including documentation of an allocation of legal liability for certain contingencies (including releases and indemnities); the wise use of professionals (including medical and legal); and an understanding of applicable laws, ordinances and regulations.

Common to both categories are the development and maintenance of a “quality program” - that is, a program which meets the shared expectations of the student and the organization, deals fairly with the students, staff and contracting parties, and allocates legal liability for matters



that go wrong.

Development of a quality program includes at least alignment, management and information.

Alignment refers to congruity between the stated mission of the organization and its activities. The organization should not be doing things which do not serve its mission. Alignment refers also to congruity between manageable risks and activities. The organization should not be engaging in activities whose risks it cannot reasonably predict and manage.

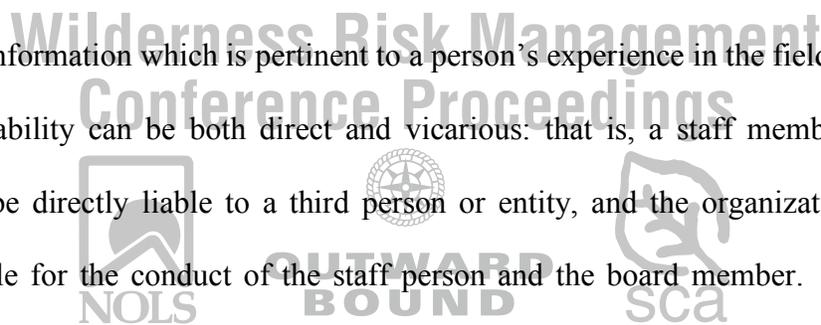
Management refers to a management of the risks: understanding what bad things can happen, how to reduce the chances of their happening, and how to recover from the happening.

Information refers to advising the student of what to expect from his or her experience, and collecting information which is pertinent to a person's experience in the field.

Legal liability can be both direct and vicarious: that is, a staff member (and a board member) may be directly liable to a third person or entity, and the organization itself can be vicariously liable for the conduct of the staff person and the board member. A conscientious claimant will sue both the direct actor (the staff or board member) and the organization.

Special laws, state and federal, provide some level of immunity to volunteers to not-for-profit organizations, to officers and staff members of such organizations and, in rare cases, to the organization itself. Under some circumstances total immunity is granted; in others, the dollar recovery is capped, usually in an amount that must be matched by insurance.

Important protection is available in the doctrine of inherent risks. An inherent risk is one which is such an integral part of an activity that, if it were to be removed, the activity would change its basic character and appeal. A person has no obligation to manage or protect another from the inherent risks of an activity. It is presumed that the community at large - not



necessarily the individual injured - has a sufficient understanding of the activity so that its members know, or should know, the risks of that activity, and it is fair to regard their participation as basically an assumption of its risks.

The main legal liability concerns of the outdoor program will be with its contractual obligations and claims of negligence.

Contract law concerns promises kept and broken. Promises may be written or oral, expressed or implied, and may be formed or modified (unless expressly provided otherwise) by persons with real or apparent authority. Photographs can create “contracts” by essentially assuring a certain condition, or state of affairs.

A breach of contract is a failure to perform that contract.

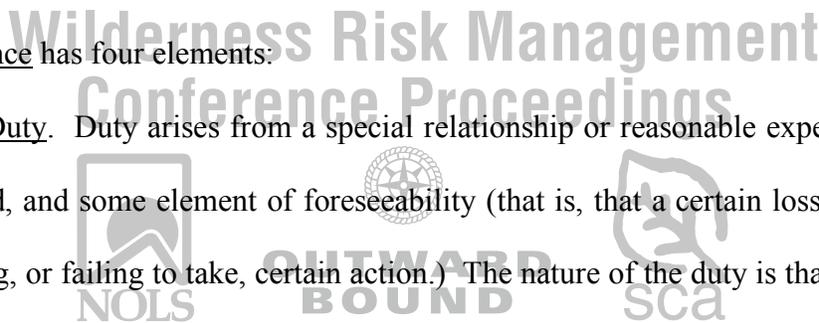
Negligence has four elements:

1. Duty. Duty arises from a special relationship or reasonable expectation that care will be provided, and some element of foreseeability (that is, that a certain loss reasonably may flow from taking, or failing to take, certain action.) The nature of the duty is that a staff member or board member must act as a reasonable person, similarly situated, would have acted under the same or similar circumstances. With respect to staff members this generally will mean that they must act as a reasonable professional would have acted. For board members, the test to be applied would be the conduct of a board member of similar training and background.

