

CURRENT INITIATIVES – LEGAL RESPONSIBILITIES AND RISK MANAGEMENT STRATEGIES IN OUTDOOR RECREATION

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As a civilised society we are drawn to the pursuit of adventure and challenge. At the same time we expect to be protected from injury and death and believe we have the right to compensation for loss. The present insurance crisis is effecting the viability of many businesses. The Outdoor Recreation Industry is no exception. Many Outdoor Recreation and Adventure Tourism companies have been forced to close their doors. Much soul searching by the industry has lead to a number of possible solutions including the formal training of operators in risk management planning and reducing exposure of risk, both for the operators and their incumbents. An understanding of risk and legal responsibilities is inherent in good risk management. The Outdoor Recreation industry has already come a long way in its development of a number of risk management tools. We need to ensure these tools are adequately meeting the industry's needs and work on their further development rather than reinventing the wheel in the rush to try to obtain insurance.

Introduction

In today's cultural climate extreme sports are growing at an incredible pace. The ability to climb Mt Everest is determined by what you're willing to pay. People are wanting to subject themselves to months in the wilderness living on what the environment has to offer in programs like 'Survivor', well aware that their chance to win a million dollars is minimal. Yet our culture promotes a civilised society that is safe, comfortable and predictable. The increasing number of litigation cases means that we try to protect ourselves and our participants from any sort of real or apparent risk.

In the midst of this "safe" civilised society the Adventure Tourism, Adventure Therapy and Nature Tourism are the new growth industries while Outdoor Recreation and Outdoor Education areas continue to grow steadily. One Victorian Outdoor provider recently reported it's annual turnover had risen from 2 million dollars to 8 million dollars in 4 short years. Why is there a heightened interest in schools in Outdoor Education and why do some individuals still deliberately pursue the discomfort, possible danger and unpredictability in the form of outdoor adventure pursuits?

In 1906 Sir Ernest Shackleton placed an advertisement in the London Times which asked men to accompany him on a hazardous journey. He offered small wages, bitter cold, long months of complete darkness and constant danger. He emphasised safe return was doubtful but their would be honour and recognition if successful. Shackleton emphasised that the expedition would be difficult and strenuous work which would most likely involve the loss of life (Shackleton, 1919). He had almost five thousand men apply.

People like Sir Ernest Shackleton, who led all his men to safety after a failed expedition to traverse the polar continent, have become revered heroes, noted as outstanding leaders of their time. It appears that the very essence of what appealed to Shackleton and his men all those years ago, to undertake such an adventure, still appeals very much to the desires and needs of humankind today.

In 1984, another advertisement, this time in the Australian Geographic, enticed people to give a year of their life for the adventure of their life in the remote Kimberley region of Northern

Western Australia, and again thousands of people applied. This continues to be the response with increasing numbers every time Australian Geographic offers this opportunity.

It seems our desire to be challenged, to seek adventure and to embark upon activities that may have an uncertain outcome and elements of risk have not diminished over the years. On the other hand the desire to be protected from injury and death and to have the right to compensation for some sort of loss has increased considerably as our society becomes more litigious. "The standard of care of professionals has increased with the passage of time in step with society's expectation"(Abrams, 2001, p2).

Latter day adventurers still want a sense of adventure and challenge in outdoor activities, but have no intention of being injured. Most people want the appearance but not the essence of risk so participants expect outdoor leaders and providers to protect them from any real harm (Haddock, 1993).

Current Initiatives

Since October 2001 over 44 adventure based tourism companies in Victoria have gone out of business due to, in nearly all cases, the inability to find an Insurer. The crisis of small businesses, sporting groups, community groups and even doctors trying to obtain insurance is very much in the forefront of the current news. Many businesses across all sectors of the market place are having the same difficulty finding insurers.

The Insurance Council of Australia reported that in recent years for every \$1.00 paid in premiums there have been claims costs of \$1.34 (McArthur, 2001). Public liability insurance is now proving difficult or impossible to obtain in this country. The viability of many companies to continue to operate depends on their ability to obtain insurance. Sport and Recreation Victoria and the Australian Sports Commission recently led a national review of insurance issues facing sport on behalf of the Commonwealth-State Standing Committee on Recreation and Sport (SCORS, 2002).

