

20 Million Dollar Lawsuit Filed Would you be prepared? Lessons from a Case Study

Dr. Al Wright, Cal State University Northridge

www.nols.edu/wrmc | (818) 710-6633 x3

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Learning Outcomes

- Examine the legal issues surrounding negligence and legal liability cases
- Understand how litigation can impact and enhance safety management protocols for outdoor programs
- Assess your organization's readiness for a major financial loss/threat
 - Increase vigilance for safe practices.
 - Increase readiness for litigation.

A story and a conversation?

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Presenter's Disclaimers

- Not a lawyer and did not go to law school
- My experience base is limited to . . .
- Lawyers are people too . . .



- Statements about the case have some limitation
 - No one admits liability
 - Plaintiff remains nameless as will the Cross-Defendants
 - Defendant is . . .

Who is Here Today?

- Have you been Sued or Not?
- Program Manager or Program Leader or both?
- Ever had serious incident/accident on a program?
- Have you testified in court or been deposed?
- Legal training? Active litigation attorney?
- What do you hope to learn today?

Before the basic story

- Some terminology

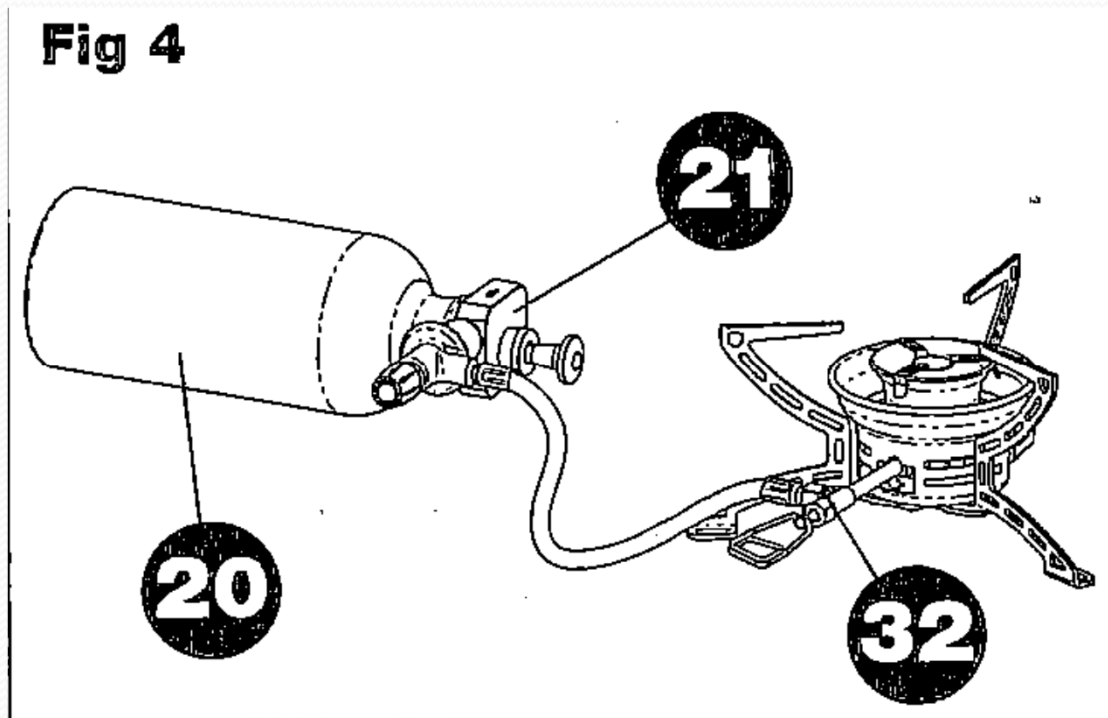
Terms: Risk Mgmt. versus Safety Mgmt.

- Risk Management is protection of assets of the corporation
- Safety Management is actions taken to try to protect the health and well-being of students (or clients, patrons, participants).
- Legal Process Terminology
 - Civil versus Criminal
 - Plaintiff / Defendant
 - File a Complaint/ Motions/ Summary Judgment/Depositions/ Expert Witness/ /Mediation/Settlement/Trial / Decision

The Case . . . the story

- A college coed participates in a credit class that *requires* (kinda) an outdoor field trip to a wilderness setting. (April 15, 2011)
- The student participates in an orientation to the trip which includes completing a brief health history and 'release and assumption of risk' form is signed by student and witnessed.
- On evening one of a two-day trip at dinner time an accident occurs with a white gas liquid fuel stove.

