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THE PUBLIC RESPONSIBILITY AND LEGAL LIABILITY OF OUTDOOR EDUCATORS IN CANADA

by

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

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ABSTRACT

In this thesis, the writer presents and discusses the legal, moral and professional responsibilities of those assuming the role of outdoor educator in Canada's outdoor education/recreation program delivery agencies and boards.

This was achieved through a study of statutory, common and case law as they pertain to outdoor education and related fields. Through this review, outdoor educators' duties were defined, as well as those vicariously assumed by the agencies and boards who employ them. Negligence and usually an accompanying legal liability arises from breaches of these prescribed duties.

It was shown that in some instances, the legal, moral and professional obligations of those acting in the capacity of outdoor educator are not necessarily corroborative. This incongruence may occur in, for example, motor vehicle law, or that pertaining to the use of waiver forms when these are signed by consenting adults.

A number of differences in the manner in which the Canadian legal system views and handles cases involving child plaintiffs as opposed to adults were also illustrated, as the majority of outdoor educators teach/lead students/participants who are under the age of majority.

This research, together with a review of existing outdoor education customs, was subsequently utilized to develop a set of outdoor leadership and programming guidelines. It was hoped that these guidelines would be useful for those initiating new outdoor programs, and that they may help all prospective outdoor leaders and their employers avoid entering into situations where they may be found legally negligent in the performance of their legally and/or ethically defined duties.

ACKNOWLEDGEMENTS

The author wishes to express her sincere gratitude to her committee for the time and assistance they generously gave in the preparation of this thesis. Warmest heartfelt appreciation is extended to Dr. H.A. Scott (Chairman) of the Department of Physical Education, whose constant encouragement and feedback made this research a pleasure to pursue. Very special thanks are also extended to Dr. S.W. Mendryk of the Department of Physical Education and to Professor E.I. Picard of the Faculty of Law, whose energy, time and informed advice were much appreciated.

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Table of Contents

ABBREVIATIONS OF COURT TITLES

C.A. – Court of Appeal (England)

H.L. – House of Lords (England)

Ex. Ct. – Exchequer Court (England)

K.B.D. – King's Bench Division

Q.B.D. – Queen's Bench Division

S.C.C. – Supreme Court of Canada

Alta. C.A. – Alberta Court of Appeal

B.C.C.A. – British Columbia Court of Appeal

B.C.S.C. – British Columbia Supreme Court

Man. C.A. – Manitoba Court of Appeal

Man. Q.B. – Manitoba Queen's Bench

N.S.C.A. – Nova Scotia Court of Appeal

Ont. C.A. – Ontario Court of Appeal

Ont. S.C. – Ontario Supreme Court

Ont. H. Ct. – Ontario High Court

P.E.I.S.C. – Prince Edward Island Supreme Court

Sask. Q.B. – Saskatchewan Queen's Bench

H. Ct. Aust. – High Court of Australia

I. IS THE RISK WORTH TAKING?

Both aboriginal Canadians and pioneering immigrants to this country risked the presence of numerous natural hazards including storms, floods, droughts, wild animals, diseases and so on. But, their environmental sensitivity and pioneering ingenuity made the existence of these risks tolerable.

Contemporary urban society has learned to protect itself from these natural risks and has replaced them with risks inherent to many of today's technologically complex 'necessities'; motorized transportation, electrical and nuclear energy and the development and utilization of an ever increasing number of largely synthetic toxic substances. Although every member of Canadian society is affected in one way or another by these factors, actual risk of injury or pre-mature death has been increasingly minimized through improved production standards, government regulations and medical technology. As a direct result of living in this somewhat sterilized society, the lives of most Canadians have become relatively routine and mundane.

The writer believes that the increasing popularity of recreational pursuits involving inherent elements of challenge, adventure and risk are a largely unintended reversion designed to combat the aforementioned urbanization and associated boredom. Although numerous other factors such as increased mobility, discretionary time and money, advances in equipment and media coverage have all been influential, the need to see and experience the land and to be temporarily relieved from 'city stress' has been the common denominator promoting all outdoor pursuits (e.g., backpacking, canoeing, cross-country skiing, etc.) currently in vogue.

Leaders in Canadian school systems, as well as a wide variety of public and private recreation agencies have seen the physical, intellectual and social benefits derivable from participation in these types of leisure activities and have hence become directly involved as programmers and facilitators of these types of experiences.

For example, Bresnehan, in discussing the philosophy of Alberta's Junior Forest Wardens program, states:

> Young people today, especially those in their teens are trying to identify what their relationship is with themselves, their peers, society and the natural environment. The instinct for adventure, risk and challenge is natural in this age group and if it is not provided through educationally sound programs, it will be

manifested in other ways.[1]

March, Outdoor Pursuits Cooodinator at the University of Calgary, believes:

> ...outdoor pursuits has attracted the educationalists as an extremely potent tool in the development of the fully actualized person. The element of interpersonal competition, an all-pervasive and not always healthy aspect of modern living, is subordinated to an inner growth of self, others and the environment.[2]

In addition to these practitioners' claims, the power of outdoor education as a venue facilitating improvement of the participant's perceived competence and feelings of self-determination; in short his self concept, has been well substantiated and documented by a number of Canadian researchers.[3]

However, because of the inevitability of accidents (a statement of fact) and the potential for resulting legal litigation, many school boards and recreation delivery agencies are questioning the validity of offering such activities as part of their curricula or program. In their efforts to avoid legal reprisal, many potential lifetime leisure activities have been either completely avoided, discontinued or taught in a manner which has rendered them so safe that they no longer contain the essential ingredients of risk and excitement. The "watered down" remnants have often been labelled "too soft, too dull, and too ordinary."[4]

Although the writer hopes to explain, through this thesis, the basis of legal liability in outdoor education and how accidents which may result in unfavorable litigation can be avoided, it must be admitted that the present practitioners' fear of litigation is not completely unfounded. The last decade has seen a tremendous increase in the number of civil suits brought against the professions and a concommitant increase in the standard of care expected of these people has not made the situation any easier. "Nowhere are these trends more noticable or causing more concern, than in our educational system" says

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[1] William Bresnehan, Legal Liability and Protection in the Junior Forest Warden Program: Script from slide tape presentation, p. 1.
[2] William March, "Outdoor Pursuits - What are the Legal Implications," Canadian Intramural Recreation Association Bulletin, Vol. 6, No. 1, p. 1.
[3] William G. Gibson, "Evaluation of Outdoor Education Using Guttman Scales and Sociometric Analysis," (Unpublished Master of Arts Thesis, University of Alberta, 1966); Shauna Thompson, "Self and groups in Outdoor Education," (Unpublished Master of Arts Thesis, University of Alberta, 1974); Roger Grant, "A Juvenile Wilderness Corrections Program Assessment," (Unpublished Master of Arts Thesis, University of Alberta, 1979).
[4] Betty van der Smissen, "Legal Aspects of Adventure Activities," Journal of Outdoor Education, Vol. 10, p. 12, 1975.

Rogers, a lawyer and solicitor for the North York Board of Education.[5] He attributes these trends to society's decreased individualism and increased reliance on government and he sees an ever increasing association with large corporate entities and smaller, but well insured private enterprises, allowing us to become emotionally dissociated with them.[6]

van der Smissen, an American lawyer and a prolific writer in the area of legal liability in the physical education/recreation professions, believes that "today's suits against the individual indicate a lack of the old sense of community feeling."[7] She feels that it has been replaced with the somewhat questionable attitude that regardless of fault, society 'owes' the individual should he/she be injured. As Rogers supports:

> The public of today is less and less likely to accept misfortune as a fact of life and is more inclined to look to the courts for compensation.[8]

Although most school boards and recreation delivery agencies are well insured against negligence, those teachers and educators instructing or leading so-called 'high-risk' activities (and insurance companies consider most outdoor pursuits as 'high-risk' activities) are quite justly concerned and anxious to know and understand what standards of performance the courts expect of them.

It is in the study, evaluation and implications of this form of potential litigation for outdoor educators, that this thesis will focus its attention.

A. Statement of the Problem

The purpose of this study was to develop a set of guidelines for outdoor educators which may help them better understand their legally defined duties, and thereby avoid situations where they may be found legally negligent in the performance of these prescribed duties.

These guidelines were based on a study of statutory, common and case law as they relate to the duties, and subsequent liability for negligence, of individuals assuming the outdoor educator role in Canada's outdoor adventure/pursuits programming agencies

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[5] Donald H. Rogers, "The Increasing Standard of Care for Teachers," Education Canada, Spring 1980, p. 26.
[6] Ibid., p. 26.
[7] Betty van der Smissen, "Where is Legal Liability Heading," Parks and Recreation, May 1980, p 50.
[8] Rogers, supra n. 7 at p. 27.

and school systems.

B. Subsidiary Problems

A number of subsidiary problems directly related to the aforementioned problem were studied and discussed. These included an examination of the following questions:

1. What is an outdoor educator in the Canadian system; ie. what qualifications and certifications are commensurate to the recognition of an individual as a competent outdoors leader?
2. What are the legally definable duties of an outdoor educator? Do these duties and the standards of care pertinent to each vary in different activity pursuits and in different environments?
3. What are the existing and potential defences to tortious liability for outdoor educators?
4. How can outdoor educators and outdoor program delivery agencies best prevent and/or otherwise deal with the types of accidents likely to result in litigation?

C. The Outdoor Educator - A Conceptual Definition

At this point, a functional definition of the Canadian outdoor educator will serve not only to help clarify the author's perspective of this role, but also to identify the probable audience for this thesis.

There are probably as many definitions of the terms 'outdoor education' and 'outdoor educator' as there are individuals working in this area. There is, to date, no universally accepted definition in Canada, Britain, Australia, the United States or any other country of which the author is aware. Backiel [9] did a replicative thesis (repeating a 1968 study), comparing A.A.H.P.E.R. (American Association for Health, Physical Education and Recreation) Outdoor Education Council members' attitudes toward the term 'outdoor education'. Even with a seventy-one percent return rate on her questionaires, this researcher found that the responses were so variable that it was impossible to distinguish what the population discerned as the meaning of the term.

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[9] M.L. Backiel, "Comparative Study of Attitudes Toward the Meaning of the Term 'Outdoor Education' as Viewed by Selected Members of A.A.H.P.E.R.'s Council on Outdoor Education in 1968 and 1975" (Unpublished Master of Science Thesis, George Williams College, 1976).

A number of reasons exist for this lack of agreement concerning the content of the discipline of 'outdoor education', and even more exist regarding the qualifications and certifications which are commensurate to the recognition of individuals as outdoor educators. The first is the fact that outdoor education is a relatively young field. Doctors, lawyers and most other professionals and paraprofessionals have been recognized by function and by their organization for centuries, whereas a resurgence in broad interest outdoor programs and development of outdoor clubs and organizations has only really begun to grow within the last twenty to thirty years.

A second crucial factor in the slow growth of this area is the lack of a unifying organizational or administrative governing body or association. Although a number of activity-specific governing bodies and professional associations exist in Canada (e.g., Canadian Association of Nordic Ski Instructors, Canadian Ski Association, Canadian Recreational Canoe Association, Association of Canadian Mountain Guides, etc.), the closest these groups have come to a nationally representative organization is the C.A.H.P.E.R. (Canadian Association of Health, Physical Education and Recreation) Outdoor Committee, with about one hundred and fifty members who are primarily involved in outdoor education as school teachers, physical education consultants and university professors.

It is interesting to note that this committee, like its American counterpart, has been unsuccessful in its previous attempts at arriving at unanimously acceptable definitions of the terms 'outdoor education' and 'outdoor educator'. It would require an entire thesis to list all of the activities, teaching and leadership methodologies and environmental components the members of this group have pursued in the guise of outdoor education in this country, and nearly as much effort to describe and discuss the qualifications and certifications these individuals perceive are vital for leaders involved in the delivery of these programs and curricula. In a 1980-81 study by Wuyda et al.,[10] a nationwide survey of C.A.H.P.E.R. Outdoor Committee members and other known outdoor education practitioners yielded twenty-one responses and indicated that the most commonly held certifications were:

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[10] Glenda Wuyda, Ambrose G. Gilmet and Harvey Scott, "Leadership Qualification Versus Certification in Outdoor Education in Canada." An attitudinal survey completed for the C.A.H.P.E.R. Outdoor Committee, 1981.

1. A St. John's Ambulance First Aid certificate (thirty-three percent)
2. A Royal Life Saving Society Lifesaving Award (Bronze Medallion assumed) (twenty-eight percent)
3. A Red Cross Water Safety Award (twenty-three percent)
4. A teaching certificate from the province of the individual's employ (twenty-three percent)

About fifty-six percent of the agencies responding to the questionaire either provided one or more certification programs or required their leaders to hold one or more certifications. However, other than the first aid, aquatic and teaching awards mentioned, most organizations appear to be selecting their leaders' certifications on an ad hoc basis; little or no consistency existed among the provinces.

The vast majority (seventy-eight percent of respondents) appeared to see some value in the promotion of certifications to facilitate the development and selection of outdoor leaders, as long as they do not provide the sole criteria. However, a small but vociferous group (twenty-two percent) indicated strong opposition to the use or promotion of certifications for these purposes. These individuals and the agencies and boards they represent, advocated practical experience and apprenticeship as the best means to developing in leaders the judgment, empathy, initiative and other desirable leadership characteristics not currently nurtured in existing technical skill oriented certification programs.

This same attitude was reinforced by a nationally representative panel [11] and by a presentation by March on 'the Pros and Cons of Outdoor Education Certification', both heard at the 1981 C.A.H.P.E.R. conference in Victoria.

Hence, it appears overall that strong leadership qualifications are valued somewhat more than certifications and that leaders are by and large selected on the basis of their experience and perceived judgmental abilities, commensurate with the risk perceived in the activity to be pursued. These results were again supported in a later 1981 Alberta Law Foundation Study, carried out by four graduate students from the

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[11] The panel consisted of the following regional representatives: Stephen Cook (Atlantic Provinces), Alphonse Caissie (New Brunswick and Quebec), Patricia de St. Croix (Ontario), Andrew Power (Prairie Provinces) and James Boulding (Pacific Region).

University of Calgary, coordinated in part by the author. [12] In a section entitled 'A Survey of Population, Program Standards and Liability Factors in Outdoor Risk Activities in Alberta', Grav learned that personal and job related outdoor experience were deemed the most important criteria assessed by Alberta employers, (sixty-five and sixty-two percent respectively).[13] The forty-nine respondents ranked federal (fifty-five percent) and provincial (forty-five percent) certifications as the next most desirable factors. However, he also noted that a number of the agencies participating were bound by statute to hiring individuals with certain prescribed certifications (e.g., teaching certification, national park guiding certification, a university degree etc.).[14]

The study done for the Alberta Law Foundation was an Alberta based project; participants were from a wide variety of public and private agencies and camps, but all were located in Alberta. Alberta has been nationally regarded as one of the most certification/regulation oriented provinces in the country with respect to the outdoor programming area, undoubtedly due in large part to national park regulations requiring Association of Canadian Mountain Guides certification for high country leaders.

At this point, it should be clear to the reader that no single source may be drawn upon in presenting a satisfactory definition of who rates as an outdoor educator in the Canadian context. Therefore, for the purpose of this thesis, the writer has developed a fairly broad operational definition of the outdoor educator which includes the following parameters:

1. He or she may work as an outdoor program leader/instructor or facilitator and/or as an agency administrator where the latter's responsibilities may pertain to vicarious liability for subordinates.
2. He or she may be responsible for any number of program participants, from as few as one or two in the case of a guide to as many as fifteen or twenty in the case of some agencies and camps. Preferred ratios will be discussed in a later chapter.
3. No definite age delineations were made for either leaders or participants. Although most leaders were assumed to be over the age of sixteen, a large number of adolescent leaders or counsellors-in-training open to liability would not meet this

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[12] William March, Byron Henderson, et al., Legal Liability in Outdoor Education/Recreation in Alberta, (Calgary: Alberta Law Foundation, 1981).
[13] Eberhart Grav, in March et al., supra, p. 13.
[14] Ibid., p. 11.

standard. Outdoor participants come in all ages and ranges of abilities and disabilities and no attempt was made to restrict the scope of the study to children or adults. However, for three reasons an emphasis was placed on children from the ages of six to eighteen. First, this group accounts for the largest number of participants in outdoor programs. Second, due to inexperience and compulsiveness, youths in this age range appear to have the greatest propensity for accidents. And finally, case law indicates that adults are usually held personally accountable for exposing themselves to risks common in the out-of-doors and are therefore rarely successful in bringing actions against others in this area.

4. The outdoor educators discussed in this study were not segregated on the basis of whether they were paid or worked as volunteers. Although the majority of people working in this field are paid for their services, there are a tremendous number of volunteers involved as well (e.g., Boy Scout/Girl Guide, Y.M./Y.W.C.A leaders and leaders-in-training, etc.).

5. Because of the wide variety of activities which are currently being lead or taught in outdoor education, the writer, while not actually delimiting any from the general content of the thesis, chose to emphasize those pursuits which the Alberta Law Foundation Study indicated were most common; hiking and backpacking, canoe and kayak instruction and touring and cross-country ski instruction and touring.[15] The leader dealing with participants engaged in one or more of these activities is continually confronted with a number of potential risks inherent to these activities, those common to all outdoor pursuits (e.g., weather) and those which are more activity-specific (e.g., reading white water). Although the content of the study may be relevant to leaders pursuing other activities with their charges, (e.g., rock or ice climbing, spelunking, sailing, etc.) the highly technical aspects of these activities and the relative infrequency of their pursuit allowed the cursory coverage they received herein to be adequate in the writer's mind.

6. The outdoor educator referred to in this thesis may operate his/her programs in any environment from municipal parkland to true wilderness setting. The emphasis, however, was placed in the wildland environment in which most agencies and camps

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[15]Ibid., p. 9.

function (ie. private lands, national, provincial and municipal parks and crown lands).

As can be seen, this conceptual definition has of necessity been kept broad in scope, with only minimal effort being made at delimitation of the outdoor educators' responsibilities. Because of the lack of any similar research or writing in the area of legal liability in outdoor education, the writer felt that it would be more advantageous to provide a large group of potential readers with some general information relevant to them, than to cater to a smaller number in more specific terms.

D. Justification for the Study

The content and results of this thesis may be significant in three ways:

First, although Canadian academics have produced parallel works in the areas of legal liability pertaining to physical education teachers, [16] recreation professionals, [17] and sport coaches;[18] no similar effort has been made concerning outdoor educators. Therefore, this study may be justified on the basis of its contribution to society's body of knowledge.

Second, because a concrete set of operational guidelines for outdoor educators is to be developed, the results of this thesis may be considered significant for social and practical application in the field of outdoor education. The writer sees the acceptance of such guidelines as being crucial to the development of outdoor education as a credible profession or para-profession.

And finally, as an outdoor educator with special interest in leadership development, the author is personally concerned with the maintenance of outdoor education career opportunities for individuals qualified to assume that role. The increasing number of incidents over the past five years has led to an increasing fear of legal reprisal in agencies engaged in outdoor education delivery, and some are opting out of what they perceive to be an uncertain and potentially hazardous role. A reduction in the number of agencies offering outdoor programs means a significant decrease in the number of opportunities for employment in the field. This detrimentally affects oportunities not only

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[16] Donna L. Hawley, "The Legal Liability of Physical Education Teachers," (Unpublished Master of Arts Thesis, University of Alberta, 1974).
[17] Stephen Bird, "Tortious Liability in Recreation Activities," (Unpublished Master of Arts Thesis, University of Waterloo, 1979).
[18] National Coaching Development Program, Alberta Plan, Level One Theory, Coaches Manual, Alberta Recreation, Parks and Wildlife, n.d.

for those individuals who wish to become qualified as outdoor educators, and those who work in the area of outdoor education leadership development, but also the opportunities for satisfactory outdoor experiences by those individuals in the society who rely on these leaders to enhance their outdoor pursuits.

E. Limitations

Because of the tremendous scope of this study, the author feels that there are at least five possible limitations which may affect its outcome:

1. The reader must be cautioned that the information provided in this thesis is not intended as an absolute legal reference, but merely as a guide for outdoor education practitioners, based on statutory, common and case law as they exist at this time in the profession's development.
2. It may be difficult for the writer to identify duties and predict liability where no precedents have as yet been set. Because of the large number of variables potentially involved in any one case, it will be impossible to draw conclusions and subsequent recommendations based on the incorporation of more than a few of these variables at a time. In the end, each case will be tried largely on its own merit.
3. In addition, because few outdoor education cases appear to have been brought to court and therefore few precedents exist to date, future judicial decisions may appear unusually speculative. Members of the judiciary may or may not see the social utility of outdoor education in the same light as an outdoor educator and this may affect their judgment.
4. Because the author is an outdoor educator, some biases held may be reflected in the position taken and recommendations made in this thesis.
5. And finally, because the author does not hold a law degree, the validity of this thesis may be questioned by some readers. However, as this study is not intended as a strict legal reference, but rather as a practical guide for the practitioner, based on legal principle, it is hoped that this will not be a significant issue.

F. Delimitations

The writer has also placed five delimitations on this thesis:

1. As previously mentioned, this thesis will adopt a Canadian scope, and as such, implications and guidelines drawn from it will apply only to the Canadian scene. Generalization to and/or comparison with other countries will not be attempted to any appreciable extent.
2. Because the province of Quebec follows the Napoleonic Civil Law Code and not the British Common Law base the remainder of the country abides by, reference to Quebec statutes and case law will be minimal. However, many of the conclusions and implications drawn in this study will be of much relevance to outdoor educators in Quebec.
3. This thesis will deal with liability surrounding non-motorized activity modes of transportation; activities such as power boating, snowmobiling and dirt biking will be largely delimited. However, a relevant section will be included discussing the liability involved in transporting participants to and from program sites.
4. Although many forms of liability arise out of contracts with outdoor equipment suppliers and manufacturers, no attempt will be made to go into any detail regarding these aspects.
5. Because of the potential for this type of study to go on indefinitely, especially as new and relevant cases occur and are interpreted, the author has set a time limit on the completion of this thesis. However, cases drawn upon will not be restricted to any time period previous to the March, 1982 deadline.

A number of other delimitations may be found in the section titled "The Outdoor Educator - A Conceptual Definition," page 4 of this chapter.

G. Definition of Terms

Legal Terms

Assumption of Risk (Volenti non fit injuria)

An individual who knowingly and voluntarily accepts a risk which he fully understands the possible consequences of, may not bring a case of negligence against another party for

injuries he may happen to sustain while taking that risk. [1]

Case Law

A form of common law, case law is based on the jurisprudence or law which has developed from an aggregate of adjudged cases in a particular subject area. [2]

Common Law

Laws deriving their origins and authority from principles, rules of conduct and customs, accepted and recognized by the courts as previously belonging to the society using them. It is thereby distinguished from statutory law, which is law established and enacted by the will of the legislature. [3]

Custom

A commonly used defence to a negligence suit, custom involves a practice or application of methods, which by common, oft-repeated use by the people of a society, comes to acquire "the force of law with respect to the place and subject matter to which it relates." [4]

Negligence

Negligence is the doing of something which a reasonable man, "guided upon those considerations which ordinarily regulate" [5] human conduct, would not have done, or omitting the doing of something which a reasonable and prudent man would have done in the same circumstances. As negligence is a type of tort infraction, the necessary elements of torts must be present for a case to exist. [6]

Occupiers' Liability

The liability an individual or agency has for injuries sustained by others due to foreseeably unsafe conditions present on land owned or controlled by him/it. [7]

Statute

A law that is established and enacted through a governmentally legislated act. [8]

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[1] Henry C. Black, Black's Law Dictionary, fifth edition, (St. Paul, Minnesota: West's Publishing Co., 1979), p 1412.
[2] Ibid., p. 142.
[3] Ibid., pp. 250-251.
[4] Ibid., p. 347.
[5] R.S. Vasan, R.S., Editor, Canadian Law Dictionary, (Toronto: Law and Business Publications of Canada Ltd., 1980), p 381.
[6] Ibid., p. 259.
[7] John G. Fleming, The Law of Torts, fifth edition, (Sydney: The Law Book Co., 1977), p. 374.

Tort

"A civil wrong, giving rise to an action independent of contract." [9] In order for this civil wrong to result in a court action, the defendant (the individual being sued), must have breached a duty he/she had to care for the plaintiff (injured victim), and this breach of duty must be determined to be the proximate cause of the injury(ies) for which the plaintiff seeks damages. The plaintiff must not have prejudiced his position through his own actions. [10]

Vicarious Liability

The legal responsibility an employer and the agency he/she represents indirectly has for the comissions and/or omissions of an employee or volunteer agent (collectively referred to as 'employees' in this thesis). If an injury is sustained by an individual under the direct care of an employee, it is not only the employee, but also the agency he/she works for who will be titled the defendants in the suit. Often the agency will be exclusively responsible for paying out any damages awarded the plaintiff. [11]

Outdoor Education Terms

Certification

A concrete document granted by a sanctioned agency, and stating that an individual has attained a given level of proficiency in the knowledge and/or skill area(s) being tested. Examples of certifications frequently held by outdoor educators include; St. John's Ambulance Emergency or Standard First Aid, Royal Life Saving Society Bronze Medallion, Red Cross Small Craft Water Safety Instructor, Canadian Association of Nordic Ski Instructors Level One, and so on.

Education

The systematic development of an individual's ability to adapt processes, skills and facts to the discovery of solutions to problems. It strives to teach the individual to better cope intellectually, physically and socially with the stresses present in society.

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[8] Black, supra n. 19; p. 1264–65.
[9] Vasan, n. 23, p. 381.
[10] Ibid., p. 381.
[11] Black, supra n. 19, p. 1404.

Outdoor Education

"Outdoor Education includes all direct learning experiences that involve enjoying, interpreting and wisely using the natural environment in achieving at least in part, the purposes of education." [12]

Outdoor Educator

An individual, paid or volunteer, who is involved in the instruction, leadership and/or facilitation of outdoor programs for one or more participants. A much more detailed description has been provided earlier in this chapter.

Outdoor Environment

The environment in which outdoor education primarily occurs. For the purposes of this study, it will include all wildland sites (city park to wilderness preserve), where schools or outdoor education/recreation agencies provide outdoor experiences for their participants.

Outdoor Pursuits

Outdoor pursuits are simply outdoor living and transportation skills. These include activities such as: survival training, mountaineering and rock climbing, backpacking, cross-country skiing, canoeing, kayaking, and so one, where some element(s) of adventure, challenge and risk to the participant prevail.

Qualification

A combination of appropriate theoretical, technical and practical knowledge in outdoor living and transportation skills, experience and an ability to make sound judgments while accepting the leadership role of an outdoor educator.

Risk

Risk is an expression of possible loss. In this study, it should be understood that risk taking in outdoor education should be influenced by an evaluation of the odds (ie. the risk is a calculated one). In high risk outdoor pursuits, risk is obviously related to the skill and experience of the participant; less skill increases the hazard to that participant. Strong, experienced leadership decreases the possibility of taking uncalculated or poorly calculated risks, thereby reducing the chances of an accident occurring on the outing. Although risk may have subjective 'perception' elements, this thesis will focus on dealing with the objective 'real' risks one encounters in outdoor pursuits programming.

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[12] Gibson, supra n. 3, p. 10.

Wilderness Environment

Wilderness environments are outdoor environments where "mans' influence is non-existent or not readily perceivable, and where the environment is affected primarily by the forces of nature." [31]

H. Research Methodology

The majority of this study involved the application of legal research to the discipline of outdoor education, and as such it utilized a number of varied sources.

Extensive use was made of statutes, case reports and books of legal authority found in the University of Alberta's Law Library. As well, a variety of on-campus and off-campus literary sources in law, physical education, sport, recreation and outdoor education were used. The Sport Information Resource Center in Ottawa, for example, proved a valuable source of literary material.

Information collected and synthesized in a preliminary study in the area of Outdoor Education Leadership Certification was useful in defining the duties of outdoor educators. Extensive use was also made of a 1981 Alberta Law Foundation research project completed at the University of Calgary under the direction of March (outdoor pursuits) and Henderson (law).

In addition, a number of recent fatal accident enquiries and coroner's inquest reports were reviewed for their relevant content and recommendations.