The review recommended a range of measures to improve insurance outcomes. Firstly, that a comprehensive risk-management system be instituted nationally for the sport and recreation industry. Secondly, the development of a national insurance education program with detailed plans to facilitate group purchasing of insurance by sport and recreation organisations (Active State, 2002).

A National Summit on Public Liability Insurance held on 27th March 2002, also raised a number of issues these included:

- volunteer protection and protection of organisations from liability for minor claims when the organisation meets specified safeguards.
- protection of land managers and owners from liability where they meet specified standards and
- amendment of the Trade Practices Act to enable participants to legally and confidently assume personal responsibility for high-risk activities (Active State, 2002, p16).

In December 2001, a number of key stakeholders and government agencies called an Outdoor Recreation forum to look at the problem of insurance, litigation and risk management. The outcomes from this forum include the continued development of the Minimum Standards for Outdoor Recreation activities in Victoria. The forum also discussed the possible use of and further development of Safety Network /Outward Bound "Outdoor Medical Database" to collect data and participation rates in outdoor recreation for use in working with government and insurance agencies regarding risk management practices, program accreditation and insurance premiums (McArthur, 2001).

This forum highlighted the need for operators to review the risks in their businesses and to consider how to reduce and manage their risk better. Jamvold, (2001) proposed that the industry look at a structural change. Options suggested included, risk transfer, formal risk management, direct claims cost reduction and deliberately contesting selected public liability claims.

Risk Transfer allows operators of inherently risky activities to require participants to assume the inherent risk:

Risk transfer has been a key element of the strategy employed by the white water rafting industry in British Columbia in Canada to reduce claims costs and induce insurers back into their market. Specific indemnities are in place in some jurisdictions under what are called “Good Samaritan” legislation where specific activities, such as emergency medical assistance, is permitted to perform its tasks free from the threat of professional or public indemnity claims. There is always an overriding understanding, of course, that such legislation does not protect operators from claims of gross negligence. (Jamvold, 2001, p2).

Formal risk management involves the formal training in risk management through a university, TAFE college or specialist educator. The educator would be accredited for the task. Operators would be licensed as being competent in risk management. Formal codes of conduct, or minimum activity standards, would be established to set the yardstick for operator performance and for assessment of negligence. This would help eliminate negligence, reduce claims costs and improve the community’s approach to risk management (Jamvold, 2001).

Direct claims cost reduction would include such things as claims capping and the establishment of minimum hurdle values and structured settlements.

Deliberately contesting selected public liability claims can be undertaken by insurers and by industry. The objective is to develop a case history of claims being successfully defended. With such a case history, plaintiff lawyers can be induced to recommend to clients that they not proceed with weak cases (Jamvold, 2001).

“This strategy of contesting claims has been successfully applied in the white water rafting situation in British Columbia, in protecting claims against snowfields operators in Victoria and NSW and in the Victorian Work Cover environment”. (Jamvold, 2001, p3).

The solution to the insurance crisis needs to be a combined consultative process between the insurance industry, the government and the Outdoor Recreation industry. A combination of the ideas suggested above should be designed specifically to meet the needs of the each individual customers to be insured, taking into account their claims profiles and the circumstances at the time. (Jamvold, 2001).

Political Initiatives

In May 2000 a group of private outdoor recreation providers, through the Liberal Party, put a Private Member’s Bill forward which in essence tried to transfer the risk for adventure activity providers.

Initiated in Council 14th May 2002 by the Hon. W Forwood., the bill aimed to provide for the approval of operators of certain adventure activities, to restrict the circumstances in which damages may be recovered in respect of the injury or death of a participant in certain adventure activities and for other purposes

(Adventure Activities Protection Act, 2002):

The purpose of this Act is to regulate the compensation of persons who die or suffer injury arising out of, or in the course of, their voluntary participation in adventure activities which by their nature involve inherent risk of injury to participants, particularly where the physical or environmental challenge of the element of risk form part of the participant's enjoyment of the activity. (Adventure Activities Protection Act, 2002, p1).

