



NOLS - WRMC 2016—

Salt Lake City

Liability Reduction Primer

(Think: ‘Risk Management’)

Two Types of Risk Management

1. Minimizing the Risks or Hazards of the Actual Activity You are Conducting
2. Minimizing the Risk of Loss to Your Operation (in order to obtain #2, must obtain or come close to obtaining #1)

Risk Management Process



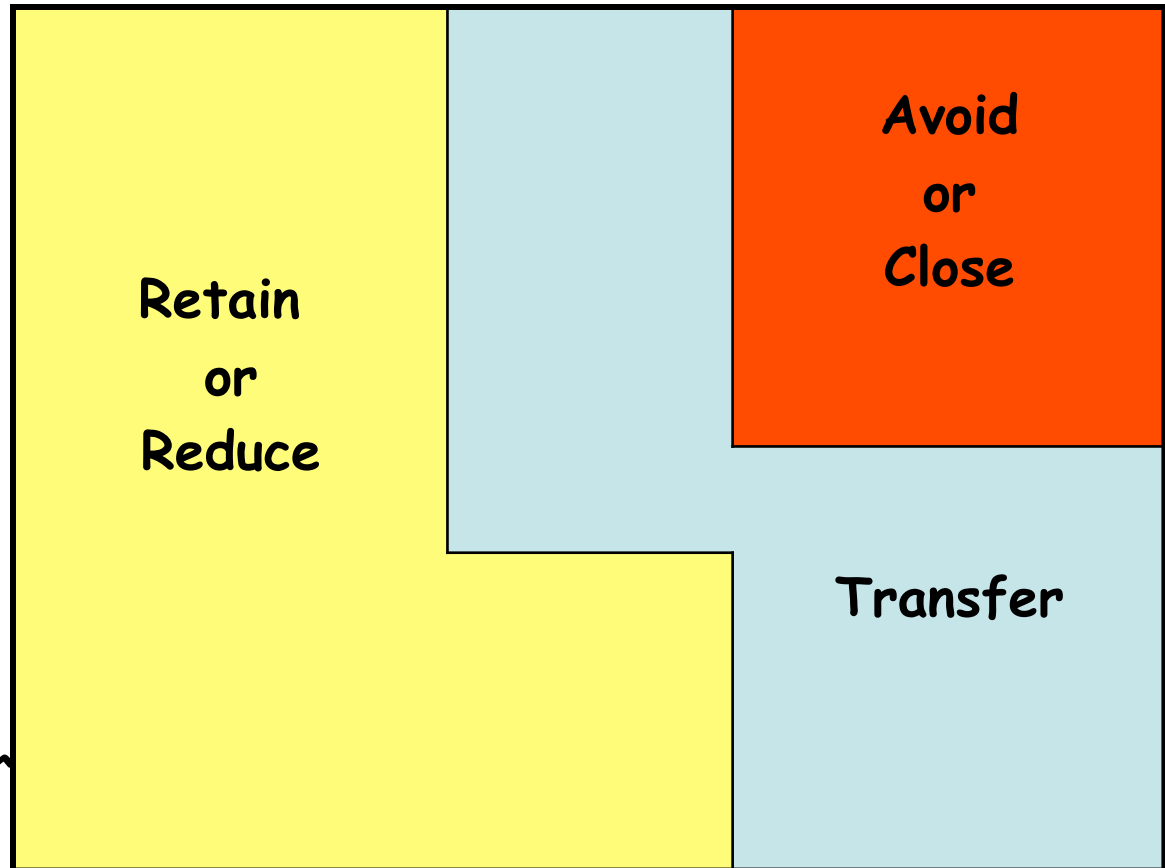
Risk Management Process

high>

Frequency
of
Accidents

low>

low ^



Frequency & Severity

- If it was foreseeable – then a reasonably prudent person (forecaster/guide/operator) would move to minimize/mitigate the risk.
- If the risk that produced the injury was in no way foreseeable then we cannot say that there is a corresponding duty to respond.
- Think: risk ‘predictability’ or ‘probability’
- Usually ‘industry standards’ form or coalesce around the notion that professionals set out to minimize/mitigate risks that produce either severe or frequent results.
- As expressed in forecasting terms, questions fundamental to risk assessment and employment of mitigation techniques include an analysis of 1) the probability of any given event occurring and 2) the consequences of an event occurring