The second element of negligence is a breach of the duty owed: the actor does not perform as a reasonable professional would have acted under the same or similar circumstances.

The third element is injury: A loss must be suffered by the claimant. That loss may be emotional, physical, financial or otherwise:

The final element is causation: There must be a causal connection between the injury and



the breach. The test is sometimes articulated as follows: The injury would not have occurred “but for” the act or omission of the party charged with negligence. If someone else or something else causes the loss, there is no liability, or responsibility may be shared.

Defenses to a claim of negligence include the absence of any of the elements identified above: duty, breach, injury and causal connection.

Again, there is no liability for an injury that arises from an inherent risk of the activity. This doctrine is referred to in many jurisdictions as Primary Assumption of Risk.

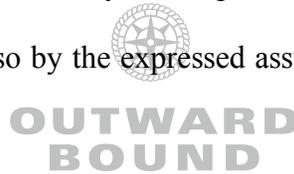
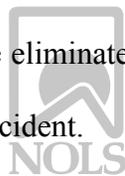
If a Court finds that the loss was not caused by an inherent risk, but rather by some enlargement of that risk, the Court may compare the carelessness of the actor with the “carelessness” of the participant in choosing to participate anyway, and either eliminate or reduce the liability of the actor on the basis of the contribution (comparative fault) of the participant. This is the doctrine of Secondary Assumption of Risks.

A duty can be eliminated also by the expressed assumption (preferably in writing) of the risk that causes the incident.

Duty may also be eliminated by an agreement of waiver or release signed by the participant.

Organizations which deal with minors have particular challenges regarding protection from their claims. Minors are legally incompetent to contract (a “release” is a contract). Protection from minors’ claims must lie in a very full explanation of activities and their risks so that it can be argued, in the event of a bad incident, that the minor expressly or impliedly assumed such risks. More about this below. In some jurisdictions, but only a very few, parents are allowed to sign releases on behalf of minors. Parents and perhaps siblings have claims for injuries to a child. Parents may release their claims and, in some states, indemnify (protect) the

Wilderness Risk Management
Conference Proceedings



organization from claims of other family members.

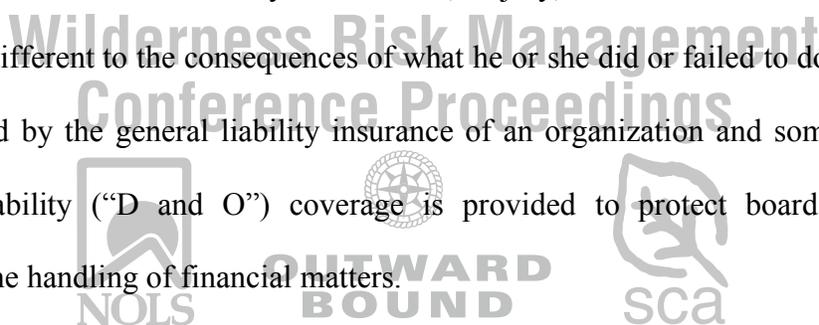
Special laws exist which expressly provide that there shall be no liability for the inherent risks of a recreational activity; and certain specialized statutes - skiing, equine and rafting, for example - exist in some states which provide specific protection for those activities. In some cases the inherent risks of the activities are described, in others they are not.

Board members generally are not vicariously liable for actions of others. Their liability lies in their failure to act as a reasonable member would act, in the areas of setting policy, and providing oversight, and supervision.

Volunteer boards have certain immunities for simple negligence but not for a degree of carelessness which is so extraordinary that a Court, or jury, is entitled to believe that the person charged was indifferent to the consequences of what he or she did or failed to do. Ordinarily the board is covered by the general liability insurance of an organization and sometimes directors and officers liability (“D and O”) coverage is provided to protect board members from misconduct in the handling of financial matters.

Staff issues are generally competency, screening, supervision and training. The staff of course is on the front line and usually will be regarded as the most significant contributor to an injury or other loss. Staff members’ assets, however, may be limited; so a claimant will also seek recovery from the organization itself. As stated above, both the board and the staff can expose the organization, which generally will be vicariously liable for the conduct of board or staff if committed in the course of the performance of their respective duties.

Reb Gregg



Wilderness Risk Management Conference Proceedings