Finally, before developing program guidelines, a number of outdoor sports governing bodies (e.g., Canadian Ski Association, Canadian Association of Nordic Ski Instructors, etc.) and practising boards and agencies were approached for their existing standards and recommendations regarding their implementation.

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[31] James R. Butler, In lecture, University of Alberta, Edmonton, September, 1980.

II. AN OVERVIEW OF THE CANDIAN LEGAL SYSTEM

This chapter has been included to insure that the reader has at least a basic familiarity with and understanding of the structure and functioning of the legal system employed by Canada. As the information contained herein is intended only as background and not of primary import to this particular thesis, only a very cursory look at the system has been provided. Readers desiring more detailed explanations in this area are advised to refer to the references cited in this chapter.

A. Sources of Canadian Law

In order to interpret and apply the law, the courts must rely upon a number of 'sources' which establish what the law is. These sources have traditionally been divided into two categories; 1) *'legal'* sources, which are in essence "the authority of any proposition of law"[1] and 2) *'literary'* sources, which serve primarily in the recording of legal sources.[2]

The two most commonly used legal sources of Canadian law are; 1) legislated statutory enactments and 2) the rationale behind decisions in adjudicated cases, commonly referred to as 'case law'[3]. Other legal sources include what Gall terms subordinate legislation and may take the form of by-laws, ordinances, statutory instruments, orders-in-council and rules and regulations "enacted by a person, body or tribunal subordinate to a sovereign legislative body."[4]

In addition, two other legal sources of Canadian law which, although used rather infrequently, may be of particular relevance to this thesis include custom or convention and judicial morality.[5]

Literary sources include books of authority written by notable scholars and various aids used in locating legal source material.[6]

In an attempt to keep this section brief and relevant, only the first two legal sources mentioned, statutes and case law, will be dealt with in any detail here. Short

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[1] Ronald J. Walker and Walker, The English Legal System, third edition, (London: Butterworths, 1972), p. 92.
[2] Ibid.
[3] Gerald Gall, The Canadian Legal System, (Toronto: Coswell Co. Ltd., 1977), p. 23.
[4] Ibid., p. 24.
[5] Ibid., pp. 29-30.
[6] Innis Christie, editor, Legal Writing and Research Manual, (Toronto: Butterworths, 1970), p. 11.

discussions of custom and morality will also be included because of their particular relevance to the topic at hand.

Statute Law and its Interpretation

Legislatively enacted statutes are the most important source of law. The consistency and precision of the statutes created by Canada's elected parliament makes them the first course the courts take in attempting to settle a dispute. In fact, a judge must apply relevant statutes even if he does not personally agree with them.

Fortunately, statute law is alterable through a repeal by the legislative body which created it or through the creation of a new statute to replace an outdated one. This may be done to determine the law where none previously existed, or to affirm or reverse a standing judicial decision.

Examples of statutory acts which outdoor educators should be familiar with may include education oriented acts such as Teaching Profession Acts, Education and School Acts and others such as National and Provincial Parks Acts , Occupiers' Liability Acts, Emergency Medical Aid Acts and the Highway Acts. These and other relevant statutes will be discussed in Chapter five.

Although, due to the limitations of our language, the interpretation of statutes is occasionally a problem, it should normally be soluble by "seeking to ascertain the intention of the legislator in relation to a given set of facts,"[7] and then applying the statute accordingly. This means that the wording of a statute should be interpreted as literally as possible, but where ambiguity exists, the words must be considered in their context.

In 1982, Canada patriated its constitution through the enactment of its own Constitution Act , R.S.C. 1982. As no relevant cases have as yet been heard, the scope and implications of the new constitution on negligence law cannot be stated at this time.

Case Law and the Rule of Precedent

Case law, the second major legal source of law in Canada, grew out of "the principles enunciated through the decisions of courts over the past six hundred years, initially in Great Britain and subsequently in Canada."[8] Also often referred to as common law, this important legal source of law developed and expanded its principles and content

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[7] Phillip S. James, Introduction to English Law, tenth edition, (London: Butterworth, 1979), p. 9.

[8] Gall, supra n. 3, p. 25.

as new fact situations arose and were decided upon by judges.

With each new case, the judge in making his decision identifies the reason(s) for his decision (called his *'ratio decidendi')* and the legal principle he lays down must be followed (subject to certain reservations) by other judges dealing with subsequent similar situations.[9]

This compulsory adherence to previous decisions is known as the rule of precedent. The courts are bound to abide by this rule of precedent in accordance with the doctrine of *stare decisis,* which literally means "to stand by decided matters", and which states that once a court has laid down a principle of law as applicable to a certain state of facts, it will abide by or adhere to that principle and apply it to all future cases in which the facts are essentially the same.[10]

The purposes of the rule of precedent are probably twofold. First, it removes some of the responsibility and accompanying psychological pressure from judges by allowing them to justify their decisions through reference to previous findings. Second, it helps ensure order and consistency and hence, fairness and credibility in the common law system.[11]

In Canada, this rule of precedent is manifested in the country's hierarchical court structure. This means that the law in each court is binding on any and all courts subordinate to that court.[12] Therefore:

1. Supreme Court of Canada decisions are binding on all other courts in the land.
2. Provincial Supreme Court (Appellate Division) decisions are binding on all courts of that particular province.
3. Provincial Supreme Court (Trial Division) decisions are binding on all District and Provincial Judges' Courts.
4. District Court decisions are binding on Provincial Judges' Court decisions.

Decisions of all provincial level courts, from Judges' Court to the Provincial Court of Appeal, will only be of persuasive value in the decision making which occurs in the courts of the other provinces and territories. The degree of their persuasive influence is

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[9] Owen H. Phillips, A First Book of English Law, seventh edition, (London: Sweet and Maxwell, 1977), p. 192.
[10] Henry C. Black, Black's Law Dictionary, fifth edition, (St. Paul, Minn. West's Publishing Company, 1979), p. 1261.
[11] James, supra n. 7, p. 17.
[12] Gall, supra n. 3, p. 180.

directly related to their relative position in the hierarchy in relation to the particular out of province court attempting to settle the case at hand.[13]

To look at the process in another light, a decision made in any court, save the Supreme Court of Canada, may be appealed in a higher court and the higher court will have the authority to affirm or overide the decision of the lower court. Supreme Court of Canada decisions can only be altered or reversed by a subsequent Supreme Court of Canada decision, or by an act of legislature.

In addition to the appeal process, a number of other judicially recognized procedures have been adopted by the courts "in order to mitigate the rigidity under the operation of the doctrine of stare decisis and satisfy the dictates of justice and fairness."[14] The best example of these processes is called 'distinguishing' where a case is decided on its own merit and not according to persuasive or binding precedents. To distinguish a case, the court must demonstrate significant differences between either the societal situation or the specific facts of the case at hand in comparison with the earlier ones.

As with statute law, the existence of various mechanisms which permit modification of the common law (e.g., appeals, distinguishing, etc.) facilitate its dynamic growth with the society it is intended to serve. Unfortunately, its constant state of flux also results in a certain degree of instability and uncertainty, not only for the layman, but also for the legal practitioner who must interpret it.

Custom and Convention

A rarely employed legal source of law, but one with great potential for realization in cases involving one or more outdoor educators, is that established through custom or convention. As defined in the preceding chapter, custom refers to a practice or application of methods, which by common oft-repeated use by the people of a society, comes to acquire "the force of law with respect to the place and subject matter to which it relates."[15] Where no statutes or case law exists to set a precedent, a court will often assess existing conventions to determine their validity.

The validity of a custom has been traditionally evaluated according to Gladstone's six criteria: 1) antiquity, 2) continuance, 3) peacable enjoyment, 4) obligatory force, 5)

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[13] Ibid., pp. 180-186.
[14] Ibid., p. 195
[15] Black, supra n. 10, p. 347

certainty, and 6) consistency.[16] Technically, the criteria of antiquity means that the custom must be traceable back to at least 1189. Fortunately, in actual practice the courts are normally willing to accept as law, customs which meet the remaining criteria and which can be shown to have been in existence for a significantly long period of time.[17] However, the problem of ascertaining what constitutes a 'significantly long period of time' remains; when does an 'oft-repeated practice' acquire the power of law? Further discussion of custom and its implications for outdoor educators may be found in Chapter ten.

Morality

In cases where no statutes or adjudicated precedents are applicable and where custom and convention are either non-existent or extremely conflicting and variable, the judge "must find out for himself; he must determine what the law ought to be, he must have recourse to the principle of morality."[18] Although situations such as these are typically rare, the relative infancy of the field of outdoor education may lead to more than one decision being made through this final recourse.

A judge assessing such a case is likely to weigh on his imaginary judicial scales, the social utility of the activity (i.e., in this case, benefits accrued through participation in the outdoor activity) on the one side and the probability of loss (i.e., injury or death) on the other side. The fulcrum of the scale represents the relative cost of increasing the safeness of the activity, without sacrificing its supposed benefits to the participant.[19]

B. Divisions of Canadian Law

The various sources of law manifest themselves in a number of categories or divisions of law. Although each division is intimately related to all other divisions, time and space will not permit a detailed description of the entire structure in this work. The writer will, instead, restrict this discussion to an illustration of the differences between public and private law and also among a few of the subdivisions of private law, one of which is the tort law on which this study will focus.

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[16] Ronald J. Walker et al., The English Legal System , fourth edition, (London: Butterworths, 1976), p. 58-9.
[17] Ibid., p. 58.
[18] Gall, supra n. 3, p. 30, quoting Gray in The Nature and Sources of the Law, 1921, p. 302.
[19] Ellen I. Picard, In lecture, University of Alberta, Edmonton, Sept. 1981.

Substantive Law

A. Public Law

- Constitutional Law
- Criminal Law
- Administrative Law

B. Private Law

- Contract Law
- Tort Law
- Property Law
- Others

In reviewing the above divisional summary, the reader begins with the positive domestic or 'substantive' legal principles identified in the legal sources of Canadian law. This division of law as opposed to public international law, is oriented toward governing the people of Canada. Substantive law is delineated into two divisions, public and private law.

Public Law

Public law includes constitutional, administrative and criminal law, the three "areas of the law where the public interest is involved."[20] Of these three subdivisions, criminal law should be identified as an example of public law and used to differentiate it from private law.

Criminal law involves the judgment of offences committed "against the state, against the people and against the public interest," [21] as opposed to wrongs done to specific individuals. It serves to punish individual criminals, to protect society from them and to deter others from following similar courses of action: restitution of wrongs is not one of its objectives

In a criminal proceeding, the crown prosecutes the accused individual for violating one of its criminal statutes, for criminal law is almost entirely statute law. If the accused is found guilty of intentionally committing a crime, then he/she is convicted and sentenced, usually to a fine or term of incarceration in a federal or provincial government operated rehabilitation institution.

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[20] Gall, supra n. 3, p. 31.
[21] Ibid., pp. 32-33.

Private Law

Private law or civil law as it is more commonly known, involves the attempts of one individual to claim restitution from another individual who he believes has wronged him. As illustrated in the divisional summary above, there are a great many subdivisions of private law, far too many to consider here.

The only type of private law this thesis will deal with is tort or negligence law, where one individual is attempting to receive compensation (usually financial), for an injury(ies) he/she received due to what he perceives to be the negligence of the person he is suing. Tort law has the compensation of victims as its primary aim and usually not the punishment or rehabilitation of the defendant (person being sued).

In a civil tort action, the plaintiff (person seeking remuneration) sues the defendant and if the plaintiff wins, the court orders the defendant to pay the assessed damages to the plaintiff.

Although the objectives, procedures and results of public versus private law cases appear to differ quite dramatically, the distinction lies more in the legal consequences of the action than in the actual nature of the act or omission itself. As is frequently seen, the same set of facts may constitute both a crime and a civil wrong [22] and therefore be tried in both courts. For example, an impaired driver involved in a motor vehicle accident may face criminal charges for impaired driving as well as a civil suit brought against him by one he injures through his recklessness.

Although the reader is encouraged to keep in mind the intimate relationship existing between all divisions of the Canadian legal system, only tort actions will be considered in the remainder of this study.

C. The Canadian Court System

In 1867, the British North American Act granted the Parliament of Canada the right to establish a Supreme Court of Canada [23] and the provinces of Canada, the right to create the necessary courts in each province [24] to enforce the laws of the land.

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[22] James, supra n. 11, p. 173.
[23] B.N.A. Act, (1867) 30 and 31 Victoria c. 3, s. 101.
[24] Ibid., s. 92 (14).

Although minor variations exist, especially at the lower court levels, the courts present in any province include the following:

- The Supreme Court of Canada
- The Supreme Court of a Province
    - Appellate Division
    - Trial Division
- County or District Courts
- Surrogate Courts
- Provincial Court
    - Juvenile Court
    - Family Court
    - Provincial Court (Criminal Division)
    - Small Claims Court [25]

The functions of each given court may be found in the enabling statutes establishing that particular court (e.g., The Supreme Court Act, The District Courts Act, The Provincial Courts Act, etc.) In addition, The Judicature Act and the rules of court are examples of other types of statute law distinct from the enabling court legislation which must be considered in defining the jurisdiction of a Provincial Supreme Court.[26] It becomes readily apparent that the sources which identify the functions of any particular court are numerous and complex. At this point, it may be wise to leave the sources of Canadian court functions and turn to a brief review of the functions themselves, especially those pertinent to civil cases.

The Supreme Court of Canada

According to the Supreme Court Act:

> The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court is, and for all cases, final and conclusive. [27]

This general court of appeal is presided over by one Chief Justice, who is also the acting Chief Justice of Canada and eight Prusine Justices. [28] At least five of these

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[25] Gall, supra n. 3, pp. 99–104.
[26] Gall supra n. 3, p. 98.
[27] Supreme Court Act, R.S.C. 1970 c. 259, s. 3.
[28] Ibid., s. 4.

Justices must be present to hold court.[29]

In terms of civil case authority, the Supreme Court hears all appeals under the 1974 amendment to the Supreme Court Act, but only if the issue is of public or legal import or of "mixed law and fact" [30] In addition, there is no stipulation as to the quantum of money involved in the case; the legal principle evolving from the case is more crucial than the settlement in the particular case. [31]

The Supreme Court of a Province

This court is the highest level court with criminal and civil jurisdiction in the province. [32] The majority of cases and appeals from lower courts are heard within the Trial division of this court. [33] All civil matters over a set monetary amount are heard here as well. [34]

The Appellate division of this court will hear, among other duties, all "civil matter appeals from District or County Court and Supreme Court, Trial Division." [35]

County or District Courts

Most provinces have two or more County or District Courts and again their function in civil cases will be to hear those disputes within a pre-determined geographical and monetary jurisdiction.[36]

The Surrogate Court

Surrogate Court cases are adjudicated by County or District Court judges and normally deal with issues such as testamentary matters and wills and the guardianship of children. [37]

Provincial Courts

This court is subdivided into Juvenile Court, Family Court, the Provincial Court (Criminal Division) and Small Claims Court, none of which are likely to be relevant to the study at hand.

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[29] Ibid., s. 25.
[30] Gall, supra n. 3, p. 101.
[31] Ibid., p. 101.
[32] The Judicature Act, R.S.A. 1970, c. 193, s. 3.
[33] Ibid., s. 15 and 16.
[34] Gall, supra n. 3, p. 103.
[35] Ibid., p. 103.
[36] Ibid., p. 103.
[37] The Surrogate Court Act, R.S.A. 1970, c. 357, s. 13.

The courts with which the reader should familiarize himself are the County or District Courts in his area, both divisions of the Supreme Court of his province and of course, the Supreme Court of Canada. A tort case may be initiated in either the County or District Court in an area, or the Trial Division of the Supreme Court of the province in which the incident occurred if the claim for damages exceeds the stipulated minimum for that province's County/District Court. The unsuccessful party, if it so chooses, may appeal the trial decision to the Appellate Division of the Province's Supreme Court and the defeated party of this appeal may make a final appeal to the Supreme Court of Canada.

D. Steps Involved in a Civil Court Proceeding

Although this process can be quite complex and drawn out, often over a period of years, a quick review of the critical path these proceedings typically follow may be of interest to the reader.

After an accident occurs, the injured party obtains legal advice from his lawyer concerning the advisability of proceeding with a lawsuit. If he decides to sue, he informs his lawyer of this fact and the wheels are set in motion.

The Rules of Court of each province lay out the complex, but consistent procedure which begins with the initiation of a suit and terminates with its settlement or a judgment and assessment of damages by the courts. Briefly, the following steps are, or may be involved:

1. *The Serving of a Writ* – This involves the issuance of a writ by the plaintiff to the defendant, outlining the case as he perceives it, the restitution sought and summonsing the defendant to enter an appearance within the prescribed time period. [38]
2. *Pleadings* – If the two parties fail to settle out of court and if there is some dispute of the facts, then both parties begin pleadings. The plaintiff's pleadings are called Statements of Claims and the defendant's Statements of Defence and once completed (which may involve more than one amendment by each party), they are

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[38] Phillips, supra n. 9, p. 372.

both filed away in a record for the trial judge's use later. [39] Frequently, the defendant's Statements of Defense will involve one or more 'counterclaims' (e.g., liable) and/or the implicating of additional parties to accept at least a share of the liability.

3. *Discovery Period* - During this interlocutory period between pleadings and trial, each lawyer is permitted to ask the opponent party to answer under oath, a number of written questions [40] regarding the material facts of the accident and injury. These inquiries and replies are "recorded and may be transcribed for use at the trial." [41]

4. *Summary Judgment or Trial* – If the two parties have still failed to settle the matter out of court, the pursuance of one of two alternate courses of action is likely. If the facts of the case are not in dispute and if the results of the case depend solely on the application of the selected law, then a 'summary judgment' may be made by the judge. [42] If the facts are in dispute and/or if the law is uncertain, then the case may proceed to trial.

5. *Trial Brief* – If the parties have still not buckled under the pressure of settling out of court, then a trial date and place are set. During the period before the trial date (which may be up to and even over a year away in some jurisdictions), both parties' lawyers prepare to present their clients' position to the best of their abilities.

6. *Trial* – If a jury is to be used they will be selected before the trial date. Fortunately, most cases are resolved by judge and not judge and jury, as the time and costs are much reduced.

Following opening statements by both counsels, the plaintiff's lawyer presents the plaintiff's case and examines his witnesses. These witnesses are then cross-examined by the defense lawyer and they may be subsequently reexamined by the plaintiff's lawyer before the entire procedure is repeated in reverse with the defense's witnesses. If the plaintiff can provide sufficient evidence to establish at least a *prima facie* case (a case established by sufficient evidence by the plaintiff which can be overthrown only by equal or greater rebutting evidence produced by the defense), then the defendant will be

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[39] M. McDonald, Legal First Aid, (Toronto: Coles Publishing Co., 1978), p. 33.
[40] James, supra n. 7, p. 65.
[41] McDonald, supra n. 39, p. 34.
[42] R. Gerald Glassford, Richard Moriarty and Gerald Redmond, "Physical Activity and Legal Liability," C.A.H.P.E.R. Research Council Monograph, p. 8.

obliged to present evidence which proves he should not be held liable, that some other defendant is liable, and/or that even if he is liable, the plaintiff has overestimated the damages. [43]

Following these presentations and closing addresses by both counsels, the judge has the option of entering a directed verdict (judgment) for one party or the other, or if he is uncertain, he maintains the right to "reserve judgment to consider his decision." [44] If a jury has been involved, the judge may either enter a directed verdict or send the case to the jury for their decision, "instructing them on the law to be applied to the facts as they were presented during the trial." [45]

Once the jury's verdict is reported to the court, "it is reduced to a judgment directing disposition of the case." [46] The losing party is usually held responsible for paying their own court costs and legal fees as well as those of the winning party. The actual amounts involved will vary significantly depending on the difficulty and duration of the case and readers interested in estimating these costs are advised to refer to their province's Court Schedule of Rules. It should also be remembered that lawyers' fees (both the plaintiff's and the defendant's), or parts thereof, are often over and above those cited in the schedule and altogether costs and fees for both parties may easily rise into the thousands of dollars.

E. Assessment of Damages

At the conclusion of the case, if the defendant has been unsuccessful in convincing the judge (or jury) that he was in no way liable for the plaintiff's injuries, then he will be required to pay at least a portion of the assessed damages. If a third party has been shown to be liable as well, and/or if the plaintiff himself was careless in some way which contributed to his injury(ies), then the assessed damages may be apportioned among the negligent parties as the courts decide.

Damages are assessed and awarded an injured plaintiff according to the principle of '*restitutio in integrum*'; money is awarded in an attempt to restore to the victim

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[43] Ibid., p. 8.
[44] Phillips, supra n. 9, p. 375.
[45] Glassford et al., supra n. 42, p. 9.
[46] Ibid., p. 9.

"what he has lost as a result of the accident". [47] As restoration is impossible for many victims (e.g., no amount of financial remuneration is going to allow a quadraplegic to enjoy a walk in the park again), the damages usually attempt to compensate the plaintiff for the unique loss he has suffered. The compensability of the plaintiff does not depend solely on the "severity of the injury, but rather on the consequences to the individual affected by the tortious act" [48]

In order to make the task of assessing damages easier, the courts have categorized the types of consequences which may warrant compensation. These categories include:

1. the physical injury itself and the pain and suffering associated with it up to the time of trial
2. disability and loss of amentities before trial
3. loss of earnings before trial
4. expenses incurred before trial
5. pain and suffering expected to be suffered in the future, either temporarily or permanently
6. loss of amenities after trial
7. loss of life expectancy
8. loss of earnings to be suffered after the trial and into the foreseeable future
9. cost of future care and other expenses [49]

In the case of a fatal accident, the dependents of the deceased and/or his estate may have a right of action. This "statutory right of action, granted only for the limited claim of specified dependents, rests upon their loss of dependency: the loss of security they derived from the continued existence of the deceased." [50]

Damages sought by the injured plaintiff will all fall under one of two larger categories, special and general damages. Special damages pleaded will include all of those expenses which can be reasonably precisely calculated, such as medical expenses, loss of earnings and/or business profits. [51] General damages, which are more arbitrary in nature and less given to precise calculation, include things like compensation for "pain,

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[47] Phillip S. James with D.L. Brown, General Principles of Torts, (London: Butterworths, 1978), p. 428.
[48] Lewis Klar, editor, Studies in Canadian Tort Law, in C.A. Wright and A.M. Linden Canadian Tort Law: Cases, Notes and Materials, seventh edition, (Toronto: Butterworths, 1980), p. 14-2.
[49] Ibid., p. 14-3.
[50] James, supra, n. 47, p. 406.
[51] Walker et al., supra, n. 16, p. 279.

suffering, loss of amenities and inconvenience." [52]

The amount of damages will vary tremendously with the specific consequences the court is attempting to compensate the victim for.

The greatest quantum of damages have in recent years been awarded to victims rendered quadraplegics and paraplegics, due to the extremely high cost of the hospital and home care they require for the rest of their lives. For example, over the past decade and a half, there have been three Supreme Court of Canada case decisions made concerning youths (fifteen and sixteen years of age) rendered quadraplegics as a result of school gymnastics accidents. In the first, Mackay v. Govan School Unit No. 29 of Saskatchewan , [53] a student injured when he fell from the parallel bars was awarded one hundred and eighty-three thousand dollars. A decade later, in Thornton v. Board of School Trustees (Prince George, British Columbia) [54] a fifteen year old boy injured when he vaulted over his protective landing mats, received an unprecedented one million, five hundred and thirty-four thousand, and fifty-nine dollars. Three years later in Meyers v. Peel County Board of Education [55] a lad injured while attempting a dismount from the rings and his father collectively received almost eighty thousand dollars inspite of the court's finding that the boy was twenty percent contributorily negligent for his injuries. The Meyers settlement was noticably less that the previous two because the plaintiff "made a substantial recovery, although he will suffer permanent partial disability." [56]

The assessments for victims losing half of their limb functions may easily exceed the half-million dollar mark. In a recent British Columbia Supreme Court decision, a young woman received six hundred thousand dollars in compensatory damages when she was rendered a paraplegic by reason of injuries suffered in a parachute jump she attempted during an instructional course offered by the defendant. [57]

Because of the tremendous variety in the types of expenses an accident victim may incur, and the range of amounts the courts may award for each type, the quantum of damages to be awarded in any accident where liability is found is difficult, if not impossible for the layman to estimate.

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[52] Ibid., p. 278.
[53] [1968] S.C.R. 589 (S.C.C.).
[54] [1978] 2 S.C.R. 275 (S.C.C.).
[55] [1981] S.C.C.D. 3081.
[56] Ibid., S.C.R. 3081-82.
[57] Smith v. Horizon Aero Sports Ltd. et al. (1981), B.C.D.Civ. 3391-01.

III. THE BASIS OF TORT LIABILITY

Similar to the preceding chapter, this section is intended to provide the reader with a basic background familiarity of the functions and principles of tort liability and the tests used in their application in a Canadian court of law. The various aspects of this area of law will not be dealt with in any great detail and application of the material contained herein to the field of outdoor education will be reserved largely for succeeding chapters, especially chapters six through ten.

A. The Functions of Tort Law

The word 'tort' derives from the Latin *tortus* (twisted) and is also directly connected with the French word *tort* (wrong).[1] Hence, this body of law is primarily concerned with compensating victims who have sustained injury as a result of the conduct (or misconduct) of others. Salmond quite succinctly defines and clarifies a tort when he calls it "a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation. [2]

In addition to its aims of justice, compensation and appeasement of accident victims, tort law has a number of other functions. One such function is the assessment of the relative abilities of the respective parties to bear the financial loss which must be accepted by one or the other. As defendants in tort cases are often publicly funded or highly insured agencies, they have the capacity to bear an economic loss by increasing their rates and thereby distributing the cost among all other purchasers of their goods or services. The doctrine of strict liability ("without fault") for inherently dangerous activities and/or conditions and that of vicarious liability both developed out of this philosophical basis. [3]

Punishment of wrongs committed and discouragement of repetition of the wrongful act by the original wrongdoer as well as all other members of society are two

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[1] Phillip S. James, General Principles of the Law of Torts, fourth edition, (London: Butterworths, 1978), p. 3.
[2] Cecil A. Wright, and Allen M. Linden, Canadian Tort Law: Cases Notes and Materials, seventh edition, (Toronto: Butterworths 1980), p. 1-2, quoting from Salmond on the Law of Torts, seventeenth edition, 1977.
[3] Ibid., p. 1-6, quoting William L. Prosser in Handbook of the Law of Torts, fourth edition, 1971.

other subsidiary functions of tort law.

B. General Principles of Liability in Tort Law

A tort is not a specific wrong. Rather, tort law refers to the identification of a variety of wrongs including among others: assault, battery, false imprisonment, defamation and negligence. Negligence leads to the most litigation and is the tort which will form the focus of this particular thesis.

The tort of negligence is concerned with the manner in which all "activities are carried out and not any particular activity." [4] A negligent act or statement is one which is viewed as reckless, careless and/or involving judgmental error.

> The allegation in a negligence action is basically that the defendant paid insufficient attention to the interests of others, and has pursued his own objectives, at the risk of the safety of other persons lives and property; and this is perhaps the foundation for the view that negligence is a moral fault. [5]

Unlike a criminal action, the plaintiff involved in a negligence case need not prove any intention of committing a wrong on the part of the defendant; proof of negligent conduct alone is deemed sufficient.

C. Negligence-The Basis of Tort Liability

The following five criteria must be proven by the claimant before he/she may have a cause for action in negligence:

1. A duty of care owed by the defendant to the plaintiff, requiring that the defendant meet a certain standard of care
2. A breach of the established standard of care or a failure to conform to it
3. Actual injury(ies) suffered by the plaintiff
4. A proximate connection between the defendant's conduct and the plaintiff's injury(ies).
5. No conduct by the plaintiff which will be prejudicial to his action (i.e., voluntary assumption of risk).[6]

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[4] Patrick S. Atiyah, Accidents, Compensation and The Law, (London: Weidenfeld and Nicolson, 1975), p. 36
[5] Ibid., at p. 55.
[6] John G. Fleming, The Law of Torts, fifth edition, (Sydney: The Law Book Co., 1977), pp. 104-105.