The Stove Type



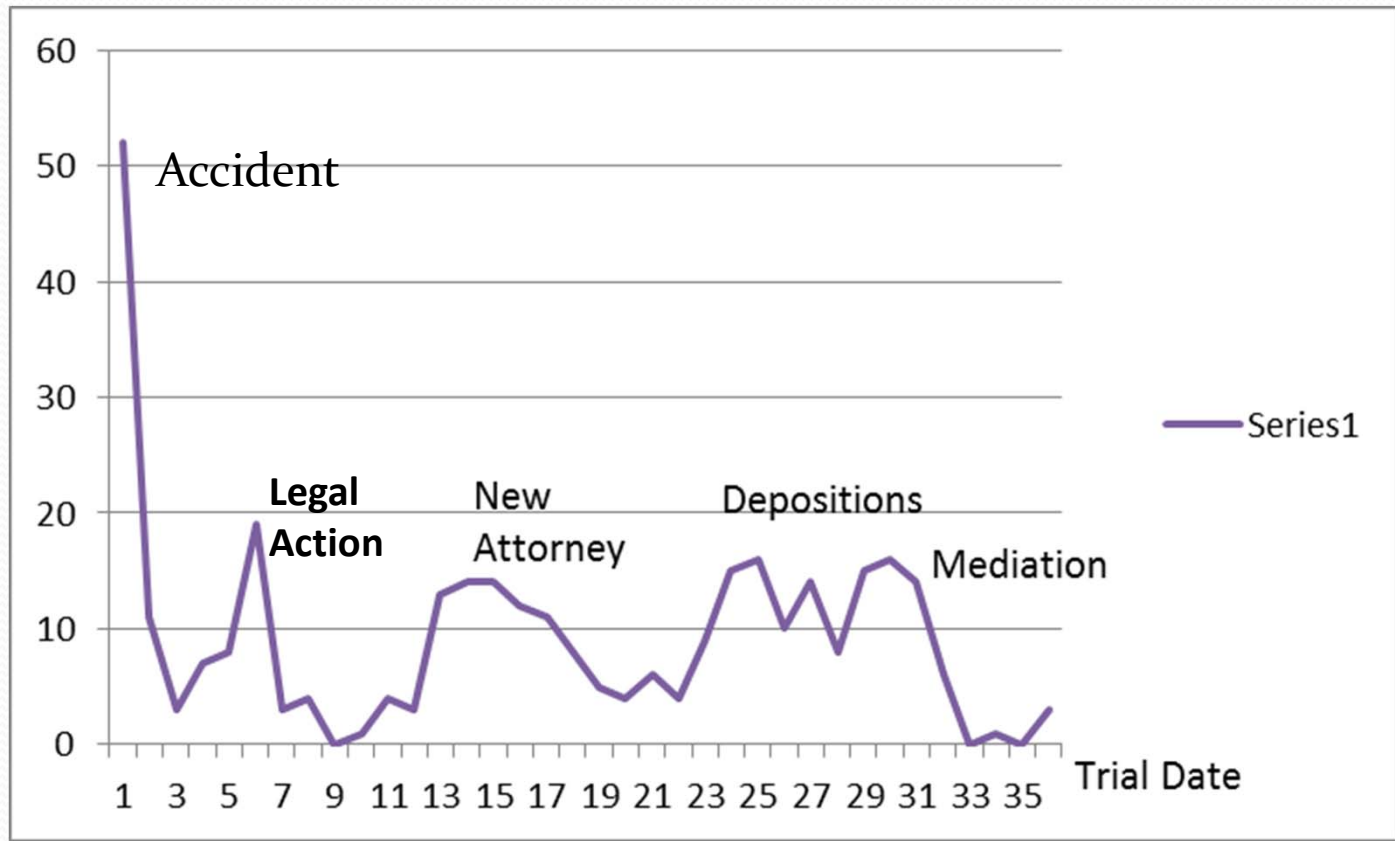
. . . Back to The Case

- The student is injured with serious burns on 20% of her body (primarily partial thickness – 2nd degree).
- First aid is given and an evac is completed (more . . .)
- Injuries require a 25 day hospital stay and some limited grafting surgery (Day 14).
- Subject progressing well. Relationship friendly.
- Seven months out and lawsuit arrives (12/1/11).

Legal Case Sequence

- Named defendant(s) (CSUN and Wright)
- Cross-complaint/ defendants
 - Distributor of stove, distributor bottle, wholesaler
- Discovery Process
- Research and Investigation
 - Interviews
 - Expert Witnesses and Consultants
- Deposition
- Mediation/ Settlement/ Trial (almost)

Timeline by E-mail Traffic by Month



Begins 4.15.11 1.17.14 Ends (3.6.14)

What do you want to know?