This Act was read, moved and passed on the 29/5/2002 in the Upper House of the Victorian parliament but subsequently thrown out by the Victorian government in the Lower House. No further action has been taken with this bill.

On the 27th of June 2002 Senator Helen Coonan, the Minister for Revenue and Assistant Treasurer introduced legislation to allow individuals to assume their own risk when undertaking risky activities to the Parliament. This was after the last Ministerial Meeting on Public Liability insurance where the Commonwealth had agreed to amendments to the Trade Practices Act so that individuals are able waive their right to sue when undertaking risky recreational activities (Lambert, 2002).

Senator Coonan said that the amendments would still allow injured consumers to sue if they are victims of gross negligence. Senator Coonan also emphasised that Adventure Tourism and sport business will still need to run safe and responsible business but these measures would assist them in the use of waivers and help reduce the cost of negligence claims and take pressure off insurance claims (Lambert, 2002).

The current crisis in insurance is having far reaching effects on all sectors of industry. On July 1st 2002 the Victorian State Government announced a bail out of Victoria's 250 million dollar Adventure Tourism industry by providing short term insurance support for approximately 30 Adventure Tourism companies that planned to close after failing to get public liability policies (Buttler, Ferguson, 2002).

The adventure based tourism industry, the outdoor recreation industry as well as sporting and community groups have been severely effected by this current crisis. Is this because traditionally these are considered areas of 'high risk'? Areas where the chance of injury or death is higher? Are there other areas that are perceived to be safer that actually may have a higher risk for the participant?

Collard (2000) examined the safety record of challenge ropes courses and found that challenge ropes courses were safer than many of the activities our society undertakes without hesitation everyday.

Referring to the "*Twenty Year Safety Study*", research has indicated that Challenge Course programs recorded 4.33 injuries per million hours of use, roughly equivalent exposure to risk as working the finance, insurance and real estate sector. To put this data in its proper perspective, injuries from driving a motor vehicle rate at approximately 60 injuries per million hours of use (Collard, p69, 2000).

Collard (2000) also looked at safety comparisons between challenge ropes courses and school Physical Education classes which found that the safety record of Challenge (Ropes) Course programs to be much safer than standard high school Physical Education classes.

Hurrell, Chapman and Dickson (2000) also found that students were twice as likely in a six month period to be injured playing Rugby Union than Rock Climbing and twice as likely to be injured playing Netball than participating in Snow Skiing. They conclude that outdoor programs are relatively risk free (physically) but that the public's perception is influenced by other factors. The public perception of Outdoor Recreation and Adventure Tourism is one of

high risk. Many adventure-based outdoor educational programs offer risk as a medium for personal growth, development and team building. Adventure based programs which have elements of risk are a popular component of many school, recreation and community programs, however society still expects outdoor leaders to keep risks at 'acceptable levels' (Haddock 1993).

Risk

"To try is to risk failure. But risk must be taken, because the greatest hazard in life is to risk nothing" (Unknown source cited, Beedie 1994, p.13).

Risk has been defined in various manners. Beedie (1994) states that risk is an uncertain outcome, and any threat to ones physical, mental and social well being. Browns' (1995) includes the exposure to the chance of injury or loss, or simply the possibilities of loss. The Oxford Concise Dictionary terms risk as a hazard as well as a chance of, loss, injury, a bad consequence or exposure to danger.

Martin (1996) explains adventure in the outdoors has to do with risk taking and being prepared to put something on the line, prepared to confront the unknown. If there wasn't an unknown element, then it wouldn't be an adventure.

Loynes (1996) illustrates that there are three different types of risk. Perceived risk, subjective real risk and objective real risk. Perceived risk is something that seems dangerous to the participant, but is protected. Subjective real risk is something that is dangerous for some individuals but can be controlled with equipment, skills and judgment. Objective real risk is something that is dangerous for all individuals and cannot be controlled.