The writer would now like to look at each of these criteria separately.

Duty of Care

The concept of a duty of care implies a relationship between the defendant and the plaintiff or the class of people to which the plaintiff belonged (e.g., driver–pedestrian, teacher–student, leader–program participant, etc.)

Duty of care is normally not a questionable issue in establishing a cause of action, except perhaps in "common adventure" types of situations or where an agency divorces itself from the actions of the staff whose conduct is in question.

Standard of Care

Determining the appropriate standard of care for an individual relating to a given group in a specified environmental setting and participating in a particular activity becomes much more difficult. However, once the standard is established, proving whether it was breached or not becomes a somewhat easier matter.

The Reasonable Man

The courts have created an objectively employable fictitious entity, the 'reasonable man', to help define the standard of care required in any risk situation. This reasonable person was first introduced in 1856 by Baron Alberson when he defined negligence as:

> ...the omission to so 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. [7]

If the defendant can show that a reasonably prudent person placed in the same circumstances as he found himself, would have acted as he in fact acted, then he will have met the standard of care required in that situation and will not be liable.

In addition to being granted average skill, intelligence, memory and judgmental capacities, the reasonable man is deemed to be one who takes the time to use foresight to seriously consider the potential risk present in the situation.

> Negligence, it will be recalled, consists of conduct involving an unreasonable risk of harm. Almost any activity is fraught with some degree of danger to others, but if the remotest chance of mishap were sufficient to attract the stigma of negligence, most human action would be inhibited. Inevitably therefore, one is only required to guard against those risks which society recognizes as sufficiently great to demand precaution. The risk must be great before he (the reasonable man) can be expected to subordinate his own interests to those of others. Whether the act or omission in question is one

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[7] Blyth v. Birmingham Water Works Co. (1856), 11 Ex. 781.

> which a reasonable man would recognize as posing an unreasonable risk must be determined by balancing the magnitude of the risk; in the light of the likelihood of an accident happening and the possible seriousness of its consequences, against the difficulty, expense or any other disadvantage of desisting from the venture or taking a particular precaution. [8]

Therefore, an accident must not only be possible, but in fact likely, before the defendant will have breached his standard of care; "there must be a recognizable risk of injury sufficient to cause the reasonable man to pause." [9]

In addition to the consideration of the likelihood of injury occurring, an evaluation of the potential severity of such injury is also an important aspect of a risk assessment.

The reasonable man will also consider the appropriateness of the activity and the potential risk for each individual involved. For example, in Saskatoon, an obese thirteen year old boy fractured a leg while performing a seven-foot vertical jump off some bleachers as part of a required physical education class. The instructor was found negligent and the school board held liable because this activity was perceived by the courts to be very dangerous for a youth in the plaintiff's physical condition and the instructor should have foreseen the risk of harm to this individual. [10]

And finally, the reasonable man will consider the degree of risk in relation to the utility of the conduct or activity being pursued. Linden constructed an equation which weighs the aforementioned factors in relation to the purpose of the act and the cost of reducing the hazard. The equation states that PL = OC

> where:
> P is the severity of the potential harm which is likely to ensue if the accident transpires,
> L is the likelihood that the harm will occur,
> O is the object or purpose of the conduct in question and
> C is the cost of eliminating the hazard which the defendant must bear [11]

Linden states that:

> If the probability times the loss is greater than the object times the cost, liability ensues; conversely, if the probability times the loss is less than the object times the cost, the conduct is blameless [12]

Unfortunately, this equation fails to account for the degree to which the individual can establish that the victim has voluntarily assumed responsibility for his own safety

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[8] Fleming, supra n. 6, pp. 113-114, quoted and accepted in Dziwenka v. Mapplebeck, [1972] W.W.R. 350 (S.C.C.)
[9] Ibid., p. 114.
[10] Boese v. Board of Education of St. Paul's Roman Catholic Separate School Dictrict No. 20 (Saskatooon) (1976), Q.B. 607 (Q.B.D.)
[11] Allen M. Linden, Canadian Negligence Law, third edition, (Toronto: Butterworths, 1982), p. 102
[12] Ibid., p. 103

The following case demonstrates how the combination of factors Linden does discuss have been historically considered. In Bolton and Others v. Stone [13] a cricket ball was struck over a seven-foot fence and struck and injured the plaintiff, travelling on a roadway one hundred feet from the fence. Although the ball had been hit over the fence half a dozen times in the preceding thirty years, no one had been injured in this manner in the entire ninety years the pitch had been in use. The House of Lords held that the likelihood of injury and the potential for it to be severe should it occur were minimal in relation to the utility of the game and the cost of eliminating the hazard (i.e., building a higher fence or finding another place to play). Lord Reid summarized the test.

> In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do is to create a risk which is substantial... In my judgment, the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger. In considering that matter I think that it would be right to take into account, not only how remote is the chance that a person might be struck, but also how serious the consequences are likely to be if a person is struck... [14]

In chapter six, a closer look at this test will be made considering the legal view of the utility of outdoor activity pursuits in relation to their potential risks.

The Prudent Professional

The standard of care will be higher than that of the reasonable man for individuals presenting themselves as professionals in a field of endeavor. And although the particular standard will vary from one profession to another, commensurate with the type and degree of knowledge and technical skill required of its practitioners, all professional people are expected to "measure up to the standard" of competence of the ordinary person professing such special skill. [15]

A highly trained specialist will normally be expected to conform to a higher standard than the average professional in the same field (e.g., an orthopedic surgeon must conform to higher standards than a general practitioner). However, anyone holding himself up as a professional will be expected to conduct his practice at the level he advertises himself. For example, a chiropracter who failed to properly diagnose the condition of a patient because he had not been trained to do so, who did not request

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[13] [1951] 1 All E.R. 1078.
[14] Ibid., p. 1086.
[15] Fleming, supra n. 6, p. 109.

assistance in making the diagnosis and who as a result, gave an improper treatment to the patient, was found liable for negligence. In passing judgment, Hyndman, J.A. stated:

> ...the defendant held himself out to be, at least, a reasonably prudent and skillful man... His falling short of the knowledge and skill which he should have possessed to diagnose the case, and working in the dark, presuming to deal with it, in effect regardless of the results, constituted negligence... [16]

Neither does the law make any special concessions for the beginner. [17] Just as a new driver must abide by all traffic laws and be held liable for any accidents he may cause, so must the newly trained professional who accepts the position be prepared to deal with its many contingencies.

Professional negligence warrants special consideration by individuals accepting the role of outdoor educator and will be discussed further in chapter six.

The Careful Parent

Yet another standard of care which will be discussed further in subsequent chapters is the standard of the careful parent adhered to by members of the teaching profession and most others charged with responsibility for the supervision and care of children. This doctrine first evolved out of Justice Cave's late nineteenth century definition of a schoolmaster's duty. In his own words, "The schoolmaster is bound to take such care of his boys as a careful father would take of his boys." [18]

Although the standard of the reasonable and careful parent has come under much criticism of late due to the special training teachers have and the class sizes they must contend with, even the most recent Supreme Court decisions in Canada dealing with teachers have employed this doctrine in determining the appropriateness of the standard of care rendered. [19]

Again, important implications of this standard for outdoor educators dealing with children and adolescents will be dealt with in chapter six.

Causation

Proximate Cause - The Foreseeability Test

Assuming that a plaintiff can demonstrate proof that the defendant breached a duty to care for him and that he was injured, he then has the often onorous task of

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[16] Gibbons et al. v. Harris [1924] 1 W.W.R. 675, at p. 706.
[17] Fleming, supra n. 6, p. 110.
[18] Williams v. Eady (1893), 10 T.L.R. 41.
[19] Thornton v. Board of School Trustees Prince George [1978] 2 S.C.R.; Meyers v. Peel County Board of Education [1981] S.C.C.D. 3081

proving that the defendant's failure to conform to established standards was the proximate cause of his injury(ies).[20] That is, he must show conclusively that it was in fact the defendant's error or omission and not some other independent act or cause (by nature or another party, including the plaintiff himself), which precipitated the accident resulting in the plaintiff's injury(ies).[21]

Today the courts commonly apply the foreseeability test to establish causation. The reasonable man is held to possess an average capacity to foresee harm coming to individuals to which he owes a duty and should one fail in meeting this standard of foresight, then he will be liable for any injuries which ensue as a result.

In advocating a shift from the earlier used directness rule to this foreseeability test, Viscount Simonds argued that:

> It is a principle of civil liability that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behavior.[22]

and later:

> After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility.[23]

Type of Foreseeable Damage Determines Liability

In later applications of this test of foreseeability, it was established that the injury(ies) resulting from an accident need not occur in the exact manner which was foreseeable. For example, in Hughs v. Lord Advocate[24] an eight year old boy tripped over a parafin lamp left near an open manhole, causing it to fall into the hole. The fallen lamp set off an explosion, the force of which caused the boy to fall into the hole and be burned. The House of Lords held the defendant post office liable because although the exact nature of the accident may not have been foreseeable (i.e., paraffin lamps were not expected to fall into manholes and set off explosions), the type of injury which was sustained by the youth (i.e., burning) was reasonably foreseeable. In citing his reasons for supporting this appeal, Lord Reid stated:

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[20] Phillip S. James, Introduction to English Law, tenth edition, (London: Butterworths, 1979), p. 383.
[21] Ibid., p. 383.
[22] The Wagon Mound (No. 1) Overseas Tankship (U.K. Ltd.) v. Morts Dock and Engineering Co. Ltd. [1961] A.C. at pp. 422-23 (P.C.).
[23] Ibid., p. 424.
[24] [1963] A.C. 837.

> No doubt it was not to be suspected that the injuries would be as serious as those which the appellant in fact sustained. But a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable. [25]

This rule has been upheld in Canadian courts from the early 1970's on. In School Division of Assiniboine South No. 3 v. Hoffer et al. [26] a fourteen year old youth, his father and the Greater Winnipeg Gas Company were apportioned damages when the youth negligently allowed his father's snowmobile to escape from his control and hit an unprotected gas riser pipe. Some gas escaped, entered a nearby school building and exploded. Dickson J.A. set out the Canadian test while discussing the liability of the boy.

> It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable. [27]

The Thin-Skull Rule

When discussing the awarding of damages to injured victims, Lord Parker stated that, "it has always been the law of this country that a tortfeasor takes his victim as he finds him." [28] He referred to the rationale of an earlier decision by Kennedy J., where the latter stated:

> If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart. [29]

Therefore, it is only necessary for the defendant to have been capable of foreseeing the type of injury which may occur. If the particular victim injured happens to have some predisposing weakness or condition which makes him more susceptible to injury and/or to a more severe form of the foreseeable harm, this is unfortunate for the defendant, but he will still be held fully liable for the plaintiff's injuries.

Intervening Forces

It should be apparent at this point that tort law is oriented toward the compensation of hapless victims and that defendants in negligence actions must be prepared to justify their every action and demonstrate that they evaluated the risk of

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[25] Ibid., at p. 845.
[26] [1971] 1 W.W.R. 1.
[27] School Division of Assiniboine South and Hoffer et al. v. Great Winnipeg Gas Co. Ltd. [1971] 4 W.W.R. 752.
[28] Smith v Leech Brain Co. [1962] 2 Q.B.D. 414, (Q.B.).
[29] Ibid., at p. 44, quoting Kennedy in Dulieu v White and Sons [1901] 2 K.B. 669

harm to those they owed a duty before engaging in the questionable conduct.

The courts also recognize that any number of extenuating variables and circumstances must be assessed in each case brought to them. Over time, these intervening forces have been categorically identified and a brief review of these factors may help clarify causation and liability in any incident in question. These intervening forces will act to reduce or even eliminate the liability of the original defendant.

The most obvious type of intervening force which acts in favor of the defendant is the potentially negligent conduct of the plaintiff himself. Because of the frequency of occurrence of accidents where the victim's own actions have contributed to his injury(ies), especially in physical education/recreation/sport situations, this factor will be dealt with separately at a later point in this chapter.

Secondly, it is possible that a third party may be wholly or partially liable for negligence resulting in damage to a plaintiff. In the evidence cited earlier in the case of School Division of Assiniboine v. Hoffer et al., [30] it was shown that although the boy's negligent driving of the snowmobile actually caused the explosion, the gas company was negligent to an even greater extent for leaving the pipe in a hazardous state and position. The boy and his father were each found twenty-five percent liable for damages; the gas company was forced to pay the remaining half of the damages.

Recurring Situations

The remaining are a variety of recurring situations which may alter, usually by increasing the number of actions or damages claimed by the plaintiff(s) against the defendant. These include for example, rescue situations where a third party is injured or killed while attempting to rescue a victim at harm because of the defendant's negligence.

Another category includes second accidents where a plaintiff injured due to the defendant's negligence is left in a state or condition which predisposes him to subsequent accidents. [31] Unless another tortfeasor (including the plaintiff) is present to accept liability for the additional damage, the original defendant may be liable for injuries sustained or worsened in the second accident. [32]

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[30] Supra, n. 27.
[31] Wieland v. Cyril Lord Carpets Ltd. [1969] 3 All E.R. 1006; McKew v Holland et al. [1969] All E.R. 1621 (H.L.).
[32] McTague, J.A., in Mercer v. Gray [1941] 3 D.L.R. 564, quoting from Beven on Negligence, fourth edition, p. 104

A final category of recurring situations to be considered is medical mishaps which complicate the plaintiff's condition and result in additional damages. Unless the defendant can prove that the medical or surgical treatment rendered was "so negligent as to be actionable" [33] (i.e., therefore an intervening act in itself), the plaintiff has the right to claim from the defendant, damages which result from errors in treatment made by qualified, reputable medical practitioners. [34]

Breach of Statute

A final factor which may lead to litigation is the failure of a defendant to perform to standard, a statutory duty.

> If a statutory duty is prescribed, but no remedy by way of penalty or otherwise for its breach is imposed, it can be asssumed that a right of civil action accrues to the person who is damnified by the breach. For if it were not so, the statute would be but a pious enactment. [35]

Therefore, in order to maintain consistency with the common law test for negligence, statutes must of necessity be defined according to the type of plaintiff and damage sustained.

In order to facilitate this consistency of application, the courts have identified four limits which must be satisfied before a negligence action against a defendant may proceed on the basis of a breach of statute. These include:

1. The legislation in question must have been violated. [36]
2. The plaintiff must have suffered a loss thereby. [37]
3. The accident must be of the sort the statute was directed to [38] and
4. The plaintiff must be of the type or category of people the legislation was designed to protect. [39]

It should be realized, however, that the courts may not always find for the plaintiff in cases where even all four criteria have been satisfied. The tendency in Canadian courts is to view such evidence not as conclusive, but as prima facie of negligence (sufficient only if the defendant cannot rebut it) The defendant may still be found not negligent in common law

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[33] Ibid., at p. 568
[34] Ibid., at p. 567.
[35] James, supra n. 1, p. 110.
[36] Chipchase v. British Titan Products Co. [1956] 1 All E.R. 613 (Q.B.)
[37] Ibid., at p. 13.
[38] Gorris v. Scott (1874), 9 L.R. Ex. 125
[39] Phillips v. Britannia Hygenic Laundry Co. Ltd. [1923] 2 K.B. 832 (C.A.)

> If a party violated the statute,... a presumption of negligence arises that he was negligent. This presumption is not a conclusive one. It may be overcome by other evidence showing that under the circumstances surrounding the event the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making induce him, without moral fault to do otherwise. [40]

An example of this extension may be a rescue situation where in a hurried attempt to save a plaintiff's life, a defendant breaks one or more statutes of a provincial Highways Act.

Breach of statute does not appear to be a commonly pleaded cause of action in physical education/recreation cases. Regardless, the types of statutes which may be relevant to outdoor educators will be reviewed in chapter five because of the present trend toward increased legislation and regulation in such areas.

Conduct of the Plaintiff

As previously mentioned, the most commonly seen intervening factor in any negligence action is the conduct of the plaintiff him/herself at the time of the accident. Hence, this fifth and final criteria of the test for negligence has been included, supported by the philosophic rationale that the law should compensate only those individuals felt deserving of its protection. The courts feel that "anyone who is negligent with regard to his own safety is denied the protection of the law in whole or in part." [41] In addition, one who knowingly agrees to accept the risk of harm will be considered to have effectively waived his right to legal action. [42]

Contributory Negligence

Contributory negligence has been defined as "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." [43] Therefore, the standard of care which a plaintiff must exercise is the same as that expected of a defendant; "he must exercise such care for his own safety as a reasonable person would in like circumstances." [44] A plaintiff being accused of contributory negligence by a defendant will be evaluated according to the same guiding principles and the same criteria (i.e., duty

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[40] MacKay, J.A., in Queensway Tank Lines Ltd. v. Moise [1970] 1 O.R. 535 (C.A.).n
[41] William L. Prosser, Handbook of the Law of Torts, fourth edition, (St. Paul, Minnesota: West's Publishing Co., 1971), pp. 416-17.
[42] Ibid., p. 416.
[43] Ibid., p. 417.
[44] Wright, and Linden, supra n. 2, p. 11-5.

to care, standard of care, proximate cause, etc.) as that defendant.

The onus is on the defendant in such cases to prove that "the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury." [45]

Historically in common law, if a plaintiff was found contributorily negligent, he was barred from any potential recovery from the defendant. [46] Canada, along with a number of other commonwealth countries, has recently enacted apportionment legislation [47] which allows a plaintiff to recover a portion of damages from the tortfeasor in proportion to his negligence. This statute assures a fairness and equitable accountability for negligence not seen with the earlier system. Contributory negligence is viewed as a defence in Canada and only after negligence on the part of the defendant has been established will it be considered by the courts.

It should be noted that the test for contributory negligence of a child plaintiff is much more subjective than the one employed with adult victims. Children under the age of six are generally immune from charges of contributory negligence and other children are only expected to conform to the standard of a "reasonable person of like age, intelligence and experience under like circumstances." [48]

In the gymnastics case of Meyers v. Peel County Board of Education, it was found that the fifteen year old plaintiff Meyers was of sufficient age, intelligence and experience to know that the stunt he was attempting when he fell "was a difficult manoeuver, fraught with some danger. He knew he was not to attempt anything on the rings without the presence of a spotter in position." [49] As a result of his intentional contravention of the rules layed out by his teacher, Meyers was found twenty percent contributority negligent for damages resulting from his quadraplegia.

The reader is directed to chapter four for a more in-depth discussion of the special case of children in contributory negligence law. There are also a number of other Canadian cases dealing with the contributory negligence of child and adult plaintiffs, [50] and

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[45] Nance v. British Columbia Electric Railway C. Ltd. [1951] A.C. 601, at p. 611.
[46] Butterfield v. Forrester (1809), 103 E.R. 926 (K.B.).
[47] The Contributory Negligence Act, R.S.A. 1970, c. 65
[48] Restatement of Torts, second edition, s. 464 (2).
[49] (1977), 2 C.C.L.T. 90.
[50] Ryan et al. v. Hickson et al. (1974), 55 D.L.R. (3d) 196 (Ont. H. Ct.); Henricks v. The Queen (1970) 9 D.L.R. (3d) 454 (S.C.C.)

some of these will be discussed in chapter ten concerning this and other defences to tortious liability.

Voluntary Assumption of Risk

The Latin maxim '*volenti non fit injuria*', which translates into "no injury is done to one who consents", [51] is a complete defence for a defendant, barring the plaintiff from recovering any damages whatsoever from him. In sport and recreation cases, arguing volenti (voluntary assumption of risk) may mean claiming that either: a) no duty was owed the plaintiff by the defendant, or b) the plaintiff knew and appreciated the consequences of the risks he was being exposed to and purposely waived his right of legal action. [52]

As the existence of a duty to care is normally fairly easy to establish, most volenti cases are argued on the grounds that the plaintiff voluntarily assumed the consequences of risks which he understood and appreciated. [53] This implies that although the plaintiff may consent to the assumption of particular risks, he is not barred from recovery "if he is injured as a result of some other risk which he did not assume." [54] Hence, a snowmobile passenger who assumes the risk of falling off the machine, does not necessarily waive his right to action should he be run over by another snowmobile. [55] And a water skier who voluntarily assumes the risk of running into an obstruction, does not necessarily waive his right to sue the boat driver for negligently failing to warn him of such an obstruction. [56]

A natural extension of this study of volenti is the legal power of exculpatory statements or waivers. In order to have any chance of receiving legal recognition, such exemption clauses must be express and not implied. Only an express disclaimer may function as an absolute waiver of rights and the courts are reluctant to accept even such explicit releases as they circumvent perceived legal rights and accountabilities. [57] In addition, it should be known that a parent may not waive his/her child's legal rights by

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[51] J.B. Saunders, Mozley and Whitley's Law Dictionary, ninth edition, (London: Butterworths, 1977), p. 353.
[52] Sandra Kalef, "Volenti Non Fit Injuria", in March et al. Legal Liability in Outdoor Education in Alberta, (Calgary: Alberta Law Foundation, 1981), p. 1.
[53] Harrison v. Toronto Motor Car et al. [1945] 1 O.R. 9.
[54] Wright and Linden, supra n. 2, p. 11-29.
[55] Ainge v. Siemon (1972), 19 D.L.R. (3d) 531, (Ont. H. Ct.).
[56] Rootes v. Skelton (1967), 116 C.L.R. 383.
[57] Restatement of Torts, supra n. 48, s. 496 (B).

signing a consent form or a waiver.

Because proving voluntary assumption of risk on the part of the plaintiff is extremely difficult, such counters are rarely successful. However, this defence has been recognized as valid in a number of outdoor sport/recreation related cases and it will therefore be discussed in much detail as it relates to participation in many of the inherently dangerous outdoor activities pursued in this country.

D. Negligent Statements

Another relevant area of negligence law pertains to the legal accountability one has, not for his negligent acts, but for verbal or written statements he makes which are found to be the proximate cause of another's injuries.

In the classic case in this area, Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.[58] the defendant bank was found negligent for making statements which lead to the plaintiff's financial loss when a business the bank endorsed liquidated. Of the principle enunciated in this case, Holland J. later stated:

> In order for there to be liability for negligent misrepresentation there must be first a duty of care; second, a negligent misrepresentation; third, reliance on the misrepresentation by the plaintiff and fourth, loss resulting from this reliance.[59]

The issue of negligent statements leading to physical and/or psychological injury in outdoor education situations will be addressed in chapter six.

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[58] [1964] A.C. 465.

[59] Toromont Industrial Holdings Ltd. v. Thorne, Gunn, Helliwell and Christenson (1976), 14 O.R. (2d) 87 (Ont. C.A.).

IV. THE CHILD PLAINTIFF

The vast majority of individuals participating in outdoor education programs and pursuits are between the ages of six and twenty-five, with the largest portion falling under the recognized age of majority, eighteen years. The inexperience and lack of skill most of these young people possess has resulted in their relatively high propensity for accidents and subsequent injury. Consequently, it is vital for the outdoor educator who may be supervising, instructing and/or leading children to understand the special position they hold in tort law, both their rights to action and the responsibility the courts deem they must have for their own accidents. Little attempt will be made in this chapter to discuss the child as a tortfeasor (except where the test for negligence relates to contributory negligence) as that particular aspect is not within the scope of this study.

A. The Standard of Care Owed The Young

Although an infant will not technically be granted special status in tort law, children are generally owed a higher standard of care in negligence law than are adults. [1] It is common knowledge that as risk increases, so does the expectation that the standard of care exercised by the reasonable person will also rise to meet the situation. The accepted unpredictability of children makes their presence or reasonably anticipative presence sufficient reason for the taking of greater care. Harris, Chief Justice in Seamone v. Fancy, stated that:

> "Children, wherever they go, must be expected to act upon childish instincts and impulses, and those who are charged with a duty and caution towards them, must calculate upon this and take precaution accordingly." [2]

The degree to which the standard of care must be raised for children depends not only on the relatively objective 'reasonable man' test, but also on a rather subjective evaluation of the age, intellect and experience of the particular child acting in the particular circumstances in which he is found. [3]

Of these three factors, the youth's age will normally have the strongest effect in

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[1] G.O. Jewers, "Damages Suffered by Children – The Standard of Care Owed Children", in Isaac Pitblado Lectures on Continuing Legal Education, 1970 The Law and the Minor at p. 49.

[2] [1924] 1 D.L.R. 650, at p. 652.

[3] McEllistrum v. Etches [1956] S.C.R. at p. 787. The facts of this case surround a six year old girl who ran out on the road and was struck by a car.

establishing negligence or absence thereof. In Williams v. Eady, [4] Mr. Justice Cave stated that, "to leave a knife about where a child of four could get at it would amount to negligence, but it would not if boys of eighteen had access to it." [5] This opinion was rearticulated in Smerkinich v. Newport Corporation, where a nineteen year old youth injured while using an unguarded circular saw, sued the education authority for negligently failing to provide a guard for the saw. In finding for the defendant education authority, Mr. Justice Lush said, "If he had been a child, the case might have been different but, so far from being a child, he was a lad of nineteen years of age..." [6]

Charlesworth defines the test for the standard of care by inquiring, "Is the thing one of a class which children of that age, are in the ordinary course of things, not allowed without supervision?" [7] This reference to custom as well as the previously mentioned subjective factors of the child's age, intellect and experience will be discussed further in the sections reviewing parental duties to their children and the test for contributory negligence on the part of child plaintiffs.

B. The Capacity of a Child to Enter Litigation

If a child or youth under the age of eighteen years is injured due to another's negligence, he has the right to claim damages through the legal process. However, plaintiff minors may not represent themselves in court; they must have an adult 'next friend' accept this responsibility. [8] One of the juvenile's parents or guardians will usually perform this role. [9]

Children are well protected through this system. For example, Canadian courts have held that the next friend of a child plaintiff "may not settle or compromise or release the infant's claim without the approval of the court". [10] Child plaintiffs are doubly favored in this process as approval will not be granted by the court for a "settlement or

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[4] (1893), 10 T.L.R. 41. In this case a teacher was found negligent for leaving a container of phosphorus lying about. An explosion resulted when some boys played with the phosphorus.
[5] Ibid., 9 T.L.R., at p. 637.
[6] (1912), L.C.T. 265, at p. 265.
[7] R.A. Percy, Charlesworth on Negligence, sixth edition, (London: Sweet and Maxwell, 1977), p. 594.
[8] Public Trustee Act, R.S.A. 1970, c. 301, s. 4.
[9] Phillip S. James, Introduction to English Law, tenth edition, (London: Butterworths, 1979), p. 18.
[10] P.S. Morse, "Infant Settlements", in Isaac Pitblado Lectures., supra n. 1, p. 54.

compromise of the claim of an infant plaintiff unless the proposed settlement or compromise is one which is beneficial to the plaintiff." [11]

An interesting fact is that although married spouses may not sue each other, a child has the right to sue one or both of his parents in tort. [12]

Although the incentive for such claims would historically have been difficult to ascertain, the "modern prevalence of indemnity insurance has raised the question to practical importance." [13] And although most of the case law involving parties with this relationship has involved torts such as assault or negligent driving, there is one Canadian case of note. In Dezial et al. v. Deziel , [14] an eleven year old youth sued his father for injuries he received while riding on the latter's carnival ride. In allowing the case, Lebel, J. orated:

> ...a situation such as this could only arise where insurance is involved... I know of no case in our courts dealing with the point, but I have no doubt that the law as it has been decided in Young v. Rankin [1937] S.C. 499, a Scottish case, is also the law of Ontario. I subscribe to the view of Lord Fleming in that case, where he said at the end of his remarks at p. 520: "I do not think that a wrongdoer should be relieved from responsibility for the consequences of his negligence merely because the injured party happens to be his own child." [15]

Therefore children, while being owed a higher duty of care than adults, also have the right to seek legal restitution from wrongdoers whose negligence causes them harm, regardless of their relationship with the tortfeasor.