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Issues raised for discussion? The conversation?

- Safety Issues
 - How did the accident happen? Responses?
 - Staff behaviors
 - Improved SOP or better practices.
- Legal Issues
 - Waivers Question – Do they work?
 - Product Liability & Professional Liability
 - Defense Strategies/ Cross Defendant Strategy
 - Role of Insurance Companies
- Organization Issues
 - Preparation/ Post Incident Response/
 - Cost Issues/ Settlement or Trial

Good News - Post Incident

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The Emergency & Evacuation Response (Actions and Blessings)

- Flames extinguished (approx. 7:15/7:30 pm)
- Cooling of burns immediately
- Runners dispatched for 911 (request ALS & Helicopter)
- Victim liter transport by students & staff
 - (Intermediate car transport)
- Advanced Care Ambulance – @ 70-80 min.
- Helicopter Transport – @ 90-100 min. (in the air to Burn Center at 9:08 pm)

Post Incident Responses

- Emergency Forms in Place/ Family Contact
- Communication/Media Plan
 - In place but did not need to be used
- Family Care Plan
- Trauma Care for other Students
- Equipment – *Chain of Custody*

The Legal Arguments

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Negligence: the 4 Basic Premises

- Duty Owed
 - Invitee/ Licensee/ Trespasser
- Duty Breached
 - Failure to perform the *standard of care*
 - “reasonable and prudent professional” (complex)
in this case is the accident “foreseeable”
- Damages
- Proximate Causation

Negligence Defenses

- Negative Defense

Some point of the negligence construct

- No duty
- **No violation of the standard of care doctrine**
- No damage
- No proximate causation

Negligence Defenses

- Sovereign Immunity
 - Argument prepared by defense in this case but abandoned
 - Limitations are significant
- Affirmative Defense
 - Contributory negligence (if any; lose all damages; not CA)
 - Comparative negligence (CA - % shared)
 - Product liability strategy// No victim CN strategy employed
 - Assumption of risk and release of liability

The Release Debate

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The Release: what's in one?

- A *release of liability and waiver of the right to sue* if any loss results from participation in the activity.
- An *express assumption of risk* where the participant acknowledges understanding the nature of the activity and the risks involved, and chooses voluntarily to accept those risks.
- A *hold harmless agreement* where the participant agrees not to hold the CSU responsible for any loss that may result from participation in the activity.
- An *indemnification* where the participant agrees to pay the CSU for any losses it may suffer as a result of the participant's participation in the activity.
- A *medical consent* in which the participant agrees to be responsible for his/her own medical expenses that may result.

Do Waiver's Work

LIKELIHOOD TO ENFORCE LIABILITY WAIVERS				
Not Enforced	Strict Standards	Moderate Standards	Lenient Standards	Insufficient Information to Classify
La. Mont. Va.	Alaska Ariz. Calif. Ark. Del. Conn. Hawaii Maine Ky. Miss. Nev. N.J. Pa. Vt.	Colo. D.C. Fla. Idaho Ill. Minn. low a N.C. N.M. Ore. Okla. S.D. S.C. Wash. Texas W.V.	Ala. Ga. Kan. Md. Mass. Mich. Neb. N.D. Ohio Tenn.	Puerto Rico R.I.

- At least 46 states, waivers can protect service providers from liability for injuries resulting from the ordinary negligence (2006. Cotton D. "Waivers & Releases of Liability" (5th edition))

Do Waiver's Work? If . . .

- NOT gross negligence
 - “an extreme departure from an ordinary standard of care”
- a well-written waiver (CSUN held a defensible waiver . . .)
 - Specific, clear, unambiguous in language
 - Have reviewed by local legal counsel with specific expertise
- properly administered (Staff!!)
 - Not rushed, questions, open for consideration
- voluntarily signed by an adult
 - Parents can't waive minors right in CA
 - NO coercion (peer pressure, authority, grades?)
 - What if they do not sign the waiver?

What about that stove?