Review: 1.) Negligence

- Negligence under the law is generally defined as the failure to use ordinary care; that is, failing to do what a person of ordinary prudence would have done under the same or similar circumstances.
- Essentially we are looking to determine whether an operator, educator or land administrator could or should have recognized an unreasonable risk and then did nothing to warn the participant or to reduce or eliminate the unreasonable risk.
- To examine negligence in behavior or conduct, look for 2 things: was the risk foreseeable and was the risk unreasonable

Review: 2.) Legal Elements of Negligence Claim

- Duty – this is where standards come in to play. Standards of care that are used in the industry or published or enunciated can and will be used to establish the duty that an operator owes to an injured person
- Breach – and consequently then, the standard may be used in an evidentiary sense to establish whether the duty of care was actually breached.
- Causation
- Damages

Defenses to Recreation Oriented Negligence Claims

- Release and Waiver Documents
- Inherent Risk
- Assumption of the Risk
- Defeat Negligence Elements

Negligence Claims Brought Against Recreation Providers

1. Co-participant liability
2. Premises Liability
3. Negligent Rescue/Response/Med. Care
4. Negligent Hiring, Inexperienced Guides/Instructors – Negligent Supervision
5. Failure to Warn
6. Equipment Issues

Evidence – Case Structure

During the process of discovery all the pieces of the story are obtained by gathering pieces of evidence. There are only three types of evidence and being aware of them will help you think through risk management issues and situations.

- Real Evidence - the documents, the broken ski, etc.
- Demonstrable Evidence - charts/graphs/creations
- Testimonial Evidence -
 - Witness
 - Expert
 - Party
- All evidence, including real and demonstrable, must come in through a person with testimony

Bottom Line

- Bottom line then is to think about how the claimant (plaintiff) or former client/participant is going to make out a case against you.
- What pieces of evidence will he/she marshal against you?
- What types of real evidence exist for you or against you?
- Who will testify for you or against you?
- What types of expert testimony could be offered against you?
- Patient and family care and attention (preventing suits caused by anger)

Notify:

- Base of Operations (ER Response Plan Kicks In...)
- Local ER Response (sheriffs, police, etc.)
- Family (your client/participant, your employees, families of delayed folks...)
- Public Land Administrator
- Insurance Company
- Counsel

Obtain (1):

- Witness statements, complete lists of participants and addresses
- Physical evidence and evidence of scene
- Staff/guide/instructor statements
- Agency documentation (audios...).
- Principal investigators observations...
- Photographs/video tapes - did your clients or others shoot photos? Can you get them?

Obtain (2):

- Participant agreements (registration docs)
- Releases/exculpatory agreements
- Radio logs or trip manifests
- Media reports - comments
- Your current ops plan
- Copies of your advertising
- Discovery and discoverable materials

Key Elements of a Response Plan

- Emergency Response Protocols: outlining decision-making and financial authorities, response level categories
- Roles: who does what, use of prepared checklists
- Communication: within the organization and to lawyers & insurers. Devices necessary to summon help: what the current standard is.
- Information: what to transmit – injuries & treatment, what you need, information on client group
- Coordination/Organization: initial communication with outside entities, roles/responsibilities, rendering first aid, evacuation of injured person/body, consolidation of equipment, tending to needs of other clients, addressing needs of staff after incident, CISD