C. The Duty Owed Children by Their Parents

In Canada, statutory requirements stipulate that parents must provide for their children and ensure that they receive appropriate education until they are of school leaving age, now sixteen years. [16]

Parents also have a common law duty to supervise their children in order to protect them from harm and to protect others who may be foreseeably injured by the

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[11] Ibid., p. 54
[12] John G. Fleming, The Law of Torts, fifth edition, (Sydney: The Law Book Co. Ltd., 1977), p. 669.
[13] Ibid., p. 669.
[14] [1953] 1 D.L.R. 651 (Ont. H. Ct.), at p. 653.
[15] Ibid., pp. 653-54.
[16] School Act, R.S.A. 1970, c. 329, s. 133

childrens' negligence. [17]

As mentioned previously, the standard of care pertinent to meeting this duty will involve the exercise of reasonable care in the circumstances, as established by community custom and a subjective evaluation of the child's particular attributes and subsequent requirements for care. As Professor Fleming states:

> Without going so far as to attach vicarious liability, the common law insists that parents at least exercise reasonable care, commensurate with their peculiar ability to keep their offspring under discipline and supervise their activities for the sake of the public safety.[18]

The large subjective element in cases dealing with children, be they plaintiffs or tortfeasors, means that each case will be assessed according to the particular fact situation and characters involved. And although this makes prediction of the outcomes of such cases difficult, a number of duties and the subsequent standards of care they imply have become reasonably established through precedent. Some of the factors parents, and indeed any who accept a supervisory role in place of parents should be aware of include:

1. "The practices and useages prevailing in the community and the common understanding of what is practicable." [19]
2. Knowledge of foreseeable propensities, peculiar to the particular child, of which parental awareness is known. [20]
3. General well-known propensities common to all or most children at a given stage of development, of which parental knowledge may be assumed. [21]
4. The provision of adequate instruction and supervision to children working or playing with potentially dangerous apparatus, the design and delivery of such training appropriate to the comprehension level of the youth. [22]
5. Parental knowledge of the child's physical capacities and subsequently his physical ability to follow instructions given by the parent. [23]

A case in point which illustrates a number of these duty elements is the situation

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[17] Fleming, supra n. 11, p. 151.
[18] Ibid., at p. 151.
[19] Hatfield v. Pearson (1956), 209 W.W.R. 580 (B.C.C.A.).
[20] Streifel v. S.B. and G. [1957] 25 W.W.R. 182 (B.C.S.C.).
[21] Sullivan v. Creed [1904] 2 I.R. 560.
[22] Starr et al. v. Crone [1950] 2 W.W.R. 560.
[23] School Division of Assiniboine South No. 3 v. Hoffer et al. [1971] 4 W.W.R. 746

and findings outlined in Ryan et al. v. Hickson et al. [24] In this case, the twelve year old defendant was giving a ride to the nine year old plaintiff of the back of the former's snowmobile. The plaintiff released his hold and turned to wave at the second defendant, a fourteen year old boy driving a second snowmobile behind him, just as the machine the plaintiff was a passenger on hit a snowbank. The impact threw the plaintiff from his snowmobile and directly into the path of the oncoming machine which injured him. Both drivers were found negligent and the plaintiff was found thirty-three and one third percent contributorily negligent. But perhaps more importantly here, the courts found the fathers of both defending youth to be jointly and equally responsible with their respective sons, with the apportionment of responsibility being equal between both defendant boys at thirty-three and one third percent. Goodman J. cited the reasoning as follows:

> It is an act of negligence to give a young boy care and control of a snowmobile which is a thing known to be dangerous or capable of causing danger to others, unless it is proved a) that he was properly trained in its use, with particular regard to using it safely and carefully, and b) that the boy was of an age, character and intelligence such that the father might safely assume the boy would apprehend and obey the instructions given to him... [T]he parent must, in addition to the above requirements, prove not only that he could safely assume that the child would apprehend and obey the instructions given him, but that he was physically capable of safely following those instructions and also of safely operating the vehicle. [25]

In this case, the courts found the defendant boys' fathers negligent in both their instruction of their sons in the safe operation of snowmobiles and in their supervision of the boys using these inherently dangerous machines. This same duty would fall upon the shoulders of a responsible teacher or leader standing *in loco parentis* – in the place of the parent.

D. The Liability of Those Taking The Place of Parents

An individual who stands in loco parentis, whether he/she be teacher, coach, recreation programmer or outdoor educator, will be handed full responsibility for the youngsters in his care and he will also be granted the concomitant authority required to fulfill this responsibility. His duty is to act as a reasonably prudent parent, including the often onerous task of protecting the child from participating in any activity in a manner

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[24] (1974), 55 D.L.R. (3d) 196.
[25] Ibid., at p 196.

which is likely to lead to harm to himself and/or others. Again, to generalize Lord Esher's words to other professionals working with children:

> The school master was bound to take such care of his boys as a careful father would take care of his boys and there could not be a better definition of the duty of a schoolmaster. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievious acts and their propensity to meddle with anything that came in their way. [26]

Although this standard does exhibit a certain appealing simplicity and is still respected in Canadian courts, [27] in other ways it is a somewhat antiquated British anomally requiring more serious reflection [28] and perhaps replacement with the more appropriate standard of the careful professional. Two reasons for a move to this alternative exist.

First, the careful parent test fails to account for the size of group in a professional educator/leader's care. What is deemed reasonable care for young members in a family of four or five (a large family by today's standards), may be totally unfeasable for a teacher [29] or recreation programmer with twenty or more students/participants to supervise.

Second, most of these professionals have had specialized training which should indicate a duty to perform to a higher standard than the proverbial 'man in the street' who lacks this supplementary education. "Teachers are expected to know more of the vagaries of children than most people do" [30] and the writer would hazard to add that well-seasoned teachers probably know more of the characteristics and propensities of children in the age group they teach, than most parents of like-aged children; with the small families prevalent today, the parents are most likely still engaged in intensive 'in-service training' in child rearing. The same superior knowledge and training could probably be granted many recreation leaders, minor sport coaches and outdoor education practitioners.

Fortunately, the courts have taken the first step toward changing the standard. In the 1981 Meyers [31] Supreme Court of Canada decision, acceptance was given of the earlier trial judge's application of the tests articulated by Carrothers J.A. in Thornton et al.

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[26] Williams, supra n. 4, at p. 41.
[27] Meyers v. Peel County Board of Education [1981] S.C.C.D. 3081-01
[28] Beaumont v. Surrey C.C. (1968), 112 S.J. 704.
[29] Nicholson v. Westmorland C.C., The Times, October 25, 1962.
[30] Geoffrey R. Barrell, Teachers and the Law, fifth edition, (London: Methuen and Co. Ltd., 1978), p. 293.
[31] Meyers, supra n. 26.

v. Board of School Trustees of District No. 57 (Prince George) et al. [32] He refers to this part of Carrothers judgment:

> This is not to say that... the school authorities were relieved of their common law duty to take care of this pupil during this activity in the manner of a reasonable and careful parent, taking into account the judicial modification of the reasonable-and-careful-parent test to allow for the larger-than-family size of the physical education class and the supraparental expertise commanded of a gymnastics instructor. [33]

McIntyre J., who gave the Supreme Court reasons for judgment in the Meyers case added this in his discussion of the standard of care in physical education situations:

> It (the standard) has, no doubt become qualified in modern times because of the greater variety of activities conducted in schools, with probably larger groups of students using more complicated and more dangerous equipment than formerly: see McKay v. The Board of Govan School Unit No. 29 of Saskatchewan et al. [1968] S.C.R. 589, but with the qualification expressed in the McKay case and noted by Carrothers in Thornton, supra, it remains the appropriate standard for such cases. It is not, however, a standard which can be applied in the same manner and to the same extent in every case. Its application will vary from case to case and will depend upon the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, the competency and capacity of the students involved, and a host of other matters which may be widely varied but which, in a given case, may affect the application of the prudent parent standard to the conduct of the school authority in the circumstances. [34]

This statement quite explicity explains the inadequacy of the reasonable parent test used without supplementary qualification and perhaps as education related disciplines earn professional status and credibility, the need for its application will pass. In order to attain this professional credibility, universities and professional education/recreation organizations and associations must devote much time and energy to the development of sound guidelines and standards for physical education, recreation and their associated disciplines. An individual cannot be judged according to the criteria of the reasonably careful professional until the standards which that fictitious entity performs his duties in accordance with have been established. [35]

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[32] [1976] 5 W.W.R. 240 (B.C.C.A.).
[33] Ibid., at p. 265.
[34] Meyers v. Peel County Board of Education et al. 1981 unreported Supreme Court or Canada case notes, p. 10.
[35] Ellen I. Picard, and Steve W. Mendryk, "Legal Liability in Physical Education and Athletics", Paper presented at the Conference on Curriculum Development and Teaching in Sports Medicine, Edmonton, 1981, pp. 3-8

E. Contributory Negligence of the Young

The judicial system has often been accused of exhibiting an unacceptable partiality to child plaintiffs. Mr. Justice Hilbery discussed this sympathetic response.

> Our law reports show how fatally attractive childrens' cases have been to those who have to try them. Judges are human beings and their feelings are easily aroused in favor of the child, especially children of tender years. When they meet with an accident, any court is liable to strain the law in favor of the child, but an infant plaintiff has exactly the same burden of proving his case as any other plaintiff. [36]

Although this unwritten policy of reduced accountability of the young for injuries resulting from their immaturity has been widely accepted historically, [37] the current trend in apportionment of damages makes the finding that a child plaintiff has failed to exercise reasonable care for his own protection a more likely outcome than previously. The determination of 'reasonable care' when dealing with a child plaintiff involves the same test as that used to establish negligence on the part of a child tortfeasor. Although the entire test is rather subjective when compared with the adult evaluation, it is deemed to be a two part test, with one part being quite objective and the second, more subjective in nature.

The first half of the test of child contributory negligence was established in the Supreme Court of Canada decision in McEllistrum v. Etches. [38] Although the facts of the case are not particularly relevant, what was of interest was the courts' finding that:

> ...where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience. [39]

Although no definite age has been determined for whether a child may be found contributorily negligent, it appears that children in Canada have enjoyed total immunity from this charge while they have remained below five years of age. However, this complete exemption most likely does not extend through a child's sixth year. [40]

For example, the Supreme Court of Nova Scotia found a child of five years and nine months sixty-five percent responsible for the injuries she incurred when she darted

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[36] Marston v. St. George Hospital (1956), 1 All E.R. 384.
[37] H. Shulman, "The Standard of Care Required For Children" (1927-28) 37 Yale L.J. 618
[38] McEllistrum, supra n. 3, at p. 787.
[39] Ibid., at p. 793.
[40] J.F. O'Sullivan, "Infants and Contributory Negligence" in Isaac Pitblado Lectures, supra n 1 pp 38-9

from behind a parked car onto the busy street in front of her home.[41] The Supreme Court of Canada believes that a child of six may be found guilty of contributory negligence.[42] However, this high court has clarified its position by stating that although the objective test involves a comparison with the reasonably "prudent child of given years,"[43] ..."age is not to be taken too literally" because, "as with the adult, the standard takes into account any clearly shown special knowledge"[44] or experience on the part of the plaintiff. This comment extends not only to those children at or around the lower limit of potential liability, but indeed throughout the time juveniles spend between their tender years and the time they reach the age of majority, when they must meet adult standards of maturity. Therefore, although a youth falling in the five to eighteen year age range, of average intelligence and little experience in the injury producing activity, may easily be absolved of a defendant's claims of contributory negligence, one who is perceived as displaying above average intelligence or "shrewdness" and who has had some experience in the activity may not enjoy the same exonerations.[45]

The subjective aspect of the test of infantile contributory negligence involves more detailed evaluation of the particular child's intelligence and experience to ascertain whether that child was capable of the foresight necessary to understand and appreciate the potential consequences of his conduct.[46] This test involves an assessment of such criteria as: a) the child's ability to rationalize in the situation and to perceive, understand and appreciate any hazards present;[47] b) the type and extent of instruction and supervision the child previously received in the activity;[48] and c) knowledge of essential safety precautions in the activity, learned through experience in the activity under question or in related activities.[49]

Thus, in the Messenger et al. v. Sears and Murray Knowles Ltd.[50] case, the courts felt that the five year, nine month old girl defendant was contributorily negligent for her

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[41] Messenger et al. v. Sears and Murray Knowles Ltd. (1960), 23 D.L.R. (2d) 297.
[42] Kerwin, C.J.C., in McEllistrum, supra n. 3, criticizing Trueman J. in Eyers v. Gillis and Warren [1940] 4 D.L.R. 747.
[43] Rand, J., dissenting in The King v. Laperriere [1946] S.C.R. 415, at p. 446.
[44] Ibid., at p. 445.
[45] Flett v. Coulter (1903), 5 D.L.R. 375, at p. 378.
[46] McHale v. Watson [1966] 39 A.L.J.R. 459, at p. 464, (Aust. H. Ct.).
[47] Sheasgreen et al. v. Morgan et al. [1952] 1 D.L.R. 48, (B.C.S.C.), at p. 61.
[48] Hatfield, supra n. 18, at p. 581.
[49] Schade and Schade v. Winnipeg School District No. 1 et al. (1959), 28 W.W.R 577, (Man. C.A.), at p. 580.
[50] Messenger, supra n. 41.

own injuries because it was,

> ...highly probable that the child would have learned from her brothers and sisters, if not from her parents, as well as from her own experience, to appreciate the risks involved in running into a vehicular traffic pathway on this street in the circumstances disclosed in this case... [51]

In Ryan et al. v. Hickson et al. [52] the child plaintiff, a passenger on a snowmobile, was found one third contibutorily liable for injuries sustained when he fell off the machine he was riding only to be struck by a trailing snow machine. The Ontario High Court decided that Ryan was "of normal intelligence for his age" and that he had had "considerable experience in riding as a passenger on snowmobiles." [53] He was therefore deemed to know and appreciate the importance of hanging on to the driver and watching where they were going and to take these precautions whenever he was riding on the back of a snowmobile.

Similarly, in Meyers, [54] the Supreme Court of Canada restored the trial judge's finding that the fifteen year old Meyers was twenty percent contributorily negligent for the temporary quadraplegia he suffered as a result of his gymnastics accident. In this precedent setting case, the plaintiff was found negligent in attempting a straddle dismount from the rings "without proper experience and precautions." [55] Factors which operated against Meyers were the fact that the accident occurred very near the end of a five week unit in gymnastics, throughout which the function and importance of the use of spotters had been stressed by Meyer's teacher. [56] At the time of the accident, the plaintiff was attempting a risky manouever for the first time in his life, without practising any progressions and without making sure that his spotter knew what he was going to do and was prepared to catch him should he miss on his attempt. The Supreme Court reiterated the trial judge's finding that Meyers was intelligent enough and had had sufficient experience to know that what he was doing was wrong. In the trial judge's words,

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[51] Messenger, supra n. 40, at p. 300.
[52] Ryan, supra n. 23.
[53] Ibid., at p. 396.
[54] Meyers, supra n. 26.
[55] Meyers, supra n. 33, at p. 4.
[56] Ibid., at pp. 2-3.

> I find that Gregory Meyers knew that it was a difficult manouever, fraught with some danger. He knew that he was not to attempt anything on the rings without the presence of a spotter in position. [57]

In both of these cases, the plaintiffs were felt to be of sufficient age, intelligence and experience to be capable of foreseeing the consequences of their careless acts. Additional Canadian case examples where children have been found contributorily negligent include incidents where eleven and twelve year old juveniles tampered with explosives left at a worksite, [58] where an eight year old was injured while playing street hockey on a slippery road [59] and where a fifteen year old weak swimmer disobeyed instructions to stay with the boat and subsequently drowned. [60]

The judicial protection of child plaintiffs ceases to be exercised when the child, regardless of age, is "engaged in an adult activity which is normally insured." [61] As society permits youth of fifteen and sixteen years the opportunity to drive automobiles, [62] to say nothing of the twelve and thirteen year olds that it allows to operate motorboats, dirt bikes and snowmobiles, it must hold them to the standard of the reasonable adult while they are engaged in these activities.

In summary, as a general guiding principle, the younger the child plaintiff (usually under seven years), the more subjective will be the evaluation of the standard of care owed him and whether or not he contributed to his own injuries; i.e., the more emphasis placed on his intellectual and experiential development. Concomitantly, the older the youth, the greater the emphasis placed on more objective criteria such as age.

The special duty of care owed children by the occupiers of land will be dealt with later in the following chapter concerning the statutory duties of outdoor educators.

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[57] Meyers (1977), 2 C.C.L.T. 269.
[58] The King v. Laperriere, supra n.42.
[59] Holmes v. Goldenburg [1953] 1 D.L.R. 92, (N.S.C.A.).
[60] Grieco et al. v. L'Externat Classique St. Croix [1962] S.C.R. 519 (Que.).
[61] Allen M. Linden, Canadian Negligence Law, third edition, (Toronto: Butterworths, 1982), p. 126.
[62] Highway Traffic Act, R.S.O. 1970, c. 202, s. 18.

V. STATUTE LAW AND THE OUTDOOR EDUCATOR

In this chapter, the writer hopes to draw a variety of potentially important legislation to the readers' attention. In reviewing an action based on the alleged negligence of an outdoor educator, before looking at the common law for precedential assistance, the courts must first check for any acts containing statutes relevant to the situation.

Because of the great range of activity pursuits and environmental settings utilized in the delivery of outdoor education/recreation programs in Canada, it would be a monumental task to list and describe all of the federal and provincial acts and municipal by-laws which may be relevant to the outdoor programmer in each region of the country. Instead, the author has attempted to focus on those statutory elements fairly common to the largest majority of these professionals and to provide one or two examples of each.

To this end, various types of legislation directed at the teaching profession will be reviewed, as the majority of outdoor educators are teachers by training, certification and employment.[1] This section will be restricted to members of the teaching profession only, no attempt will be made to discuss the liabilities of associated administrators or policy boards.

Secondly, the duties of outdoor educators acting in the capacity of land occupiers will be reviewed with a detailed illustrative look at selected provinces Occupiers' Liability Acts.

Finally, because so many programs are conducted on public and private lands other than those occupied by the outdoor educator or his agency, this review of environmental settings legislation will include a brief discussion of some relevant statutes which may be important to the outdoor educator running his programs in public and private wildlands and designated park areas.

As stated above, it is not the intent in this chapter to provide a detailed examination of every province's statutes. It is hoped that the general information contained herein will help lead the reader to the legislation enacted in his particular province which is of import to his particular situation.

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[1] Glenda Wuyda, Ambrose G. Gilmet and Harvey Scott, "Leadership Qualification Versus Certification in Outdoor Education in Canada" An attitudinal survey completed for the C.A.H.P.E.R. Outdoor Committee, 1981 and presented at the C.A.H.P.E.R. Conference in Victoria, 12 June, 1981.

A. The Statutory Duties of Teachers

A large sector of outdoor educators in Canada are employed as teachers by school boards in various urban and rural municipalities. In addition to the common law which dictates many of these individuals' duties, most provinces have enacted statutory legislaton to help standardize these duties for legal purposes. Although the statutes reviewed are intended for all teachers, the reader will note that they will have special relevance to those working in the discipline of physical education.

Again, the statutes included herein were written in each case for certified teachers (and in some cases student-teachers), working for a recognized school board in a particular province. [2] They will not apply as law to individuals working for other public or private agencies or ventures.

While some provinces have placed all primary and secondary education related statutes in one act (e.g., Saskatchewan), others have a number of acts directed at individuals involved in the education system (e.g., Alberta). These may be intended for persons involved as policy writers, [3] administrators [4] and teachers. [5] Usually however, only one act will provide regulations regarding the legislated duties of teachers. In very few provinces (e.g., Alberta), these duties have not been laid out in statutes. Following is a cross-national sample of some of the statutes relevant to teachers, particularly those involved in teaching physical education curricula. Teachers have a duty to:

1. "perform the teaching and other educational services required or assigned by a board or the ministry." [6]

2. "inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugalty, purity, temperance and all other virtues." [7]

3. "maintain proper order and discipline in the school or room in his charge." [8]

4. "plan and organize the learning activities of the class with due regard for individual differences and needs of the pupils." [9]

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[2] Public Schools Act, R.S.B.C. 1960, c.319, s. 2 (1); The Education Act, R.S.O. 1980, c 129, s. 1.
[3] Alberta School Trustees Act, R.S.A. 1970, c.330.
[4] Municipal School Administration Act, R.S.A. 1970, c. 249.
[5] Teaching Profession Act, R.S.A. 1970 c.362.
[6] Public School Act, R.S.B.C. 1974, c. 74, s.10 (a).
[7] Education Act, R.S.O. 1974, c. 129, s. 235 (1).
[8] Education Act, R.S.N.C. 1967, c. 81, s. 74 (b).
[9] Education Act, R.S.S. 1978, c. 17, s. 227 (b).

5. "conduct and manage assigned functions in the instructional program in accordance with the educational policies of the board of education and the applicable regulations." [10]

6. "report regularly... to the parent or guardian of each pupil with respect to his progress and any circumstances or conditions which may be of mutual interest and concern to the teacher and the parent or guardian." [11]

7. "report immediately to the board and the inspector the existence of any infectious or contagious disease in the school or the existence of any unsanitary conditon in the school building or surroundings." [12]

8. "give constant attention to the health and comfort of the pupils..." [13]

9. "see that the premises and other property of the school are, as far as possible, preserved from damage..." [14]

10. "report to the school board any necessary repairs to the school building or furniture and any required... furniture or equipment." [15]

In addition to these rather generic statutory duties, common to most provinces, some provinces have enacted legislation specifically designed to protect their teachers and school boards from legal actions arising from accidents. For example, the Public Schools Act, of Manitoba contains a number of liability specific statutory provisions. Following are a few examples of this legislation:

> Where injury or death is caused to a pupil enrolled in or attending a public school...
>
> during, or as a result of, physical training, physical culture, gymnastic exercises, or drill, carried on in connection with the school activities... no cause of action accrues to the pupil or to any other person for loss for damage suffered by reason of the bodily injury or death, against the school district or any servant or agent thereof or any trustee of the district unless it is shown that the injury or death was caused by the negligence of the school district or misconduct of any of its servants or agents or of any one or more of the trustees. [16]

This rather wordy statute does little more than state the necessity for a student plaintiff to prove the breach of an owed duty by the defendant school board and/or teacher as the proximate cause of his injury(ies).

The succeeding section alludes to the duty owed by the school board as an occupier. Although mentioned here to show the scope of this particular province's statutes, its content will not be discussed until the next section of this thesis, pertaining to occupiers' liability.

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[10] Ibid., (c).
[11] Ibid., (g).
[12] Education Act, supra n.9, (j).
[13] Ibid., (h).
[14] The Schools Act, R.S.N. 1970, c. 346, s. 81 (e).
[15] The Secondary School Act, R.S.M. 1970, c. 250, s. 183 (9).
[16] Public School Act, R.S.M. 1970, c. 215, s. 259.

> Where the bodily injury or death of a pupil... is caused by defective or dangerous apparatus supplied by the school district for the use of the pupil, the district and its servants and agents and the trustees shall be deemed not to have been guilty of negligence or misconduct unless it is shown that the district or one or more of the servants or agents thereof or the trustees had actual knowledge of the defect in, or the dangerous nature of, the apparatus and failed to remedy or replace the apparatus within a reasonable time after acquiring the knowledge. [17]

The following section of the Manitoba school statutes is concerned with the voluntary assumption of inherent risks accepted by those involved in technical or vocational training.

> Any pupil attending any course in technical or vocational training... shall be deemed to have accepted the risks incidental to the business, trade, or industry in which he is being instructed or trained; and if bodily injury or death is caused to any such pupil during or as a result of the course, no cause of action for loss or damage suffered by reason of the bodily injury or death accrues to the pupil or to any other person,
>
> (a) against the school district or any of the trustees, if it is shown that, after making investigations, the board of trustees believed, upon reasonable grounds, that the person with whom the pupil was placed was competent to give the instruction, and that his plant and equipment were such as to provide reasonable safeguards against injury; or
>
> (b) against the person giving the instruction or his servants or agents, unless the bodily injury or death of the pupil was caused or contributed to by the negligence or the misconduct of the person giving the instruction or his servants or agents. [18]

Although not directed at students participating in outdoor education curricula, the author is confident that this statute would receive analagous attention in Manitoba in the event of a school outdoor education accident where the defendant school board wished to claim volenti on the part of the student plaintiff. Clauses (a) and (b) merely reiterate the law stated in the previous subsection, concerning the burden of proving negligence placed on the plaintiff.

Alberta statutes are unique in that they do not include a section setting out the statutory duties of teachers, but they do require school boards in the province to carry accident and liability insurance policies for the express purpose of indemnifying any board and/or teacher sued in tort law.

In Alberta, the Alberta Teachers' Association has also taken an active role in establishing guidelines and procedures for teachers involved in leading field trips,

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[17] Ibid., s. 259.
[18] Ibid., s. 260.

including specific guidelines pertinent to outdoor education fieldtrips. [19] An example of a general recommendation for all trips would be:

> A suggested maximum pupil/supervisor ratio should be 16:1; however, supervision must be appropriate in terms of the number and age of the students in the group, the duration of the trip and the nature of the activity. [20]

This clarification usually indicates a lower ratio for potentially risky outdoor education excursions. Also,

> Both male and female supervision must be provided for overnight co-educational outdoor education and camping experiences at the secondary level. [21]

Although not presented as a legal source of law, the general and specific guidelines such professional associations have written for their members running outdoor education field trips, may set useful examples not only for their own members, but for other boards, agencies or associations interested in developing similar standards. These and other such standards will be dealt with in chapter eleven of this thesis.

In sum, the existence of legislated teacher/school board duties provides educators in most provinces with a set of relatively general guidelines upon which to conduct their curricula and premises. However, it should be noted that the vast majority of actions which may arise in physical education programs have been settled on the basis of adjudicated precedents in case law; only rarely drawing on a breach of statute as the cause of action.

B. The Statutory Duties of Occupiers

Although occupiers' liability issues are usually dealt with through common law processes, three provinces (Alberta, British Columbia and Ontario) [22] have taken the initiative in enacting legislation and have done much to help clear up the haze surrounding this issue in their respective regions. As Professor Fleming so aptly described the problem:

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[19] "Field Trip Guidelines", Alberta Teachers' Association Monograph No. 6.
[20] Ibid., at p. A16.1.
[21] Ibid., at p. A16.1.
[22] Occupiers' Liability Act, R.S.A. 1973, c.79; Occupiers' Liability Act, R.S.B.C. 1974, c.60; Occupiers' Liability Act, R.S.O. 1980, c.14.

> Indeed, nowhere else in the law of torts has confusion been as prevalent and injustice as rampant as it has been in disputes arising out of injuries sustained on the land of another. [23]

In addition, the power of occupiers' liability legislation in these three provinces supercedes the common law duty of care.

> ...the provisions of the Act apply in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining his liability in law in respect of dangers to persons entering the premises... [24]

Courts in all Canadian provinces still adhere to the belief that an occupier's liability is totally dependent on the duty he owed to the plaintiff visitor and that this duty depends upon the visitor's category. Most provinces have held to the traditional three category system, where visitors have been treated as either; (a) trespassers, (b) licensees, or (c) invitees. [25]

A trespasser typically enters the occupier's land without the former's permission and to him, the occupier owes only the duty not to intentionally lay traps likely to injure him. [26]

The licensee is generally viewed as a social guest entering the occupier's land with the latter's consent, but not to conduct any business. To him, the occupier owes a duty to give warnings or otherwise prevent injury resulting "from concealed dangers or traps of which he (the occupier) has actual knowledge." [27]

And the invitee, who is a "lawful visitor from whose visit the occupier stands to derive an economic advantage," [28] can expect the occupier to "use reasonable care to prevent damage from unusual dangers, of which he knows or ought to know..." [29] Participants paying for outdoor programs would fall into the category of invitees as they have a contractual right to be on the premises and protected from hidden dangers.