The Outdoor leader should be careful not to expose the participants to real risk. There are many kinds of risks for the outdoor leader to be aware of, psychological, emotional, physical, culture, social, gender and spiritual risk. (Haddock1993).

Legal Responsibilities

"Courts and camps are the only places to learn in the world"
(Earl of Chesterfield, cited Abrams, 2001, p17).

The outdoor leader needs to manage and minimise risk for both moral and legal reasons. The law requires outdoor leaders to provide a high standard of care, which is in keeping with sound common practice. Over the past century, the law has demanded an increased standard of responsibility from those placed in a position of trust.

Legal liability of educators is now to take reasonable measures to protect students in their care from risks of injury that the educator should have reasonably foreseen.

The duty requires affirmative action to take reasonable steps to prevent reasonably foreseeable risk of injury (Abrams, 2001, p3).

Three elements need to be established for a participant or pupil to be successful in an action for damages against a provider, educator or school.

The three elements of negligence are as follows:

1. That the party sued owes the injured party a *duty of care* and a requisite standard of care is required to fulfil that duty.
2. That the standard of care has been breached and the *breach of the duty* has caused the injury for which the injured party is seeking redress, which is usually in the form of monetary damages.

3. That the *breach of duty must lead to actual damage* which may be physical damage, psychological injury/impairment or consequential loss (Abrams, 2001, p3).

The standard of care alters with various factors such as age, danger, handicap, and past experience.

The legal world acknowledges gains that can be made from participating in Outdoor Adventure activities but it is clear that leaders in this field have definite responsibilities. The State Coroner Graeme Johnstone in the Lal Lal Falls case where two students died due to a rock fall accepted that “a rounded education was meant to include outdoor adventure sports such as rock climbing and abseiling There are certain risks in these personal development sports. Therefore, they require the right balance of risk management to minimise the dangers”(Abrams, 2001, p 26).

Risk Management

One of the major points raised at each forum was the need for organisations and operators to have a clearly defined set of risk management policies and guidelines as well as formal training in this area. Within the outdoor recreation, outdoor education and adventure based tourism industry the concepts of risk management plans, emergency plans, organisational protocol and guidelines have generally been accepted as standard professional practice for many years. Even before the term 'Risk management' became accepted as a common tool to describe such protocol, leaders in the field were expected to complete the itinerary plans and trip plans. There was an expectation, for trips into the outdoors with students to follow such things as the staff : student ratios recommended, and staff qualifications and experience and equipment requirements according to safety guidelines put out by their governing educational body.

These basic principles have evolved and developed over the past ten years. There are now a variety of different approaches to risk management within the Outdoor field as well as outside this specific field, which offer detailed models and modes of applications of a variety of risk management plans and strategies.

The Australian and New Zealand standards (1999) outlines risk management as a process. It defines it as having well defined steps that support better decision making by contributing a greater insight into risks and their impact. Risk management is a process that includes identification, analysis, assessment, treatment, and monitoring risk in a proactive manner as well reviewing, communicating and consulting.

“The risk management process can be applied to any situation where an undesired or unexpected outcome could be significant or where opportunities are identified. Risk management is recognised as an integral part of good management practice” (Australian/New Zealand Standards, 1999, p3).

In the outdoor context it is about reducing the risks to acceptable levels (Haddock, 1993). There are many resources and books, which focus risk management for the outdoor leader or activity provider. (Priest and Gass, 1997; Brown, 1998; Safety Guidelines, State Government of Victoria, 1998). Haddock's (1993) *Managing Risk's in Outdoor Activities* gives a straight forward and easy to use approach for the outdoor leader and is widely used in the outdoor educational sector. Jack's (no publication year cited), *Strategies for Risk Management in Outdoor and Experiential Learning*, is very useable in terms of it's step by step approach to developing risk management strategies and protocol and is particularly pertinent to the small business operator. *The Australian and New Zealand Standard on Risk Management* (1999) is applicable and across many professions and industries including, with some modifications, the Outdoor Recreation industry.

Refocussing Risk Management

The expectation for documentation of every aspect of an outdoor program continues to increase. So too does the complexity of risk management plans. Many have become unwieldy and do not effectively address the needs for which they were originally designed.