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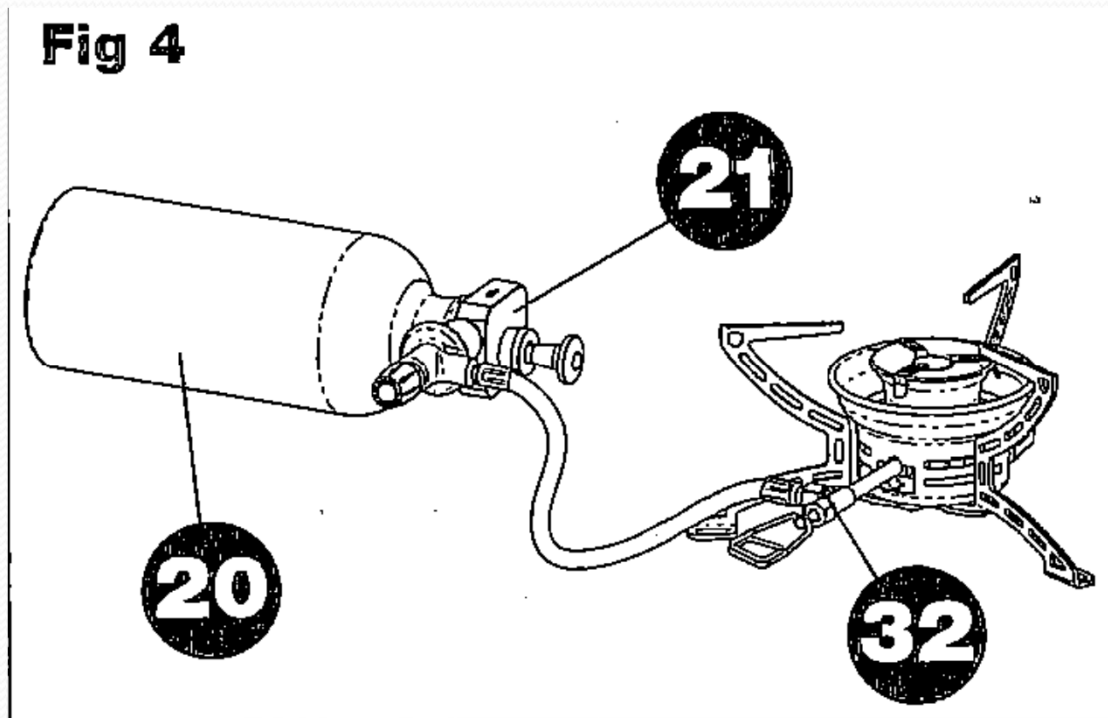
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What about the Stove?



... in the end all we have is plausible theories

Deposition



- lots of questions
- 1061 pages
- 3 days
- hostile interactions
- interesting rules of engagement

The bottle debate

- What's written?
- Manufacturer's statements are key

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The interchangeable bottle issue

Attack

- “6.02 Fill a _____fuel bottle with liquid fuel to the filling mark. Note: never overfill the bottle.” (instruction sheet)
- Fuel Bottle: “Use only _____ Fuel Bottles with your _____Stove”

Counter

- “The connecting threads are standard. Fits most common stove pumps” – seller written statement
- “_____ fuel bottles fit most other brand pump stoves that burn liquid fuel.” - seller quote
- Professional practice

Lessons Learned

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Why did we settle?

- Risk assessment (loss/gain /risk)
 - The ‘business decision’
- Fear of the “run away jury” in combination with the high profile attorney of plaintiff.
- Liability insurance in place that could settle the claim
- Concerns over certain aspects of the defense case
- Aversion to negative publicity
- Large system: deep pockets and legal resources that create a movement toward settlement (10.23.13 ready for trial/ 10.28.13 mediation day/ settled)

What we lost by settling?

- Release and waiver not heard – lost case law option
- Negligence argument not heard
 - “Foreseeable” issue not argued
- Lost the risk settlement game to risk aversion which had become the mantra of many organizations.

Changes in our SOP

- Students not allowed to bring or use any ‘critical safety’ gear on field trip. Stoves explicitly included in this phrase rather than climb gear only. (What if)
- Stoves must have a full breakdown annual inspection in addition to “inspection as put into use”.
- “No Exceptions” for compliance with published manufacturer’s information
 - Over rules standard professional practice (hammered)
 - ?Adolph's Meat Tenderizer?

A program checklist for your readiness for a lawsuit

- ___ Safety protocols written and followed
 - You will be asked?
- ___ Paper work ready to present (releases, SOP, invoices, descriptions of programs, certifications, trip plans, evacuation plans,
- ___ Insurance limits adequate? Activities covered
- ___ If Big organization – do they know, do they have your back,
- _____ Others:

Personal Learnings

- Emotional Impact
- Insurance and Incorporation are essential
 - Moral duty and Financial duty
- Integrity is your only thing to offer
- Nobody really wins once greed becomes involved