Recently, there has been a strong movement toward the reduction of the licensee and invitee categories to one, due in large part to the tremendous inconsistency with which plaintiffs are typically assigned these categories. In case law this inconsistency has

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[23] John G. Fleming, The Law of Torts, fifth edition, (London: Sweet and Maxwell, 1977), p. 432.
[24] Occupiers' Liability Act, R.S.O. 1980, c.14, s. 2 (n).
[25] Cecil A. Wright, and Allen M. Linden, Canadian Tort Law: Cases, Notes and Materials, (Toronto: Butterworths, 1980), p. 10-91.
[26] Haynes v. C.P.R. (1972), 31 D.L.R. (3d) 62 (B.C.C.A.).
[27] Addie v. Dumbreck [1929] A.C. 358.
[28] E.C. Harris, "Some Trends in the Law of Occupiers' Liability", in Allen M. Linden's Studies in Canadian Tort Law, third edition, (Toronto: Butterworths, 1972), p. 403.
[29] Indermaur v. Dames (1867), L.R. 2 C.P. 311 (Ex. Ct.), at p. 388.

been evidenced in situations where for example, school students [30] and library patrons, [31] whose presence is not usually economically advantageous to the occupier, were nevertheless termed invitees.

In statute law, Alberta, British Columbia and Ontario have all eliminated the distinction between licensees and invitees. The Alberta Occupiers' Liability Act of 1973 [32] states that:

> An occupier of premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises
>
> where "visitor" means:
> ...a person who is lawfully present on premises by virtue of an express or implied term of contract, or
> ...any other person whose presence on the premises is lawful," [33]

The common law duty of care which has been accepted in this statute applies to

> (a) the condition of the premises,
> (b) activities on the premises, and
> (c) the conduct of third parties on the premises. [34]

However, all three reform acts clarify the occupier's position further by granting him the authority to "restrict, modify or exclude his duty" [35] "by express agreement or express notice..." [36]

In addition, the common duty of care owed to a group of individuals who voluntarily assume certain inherent risks when entering the occupier's premises may only be that described as owed a trespasser; i.e., the duty not to create unnecessary dangers for that visitor. [37] A visitor will be subject to this lower duty of care because of voluntary assumption of risk,

> ...where the entry is for the purpose of a recreational activity and,
> no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreational club or association, and
> the person is not being provided with living accommodation by the occupier. [38]

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[30] Phillips v. Regina Public Schools District No.4 Board of Education (1976), 1 C.C.L.T. 197 (Sask. Q.B.).
[31] Nickell v. City of Windsor (1927), 59 O.L.R. 618.
[32] c. 79, s. 5.
[33] Ibid., c. 79, s. 1.
[34] Ibid., s. 6.
[35] Occupiers' Liability Act, R.S.O. 1980, c.14, s. 3.
[36] Occupiers' Liability Act, R.S.A. 1973 c.79, s. 8.
[37] Occupiers' Liability Act, R.S.O. 1980, c.14, s. 4.
[38] Ibid.

Some of the premises applicable to this subsection include:

(a) a rural premises that is
  (i) used for agricultural purposes
  (ii) vacant or undeveloped premises
  (iii) forested or wilderness premises

(b) golf courses when not open for playing...

(h) recreational trails reasonably marked by notice as such. [39]

These sections concerning the occupier's right of exclusion of duty and the responsibilities of those willingly accepting risks have quite obvious implications for outdoor agencies and/or programmers operating on property other than their own. And as will be shown in the succeeding section of this thesis, this personal responsibility may extend to the running of programs on public as well as private land.

The inevitable dissipation of the licensee-invitee dichotomy is indicated by the reduction in the power of warnings, previously held as adequate protection for the occupier in his dealings with licensees on his property.

> A warning, without more, shall not be treated as absolving an occupier from discharging the common duty of care to his visitor unless in all the circumstances the warning is enough to enable the visitor to be reasonably safe. [40]

And finally, agencies operating programs on their own property must be aware of the special duty they owe children whether they technically be licensee-invitees or trespassers. [41] A child trespasser is owed a higher duty of care than an adult trespasser. In an entire section devoted to this relationship, the Alberta Act says:

> (1)When an occupier knows or has reason to know
>
> (a) that a child trespasser in on his premises, and
> (b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,
>
> the occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.
>
> (2) In determining whether the duty of care under subsection (1) has been discharged consideration shall be given to
>
> (a) the age of the child,
> (b) the ability of the child to appreciate danger, and

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[39] Ibid.
[40] Occupiers' Liability Act, R.S.A. 1973, c.79, s. 9.
[41] Walker v. Sheffield Bronze (1977), 2 C.C.L.T. 97.

> (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child.
>
> (3) For the purposes of subsection (1), the occupier has reason to know that a child trespasser is on his premises if he has knowledge of facts from which a reasonable man would infer that a child is present or that the presence of a child is so probable that the occupier should conduct himself on the assumption that a child is present. [42]

Although this section of the Alberta Act is quite new and the only one of its sort in Canada, British statutes have long recognized that "an occupier must be prepared for children to be less careful than adults." [43] The most common cause for the raising of the standard of care owed a child trespasser is the existence of some allurement or 'attractive nuisance' on the occupier's property which while fascinating the child is also "inherently dangerous in ways which he cannot be expected to appreciate." [44] In order to apply the doctrine of attractive nuisance, the child must be of sufficient age to be drawn by the object, yet still too immature to appreciate the hazards associated with it. [45]

In the classic case in this area of law, Glasgow Corporation v. Taylor, [46] a seven year old boy died after eating some poisonous berries he picked in the defendant's public botanical garden park. It was held that the defendant municipal occupier was liable by virtue of the fact that although they were aware of the poisonous nature of the berries and the constant presence of children in the park, they did not take measures to fence off the shrub or to give adequate warning intelligible to younger patrons. The big, black berries were considered an allurement and a trap to the plaintiff as he could not be expected to know their contents. [47]

Therefore, in order to constitute an 'attractive nuisance' in law, the location or item must have some hidden danger. According to some, open water, whether naturally or artificially occurring, is an obvious hazard which has no dangers that are not apparent and as such cannot be considered a trap. [48] The writer contends that this is not

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[42] Occupiers' Liability Act, R.S.A. 1973, c.79, s. 9.
[43] Ibid., R.S.A. 1957, s. 2 (3a).
[44] Phillip S. James, General Principles of the Law of Torts, fourth edition, (London: Butterworths, 1978), p 98.
[45] Occupiers' Liability Act, R.S.A. 1973, c.79, s. 13 (2a and b).
[46] (1922), 1 A.C. 44.
[47] Ibid., at p. 44.
[48] Liddle v. Yorks North Riding (1944), 2 K.B. 101, at p. 112.

necessarily so as unexpected drop-offs, [49] undercurrents and dangerous objects concealed in murky water have caused many injuries and deaths.

In Latham v. R. Johnson and Nephew Ltd. [50] it was established that an occupier could not be liable unless the item could be shown to be a dangerous allurement.

> ...A trap is a figure of speech, not a formula. It involves the idea of concealment and suprise, of an appearance of safety under the circumstances cloaking a reality of danger. [51]

The Alberta Occupiers' Liability Act. takes the allurement doctrine one step further by considering not ony the probability of harm coming to a child because of an attractive nuisance, but also the feasibility of the occupier removing the hazard or otherwise "protecting the child from the danger." [52] In the 1949 Alberta case of Ware's Taxi Ltd. v. Gilliham, [53] the defendant taxi company was contracted by a school to drive children to and from its kindergarten. The children it served were from ages three to eight and the vehicle used was a regular four door sedan with handles and push button locks on all the doors, which the taxi driver made sure were down before starting the car. The five year old plaintiff was injured when she fell out of the vehicle after tampering with the button and handle on her side of the car. The Supreme Court of Canada upheld the trial decision which found the defendant taxi company liable for not installing inexpensive safety devices readily available on the market which made it impossible for children to open the car doors. The push buttons were deemed an attractive nuisance. Estay J. discussed the allurement of the door lock mechanism.

> This push button was within easy reach of every child in the rear seat of the automobile. Moreover, that it could be raised up and pushed down was made evident to each child every time the driver of the automobile opened or closed that door. [54]

Although this particular case is not concerned with the liability of an 'occupier' of land, it serves to provide an excellent illustration of the concept of allurement, which may be readily applied to many items and situations including those involving land.

The statutes and cases presented here should help clarify the legal position of the outdoor educator, whether he be visitor or occupier. Many questions still exist in this

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[49] Moddejonge v. Huron County Board of Education (1972), 2 O.R. 437 (Ont. H. Ct.).
[50] [1913] K.B. 398, at p. 407.
[51] Ibid., at p. 416.
[52] R.S.A. 1973, c. 79, s. 13 (2c).
[53] S.C.R. 637.
[54] Ibid., at p. 640.

area of law, in Canada and indeed throughout the commonwealth. Rather subjective questions often raised in these cases include: a) whether a given hazardous condition actually constituted a concealed danger, b) whether the occupier, acting as a reasonable man, should have realized the hazard held a concealed danger, and c) whether in the cost-benefit analysis, it was feasible to eliminate the hazard or at least warn of its presence.

The outdoor agency operating facilities and/or programs on its own land must take time to regularly inspect the site for potential hazards and take steps to remove, isolate (i.e., fence off) or at least warn of any hazards which hold concealed dangers.

For example, a raft moored in shallow water in a lake or ocean, especially where murky water would reduce visibility and subsequent examination of the depth by a diver, could constitute an unwarranted hazard. In 1980, the British Columbia Court of Appeal found the Town of Powell River eighty percent responsible for the quadraplegia suffered by a twenty-two year old swimming instructor/examiner, injured when he dove off a five meter diving board on an ocean raft into only two meters of water.[55] Although the plaintiff was twenty percent contributorily negligent due to his specialized training and lack of care for himself in the situation, the defendant municipality was held primarily responsible for his damages as they induced him into a false sense of security by failing to post warning signs on the raft.[56]

In this example, the hazardous condition contained a concealed trap (shallow water); the town recreation department ought to have foreseen the danger present and the cost of erecting a sign was in no way prohibitory or unreasonable in light of the potential harm which a patron could, and did incur. This same opinion was asserted in the recent Saskatchewan case of Bundas v. Oyma Regional Park Authority,[57] where the plaintiff dove off a raft in the defendant's park lake into water he knew was of irregular depth. In this case the defendant park authority was held twenty-five percent liable for the plaintiff Bundas' spinal injury (which left him unable to lift heavy objects), because it failed to post warning signs. However, Bundas was held seventy-five percent liable for his injury, because it was felt that he failed in his duty to protect himself from hazards of

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[55] Bisson v. Corporation of Powell River (1967), 62 W.W.R. 707.
[56] Ibid., at p. 714.
[57] (1980), 4 Sask. R. 124 (Sask. Q.B.).

which he should have been aware. Regardless, it is incumbent on each outdoor agency to evaluate such hazards and protect or at least warn its participants accordingly.

C. Legislation Relevant to the Utilization of Public and Private Wildlands for Outdoor Education Programming

The outdoor educator operating on lands other than his or his agency's own, whether publicly or privately maintained, must be prepared to accept this same responsibility for surveying the site and protecting his participants from any hazards identified. Although a good leader will do this regardless of legal duty, this evaluation is especially crucial in situations where the occupier has graciously allowed the use of his land while expressly restricting or excluding himself from liability for injuries incurred by the outdoor leader and/or his charges. And it almost goes without saying that an outdoor leader will always check with the owner of private land before using it for a program, to avoid any potential categorization as a trespasser.

In Alberta the Petty Trespass Act [58] deems it an offence subject to certain conditions, to trespass on "privately owned land" or posted "Crown land subject to any disposition except a grazing lease or grazing permit." [59] Therefore, this Alberta Act identifies all privately owned and occupied Crown land as off limits to uninvited entrants, with the exception of grazing leases or permits, as long as the visitor has been notified by written or verbal communicae or by signage which states that trespassing is not permitted. [60]

Again using the Alberta example, the Public Lands Act. [61] serves to limit access to vacant public lands. All public lands are open for use except those receiving special disposition (e.g., under Mineral Surface Lease, Homesteading Lease, Grazing Lease, etc.) and here access may be restricted to those with a lease or licence of occupation. [62] Similarly, the Forests Act. [63] permits access to all public lands containing timber berths. [64]

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[58] R.S.A. 1970, c. 273.
[59] Ibid., s. (2a) and (2b).
[60] Ibid., s. 2 (1).
[61] R.S.A. 1970, c. 297.
[62] Ibid., s. 38 (1a).
[63] R.S.A. 1971, c. 37.
[64] Ibid.

Although some variation in the names and scope of these and similar acts exists interprovincially, all provinces do have legislation addressing public and private land access and useage (e.g., camping, hunting, etc.). The outdoor educator intent on utilizing any land of which he is not the primary occupier, should familiarize himself with the statutes and regulations pertinent to that particular area's use. The law is there to prevent user group conflicts from arising as well as to protect various types of wildlands from indiscriminate use.

Environmental Legal and Ethical Considerations

One of the primary justifications for outdoor education programming today is found in its value in teaching people how to use and enjoy the natural environment in a manner which facilitates its preservation for future generations. An essential part of such programming is the inculcation of an understanding and appreciation of that environment, hopefully leading to each participant internalizing a sense of ownership for the land in its natural state. In order to achieve this obviously meritorious objective, outdoor educators must act as strong role models, designing their programs in ways which impart minimal impact upon the sites used.

Not only is this an important consideration ethically, but all provinces have statutory laws regulating destructive activities on public lands. In Alberta for example, the Environment Council (formerly the Environment Conservation Authority), deals "with matters pertaining to environment conservation.

> (a) the conservation, management and utilization of natural resources;
>
> (b) the prevention and control of pollution of natural resources
>
> (c) any operations or activities, whether carried on for commercial or industrial purposes or otherwise,
>
> > (i) that adversely affect or are likely to adversely affect the quality or quantity of any natural resource, or
> > (ii) that destroy, disturb, pollute, alter or make use of a natural resource or are likely to do so;
>
> (f) the preservation of natural resources for their aesthetic value;
>
> (g) laws in force in Alberta that relate to or directly or indirectly affect natural resources. [65]

The outdoor educator and/or agency should readily see the implications for environmentally conscious resource utilizaion in terms of sanitation, woodcutting trail

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[65] The Environment Council Act. R.S.A. 1970. c 125, s. 3.

development and so on. Often outdoor programming clubs and agencies actively support the Environment Council in its efforts to oppose various other commercial and industrial operations polluting or otherwise degrading the environment, especially in areas with outdoor education/recreation potential. Although not a strong lobby group to date in any province, outdoor educators have a definite vested interest in the conservation of wildlands, both within and outside designated park areas. They should therefore strive to be heard, both collectively and severally in integrated management plans and/or in voicing opposition to ecologically unsound proposals affecting natural areas.

Legislation Relevant to the Utilization of Federal, Provincial and Municipal Parklands for Outdoor Education Programming

National Parks Legislation

The National Parks Act, [66] stipulates that:

> The National Parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the National Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations. [67]

In order to achieve this goal, the Minister retains the power of controlling:

> ...amusements, sports, occupations and other activities or undertakings, and prescribing the places where any such activities or undertakings may be carried on; and the levying of licence fees in respect thereof; [68]

When assessing the statutory basis of a litigation against a National Park in Canada, the courts will refer to the Crown Liability Act, [69] which allows actions against the Crown based on either a) injury(ies) resulting from the negligence of an employee of the Crown [70] or b) injury(ies) resulting from a breach of Crown duty related to its occupation or control of land. [71]

The first subsection refers to the doctrine of vicarious liability and will be discussed further in chapter seven.

Due to the inconsistencies in the law related to occupiers' liability, it becomes rather difficult to predict Crown liability under the second subsection. Although the Crown is free to submit to evaluation under the provincial occupiers' liability reform

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[66] R.S.C. c. 189.
[67] Ibid., s. 4.
[68] Ibid., s. 7 (l).
[69] R.S.C. 1970, c. C-38.
[70] Ibid., s. 3 (1a)
[71] Ibid., s. 3 (1b).

legislations currently enacted in Alberta, British Columbia and Ontario, it is not legally bound to do so. [72] In provinces without such legislation, cases will be decided solely upon common law principles.

Part of the problem in predicting Crown liability lies in the paucity of cases actually adjudicated against it. The author believes this may be largely due to the exceptionally short (seven day) limitation period within which the plaintiff must make a claim for his injuries to the appropriate property administrator and the Deputy Attorney-General of Canada. [73] As most park visitors are unaware of this statute, their claims have occasionally been extinguished prematurely. Outdoor leaders taking people into Federal parks should definitely keep this statute in mind and begin proceedings immediately if Parks Canada negligence is the suspected proximate cause of an injury to oneself or one's participants.

Most park visitors are viewed as invitees and the responsible Parks department has the duty to exercise "reasonable care to prevent damage from unusual danger, of which it knows or ought to know." [74] In Sturdy et al. v. The Queen, [75] a female grizzley bear and her cubs were held not to constitute an unusual danger to the plaintiff, injured by the she bear while walking near a garbage dump in Jasper National Park. The Federal Court of Canada felt that there was no breach of Park's Canada's duty to warn the plaintiff invitee about the inherent dangers presented by the natural occurrence of bears in the park. Although no signs had been posted at the particular site of the mauling, pamphlets distributed at the park gates and highway signs warning of potential hazards posed by bears were held to provide reasonable warning. [76]

However, the courts clarified their finding of volenti on the part of the plaintiff, stating that even if Sturdy impliedly agreed to assume physical risks by walking near the dump "there was no consent or agreement, implied or expressed, that he waived any right of action in case of injury by a bear." [77]

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[72] Dwight Gibson, "The Federal Enclave Fallacy in Canadian Constitutional Law," Alberta Law Review, Vol. 14, p. 167.
[73] Crown Liability Act, R.S.C. 1970, c. C-38 s. 4 (4).
[74] Indemaur v. Dames (1866), L.R. 1 C.P., at p. 274
[75] (1974), 47 D.L.R. (3d) 71.
[76] Ibid., p. 96.
[77] Ibid., p. 98.

The Crown may employ a number of techniques to restrict or exclude its liability as an occupier. As the Sturdy case demonstrated, general warnings of an inherent hazard, such as pamphlets or road signs may be sufficient. However, where a definable danger exists at a particular site, say an avalanche danger on a designated cross-country ski trail, then a more specific warning may be required. Other expressly stated disclaimers, either on posted signs [78] or on entry tickets [79] may be sufficient to relieve the Crown of liability as long as these waivers are brought to the attention of the visitor.

A final method of exclusion practised by Parks Canada is their requirement that concessionaires such as ski lift operators and mountain guides carry adequate liability insurance and indemnify the park from any personal injury actions resulting from accidents.

This reliance upon other agencies and groups operating in the parks to be insured has lead to an increase in regulations regarding who has the privilege of operating profit-oriented backcountry programs, especially in the mountain parks where activity risk levels are highest. For example, no one is allowed to lead technical ascents in the mountain parks without certification as a member of the Association of Canadian Mountain Guides. Although such regulations are perceived as unnecessarily restrictive by many outdoor educators, they have probably been instrumental in keeping the standard of leadership very high and the rate of injuries concomitantly low in high country travel.

Although little litigation has been successful against Parks Canada to date, the greatly increased use of backcountry trails for hiking, skiing and trail riding and the equally significant growth of wildwater paddling in the parks, has opened up a tremendous potential for legal actions. In cases where a sanctioned outdoor educator is leading a group within Federal Park boundaries, the specific facts of the case will undoubtedly need to be scrutinized in order to determine whether a) the Crown was negligent under its duty as an occupier, b) whether the agency and/or leader were negligent in their duty to supervise and lead the group, and/or c) whether the conduct of the participant himself contributed to his injury(ies). For example, recently in an unlitigated incident in Alberta, a twelve year old boy disappeared (his body was recovered the following spring) while he and the grade six class to which he belonged were viewing the

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[78] Ashdown v. Williams (1957), 1 Q.B. 409.
[79] Wilson v. Blue Mountain Resorts Ltd. (1974), 4 O.R. (2d) 713.

Maligne Canyon in Jasper. Who would have been liable? a) Parks Canada, for failing to take reasonable care in erecting fences to keep invited visitors back from the lip of the canyon, and/or posting signs to warn patrons to stay back; b) the youth's teacher, who failed in his duty to supervise the child and keep him on the designated walkway; c) the school board, who perhaps allowed a teacher to take the group without sufficient supervisory assistance; or d) the boy himself, who at twelve years of age should have had sufficient intelligence and experience to appreciate the hazards associated with going too close to the edge? Unfortunately, there are still many more questions than answers regarding the law in this area.

For the outdoor educator, the chance of attributing liability to, or at least sharing liability with, the Crown will be highest when the leader is running his programs in highly man-influenced environments such as ski hills and designated interpretive trails, and lowest when he ventures into the backcountry, off specified trails. Here, he must have the judgment, skill and insurance to cover himself and his participants (especially if they are children), as his level of specialized training and knowledge would very likely make him liable for damages resulting from risks which the participants themselves could not or did not assume.

Provincial Parks and Recreation Area Legislation

Most of what should be said regarding provincial parks management and liability has been presented in the preceding section concerning liability in national parks. None of the provincial park statutes reviewed shed any new light on the position of the provincial parks department or of outdoor educators running programs within provincial parks boundaries.

In terms of Crown liability in tort law, the principles adhered to are virtually the same as those outlined in the Crown Liability Act.[80] In Alberta, since the eradication of section twenty-four of the Judicature Act,[81] Alberta's Proceedings Against the Crown Act,[82] has held the province liable for its torts.

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[80] R.S.C. 1970.
[81] R.S.A. 1974, c. 65.
[82] R.S.A. 1970, c. 285, s. 5.

> ...the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
>
> (a) in respect of a tort committed by any of its officers or agents,
>
> (b) in respect of any breach of those duties that a person owes to his servants or agents by reason of being their employer,
>
> (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property, and
>
> (d) under any statute or under any regulation or by-law made or passed under the authority of any statute. [83]

None of the provinces in Canada have retained governmental immunity and all may now be tried in tort law for any of the four aforementioned causes of action.

According to the Provincial Parks Act of Alberta: [84]

> 3. Parks shall be developed and maintained...
> (c) to facilitate their use and enjoyment for outdoor recreation,

and,

> 4. Recreation areas shall be developed and maintained to facilitate their use and enjoyment for outdoor recreation. [85]

The recreation values of parks have been largely tempered with natural history conservation and preservation values, whereas the primary orientation of provincially designated recreation areas is outdoor recreation. Although a number of residence camps and more transitory outdoor programs operate sites in provincial parks and recreation areas, this may not be practised without written authorization from the Minister. [86] The Minister also has the authority to "prescribe standards for the operation of stores, camps and other commercial ventures operated within parks or recreation areas." [87]

Municipal Parks and Recreation By-laws

As mentioned at the beginning of this chapter, the majority of outdoor educators are school teachers at the primary and secondary levels. A substantial number are also scout leaders, Y.M.-Y.W.C.A. programmers, and municipal recreation program leaders (e.g., outdoor program instructors, playground and daycamp leaders and so on). Therefore, it follows to reason that a significant portion, in fact most, outdoor education

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[83] Ibid., s. 5 (1).
[84] R.S.A. 1974, c. 51, s. 3.
[85] Ibid., 1979, c. 63, s. 3.
[86] Ibid., s. 4, 8.
[87] Ibid.

will occur within urban and rural municipal boundaries; in public parks, along river valleys, ravines and so on. Individuals and/or agencies utilizing municipal property and/or facilities for outdoor education purposes should be aware of the municipal statutes, by-laws, ordinances and regulations governing the use of those areas or sites.

In Alberta, for example, the only statutes of any particular relevance to the outdoor programmer working in a municipal setting are found in the Municipal Government Act. [88] This act contains a section on legal proceedings, including statutes pertinent to the raising of an action against a municipality, based on negligence or occupiers' liability.

Most municipal law is contained in by-laws, passed by the urban or rural municipal council. Although some of these by-laws will be relevant to only some outdoor leaders, others are generic enough to apply to anyone operating in this role. For example, a school teacher wishing to begin a canoeing unit with a few basic sessions in a municipal swimming pool, may be bound by the rights and conditions of use of such facilities cited in the municipality's Parks/School Joint Use Agreement, [89] if such a contract exists. Such agreements will also be relevant to teachers working in municipal districts, but would not apply to those teaching in county run schools where county council administers all public services including the public school system coterminous with its boundaries. This by-law will likely not apply to any outdoor educators except teachers, unless they represent a community group seeking an indoor school facility, (e.g., a crafts room), through the Parks and Recreation Department.

All outdoor program leaders, regardless of the agency or organization they are employed by should be fully aware of the enacted duties and powers of the Parks and/or Recreation Department of the municipality, municipal district or county. In Edmonton for example, By-law No. 2202 concerns the city's Parks and Recreation Departmental structure, responsibilities, and authority. [90] The duties of this and like departments includes a general duty:

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[88] R.S.A. 1970, c. 246.
[89] For example, City of Edmonton By-law No. 5769.
[90] Edmonton Parks and Recreation Department City of Edmonton By-law No. 2202 (as amended by By-law No. 2281, 2750, 2874, 2929, 2977 and 3015).

> ...To be responsible for the planning, design, construction, operation, maintenance and administration of all Public Park and Recreation and other lands under the control of the Department...,
>
> To develop sound and comprehensive recreation programs... and
>
> To act as a recreational co-ordinating body... and to ensure that all maximum and most efficient and economic use is made of all available recreational opportunities and facilities... [91]

Such departments are also responsible for developing by-laws, ordinances and regulations for the use and preservation of the parklands within their jurisdiction. In Edmonton for example, general park regulations state that:

> 10. No person while within the confines of a park shall:
>
> ...(4) Cut, break, bend or in any way injure or deface any turf, tree, shrub, hedge, plant, flower or park ornament...
>
> (8) Start any fire or permit any person under his control to start any fire except in fireplaces provided therein for that purpose...
>
> (13) Tease, molest or injure any mammal, bird or fish...
>
> 13....erect, build or locate nor permit the erection, building or locating in any park of any trailer, shelter or other building or any tent or other shelter without first obtaining the written permission of the City Commissioners. [92]

The outdoor educator will quickly recognize the implications of these selected regulations for environmental studies, campfire and shelter building programs and/or overnights. In addition, like most large cities, Edmonton also has a by-law which prevents overnighting by closing all parks to the public from eleven o'clock in the evening until eight o'clock in the morning. [93] However, it may be possible to receive special dispensation by justifying the outdoor program to the Parks Department and receiving a permit from the Commissioner. The important thing for the outdoor educator to remember is that it is his responsibility to receive clearance before initiating a program which may violate one or more regulations.

The outdoor educator has a duty to know and adhere to the enacted rules and regulations governing any and all public or private wildlands he may utilize as the setting for his programs, at least as far as his use of the area is concerned. While operating outdoor education and adventure programs in designated park environments has certain

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[91] Ibid., 3 (6), (9) and (11), pp. 1-2.
[92] Ibid.
[93] City of Edmonton Bylaw No. 2200 s. 5.

attractions to the outdoor programmer (e.g., relatively easy access to wildland areas, no direct costs for area operations and maintenance and the presence of backcountry search and rescue services (usually at no charge to registered groups), numerous responsibilities accompany these benefits.

As just expressed, one of these duties is the learning of the statutes, by-laws and/or regulations which establish parameters for the outdoor educator's use of the area. A discussion with Parks Department representatives concerning these guidelines as well as the department's policies and legal position regarding use of the area for outdoor education/recreation purposes, may be valuable time spent by the outdoor programming agency. And finally, as many such departments will attempt to restrict or exclude themselves from personal injury liability in such situations, the onus of checking for hazards inherent to use of or travel in a given area and of subsequently protecting program participants from unreasonable risks, will often remain largely on the shoulders of the outdoor educator.

The following chapter will deal with this duty further and discuss the ramifications of failing to meet it.

VI. THE PUBLIC RESPONSIBILITY AND LEGAL LIABILITY OF THE OUTDOOR EDUCATOR

In this chapter, a close look will be taken at the moral obligations and legal liabilities an outdoor educator holds while he is actually running an outdoor activity program. This will include his particular liabilities to his participants in all environmental settings discussed in the previous chapter and during all aspects of the program, except vehicular travel and rescue situations which will be dealt with in subsequent chapters.

The emphasis in this chapter will be on the common law basis of outdoor leader negligence as based on his common law duties and standards of care. Although statutes previously discussed may be occasionally referred to for clarification and/or support, the majority of law discussed herein will be derived from common law sources; adjudicated cases and custom.