Good & Bad Wording in Promotional Materials

- Because promotional materials are full of visuals they make strong impressions about the activity, the weather, the fun, etc. Use visual/written materials to attract appropriate (think: capable and informed) clients and to transmit information regarding the nature of your trips.
- Describe the levels of physical conditioning and activity required of participants. Let potential clients know outdoor recreation activities include inherent risks that cannot be eliminated.
- Describe the nature of those inherent risks and the potential injuries that can result from those risks. The objective is to fully warn and inform potential clients of the risks inherent in your trips and of

- Advise clients that they will be required to sign a liability release form before participating in your activities.
- Lastly, written or oral statements sometimes contradict the statements made in a participant agreement, potentially weakening the document, providing the basis for a breach of contract claim and/or giving a court cause to find it unenforceable.

Media – Don'ts (1)

- **Do Not** divulge the names of fatality victims or those in life threatened situations before the next-of-kin has been notified (and notification has been confirmed) by either the authorities.
- **Do Not** alter facts.
- **Do Not** provide information as factual unless it has been confirmed and **do not** speculate on anything that is unconfirmed.
- **Do Not** provide any more information than is necessary or asked for but, also,

Media – Don'ts (2)

- **Do Not** give the impression that you are hiding facts. This only leads to media speculation. If some elements of the incident are unconfirmed or information is still incomplete do assure the media that when all the facts are in hand and confirmed that the information will be readily available to them.
- **Do Not** speculate about fault or blame.
- **Do Not** issue any statement that could be construed as an admission of negligence.
- **Do Not** assume that a conversation is “off the record”.

Media Do's (1)

- **Do** appear professional
- **Do** have an articulate, well-presented person conduct media interviews
- **Do** set up a system for handling phone inquiries. You may need to involve the administrative staff and they must be carefully briefed as to your intentions and to their role.
- **Do** schedule a time to get back to media folks inquiring about the incident, and return their call as scheduled, even if you have nothing new to report.
- **Do** make information equally available and show no favoritism amongst various media contacts.

Media Do's (2)

- **Do** assemble facts, verify them and have the information you provide be consistent with the facts provided by the hosting agency. A press release is often the most efficient way of managing this.
- **Do** be carefully cooperative with the media. Confirm the basic established facts of the story and the victim's association with your operation but remember that you don't have to answer every question in detail.
- **Do** try to reinforce a positive theme by reminding the media (IF THIS APPLIES) of your commendable safety record and history.....

Review: 3.) Proving Negligence – “Standards of Care”

- A “standard of care” will be used to measure the competence of the operator/guide/etc.
- If the so-called professional’s conduct falls below such a standard he/she/it may be held liable for injuries or damages resulting from such conduct.
- The “standard of care” can be determined in a number of ways, but the most common way is from “standards of practice” developed and perhaps published by organizations.

Defining the “Standards of Care”

- Standards are defined as the action or conduct established by most of the “industry” or “profession” locally, regionally and nationally.
- In court expert witnesses may well take opposite points of view and attempt to sway the judge or jury as to what actually is the standard of care.

Standards of Practice - General

- Standards of practice published by professional organizations are commonly referred to as standards, guidelines, recommendations or position statements.
- Organizations publish or enunciate “standards” to provide benchmarks of desirable practices.
- Because these published or enunciated standards can be entered into evidence in a trial or claim proceeding to determine the standard of care or duty that the operator or educator owes to the injured person, it is critical for recreation entities to know what standards are being published or enunciated.

Types of Standards

- Occupational Standards – competencies necessary for someone to effectively perform in the occupation
- Training Standards – these very often build on occupational standards and derive from them
- Operational standards – used to evaluate operational practices, for the public to evaluate quality, for insurance company evaluations

Changing Legal Tides: Standards or What is “Reasonable” Will Shift

- Remember – legally speaking – you only have to do what is “reasonable” to satisfy your duty – you don’t have to take extraordinary measures.

However – what used to be extraordinary may become de riguer or ordinary/reasonable over time.



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