Hogan (2002) argues that most risk management plans are far more complicated than they need to be. He argues that they require listing all possible risks, and to make judgements about the likelihood of risk and the severity of the consequences. Some require quantitative assessments of the risks and whether these risks are acceptable, based on qualitative judgements that maybe flawed. Hogan also argues that we have lost sight of the crux of risk management, which is to minimise death and disabling injuries. Dickson (2001) supports Hogan's concerns. She puts forward Fines 1971(sited in Dickson, 2001) model of risk calculation for the outdoor and experiential learning environments but cautions that the risk

identification and assessment is not a objective one but a subjective process based on human judgement, determined by previous experience and knowledge. The Australian/New Zealand Standard (1999) also provides a qualitative risk analysis matrix where levels of risk are to be calculated and prioitised, but makes no allowance for the subjective nature of these types of judgements.

Hogan (2002) suggests we need to refocus our attention on what the initial development of risk management plans were for. They were developed for the minimising the possibility of death and disabling injury in outdoor programs. Hogan refocusses our attention and asks us to look not just at the broad view of all the risks that can occur on an outdoor activity or trip but to address the less frequent but more harmful situations that can cause death or serious injury. Hogan argues that in a number of incidents in the outdoors where a death or serious injury has occurred the leaders had completed detailed risk management plans yet these had failed to address the real risk that could occur and that what had taken place in their preparation was not proper risk management.

Hogan (2002) asks the planner to define risks identifying the events that will directly lead to death or serious injury. He puts forward a model based on Ballie's (1996) concept that there are only three things that cause death or disabling injury. Drowning, Impact with something solid and Exposure or hypothermia.

Hogan (2002) adds 5 of his own possible causes of death or disabling injury, Heatstroke, Severe burns, Electrocution, Poisonous bite, and pre-existing medical condition. In implementing his risk management Hogan asks the planner to identify the real risks that may fall into one or more of these 7 categories. The planner is then asked to consider the relevant organisation guidelines/rules and other relevant standards/policies. Lastly the planner is asked to identify the dangers that might lead to those risks eventuating, using the categories outlined in Haddock's (1993) Risk Analysis Management System. (See Figure 2).

Figure 1:

Risk management Planner for outdoor activities (based on RAMS, Haddock1993)

Activity		
Activity description		
Risks which could lead to death or disabling injury (disabling injury could be defined as any injury needing ambulance transport or outside rescue authority assistance)		
Relevant organisation guidelines/rules		
Other relevant standards/policies		
Risks Covered (it is recommended that one page be used for each identified risk or class of risk)		
	Dangers Factors which could lead to each inherent risk eventuating	Risk management Strategies Strategies to reduce dangers
People Attributes people bring (or don't bring) to the activity e.g. skills physical fitness, health, age, fears.		
Equipment Resources that impact on the activity e.g. clothing, vehicles, craft, ropes.		
Environment Factors that impact on the activity. e.g. weather, terrain.		
Critical Incident management (Emergency procedures should the risk management strategies be adopted)		

Hogan (2002)

Conclusion

With a different approach Hogan adds to the development of risk management plans and strategies by asking the planner to focus on preventing death and disabling injury and to insure that effective planning takes place to reduce the possibility of these occurring. As the outdoor industry and profession come under greater scrutiny, we must look at what we have already achieved and acknowledge the work that has already been done to address minimising the risks we subject our participants to. The Outdoor Recreation profession has made many positive contributions to the development of risk management protocols. We must also look at the protocols and operational procedures already developed and decide what is effective and workable for our industry and identify problems that need to be improved like those suggested by Hogan (2002), Dickson (2001), Hunt (1984) and others.

Much work has already been done by other stakeholders in the Outdoor industry in areas such as, Campsite Accreditation, Program Accreditation, National Competencies, Safety Guidelines and Minimum Activity Standards. Let us not ignore what we already have. In the rush to renew insurance policies and survive in this ever increasing litigious society we may be tempted to reinvent the wheel rather than working to further develop what we already have began.

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