A. The Test for Outdoor Educator Liability

The test used to determine the negligence of an outdoor educator is the same as that used for any other defendant. As applied from the information presented in chapter three of this thesis, this test involves an evaluation of five factors:

1. Determination of a duty owed by the leader to the participant,
2. A breach of that established duty; the failure to meet a precribed standard of care,
3. Actual physical and/or mental injury to the participant,
4. Proof that the defendant leader's negligence was the proximate cause of the participant's injury(ies),
5. Evidence showing that the participant did not voluntarily assume the particular risk which resulted in his injury(ies)

The reader is reminded that if the defendant can show that the plaintiff willingly accepted a risk which he understood and appreciated the magnitude of and which resulted in the accident, then the injured party will have no recourse to legal action against the defendant. If, however, the participant did not assume the risk, but somehow otherwise contributed to his injury(ies) through his own negligence, then the courts will likely apportion damages between the two parties according to their relative degrees of negligence.

For the purposes of this study, the relationship between outdoor educators and participants has been paralleled with that of teacher–student [1] or coach–player, where through some express agreement, contractual or not, the outdoor programming agency has agreed to supervise, instruct and train the participant in one or more of the potentially 'high risk' outdoor activity pursuit areas identified at the beginning of this thesis (i.e., hiking and backpacking, cross–country ski instruction and touring, canoe and kayak instruction and touring). The standard of care owed by the outdoor educator (instructor/leader), his supervising director and the agency/board/organization he is employed by will be considered collectively in this section as it applies to tort negligence regarding program participants. The concept of vicarious liability of agencies for their servant employees will be discussed in chapter seven.

In determining whether the standard of care demonstrated by the outdoor educator was adequate for an adult participant, the courts would apply the reasonable man test. Because of the scarcity of established standards in outdoor activity pursuits, the judiciary would probably rely on one or more professed 'experts' in the field to convince them that the leader did (or did not) conduct the activity as a reasonably prudent person with the defendant's knowledge and training. The court would strive to establish whether the leader properly evaluated the likelihood of injury and its potential gravity against the utility of the activity being pursued and the cost of eliminating the risk. Linden's PL = OC equation [2] has some interesting implications when dealing with outdoor education situations.

First of all, tremendous judgmental capacities must be attributed to any leader who can take a group of heterogeneously skilled people, realistically evaluate the magnitude of risk for *each* individual participant performing the activity in the selected environment, and plan his program accordingly. The tendency all too often, as will be discussed in the subsequent section, is for leaders to gear their program to the average participant, leaving the risk level higher for the less experienced or weaker members of the group. Achieving the ultimate objective of having everyone in the group learning and practising their skills while at an optimal level of arousal (i.e., challenged, but not to the

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[1] See Donna L. Hawley, "The Legal Liability of Canadian Physical Education Teachers," (Unpublished Master of Arts Thesis, University of Alberta, 1974).
[2] Allen M. Linden, Canadian Negligence Law, third edition, (Toronto: Butterworths, 1982), p. 8, described in chapter three of this thesis.

point of being too anxious to learn or perform) is the mark of a sensitive and usually a seasoned leader."

Secondly, outdoor education is also unique in that it relies upon the presence of perceived risk and danger for its justification. People register for outdoor adventure programs involving physical, mental and social challenges in order that through the facing of a number of 'controlled' risks, they may overcome them on their way to achieving feelings of perceived competence and self-determination in the world. However, in weighing the magnitude of risk warranted by the utility of the activity being pursued, the courts will not recognize this rationale as meritorious justification for exposing participants to unreasonable risks. In fact,

> ...in practice the activity being pursued is irrelevant in the great majority of cases of personal injury or property damages. The courts are not, save in very exceptional cases, prepared to acquit someone of negligence because he was doing something very useful, nor conversely are they prepared to convict someone of negligence because he is doing something useless or even anti-social. [3]

Therefore, regardless of program goals and objectives, placing participants either individually or in groups, in situations where the real or 'objective' risk in the situation makes their injury a likely occurrence, especially if such injury is likely to be serious, completely unjustifiable in a court of law. The 'exceptional cases' to which Atiyah refers in the above quote, are normally reserved for emergency situations. Where in the act of attempting to save someone's life, an innocent rescuer is injured, regardless of the risk to which he has exposed himself, the courts would be forced to recognize the utility of his conduct in the situation and usually to accept the risks incurred as warranted by the objective of saving another's life. This exception will be discussed in much greater detail in chapter nine.

And finally, there is the concept surrounding the feasibility of instituting "precautions or alternatives which might eliminate or minimize the danger." [4] This concept is also interesting to outdoor educators in that while they are (or should be) taking precautions to reduce or eliminate the real risk of injury present in the situation, the safety procedures employed are not necessarily intended to simultaneously decrease the participants' perceived risk, the apparent or 'subjective' risk present in that same situation.

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[3] Patrick S. Atiyah, Accidents, Compensation and the Law, (London: Weidenfeld and Nicolson, 1975), footnote 11.
[4] John G. Fleming, The Law of Torts, (Sydney: The Law Book Co., 1977), p. 116.

Thus, the use of lifejackets for canoeing or kayaking does not eliminate the chance of dumping in an intermediate whitewater river, but they greatly reduce the chance of any traumatic physical injury resulting from an unexpected swim. They also allow the leader to keep the group challenged and improving quickly. If one could only take his group on rivers they would be highly unlikely to tip in, their rate of skill progress and their enthusiasm for the activity would suffer. Fortunately, what the courts may recognize as an unreasonable risk without such safety equipment as lifejackets, would probably not be deemed unreasonable with the use of such highly accepted safety devices. Therefore, it is the outdoor educator's duty to be familiar with the equipment and procedures employed by other individuals and agencies in the field and to either use these in adopting custom, or be able to justify why they are not being employed. To use another canoeing example, a number of prominent outdoor agencies have adopted the carriage of throw bags by their staff. A throw bag is a brightly colored nylon stuff sack full of rope. The rescuer holds or loosely loops the free end of the rope around his wrist and throws the bag toward the victim, allowing the loose rope to play out as the bag travels through the air. The sack is felt to be easier to see and grab in the water than the end of an ordinary rescue throw line. At a current purchase cost of about fifteen dollars (less if homemade), some agencies and/or individuals may not feel the additional safety they offer to be worth their cost. However, if an accident occurred where a victim was injured or killed because he failed to see or grab a throw line tossed to him, the courts may feel that because throw bags are a fairly established and relatively inexpensive safety device, the failure to carry and use one for rescues constituted negligence on the part of the leader (and/or agency).

Although the circumstances involved a different sort of safety device, an example of such a finding occurred in Ware's Taxi Ltd. v. Gilliham,[5] where the defendant taxi company was found negligent for not installing a commonly used, inexpensive safety device to keep children from opening car doors while the vehicle is in motion.

The standard of care when dealing with participants classified as minors is of course, somewhat higher than that owed an adult participant or group. Recent case law indicates that adult participants will usually be held personally liable for assuming most, if

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[5] [1949] S.C.R. 637.

not all inherent risks in the activity as it will be presupposed that they are of sufficient age, intelligence and experience to be aware of these risks and their potential consequences. [6] In dealing with child participants however, the standard of the careful parent laid down by Lord Esher, [7] although slightly modified, is still the model recognized by commonwealth courts.

In the outdoor education case example of Moddejonge v. Huron County Board of Education, a school outdoor education coordinator was found negligent for allowing a number of girls who could not swim to wade in an unmarked swimming area with a steep drop-off of irregular outline. [8] Inspite of his cautions, two students drowned when one girl who could swim attempted to rescue the second of two non-swimmers who had gotten into the deep water over the drop-off area. The coordinator himself, holder of a master's degree in outdoor education, was a non-swimmer and he had failed to secure a lifeguard or any lifesaving equipment (e.g., poles, ropes or other reaching or throwing assists, a paddleboard or boat, etc.) before permitting the girls to wade in the area.

In applying the careful parent standard to this case, Pennell J. felt that,

> ...a reasonably careful parent would have been unlikely to permit his daughter, who was unable to swim, to go into this particular body of water without exercising more care for her safety or ensuring that someone else did so on his behalf. [9]

It was held that the defendant had failed to meet his duty and his lack of foreseeability of the likelihood of one or more of the non-swimmers drifting into the deep water was attributable as the proximate cause of the accident which eventuated. He failed in his duty to take precautions to protect the girls from the real danger they were in.

This same careful parent standard of care was also held owed by a downhill ski instructor in the British Columbia decision in Taylor v. R. [10] In this case, the fourteen year old girl plaintiff fell in a spot on the hill not visible from above and she was subsequently injured when another skier ran into her. The court concluded that in addition to the fact that very few skiers had been injured in that particular location on the hill (only two out of two hundred and twenty-nine accidents reported that year), the reasonably prudent

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[6] Sturdy et al. v. R. (1974), 47 D.L.R. (3d) 71.
[7] Williams v. Eady (1893), 10 T.L.R. 41.
[8] (1972), 2 O.R. 437 (Ont. H. Ct.).
[9] Ibid., at p. 443.
[10] (1978), 95 D.L.R. (3d) 82 (B.C.S.C.).

parent would not hesitate to take his/her teenage daughter down that same hill. In essence, they decided that the inherent risks involved in descending downhill ski slopes are not above the evaluation and assessment capabilities of the ordinary parent, and that a ski instructor's expert technical knowledge was not necessary to predict and if necessary avoid hazardous areas. [11]

As discussed in chapter four, the standard of the careful parent has been modified in recent years to account for a number of factors in additon to the teacher-student in loco parentis relationship. And although the careful parent test "remains the appropriate standard for such cases... it is not... a standard which can be applied in the same manner and to the same extent in every case." [12] McIntyre J. in the proceedings of the Supreme Court of Canada deciding on the Meyers case, supported qualifications to the original test, as presented in McKay v. Board of Govan School Unit No. 29 [13] and reiterated in Thornton v. Board of School Trustees of School Division No. 57 (Prince George). [14] In discussing these qualifications of the standard, McIntyre stated:

> It (the standard) has, no doubt, become somewhat qualified in modern times because of the greater variety of activities conducted in schools, with probably larger groups of students using more complicated and more dangerous equipment that formerly... Its application will vary from case to case and will depend upon the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, the competency and capacity of the students involved, and a host of other matters... [15]

As a quick review of these qualifications will demonstrate, they are all directly applicable to the outdoor education situation. A few examples will serve as illustration.

In looking at the 'greater variety of activities' being pursued, outdoor education can boast additions to traditional outdoor programs emphasizing hiking, snowshoeing and canoeing, of activities such as rock climbing, kayaking and cross-country skiing among other rising adventure pursuits.

Because of recent innovations in equipment and skill technologies, children are now exposed to more complicated and in some ways; more hazardous outdoor equipment than formerly. For example, high technology camping equipment such as

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[11] Ibid., at p. 82.
[12] Meyers v. Peel County Board of Education 1981, unreported S.C.C. notes, p. 10.
[13] [1968] S.C.R. 592.
[14] [1976] 5 W.W.R. 340 (B.C.C.A.)
[15] Meyers, supra n. 12, at p. 10.

naptha or compressed gas stoves and lanterns pose new danger.

Two other examples of qualifications to the test which may be more peculiar to the less clearly defined outdoor education circumstance than a regular school situation, but which would definitely be considered in evaluating the potential negligence of an outdoor educator include:

1. The actual training and certification of the leader. The standard of care expected of a certified mountain guide would be somewhat higher than that of a schoolteacher taking his class backpacking in the mountains.
2. Knowledge and employment of safety equipment and procedures designed to eliminate or significantly reduce the real risk of injury present in the situation. For example, first aid knowledge and a well stocked first aid kit may be deemed vital in dealing with a backcountry accident.

These and other elements will be listed and discussed in greater detail in the next section of this thesis. The point being made in this discussion however, is that in physical training accidents, indoor or outdoor, the courts must consider much more than just how a prudent parent would have conducted the activity in question. And even though Canadian courts continue to adhere to this standard, they have recognized the need to temper it with consideration of the contemporary physical educators' circumstances. In time it is likely that increasing litigations will lead to a raising of the standard to that of the careful physical educator [16] or outdoor educator as the case may be.

In brief then, an outdoor educator facing tort charges would be evaluated largely on the basis of the foreseeability he exercised in predicting the likelihood of one of his students/participants being injured, in the activity being pursued and in the manner he was directing it.

In dealing with adult participants, the leader would be held to the standard of the reasonably prudent outdoor educator (i.e., the reasonable person with the defendant's outdoor knowledge and training). However, and although open to some interpretation, children are owed a standard concomitant with that expected from the reasonably careful parent.

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[16] Donald H. Rogers, "The Increasing Standard of Care for Teachers," Education Canada, Spring 1981, p 27.

B. Duties of the Outdoor Educator

In order for a litigation to proceed against an outdoor educator, the injured plaintiff must show that his injury(ies) were proximately caused by the breach of one or more duties (standards of care) owed him by that leader. These duties may be related to the instructor/leader's personal competence and qualifications, or they may be directed at specific responsibilities this individual accepts in guiding, supervising and instructing participants and in ensuring that adequate safety precautions have been taken prior to and during their participation and in the event of an accident or emergency situation. In the remainder of this chapter, the writer will categorically review these duties; the grounds upon which negligence may be found in a court of law.

Outdoor Educator Qualifications

The public or private agency hiring an outdoor educator must be confident that he has the qualifications, [17] (e.g., technical knowledge and skill, physical fitness, age, experience, judgment, etc.) and certification(s) required by law and common sense to do the job. In the case of Walton v. Vancouver, [18] a school board was held liable for allowing an unqualified teacher to supervise a shooting competition during which a rifle backfired and injured a student.

In the Moddejonge case, the outdoor education coordinator supervising a group of girls swimming was neither qualified (he was a non-swimmer himself), nor certified (as an aquatics lifesaver) to be placing himself in the role of lifeguard. [19] Instructor qualifications have also been implicated as a cause of death in British [20] and American [21] outdoor education accidents. The latter of these was one of many actions against American Outward Bound schools, most of which run programs in a very similar manner to those seen in Canadian Outward Bound Schools. In this particular case, an instructor's qualifications were questioned when a twenty year old woman was killed by a falling rock while she was rock climbing with the school. [22]

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[17] Walton v. Vancouver [1924] 2 D.L.R. 387.
[18] Ibid., n. 17.
[19] Moddejonge, supra n. 8.
[20] "The Cairngorm Tragedy: A report on the Fatal Accidents Enquiry," Mountain, No. 20., 1972.
[21] Ross v. Colarado Outward Bound (1977), unreported case, December 1978.
[22] Ibid.

Instructor/leaders should not only teach/lead in their areas of competency, but also at a level well below their own level of ability. For example, little safety margin would be present where an intermediate paddler was found leading a kayaking trip on a difficult (class three to four) whitewater river. Outdoor educators who lead programs solely because of the challenge they find in the activity are a hazard to the program participants and themselves. And of course, the more dangerous the activity or the level of pursuit, the higher the expectations will be of a leader's qualifications and certifications. Therefore, both the agency hiring and placing outdoor educators and the leaders themselves have a duty to know the leader's capabilities and limits of performance and leadership.

Knowing one's limits and operating within them is one example of how outdoor educators demonstrate their judgmental abilities. Other examples may be seen in the way they assess and relate risks to participant abilities in developing a strategy to safely supervise and instruct each program they run. Contrary to the somewhat unrealistic policies of most schoolboards and many agencies who strive to make everything completely 'safe' for their charges, one of the ideals of outdoor education is an underlying philosophical challenge of preparing individuals to evaluate and accept risks in relation to their own abilities to deal with them.[23]

Risk Assessment

The outdoor educator has a duty to assess the real risks inherent to participation in a given activity pursuit, with an identifiable group using certain equipment in the particular environmental circumstances found on the proposed site or travel route. Risk factors worthy of assessment in any outdoor education situation include weather (e.g., exposure to sun, heat, cold, wind, precipitation) and the chance of someone becoming unexplainedly ill during the program. Most other factors are rather activity specific. For example, the leader taking a group out high country hiking may be concerned about water availability and quality, wild animals, poisonous plants and rockfalls or landslides while the canoe trip leader will be more concerned with water level, volume and obstacles and possible cold water immersion by participants.

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[23] William March; "Outdoor Pursuits: What are the Legal Implications", Canadian Intramural Recreation Association Bulletin, Vol. 6, No. 1, p. 3.

In assessing each particular risk factor (as well as likely combinations of such) the leader must consider both the likelihood of anyone being injured and the potential severity of injury(ies) which may result from accepting that risk. [24]

Risk assessments cannot occur in isolation from participant capability assessments. Each hazard must be evaluated to determine both the likelihood and potential magnitude of risk posed for *each* participant as well as for the group as a unit.

Participant Capability Assessment

Although most participants, especially more mature and experienced ones, often have a fairly good idea of their capabilities, it is the outdoor educator's duty to determine these for himself. [25] The leader has a duty to know the general abilities and rates of progression of groups at various levels of proficiency and even more importantly he has a responsibility to know and appreciate the possible consequences of participation for each individual in his care. [26] Consequently, in an American case (therefore not binding in Canada), a college was found fully liable when a freshman non-swimmer taking a required course in swimming drowned. [27] Inspite of the fact that he held himself out as a swimmer when the class separated itself into swimmers and non-swimmers, the courts held that:

> Under these circumstances, the deceased who... was an unskilled swimmer who could barely stay afloat, did not, as a matter of law assume the risk of death by drowning... [T]he deceased, by separating himself into the group who could swim, did not represent that he was, or assume the position of the skilled in swimming, but was entitled to assume that his instructors knew he was not and would exercise ordinary care to protect him. [28]

Normally, one of the most important aspects of participant evaluation will be their physical abilities and limitations. This may be ascertained through statement of health forms and fitness tests related to the activity. The importance of such evaluation was born out in a survey carried out on accidents reported in Banff National Park from 1974-1980. This survey concluded that pre-existing medical problems and conditions was the second largest cause of backcountry hiking and backpacking accidents during that period of time, second only to off-trail accidents by inexperienced and unprepared

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[24] Fleming, supra n. 4, p. 114.
[25] Morehouse College v. Russel (1964), 136 S.E. (2d) 179.
[26] Dziwenka v. Mapplebeck [1972] 1 W.W.R. 350 (S.C.C.).
[27] Morehouse, supra n. 26.
[28] Ibid., at p. 189.

travellers.[29] The Dziwenka case, where a deaf-mute student was injured while using a power saw in an industrial arts class, demonstrates conclusively the need to identify and program in accordance with individual participants' abilities and disabilities.[30]

In terms of technical knowledge and skill assessment, the courts have stated that an instructor "should quickly ascertain how far advanced the student has progressed and what ability the student possesses."[31] New participants require constant, on-going evaluation[32] and feedback in order to develop their skills.

In McWilliam v. Thunder Bay Flying Club,[33] it was held that a formal evaluation of an advanced student's skills was not necessary and the instructor flying in a plane with such a student was held not liable for failing to prevent a crash caused by the latter stalling the plane in midair.

In addition to an evaluation of physical fitness and skill parameters, consideration of the participant's mental set and ability should not be overlooked. Where a participant expresses anxiety concerning a particular activity, the courts may hold that he was not psychologically prepared for it.[34] Conversely, if the participant displays enthusiasm for the activity, this may be construed as inferring a mental readiness for that exercise.[35] However, neither mental attitude displayed by the participant would conclusively indicate the activity's appropriateness or lack of such.[36] The outdoor educator must take the time to reasonably assess this for himself.[37] The outdoor leader must also have some knowledge of the different mechanisms people employ when dealing with mental and emotional stress and he must be aware of how to employ these techniques within his group to decrease unfounded perceived stresses (or to increase them when an individual or group displays overconfidence).

In addition, where an outdoor leader encourages a participant to perform a given task (e.g., paddling across a potentially hazardous rapid) by intentionally understating the risk and lulling the individual into a false sense of competence, that leader may be liable

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[29] David Godfrey-Smith, "Hiking Accidents", Explore Alberta, 2 July, 1981.
[30] Dziwenka, supra n. 27.
[31] Weston v. London [1941] 1 All E.R. 555.
[32] Brost v. Board of Trustees of Eastern Irrigation [1955] 3 D.L.R. 159 (Alta. C.A.).
[33] [1950] O.W.N. 696 (Ont. H. C.).
[34] Boese v. Board of Education of St. Paul's Roman Catholic Separate School District No. 20 (Saskatoon) (1976), Q.B.D. 607 (Q.B.).
[35] Thornton, supra n. 14, pp. 265-66.
[36] Taylor, supra n. 10.
[37] Smith v. Horizon Aerosports Ltd. (1980), 130 D.L.R. (3d) 91 (B.C.S.C).

for any injuries sustained by the participant while attempting that task.[38] The courts would be very likely to construe such comments as negligent misrepresentations of the real risk to the participant. It should be noted that it is an extremely unwise practice to require, force or otherwise coerce any individual into doing anything he expresses a strong fear or disapproval of.

Once the outdoor educator has looked at all possible environmental risks and participant characteristics, he must consider these two types of factors as they relate to each other and determine the groups' course of action accordingly. The leader may decide to take one of four possible courses of action in dealing with assessed hazards.

1. *Avoidance* – choosing not to take the risk at that particular time (e.g., taking the portage route instead of paddling a risky stretch of river),
2. *Reduction* – reducing the frequency and/or potential severity of injury (e.g., requiring cross-country ski tourers to wear glacier glasses may reduce both the incidence and potential severity of snowblindness).
3. *Retention* – risks may be retained when the chance of severe injury is very low and where the group is quite well-skilled and equipped (e.g., backpacking in an area known for its extremely variable weather),
4. *Transferance* – purchasing insurance to cover the agency for risks which are perceived as undesirable but unavoidable in the achievement of programming objectives. These risks, while occurring infrequently, may be quite catastrophic in their consequences (e.g., loose rock falling while rock climbing).[39]

When the leader has assessed the theoretical knowledge and technical skills of a group as being sufficiently high, he may permit the group to democratically make its own risk assessments and choose subsequent courses of action. However, he almost always retains ultimate responsibility for the possible consequences of their decisions, especially if the participants are minors. The duty to terminate or modify a significantly risky pursuit will remain his and his alone. This remains true because the group will very rarely have the leader's experience and knowledge of the hazard and the particular travel area. Before arriving at a level involving shared decision-making, the leader must have done much

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[38] Hedley Byrne Co. Ltd. v. Heller and Partners Ltd. [1964] A.C. 465 (H.L.).
[39] Nester J. Roos and J. Gerlin, Government Risk Management Manual, (Tucson, Ariz.: Risk Management Publishing Co., n.d.) p. 3.

assessing of the participants' physical, mental and social skills in similar risk situations, and be confident of them.

Regardless of who appears to be making the decisions, the leader must be certain that the course of action selected is congruent with his assessment of the party's ability to handle the particular situation. A risk worthy of avoidance with a group of novices may be retainable as is or with some form of reduction for a more experienced party. For example, while an icy river swollen with spring floodwaters may be perceived as too hazardous for a class of neophyte paddlers, an intermediate group wearing wetsuits and helmets and carrying extra floatation in their boats may actually seek the risk.

The following incident will bring to bear the imperativeness of assessing risks in relation to the participants' capabilities. Early in 1972, six youths lost their lives while on an Edinburgh Education Authority sponsored training hike on the Cairngorm Plateau in Scotland. [40] The six, part of a group of seven being lead by an assistant instructor, walked into a blizzard and the resultant heavy snowfall and white-out conditions kept them stranded in bivouacs for two nights, less than a kilometer from their destination cabin of the first night. It took a full day for the program instructor, leading another group in the same area, to realize the other party's absence, and bad weather and pending darkness precluded the search until late the second day. A helicopter pilot finally spotted the assistant instructor and lead a search party to the remainder of her group, buried in the snow.

A report outlining the judicial fatal accidents enquiry which followed the tragedy cited the instructor's "underestimation of the Cairngorms as a dangerous mountain group and his naivety in taking children into the area in the winter" as "the most serious charge to emerge" from the enquiry. [41] Numerous 'expert' witnesses stated that they considered these mountains too hazardous for such expeditions, "particularly because of the likelihood of savage weather, in featureless terrain from which retreat is difficult." [42] In bad weather, this area was perceived as a severe challenge for "seasoned mountaineers, let alone young climbers trying to gain experience." [43]

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[40] Public Enquiry, supra n. 21.
[41] Ibid., at p. 2.
[42] Ibid., at p. 3.
[43] Ibid., at p. 3.

Leader qualification was also brought under question, in reference to the assistant instructor placed in charge of the group. A number of authorities questioned felt she was "too young, insufficiently qualified and not experienced enough to take charge of parties of school children." [44]

Other factors which were deemed to have contributed to the disaster included the lead instructor's failure to perceive the dangerous conditions pending and to reunite the group when the weather deteriorated and numerous minor errors in judgment made by the assistant instructor while following the instructor's directions without question.

Inspite of all of these allegations, the jury concluded in their findings that "there was no one area of serious negligence," and that the accident had resulted from the "cumulative effect of a number of miscalculations." [45]

It must be noted that no lawsuits succeeded this judicial enquiry, and enquiries themselves do not yield any binding law. However, many excellent points did evolve which are worthy of consideration by all outdoor educators attempting to match environmental risk assessments to participant needs and capabilities.

Navigation and Guidance

Even a leader who is careful not to overextend his participants' resources by carefully matching their abilities with the planned activity and environment, may be negligent in the manner in which he guides his charges or in the way he conducts his program. The fact that the outdoor educator often runs his program in a transient manner, sometimes leading his participants many kilometers in a day (regardless of travel mode), indicates that he has a number of specific decision-making duties to perform throughout each trek. Unlike most other physical educators who function in relatively fixed, easily definable environments (e.g., gymnasia or playing fields), the outdoor educator must combine his educational duties with those of a navigator and guide. As a navigator, he must be able to make necessary route choices, both before and during each days' travel. Good orienteering skills are difficult to acquire and require much time and experience travelling in the type(s) of terrain that one will eventually lead in.

In addition to acting as group navigator, the outdoor leader must be a competent outdoor guide, capable of managing the group (i.e., getting them up and on the trail or

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[44] Ibid., at p. 3.
[45] Ibid., at p. 4.

water, organizing meals, keeping the group together, checking on individual participant's progress and solving or helping solve any problems which may arise), as well as motivating them to achieving their desired objectives. Unlike a physical education teacher who can exclude a student who isn't feeling up to participating on a given day, leaving them sitting on the sidelines, an outdoor educator must demonstrate sufficient flexibility to modify his program to meet such contingencies, yet still keep everyone moving if possible. A group engaged in a wilderness travel experience can by and large, move only as fast as its slowest member and the leader will have a duty to manage the group's resources wisely (e.g., sharing weaker members' pack loads among stronger members) or to seek more drastic alternatives (e.g., a rest day, evacuation, etc.) when one or more individuals' condition becomes questionable.

In these navigation and guidance duties, the outdoor educator plays a rather unique role, perhaps somewhat analagous to that of a ship's captain organizing and directing the affairs of his crew over the course of their journey.

In addition to these extensive decision-making and group leadership responsibilities, the outdoor educator has a number of duties quite generic to all physical educators. Hawley has placed the duties of physical education teachers into three categories: the duty to supervise; the duty to instruct; and the duty to provide adequate safety measures.[46] The remainder of this chapter will be devoted to a discussion of these categories of duties as they pertain to the outdoor educator instructing and leading individuals and groups in outdoor activity pursuits.

Supervision

Supervision refers to the general duty to oversee the participants from the time the outdoor educator assumes responsibility for them until the program is complete and the leader and group part company. In the interim, the degree of supervision administered by the leader varies, as it is neither essential nor desirable that he watch his participants every minute of the day. Factors affecting the tightness of supervision required include: the nature of the activity, the real risk present in the situation, the age, experience and technical expertise of the participants themselves.

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[46] Hawley, supra n. 1.

For example, in Sholtes v. Stranaghan, [47] an experienced outdoorsman employed a professional guide to accompany him on hunting, fishing and animal photography expeditions. Although the guide always escorted the plaintiff on hunting trips, he did not always go along on the latter's fishing and photography excursions. When the plaintiff was mauled by a grizzly bear while on a photography outing, he tried to claim damages against the guide for "breaching his duty of care" by allowing him to be "out in the wilds alone." [48] The courts dismissed the action and held that the guide/outfitter's standard of care "depended upon the knowledge and experience of the person who hired him." [49] In this case, he was justified in allowing the experienced plaintiff to pursue a low risk activity (photography) without his direct supervision.

Although the duty to supervise will be higher with children, especially with young children, the courts have tempered the need to "prevent unnecessary accidents" [50] with the impossibility and undesirability of watching every child continuously. In a British school case, McNair J. stated that "a balance must be struck between the meticulous supervision of children every moment at school and the desirable object of encouraging sturdy independence as they grow up." [51] The duty to supervise children in a given situation was shortly thereafter held to be that which an "ordinary and prudent schoolmaster or mistress" [52] would observe in that same situation.

While *general* supervision (i.e., where participants may summons the leader for assistance if they require it), may be adequate where risk is low and participant skill high, *specific* (i.e., close and concentrated) supervision is necessary when participants are attempting skills for the first time or practising inherently dangerous activities where foreseeable accidents may result in serious injury. In outdoor education situations where a group is geographically spread out but where risk is still fairly high, many leaders employ a 'buddy' system where participants keep an eye on one another. For example, while on a canoe trip a leader may make partners in a boat responsible for one another and may also make each craft responsible for the boat directly behind it. This practice

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[47] (1981), 8 A.C.W.S. (2d) 219 (B.C.S.C.).
[48] Ibid., at p. 219.
[49] Ibid., at p. 219.
[50] Geoffrey Barrel, Teachers and The Law, fifth edition, (London: Methuen and Co. Ltd., 1978), p. 274.
[51] Jeffery v. London County Council (1954), 119 J.P. 43, at p. 43.
[52] Carmarthenshire County Coucil v. Lewis [1955] A.C. 559 (H.L.).

allows the boats to spread out so they won't run into one another, but keeps everyone within sight of at least one, if not two other craft. It should be noted however, that although this type of system may help the leader perform his/her job, that leader retains ultimate responsibility for all participants; this duty cannot be delegated away.

The outdoor educator also has a duty to supervise most closely, those participants engaged in the most dangerous activity. In the Dziwenka case, an industrial arts teacher was held liable for not remaining close to the only student using a potentially dangerous tool in the class.[53] In giving his reasons for the finding, Laskin J. felt:

> ...he could have stayed with the plaintiff until the job was done with the unguarded saw... I do not find it improbable that the accident would not have happened if the instructor had directly supervised the operation...[54]

In the Moddejonge case, part of the outdoor coordinator's liability for the drownings of the two students was based on the fact that he had wandered some distance up the beach from the place he had left his group of girls wading.[55]

Charlesworth states that a "greater degree of supervision is required during hours of instruction than during hours of recreation."[56] In the outdoor education situation, this is certainly true and the statement may also be extended to reduce the standard of care required during free time, meal times and at night when leaders and participants are sleeping. A leader could hardly be faulted if a participant out sleepwalking in the middle of the night wanders over a cliff some distance from his tent. Again, only the standard of the reasonable outdoor leader (or parent if the participant is a minor) need be met.

As stated earlier, one of the major objectives of outdoor education is to provide participants with sufficient knowledge and skill that they may pursue the activities they are trained in independantly upon completion of the program or course (or series thereof). One of the methods a number of agencies (e.g., Outward Bound Schools, some universities, etc.) use to facilitate the development of this self-sufficiency, is by including a soloing component (group, individual or both) during the program. Supervision during such aspects of programs may be within whistle range or so distant as to be virtually non-existent, again depending on the leader's perceptions of the participants' skills and

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[53] Dziwenka, supra n. 27.
[54] Ibid., at p. 36.
[55] Moddejonge, supra n. 8, at p. 437.
[56] R.A. Percy, Charlesworth on Negligence, sixth edition, (London: Sweet and Maxwell, 1977), p. 594.

judgment in relation to the real risk present in the environment (except where agency policy dictates the level required).

In 1978, three young adults drowned while ocean kayaking off the Baja penninsula in California.[57] They were part of a group of nine, engaged in the final training expedition of an Outward Bound program, and they were travelling without the accompanyment of their instructors. The instructors, according to Outward Bound School procedure, were to travel separately and make once-daily checks on the progress of the group at pre-determined locations.

The Baja general weather pattern while far from predictable, usually consists of calm pre-dawn weather, with winds picking up to often violent levels by late morning. While fully knowledgeable of this pattern, the group succumbed to the natural tendency to break camp slowly when faced with the cool chill of morning and the calm sea ahead. As a result, they had been on the ocean less than an hour when a violent windstorm blew up. The accompanying fifteen foot swells overturned all but one of the kayaks, leaving six of the group in the water clinging to it for over fifteen hours before they finally managed to kick their way to the rocky shore.

Two of the three drowned students' parents brought lawsuits against the Southwest Outward Bound School on behalf of their children, citing negligence in a number of areas. Among their allegations, they claimed that the course was not reasonably safe for the students, that the area selected was very dangerous and known for its storms and that the students were inadequately supervised. In reviewing the supervision question, it was learned that a second Outward Bound group, travelling independently, returned to shore when the winds picked up and sought out the instructors. After directing this group to either portage or attempt the ocean again, the two instructors claimed that they took their motorized sailboat through the area where the first group was having trouble. The plaintiffs denied this and said that no attempt was made to summons help until almost noon the following day when a fishing vessel who rescued the survivors contacted the harbormaster.

It is almost certain that the absence of an instructor contributed to the late start of the group and the subsequent disaster. According to an interview with one of the

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[57] Megan Rosenfeld, "Outward Bound: Life and Death in the Wild, Lawsuits and Sorrow in the Aftermath" The Washington Post, November 23, 1979, p. E1.

female survivors:

> The instructors had us out by the crack of dawn every day that we went on the water... We didn't have an instructor cracking the whip so we just took a little longer. [58]

This case should bring to bear for the outdoor educator, the importance of instilling the value of self-determined exploration, while treading carefully the thin line between adventure and misadventure.

The case was eventually settled out of court and being of American origin, it would not have held any precedential power in Canadian courts even if it had been fully litigated. However, it nevertheless leaves outdoor educators with an important message concerning the importance of providing at least general supervision during all programs. The instructors in this unfortunate tragedy could have averted the disaster by keeping an eye, however distant, on their charges and moving in to render assistance when the group found themselves in trouble.

It should be remembered that in order for a plaintiff to convince a court of law that an accident resulted from a lack of adequate supervision, he must demonstrate that the same or a similar accident would have been unlikely had supervision been more specific and direct in the situation. [59] A participant who injures himself when he trips over his own feet while hiking, is unlikely to win an action he raises by claiming his leader was in front of the group at the time, instead of watching him walk. Also, an instructor does not have a duty to stop everyone in a group from proceeding with the activity while giving individual attention to a particular participant experiencing problems with equipment or skill techniques. [60]

In brief, an outdoor educator has a duty to provide supervision equivalent to that which would be expected of a reasonably prudent leader, or parent where children are involved. The need for specific, close supervision will be highest with young, inexperienced participants engaged in potentially risky pursuits and will decrease as the participants' age and skill level increases, and/or the real risk present in the situation decreases.

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[58] Ibid., at p. E3.
[59] Gard v. Board of School Trustees of Duncan (1946), 1 W.W.R. 305 (B.C.C.A.).
[60] Butt v. Cambridgeshire and Isle of Ely C.C. (1969), 119 New L.J. 118.

Instruction

Virtually all outdoor educators are involved as instructors, if only through the example they set for their participants. Those who are hired for their outdoor activity instructional skills assume a great duty to teach their students the activity pursuit comprehensively and safely. In addition to teaching physical activities, the outdoor instructor has a duty to teach some of the scientific theory relevant to the pursuit before and/or during the students' engagement in it. For example, when teaching river canoeing, films, slides and/or discussion of topics such as the reading of rivers, river grading systems and the biomechanical principles of efficient paddling are all integrally related to the learning of the activity.

A functional understanding of important elements related to an activity is crucial to providing students with an understanding and appreciation of risks inherent to involvement in the activity. This understanding and appreciation of risks is an important prerequisite to the delivery of essential cautions and warnings concerning the handling of these risks. [61]

It is prudent to make sure that *every* participant hears these warnings; the more frequently they are delivered the better. A factor the courts may consider in a case would be the length of time expired since the last warning was issued regarding a particular risk which eventuated in an accident. Warnings need not be presented to each individual separately; a group communication of them is sufficient as long as any members not present at the group session are individually cautioned when they arrive. Although these warnings will not absolve the instructor of negligence should he fail to take adequate care in one or more of his other duties, they certainly provide evidence in his favor and place much onus on plaintiff participants (especially adults) to show that they did not assume the risk voluntarily. [62]

One of the major general duties of all instructors will be to ensure that safe and proper techniques are taught. In Olsen v. Corry, [63] an aviation apprentice sued the defendant aviation company for injuries he sustained while swinging a plane's propeller to help start the plane. He won the suit, based on his claim that no safe procedural system

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[61] James v. River East School (1975), 64 D.L.R. (3d) 338 (Man. C.A.).
[62] Dukes v. Vancouver (December 4, 1973), unreported case, (B.C.S.C.).
[63] [1936] 3 All E.R. 241, (K.B.).

for starting engines was taught or enforced at the aerodrome. [64]

In Starr and McNulty v. Crone, [65] a father was found negligent in failing to teach his son proper and safe use of a firearm, resulting in the fifteen year old shooting another youth. Wilson J. stated that:

> ...it is negligent to entrust a dangerous weapon to a young boy unless it is proved: (a) That he was properly and thoroughly trained in the use of the weapon, with particular regard to using it safely and carefully; (b) That the boy was of an age, character and intelligence so that the father might safely assume the boy would apprehend and obey the instructions given him. [66]

This same standard of care was found wanting in School Division of Assiniboine South No. 3 v. Hoffer et al. [67] where a father taught his son a modified and unsafe technique for starting his snowmobile with the kickstand down, resulting in the son losing control of the machine and it contributing to the damage of a school building.

Again, a safe and proper technique will normally be that which has either been customarily used by a large percentage of outdoor educators in the area without mishap, and/or one which the agency has adopted to safely fit the particular environmental variables they are operating with. Unlike a school gymnasium, outdoor education sites vary tremendously in their nature and in the elements of risk present. An important consideration in court is sure to be the forethought the outdoor educator can show he used in planning his program in the manner he chose.

Wilson J.'s comment in the Starr case also brings up the importance of gearing explanations and instructions to the individual participants' level of comprehension. [68] The School Division of Assiniboine South No. 3 case also indicated that the instructor must not only gear his instructions to the participants' level of understanding, but he must also be conviced of the students' physical ability to safely follow the directions given. [69]

Lack of proper instruction and supervision were found to have contributed to the injuries sustained by a nine year old plaintiff injured when he fell off a snowmobile he was a passenger on, being subsequently struck by a second machine. [70] In addition to finding both infant drivers negligent and the plaintiff contributorily negligent, the courts

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[64] Ibid., at p. 438.
[65] [1950] 4 D.L.R. 433.
[66] Ibid., at p. 438.
[67] (1971), 21 D.L.R. (3d) 608.
[68] Also stated in Murray et al. v. Board of Education of the City of Belleville [1943] 1 D.L.R. 494 (Ont. H. Ct.).
[69] School Division of Assiniboine South No. 3, supra n. 67, at p. 612.
[70] Ryan et al. v. Hickson et al. (1974), 352 D.L.R. (3d) 196

held both drivers' fathers equally negligent in failing to teach the boys the safe and careful use of these dangerous machines in a manner which they could understand, appreciate and physically carry out. [71]

Instructions and explanations may be related to any number of aspects concerning the environment, the skills involved in the activity, safety precautions particular to individual skills or general emergency procedures to be carried out in the event of an accident. Often a verbal description will suffice, but where concepts are difficult to visualize, instructors should employ more illustrative visual and where possible experiential teaching methods.

In addition to verbal instructions, one of the most common instructionsl methods employed in teaching skills is the performance of a demonstration. In the McKay case, where a teenage youth was seriously injured while attempting a stunt on the parallel bars, part of the teacher's liability was attributed to the fact that he "had described the exercise but had not demonstrated it." [72] Demonstrations need not be perfect, but must be technically correct, which points to the importance of instructors practising their own skills and maintaining them at a high level.

It is not essential that the instructor himself perform all demonstrations; an assistant and/or skilled participant is adequate and often better as this frees the instructor to point out various elements of the skill, to demonstrate proper spotting position and so on. For example, it is perfectly acceptable for a canoeing instructor to remain on shore with the students while he has an assistant and/or skilled other demonstrate how to ferry a canoe across a rapid. From his position on shore he can point out how the water acts on the hull of the craft when the paddlers lean downstream and he can illustrate uses for this skill in crossing a stream. This procedure also saves time as much of the instruction occurs concomitantly with the demonstration and the instructor is close enough to the students that he needn't yell to be heard over the sound of the river.

Probably the most essential concern with instruction is that it be progressive in degree of difficulty. In outdoor education situations, progression may and should be utilized: a) between the skills taught (e.g., teaching a diagonal stride before telemarking); b)

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[71] Ibid., at p. 196.
[72] McKay, supra n. 13, at p. 592.

within each skill taught (e.g., teaching diagonal stride weightshift and glide without poles first, only introducing pole use to those who have mastered the earlier progressions); and c) within the environment in which the skill is practised (e.g., teaching diagonal stride on flat or very easy rolling terrain before working it on steeper hills). The same categories of instructional progressions may be considered regardless of the outdoor activity pursuit being taught, only the specific skills, skill components and environmental variables will change. In the Murray case, [73] the physical education teacher was not held liable for injuries a twelve year old student sustained while breaking up a human gymnastic pyramid, largely because:

> ...there is an element of danger in all sports and even in the less dangerous ones, but at the same time that element of danger can be reduced to a minimum when the participants observe the rules of the game, play with reasonable prudence and care after having, in the proper cases, been progressively trained and coached in such exercises. [74]

Yet another important consideration regarding the use of progressive training is the importance of allowing time for *each* student to master one progression before going on to the next. [75] All too often, instructors progress their groups at the rate of the *average* student, often placing the less physically adept in situations with more skill components and/or environmental variables than they are physically and/or psychologically prepared to cope. The writer has seen countless examples of failures to meet this duty in outdoor education situations, on occasion with near disasterous results. In one instance some years ago, the author recalls taking a general month-long spring outdoor adventure course (the agency will go unnamed) which included a one-day introduction to kayaking. After spending less than two hours learning and practising the basics on a nearby lake, the entire group was dropped in a class two-three river (in spring flood) with a lead instructor (who admitted she always grew grey hairs on this day of the course) and an assistant instructor the group had never seen before. Within five minutes, one boat had tipped and broached against a partially submerged stump (it later took ten people hauling on a rope to free it) and the paddler was left on shore to make his way back to the center alone. Upon returning to the center, the author looked for the abandoned paddler and found him, right where he'd been left, staring at his

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[73] Murray, supra n. 68.
[74] Ibid., at p. 495.
[75] McKay, supra n. 13, at p. 589.

semi-submerged kayak in a state of shock. Although an avid outdoorsman, at last contact he had not sat in a kayak since that day.

The lesson to be drawn from this incident and similar ones the author is sure many readers will be able to recall from their own experiences, is that unless special alternatives are allowed within a program, (e.g., extra sessions for the less experienced or slower learners, selection of an area with enough variety that everyone can work at his own level, etc.) then a group may only progress as fast as its slowest member.

And finally, while students are engaged in learning new skills, it is wise to avoid initiating any elements of competition or grading betweeh them. This point was brought out in the Meyers case, [76] as students received higher marks for completing more complicated gymnastics manoeuvers. This fact was felt to contribute to the plaintiff youth attempting a rather dangerous manoeuver he had never tried previously:

> He had not been told to try it. In fact he had been virtually invited to do so, since higher marks could be obtained by the performance of Level Two exercises. [77]

An illustration of the importance of a number of these elements of instruction can be found in the facts leading to the recent decision in Smith v. Horizon Aerosports Ltd. et al., [78] where the plaintiff was rendered a paraplegic in a sport parachuting instructional class. Near the end of a short four-hour introductory session, the plaintiff and her class were taken up in a plane to attempt their first jumps. The plaintiff, although visibly anxious, was permitted to make her jump. She mentally froze as soon as she left the plane, immediately forgetting all of her previous instruction. As a result, she failed to steer her canopy to the safe landing area and instead landed in a tree, fell to the ground and broke her back.

Some of the factors Spencer J. used in attributing negligence to the school included the instructor's failure to adequately describe and discuss a number of elements of the upcoming jump, resulting in the plaintiff being excessively unfamiliar with the procedure and concomitantly overstressed by the situation.

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[76] Meyers v. Peel County Board of Education [1981] S.C.C.D. 3081-01.
[77] Meyers, supra n. 12, at p. 14.
[78] Smith, supra n. 38.

> The plaintiff was not shown a diagram or photograph of the drop zone so that she knew what to look for from the air... Although told there would be a rush of wind, its strength and effect were not brought home to her. Although told she might have to turn to find the arrow (held up by a co-instructor on the ground directing jumpers to the landing area), she was not told that because they would be dropped upwind it was probable she would have to do that. There was insufficient testing and questioning to ensure that she grasped the essentials of the jump thoroughly enough to perform it safely. I do not say it is necessary to provide written tests. Verbal testing should suffice but it was inadequately done in this instance. The subject of canopy control was passed over too quickly in favour of concentration upon other elements of the jump. [79]

And although not finding the school or instructor negligent for attempting to prepare jumpers in only four hours, the trial judge stated that the

> ...shortness of the course which is deliberately designed to whet the appetites of novices so that they may jump with the minimal involvement of time puts on those who teach it a heavy onus to ensure that each individual novice has learned well enough to jump safely. [80]

And finally, although no overt competition was present, the court felt that

> Having gone through the training and come to the point of the jump there are probably strong peer group pressures on the student to complete the task. I find it to be part of a jump master's duties to tell an alarmed student that she does not have to jump unless she is quite ready and that no one will think the worse of her if she declines. [81]

In fact, this court felt that it was the jump master's duty to prohibit any jumper who he felt was not "physicially and emotionally in a condition to exercise clear and quick judgment," even if the jumper felt personally ready to proceed. [82]

The reader can surely draw parallels with other outoor activities demanding participant commital, the easiest perhaps being the paddler about to run a rapid for the first time.

In summary, an outdoor educator has numerous duties to meet while he is instructing others in outdoor living and travel skills. He has a foremost general duty to progressively teach participants the activity, using a variety of recognized teaching methodologies. While doing so, he must always be careful that each student has the intellectual, physical and emotional capability to perform at a safe level, the progressions taught.

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[79] Ibid., at p. 102.
[80] Ibid., at p. 103.
[81] Ibid., at p. 102.
[82] Ibid.

Provision of Safety Measures

A fourth and final category of duties, integrally related to the duties pertaining to guidance, supervisory and instructional responsibilities are those varied but essential duties collectively considered safety precautions.

The types of safetly measures employed will vary slightly depending on the activity, group, equipment and environment, but most of the factors considered here have warranted some attention in a wide variety of outdoor programs.

The first duty involves the need for outdoor educators to know their participants, both the general characteristics and propensities of the age group being dealt with [83] and any specific outstanding propensities displayed by any one participant. [84] Usually pertaining to children or the mentally disabled, this duty would be reflected in responsibilities to create and enforce necessary rules and regulations which facilitate organization and control of the group. Such rules and regulations may concern camp boundaries, unsupervised equipment use, horseplay during programs and so on and will most likely be appreciated by participants as they lay important guidelines for the activity.

Another large area requiring frequent, careful safety analysis involves the equipment used by the participants. It should be maintained in good repair and replaced when it becomes unsafe or obsolete. A leader employed by an agency using unsafe equipment or procrastinating the purchase of needed replacement equipment, would be wise to protect himself from liability by writing a formal letter to his supervisor requesting new equipment and keeping a copy for himself. Another important equipment consideration is the need to carry adequate amounts of quality personal technical equipment (e.g. lifejackets, paddles, ski boots, ski poles, etc.) if advertising the provision of such.

In the recent case of Delaney et al. v. Cascade River Holidays Ltd. et al. [85] the defendant whitewater rafting outfit was found negligent in failing to provide the plaintiff, (who drowned while engaged in one of the defendant's guided rafting excursions) with a lifejacket meeting required buoyancy specifications for this type of useage. The crew and passengers were wearing Department of Transport small craft approved lifejackets

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[83] Durham et al. v. Public School Board of Township School Area of N. Oxford (1960), 23 D.L.R. (2d) 719 (Ont. C.A.).
[84] Starr and McNulty, supra n. 65, at p. 563.
[85] (1982), 34 B.C.L.R. 62 (B.C.S.C.).

affording twenty-one pounds of buoyancy.

However, the president of the corporate defendant admitted that he had previously recognized the inadequacy of these personal floatation devices when used in the cold, turbulent waters of the Fraser River, and although he knew where he could obtain Ministry of Transport approved lifejackets with thirty pounds of buoyancy, he "made no effort to purchase those jackets before the tragedy but continued to provide passengers with personal floatation devices which were inadequate for whitewater rivers." [86] While not claiming that jackets with a higher buoyancy ratio would have prevented the tragedy, Callighan J. stated that

> ...based on the evidence before me they (the jackets) may have averted or reduced the loss of life that occurred when the crew and passengers were swept from the motorized raft. [87]

In this particular case, inspite of the defendant's negligence the plaintiff's estate was barred recovery because the plaintiff had signed a disclaimer which expressly excluded the company from liability, including that caused by its own negligence. Regardless, outdoor educators or agency directors should note their responsibility to provide high quality equipment, suitable for the type of use it is likely to receive. Also, such equipment must be stocked in a variety of sizes to meet various participants' needs. In addition to detrimentally affecting learning, improperly fitting equipment can be hazardous. A lifejacket that is so large it slips over the head of the wearer is dangerous, as is a pair of cross-country ski boots so small that they constrict circulation and promote pre-mature frostbite of the feet.

That equipment should only be utilized in the manner for which it was intended was born out in the Thornton case, [88] where a teenager was rendered a quadraplegic doing somersaults in a gymnastics class. He gained momentum by jumping from a vaulting horse down onto a springboard and on a bad rebound from the board overshot his landing mats and landed on his head. Outdoor educators will have the same duty this youth's physical education teacher was held to owe; the duty to use suitable equipment for each planned activity and not to use equipment for purposes other than those for which it was intended without careful analysis of the potential risks involved in doing so.

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[86] Ibid., at p. 67.
[87] Ibid.
[88] Thornton, supra n. 14.

Innovation and improvisation of equipment are admirable, but they must be rationally considered.

The Meyers case set out in law the duty for physical educators to provide adequate protective landing surfaces for gymnasts working at heights, in this case on rings. Part of young Meyer's temporary quadraplegia was attributed to a finding that

> ...on a balance of probabilities... there had been inadequate matting beneath the rings at the time of the accident, and inadequate supervision of the exercise room where the accident took place. [89]

In the Moddejonge outdoor education case, [90] a failure to provide adequate lifesaving equipment was found to be a contibuting cause in the deaths of two girls swimming in an unmarked beach area. With technology at its present level, vast innovations and improvements have been made in the types and designs of various pieces of lightweight, compact lifesaving equipment used in each activity pursuit. For example, the wilderness highcountry ski leader may soon not only be admired for providing complete lifesaving gear, but indeed expected to provide or require all participants to provide such apparatus as electronic receiver-transmitters, avalanche cords and probes, shovels, an emergency toboggan and so on.

Yet another useful and widely utilized technique to promote safety in many outdoor education settings is the 'buddy' system previously mentioned, where two or more individuals are made reciprocally responsible for one another. A canoeing example was already described, but similar systems are also appropriate on, for example, winter ski or snowshoe treks where buddies watch each others' faces for signs of frostnip. However, leaders are again reminded that when employing such systems, they cannot delegate their personal responsibility away to their participants; [91] in the event of an accident involving negligence the instructor not one of his participants, will be held liable.

A final area of concern is the importance of planning and preparing for emergencies which may arise during the program. As many outdoor education programs are conducted in wildlands some distance from normal life support systems, a plan of action which can be quickly implemented by a well-trained leader, using the human and equipment resources at hand, may make the difference between life and death or the

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[89] Meyers, supra n. 11, at p. 7.
[90] Moddejonge, supra n. 8, at p. 437.
[91] Meyers, supra n. 75, at p. 3081-01.

remaining quality of a life saved. The fact that accidents will happen is a given; where, when, how and how serious are the only questions which need to be asked. Given this knowledge, the outdoor educator has a duty to develop a set of emergency procedures, including contingencies, to initiate in the event of an accident. These procedures must include first aid knowledge and equipment, a communication system and/or designated evacuation routes. Rescue from the outside may be facilitated by leaving route cards and estimated times of arrival with the agency or another responsible source. Some parks have mandatory backcountry permit systems in place and a failure to register in these areas may mean paying the full cost of any searches or rescues necessitated (at sixty dollars plus per minute for helicopter time; this is an expense few agencies could afford to incur). Leaders should carry statement of health cards on each participant, indicating any pre-disposing conditions or susceptibilities which may be useful in rendering first aid. Participants engaging in strenuous wilderness travel, especially if they are middle-aged or older or in questionable health, should be required to undergo a complete physical examination prior to beginning the program. The writer is sure the reader will have other general or activity-specific safety measures in mind, but this list will suffice for the present. A much more complete list and description may be found in chapter eleven.

Perhaps one final incident example will serve to tie many of these precautions to risk and participant evaluations and subsequent program design and operation.

On June 12, 1978, twelve boys and one teacher were found drowned in Lake Temiscaminque.[92] They had been engaged in a wilderness canoe trip run by the Ontario St. John's Boys School when a storm suddenly blew up on the lake causing some of their boats to capsize. In the ensuing efforts to save these boys, the rest of the expeditions' boats also tipped and the waves and cold water claimed the lives of those who could not make it to shore. Some of the contributing factors cited in the coroner's report included:

1. The absence of a chain of command and contingency plans should one of the four leader steersmen be unable to complete the trip.
2. There was no communication system (e.g., walkie talkies, whistles, etc.) between the canoes or between the group and civilization.
3. No route card or plans had been drawn up; "it was simply hoped to

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[92] Stanislas Dery, Coroner's Report of Lake Temiscaminque Drownings, Inquest held by the Province of Quebec, June 28-29, 1978.

cover about forty miles a day." [93]

4. No one in the group had travelled the route previously and they relied soley on two copies of a small-scale topographical map.

5. No emergency procedures had been established and the group carried no rescue equipment (e.g., inflatable rafts).

6. Neither the leaders nor any of the twenty-seven boys (aged twelve to fourteen years) had had a medical checkup prior to this planned three-week expedition and none had been required to undergo any pre-trip physical conditioning, swimming, canoe rescue or lifesaving training.

7. Many of the boys were non-swimmers, and the leaders could not identify which boys could swim and which could not.

8. Neither the leaders or any of the boys had paddled a canoe since the previous summer, eight months prior to the day they set out.

9. A social the night before, all-night driving, an early start and the lack of a hot breakfast or lunch did nothing to ensure the endurance of the participants or instructors that day.

10. One of the steersmen was unqualified to accept this role and the students acting as bowsmen in the twenty-two foot canoes had received no prior training in paddling in this important position. [94]

And in their summary statement:

> We feel that for boys from twelve to fourteen years of age; this entire expedition consituted an exaggerated and pointless challenge. [95]

Later studies of the modified twenty-two foot Selkirk canoes used on the expedition (all of which overturned, either unexplainedly or in the attempt to effect rescues of swimmers), found this craft highly unstable and considered safe only for "experienced paddlers in calm water." [96]

Inspite of the almost incredible list of duties and subsequent standards which the St. John's School and its leaders failed to meet, the coroner's inquest arrived at the verdict that the thirteen members of the party "died violently and accidentally" and because "no criminal responsibility was involved," the issue was dropped. None of the boys' parents sued the school, due largely to the excellent school/parent relationship which existed. It could be speculated that if one or more of the boys had been seriously injured, but not killed, the parents may have been more inclined (if not almost compelled) to sue in order to recover the damages necessary for extended medical care. However,

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[93] Ibid., at p. 12.
[94] Ibid., at pp. 12-14.
[95] Ibid., at p. 15.
[96] H. Frazer and F. Wenger, "Report on the Twenty-two Foot Selkirk", Sent to Quebec coroner; also in Canadian Recreation Canoe Association files, Sept. 30, 1978.

this incident well illustrates the tremendous importance of outdoor leaders striving to establish and maintain strong, trusting relationships with their students or participants and their families.

The only recommendation the inquest evolved was a desire to see such activities regulated through provincial legislation.[97] Although most outdoor educators in Canada would prefer not to be subjected to statutory regulations and constraints placed on their activities; the need for higher and more consistent standards of care, both within and between provinces is quite evident.

As professional outdoor outfitters in some provinces can attest, where a group of people offer goods and/or services without any internal regulation or policing, an external body (usually government) will step in and impose what it perceives are steps necessary for public protection. As these imposed standards may not prove as desirable as self-determined regulations, outdoor educators would do well to improve their professional credibility by establishing, disseminating and encouraging adoption of their own guidelines or standards.

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[97] Dery, supra n. 91.

VII. VICARIOUS LIABILITY

When an injured plaintiff claims for legal restitution due to the alleged negligence of an outdoor educator, he is likely to do so against the outdoor leader, his immediate supervisor, the agency or board he is employed by and/or anyone else he thinks he may be able lay fault with for his damages. In this chapter, the author would like to review the potential liability of those organizations the outdoor educator may be affiliated with through his personal training and employment. Special emphasis will be placed on the concept of vicarious liability as it relates to the negligent conduct of outdoor educators operating as the servants of various agencies and boards. Finally, a brief look will be taken at why and how most agencies, boards and some sports governing and certifying bodies transfer liability to insurance companies.

A. The Relationship Between Outdoor Education Leadership and Programming Organizations

In outdoor activity pursuits, there are a number of sports governing and leadership certifying bodies and professional associations operating quite independently of outdoor education/recreation delivery agencies and boards, and therefore rather immune to the liability allegations these agencies may be open to.

However, these higher level organizations are often granted authority to develop instructor/leader qualification standards (as per various certifications and certification levels), which are used as guidelines by agencies involved in outdoor education leadership development or those interested in hiring 'certified' leaders for their programs. For the individual outdoor educator, this means that his qualifications may be sanctioned from a variety of sources over and above the agency he is employed by. For example, a cross-country ski tour leader may be influenced by training and direction he receives from any or all of the following sources:

Canadian Ski Association – Sports Governing Body (and in this case, also Leadership Certifying Body).

University – Leadership Training Agency; agency through which the cross-country tour leader was trained.

Y.M.C.A. (and its executive director) – Program Delivery Agency; employs outdoor leaders (e.g., tour leaders).

Outdoor Program Director – Supervises outdoor leaders (e.g., tour leaders).

Outdoor Educator - Cross-Country Ski Tour Leader One.

For the cross-country ski instructor the top level of this hierarchy of sorts (in this case the Canadian Ski Association), would be replaced by the Canadian Association of Nordic Ski Instructors (C.A.N.S.I.), a professional association and certifying body nationally sanctioned to develop and organize cross-country ski instuctors in Canada.

To date there are no examples of successful lawsuits against any leadership certifying body or agency for insufficient or improper training of outdoor educators. This follows the well-established principle that a teacher is not liable for the subsequent use of the knowledge and skills he passes on to his students as long as he teaches recognized theories and methods. The theories and skills taught must not of necessity be the most popular currently, or even the most correct, but they should not be contrary to long standing custom. For example, if a first aid instructor taught his class to administer sugar to a victim displaying signs and symptoms of insulin shock, insulin to one appearing to be in a diabetic coma and insulin if unsure, the instructor could be negligent. This procedure is exactly opposite that customarily taught by virtually all emergency medical training agencies and institutions and if a student taught and examined in this incorrect first aid method were to subsequently cause further injury to a diabetic patient, the instructing agency could be liable for that victim's damages. Such incidences of obviously negligent instruction are fairly rare and the unlikelihood of a specific related accident coincidentally arising later in the leader's career makes such suits even less likely. However, organizations developing leadership certification course curricula and agencies presenting these courses to prospective outdoor leaders should be aware of their responsibility to teach safe and proper techniques.

For example, in the case of Smith v. Horizon Aerosports Ltd. et al., [1] where a parachuting student was rendered a paraplegic on her first jump, the plaintiff attempted to attribute some of the liability to the Canadian Sport Parachuting Association (C.S.P.A.). She claimed that the C.S.P.A. misled her through their brochure which indicates sport parachuting was safer that she later believed it to be, and that they failed in their duty to require adequate pre-jump training, to provide qualified instructors and to supervise

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[1] (1988), 130 D.L.R. (3d) 91.

Horizon Aerosports' personnel and teaching methods more closely. [2]

Spencer J. countered each of her arguments in finding the defendant C.S.P.A. not negligent, and stated that he held such voluntary non-profit organizations to a lower standard of care than any other person. He felt that:

> ...it is in the interest of society that voluntary efforts directed towards promoting excellence and safety in any field of endeavor are to be encouraged. If the standard expected from a non-profit organization is put too high, such organizations may depart the field. In my judgment, the standard to be expected of them may be compared to the standard expected from a rescuer - another form of volunteer. A rescuer does not become liable towards a victim who he is trying to help unless what he does worsens the victim's plight: see Horsley et al. v. MacLaren et al. (1970), 22 D.L.R. (3d) 545, [1972] S.C.R. 441. The plaintiff suffered harm because of negligent training in canopy control and negligent supervision. C.S.P.A. was not responsible for either of those... [3]

The facts in this case clearly illustrate a failure on the part of the instructor to assess the plaintiff's readiness to jump and to act accordingly, and as he was certified by the C.S.P.A., this case can be used as an example of the problem of teaching and evaluating leadership. As was mentioned earlier in this thesis, the outdoor pursuits certifying bodies presently involved in leadership development in Canada are little more than technical skill training institutions. None have found a method of accurately teaching and/or assessing a prospective outdoor leader's judgmental capabilities, [4] the very core of all leadership in the outdoors.

However, it should be noted that a number of outdoor leadership sports governing and certifying bodies and professional associations (e.g., Coaching Association of Canada (C.A.C.), C.S.A., C.A.N.S.I., Association of Canadian Mountain Guides (A.C.M.G.), etc.) have taken a positive active role in providing their certified members with insurance coverage while these leaders are working in the activity pursuit for which they have been certified. The extent and types of coverage these organizations have arranged will be discussed later in this chapter.

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[2] Ibid., at pp. 108-109.
[3] Ibid., at p. 110.
[4] William March, "Assessing Outdoor Leaders," Foothills Wilderness Journal, n.d., pp. 16-17.

B. The Liability of Outdoor Education Program Delivery Agencies and Boards

A Program delivery agency or recreation or school board may be held liable for injuries sustained by a participant or student "on the basis of a personal fault or because of the agency's vicarious liability" [5] for the conduct of the outdoor educators it employs. Professor Atiyah distinguishes personal liability from that arising through a vicarious relationship.

> A person is not, subject to well known exceptions, generally liable in tort except where he has intentionally or negligently caused some loss or damage to the plaintiff. But the result of vicarious liablity is to make one person compensate another for loss not due to his fault at all, although it may be due to the fault of his servant, agent or independent contractor. [6]

Agencies may be personally liable for breaching statutes contained in their provinces' School or Education Act, [7] (if they have one) or for failing to meet their statutory or common law duty to maintain their equipment, buildings and grounds in a safe condition. [8] They may also be held liable for failing to meet the standard of care required in ensuring adequate supervision [9] (i.e., keeping leader-participant ratios low enough for safety) and qualified instructors. [10] But, as Professor Atiyah states, that form of 'personal' liability

> ...is really another way of saying that some servant or official of the defendant, at some time, and in some way... failed to do something which ought to have been done, and that this was the cause of the accident. [11]

The Concept of Vicarious Liability

The doctrine of vicarious liablity is a form of strict liability, wherein an employer "is called upon to make good, loss(es)" resulting from the tortious conduct of his employees, "even though he is not personally at fault." [12]

It has been interpreted that this concept evolved because "the employer, having put matters into motion, should be liable if the motion that he has originated leads to

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[5] Brian Leroy, "The Legal Responsibilities of Individuals and Agencies Delivering Outdoor Education/Recreation Programs," in March et al. The Legal Liability of Outdoor Educators in Alberta, (Calgary: Alberta Law Foundation, 1981), p. 30.
[6] Patrick S. Atiyah, Vicarious Liability, (London: Butterworths, 1967), p. 3.
[7] School Act, R.S.A. 1970, c. 329, s. 65; Education Act, R.S.O. 1974, c. 109, s. 146;
[8] Occupiers' Liability Act, R.S.A. 1973, c. 79; Pook v. Ernesttown Public School Trustees [1974] 4 D.L.R. 268.
[9] Meyers v. Peel County Board of Education [1981] S.C.C.D. 3081-01.
[10] Walton v. Vancouver [1924] 2 D.L.R. 387 (B.C.C.A.); McKay v. Board of Govan School District No. 29 [1968] S.C.R. 592.
[11] Atiyah, supra n. 6., at p. 5.
[12] Cecil A. Wright and Allen M. Linden, Canadian Tort Law: Cases, Notes and Materials, seventh edition, (Toronto: Butterworths, 1981), p. 12-34.

damage to another." [13] Other justifications providing the rationale for vicarious liability include:

1. As an employer "employs others to advance his own economic interests," he should "be placed under a corresponding liability for losses incurred in the course of the enterprise." [14]
2. The employer selects his employees and should therefore be accountable if he hires or supervises them inadequately. [15]
3. The employer is much more likely to have a capacity to bear the economic loss of damages than is an employee. [16] Such losses are normally covered by insurance and the employer may pay the cost of higher insurance premiums by increasing the price of his product or service, thereby distributing the cost to that sector of the population purchasing that good or service. [17] If the employer happens to be an agent of a federal, provincial or municipal government or a school board, the cost may be distributed through taxation increases.
4. The doctrine is also supported "for its admonitory value in accident prevention." [18] It not only effectively places deterrent pressures at higher organizational levels, emphasizing the need for safety conscious supervision, but provides the employer with legal incentive to discipline employees not meeting imposed standards. [19]

In short, the application of vicarious liability follows the tenets of tort liability in that it is a form of legal accountability oriented toward the just compensation of accident victims. In this case, employers are held legally accountable for the tortious wrongs of their employees, in part because of the master-servant relationship and in part due to the formers' greater capacity to bear the risks inherent to the operation and to distribute the potential losses incurred through these risks.

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[13] Rose v. Plenty [1976] 1 W.W.R. 141, at p. 147.
[14] John G. Fleming, The Law of Torts, fifth edition, (Sydney: The Law Book Co., 1977), p. 355.
[15] Atiyah, supra n. 6.
[16] Fleming, supra n. 14.
[17] Glanville Williams, "Vicarious Liability and the Master's Indemnity," (1957), 20 Mod.L.Rev. 220, at p. 232.
[18] Fleming, supra n. 14.
[19] Ibid.

The Test for Vicarious Liability

In order to impose vicarious liability upon an employer, the plaintiff must show that he was injured due to the negligent act or omission of an employee (whether paid or volunteer), performing some recognized duty for the defendant employer. [20] The limits of an agency, recreation or school board's vicarious liability will therefore be defined through a two part test. First, a master-servant (employer-employee) relationship must be proven, often referred to as a contract of service. Once this relationship has been established, it must be determined if the tortious conduct occurred within the scope of the servant's employment.

Organizational Control

The question usually raised when attempting to define the employer-employee relationship is whether the employee was working under a contract *of* service or a contract *for* service. [21] This distinction basically involves the determination of whether the employee was a 'servant' of the employer or whether he was hired as an independent contractor. While doctors, lawyers and some entertainment professionals are often hired as independent contractors, school teachers and most (not all) outdoor educators will be employed under a contract of service.

Historically, and even in some quite recent cases, the determination of a contract *of* versus a contract *for* service was held to be a control test. The question to be answered was:

> Does the employer control the activities of the employee by saying not only *what* is to be done but also *how* it is to be done. [22]

If such control could be shown, then a contract of service existed. If not the employee was considered an independent contractor operating under a contract for service. For example, in Rheaume v. Gowland, [23] a rifle club allowed a man to live on its property in an attempt to control trespassing and vandalism. This volunteer 'resident manager' was merely instructed to telephone the R.C.M.P. in the event of trouble and when he negligently shot a trespasser, the courts held him personally liable for taking this unauthorized duty upon himself.

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[20] Atiyah, supra n. 6.
[21] Phillip S. James, General Principles of Tort Law, fourth edition, (London: Butterworths, 1978), p. 357.
[22] Rheaume v. Gowland (1978), 9-1 D.L.R. (3d) 223 (B.C.S.C.), at p. 225.
[23] Ibid.

In modern times, the application of the control test has been largely modified due to the high degree of technical specialization of many servants, making employer understanding and subsequent control of how various jobs are to be performed, an unreasonable expectation.[24]

In the mid 1960's, Lord Parker C.J. admonished the control test.

> ...clearly, superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience.[25]

Today the question of control over the manner of task performance is only one factor considered indicative of the employer's organizational control over the employee. Other criteria include such incidental and collateral matters as:

> ...the employer's power of selection of the person concerned, the nature of the payment fixed (wages or salary), the employer's rights in respect of suspension or dismissal, the degree of skill required, whether the employee is integrated into the business,[26] whether the man performing the services provides his own equipment, whether he hires his own helpers and what degree of financial risk he takes...[27]

In outdoor education situations, other factors indicative of an employer's organizational control may include the employer's right to make stipulations regarding program content, methodology and location and the provision and directions of use regarding specific safety equipment and devices. As stated earlier in this section, most outdoor educators are employed under contracts *of* service. This is true, if for no other reason than the fact that the majority of outdoor educators are schoolteachers employed under such contracts by various urban and rural municipal school boards and county councils.

However, a significant number of individuals across the country are operating outdoor education adventure businesses as independent contractors. In these cases, the independent contractor provides the hiring agency or individual with the outdoor educator/trip leader staff and often the outdoor equipment (e.g., canoes, paddles, lifejackets, shelters, cook stoves and utensils, etc.) and food. The independent contractor maintains organizational control over the staff he selects and is the insured defendant in the event of a lawsuit. As long as the individual or group hiring this contractor has no

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[24] James, supra n. 21.
[25] Morren v. Swinton and Pendlebury Council [1965] 2 All E.R. 349, at p. 351.
[26] James, supra n. 21, at p. 358.
[27] Market Investigations Ltd. v. Minister of Social Security [1969] 2 Q.B.D. 173, at p. 184.

controlling powers over the staff hired by the independent contractor, they cannot be held liable for any torts the staff may commit while running a program or leading a trip for them. The independent contractor will vicariously assume responsiblity for any injuries sustained by program participants resulting from the negligent acts or omissions of the staff line outdoor educator he has provided. Of course this responsibility may be altered to some extent where the independent contractor gives the agency hiring him the power to control what and especially how the program is run and what safety precautions are taken by the staff. [28]

A number of agencies the author is aware of have attempted to hire their staff under contracts for service, thereby relieving themselves of vicarious responsibility for these individuals' actions. They have argued that it is impossible for them to superivise outdoor leaders running programs in a variety of wildland locations simultaneously, and they therefore feel they have little control over how programs are run. This has been shown to be an invalid practice as:

> ...the law is concerned with the nature of the contractual relationship. The terms of the contract, although relevant, cannot be used by the employer to convert a contract of service into a contract for service. Thus, merely using the words "independent contractor" to describe the employee's status will not eliminate liability if sufficient control is proven. [29]

Therefore, the only way an agency may legally avoid being vicariously liable for its outddor instructor/leaders, would be by completely relinquishing control over the method of participant supervision, instruction and most importantly, "the safety measures employed during the course of instruction." [30]

Scope of Employment

In order for an employer to be held vicariously liable for the torts of his employees, the negligent act or omission must have transpired while the servant employee was working within the scope or course of his employment. [31] A reasonably clear distinction between an employee's allowable deviation from his duty and a blatant departure from it was drawn by Lynsky J. when he stated:

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[28] Mersey Dock and Harbour Board v. Coggins and Griffiths Ltd. [1947] 2 All E.R. 345.
[29] Leroy, supra n. 5., at p. 34.
[30] Ibid.
[31] James, supra n. 21, p. 361.

> It is well settled law that a master is liable even for acts which he has not authorized provided they are so connected with the acts which he has authorized that they might rightly be regarded as modes, although improper modes, of doing them. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it but is an independent act the master is not responsible for, in such a case the servant is not acting in the course of his employment but has gone outside it. [32]

Hence, the employer's liability will extend through all acts he has "expressly or implicitly authorized his employees to perform," [33] including the employees' freedom to deal with unforeseen circumstances not necessarily defined in the job contract. Implication of such authorization will be determined through an assessment of the decision-making discretion expressly granted the employee, the direction available to him from superiors, the duties typically performed by similar employees in other agencies and the duties and acts foreseeably incidental to performance of the duties expressly outlined by the employer. [34]

On occasion, an employer may successfully limit his vicarious liability by expressly prohibiting certain acts or conduct. Such prohibitions must relate directly to the course of employment and not merely to the employee's conduct in performing his duties within that course of employment (i.e., the manner, place or time of his acts). [35] For example, in the case of C.P.R. v. Lockhart, [36] a carpenter negligently injured a plaintiff while driving his own uninsured vehicle for business purposes. Although his company had expressly forbidden him to use his own car unless it was insured, they were still found vicariously liable because they had granted permission to use his own car and he was doing so while performing duties within the scope of his employment. [37]

In a school case, a board was found not liable when a number of teachers took it upon themselves to grant their students a half-day holiday to attend a concert. [38] When a student was injured after being thrown from an overloaded truck the teachers were using to transport the students to the concert in, the board was absolved of liability as its employee teachers were acting outside their scope of employment and well beyond their authority. In discussing the law here, the court stated:

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[32] Poland v. John Parr and Sons [1977] 1 K.B. 236, at p. 240.
[33] Leroy, supra n. 5, p. 36.
[34] Atiyah, supra n. 6, pp. 51-69.
[35] Fleming, supra n. 14, footnote 5, at p. 365.
[36] [1942] A.C. 591 (P.C.).
[37] Ibid.
[38] Beauparlant v. Appleby Separate School Board of Trustees [1955] 4 D.L.R. 558 (O.H.C.).

> There is no doubt that a School Board is liable in law for an accident due to a teacher's negligence if in a matter which may reasonably be regarded as falling within the scope of his employment... [39]

In the Moddejonge case, [40] the courts found the outdoor education coordinator/teacher negligent in failing to supervise or provide adequate safety measures for a group of girls he took swimming. The court pointed to the vicarious liability of the defendant board.

> It is to be observed that McCauley (the teacher) was acting within the scope of his employment. It follows that the defendant board is also liable. [41]

Had the school board expressly prohibited him from taking students swimming, the outdoor education coordinator would have been solely liable. But as they merely placed parameters on his taking them swimming (e.g., not taking them unless a lifeguard and/or lifesaving equipment were present) they remained vicariously liable.

In conclusion, only rarely in outdoor education situations, (e.g., where the outdoor educator is an independent contractor and/or where he is proven to be expressly operating outside of the scope of his employment) can an agency or board successfully avoid vicarious liability for the tortious acts of its employees. Although they may limit their liability to some extent by expressly delimiting the scope of their employees' duties, the limited benefits derivable from such a course of action hardly warrant these restrictions and the loss of trust and perceived autonomy they create. The author is certainly not advocating an open system, completely lacking direction and boundaries for employees. Rather, agencies and boards should take to heart their legal and ethical responsiblities to their participants and their employees, ensuring that their staff are well-qualified and their programs are run as safely as is practicable.

C. The Case of Non-Incorporated Clubs and Associations

Quite often, outdoor educators find themselves belonging to or otherwise involved with one or more non-incorporated organizations in the guise of various outdoor clubs. These associations are little more than conglomerations of people with a common area of interest; they have no legal status and usually no insurance. These organizations operate on the premise that most members are adults who are personally

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[39] Ibid., at p. 444.
[40] Moddejonge v. Huron County Board of Education [1972] 2 O.R. 437.
[41] Ibid., at p. 444.

responsible for assuming the risks they take in pursuing the activity. And while this is likely true to a large extent for adults co-adventuring in wilderness areas, those clubs advertising education and/or competition as within their mandate must accept greater legal responsibity for the participants they attract. An absence of legal standing may have tremendous implications for the executives of these associations as well as for individual members.

Unless a club is legally incorporated under the Societies Act, [42] "the members of the Board of Directors can technically be sued personally." [43] In addition, such an organization does not have the capacity to buffer its members from legal accountability. Therefore, members must carry sufficient "liability insurance to personally protect themselves in case of a suit." [44] Tort law exists to compensate accident victims, and although the courts may tend toward holding volunteer, non-profit organizations to a somewhat lower standard of care than the average person, this cannot be counted on where no other vehicle for compensation exists. Responsibility for checking whether an organization is incorporated and/or insured and purchasing adequate personal coverage if it is not, falls squarely on the shoulders of the individual outdoor educator volunteering to instruct and/or lead club members in outdoor ventures.

It would be prudent for such clubs or associations to acquire corporation status and purchase liability insurance to protect itself and its members. Once an association has become incorporated and bought insurance "claims can not be made against the individual members or officers, only against the legal entity, the corporation." [45]

For example, the Alberta Whitewater Association (A.W.A.) consisting of at least eight member canoe and kayak clubs, recently purchased one million dollars worth of general insurance for itself as an incorporated association. This insurance purchase closely followed a precedent set by the British Columbia Whitewater Association (insured as a member body of Canoe Sport B.C.). [46]

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[42] R.S.N.S 1967, c. 286; R.S.S. 1965, c. 142; R.S.B.C. 1979, c. 390.
[43] Richard Moriarty et al., Sport Activity and the Law, (Windsor: University of Windsor (SIR/CAR), 1982), p. 112.
[44] Ibid., at p. 110.
[45] Ibid., at p. 111.
[46] Jeffrey Gruttz, Information release, submitted to the executive of the A.W.A., November 28, 1981.

At the time of this writing, the members covered included the Alberta Whitewater Association's and club's executives and the instructors (certified by the Association) from a student who was injured (and chose to sue), provided the instructor was found negligent and volunteers acting on behalf of the Association.[47]

The British Columbia policy is more comprehensive in that it provides coverage for any "participant involved in an accident at any club or Association organized" trip, race or event, if the accident was caused by any other executive or club members' negligence. Although more than twice as expensive, such a policy provides almost total protection from liability for all organizers and participants.

Associations and clubs in other activity pursuits are advised to look into the benefits and feasibility of providing the sorts of liability insurance protection discussed herein to their executive, instructors, trip leaders and/or other event organizers, officials and volunteers. More specific information concerning the purchase of liability insurance may be found in the next section of this chapter.

D. Insurance: The Transference of Liability

The purchase of accident and liability insurance, although obviously a 'bandaid' approach to treating activities with inherent risk, does facilitate the compensation of accident victims and the enduring solvency of agencies and boards providing potentially dangerous activities such as outdoor pursuits. Without this support system, the financial destruction of many innocent accident victims and/or the individuals and agencies liable for their protection would be inevitable.

Who Purchases Insurance

The individual outdoor educator may purchase his own liability insurance, and this is recommended if he is operating as an independent contractor, if he is involved in one or more non-incorporated associations or if he is otherwise not protected through another policy. However, he is most often covered by one or more other sources. It is the personal responsibility of each leader to review his agency or board's policy and/or his certifying body where applicable to ensure that it affords sufficient coverage, and to request increases in protection where they are found wanting, or to purchase personal liability insurance to cover these areas of potential exposure.

[47] Ibid., at p. 1.

Almost all outdoor leaders in the employ of an education and/or recreation program delivery agency or board will be vicariously protected by that organization's insurance policy. In addition to property insurance, most agencies will carry substantial liability insurance to protect themselves from damages claimed due to personal liability (e.g., breach of statutory or common law occupiers' duties, inadequate provision of a sufficient number of qualified staff, etc.) and vicarious liability (i.e., due to tortious acts or omissions committed by their staff). Some very large agencies, such as federal and provincial governments are self-insured, while most others purchase policies from commercial insurance companies. The cost of insuring all government activities, agents and vehicles annually would be astronomic; covering losses as necessary from general funds is much less expensive in the long run. When claims are paid out, the loss is simply distributed through the public through increases in taxation in the following fiscal year.

In addition, a number of sports governing and certifying bodies and professional agencies have taken upon themselves, responsibility for providing their members with liability insurance. The Association of Canadian Mountain Guides (A.C.G.M.) covers all certified mountaineers, the Canadian Ski Association (C.S.A.) protects downhill ski instructors and coaches and cross-country ski tour leaders (through separate policies), the Canadian Association of Nordic Ski Instructors (C.A.N.S.I.) insures cross-country ski instructors and the Coaching Association of Canada (C.A.C.) has very recently purchased a policy to offer to certified individuals functioning as coaches in any sanctioned sport.[48]

There is the possibility that such coverages may prove redundant for leaders already covered by their agency or boards' policies.

However, overcoverage is certainly preferable to inadequate protection. Normally, the agency vicariously liable would be called upon to make damage restitution through its policy first, but this will depend upon examination of the terms of the contracts and the history of the accident and may involve some compromise between the two insurers. Insurance provided by the other certifying organizations mentioned would be used when the leader was teaching a certification program, working without sponsorship or if the agency vicariously liable decided to in turn sue the leader for example, for lack of qualification. It is established law that any employer held vicariously liable has the option

[48] Al Tilly, (Marketing Services Manager of the C.A.C.), in a Personal Interview, Ottawa, June 25, 1982.

of claiming the loss from the employee, but this is rarely pursued as few employees have access to sufficient financial resources to indemnify the agency.[49] Although such follow-up claims may become more likely for individuals with this back-up insurance, to date, there have been no cases to demonstrate this recourse.

Suffice to say that most individuals working in the outdoor education field will be insured from one or more sources. More crucial questions are what type(s) of insurance are protecting the individual and his agency or board and does it adequately cover the risks leaders and participants may be exposed to in foreseeable courses of events.

A final option is that of having participants purchase their own insurance which pays when the individual is injured, whether or not the agency was liable. Many school boards historically made such coverage available for students and 'Campers' Insurance' can be purchased to "provide medical coverage on behalf of campers injured while involved in camp activities."[50]

Principles of Insurance

When considering the purchase of insurance, the agency should review the particular risks it is dealing with and determine the viability of insurance according to the magnitude of each risk. It is almost essential that a "competent, experienced agent or broker... interested in the agency's insurance requirements"[51] be consulted for advice and recommendations.

For risks which tend to eventuate in frequent injuries involving relatively minor damage, the agency should adopt a policy of non-insurance. If the losses may be easily absorbed in the operations budget of a single year, then they are not worth the price of the insurance to cover them.[52] It is imperative, however, that this be a "conscious planned retention program, and not unconscious because the risk had not been identified.[53]

The number of insurance claims made may also be reduced through the employment of a funded reserve (self-insurance) and/or the use of deductibles. Self-insurance differs from non-insurance in that foreseeable losses have been

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[49] Fleming, supra n. 14, pp. 355-56.
[50] Robert Bell and Associates Ltd., Insurance Report for Members of the Alberta Camping Association, January 12, 1981, p. 4.
[51] Ibid., at p. 1.
[52] Michael Power, "Recreation and the Law", Paper presented to Recreation Board Members' Provincial Workshop, Alberta, March 19, 1978.
[53] Nestor Roose et al., Government Risk Management Manual, (Tucson, Ariz.: Risk Management Publishing Co., n.d.), p. 3.

estimated and a special fund set aside to cover them.[54] Deductibles involve the retention of risks to a certain point and subsequent transfer of all others above that level. These two methods help keep an agency or board's interactions with its insurance carrier to a minimum and therefore keep administrative maintenance costs down.

"Always insure where the risk of potential loss is **severe** even if the **probability** of loss is small."[55] Insurance should be used for those risks which have been identified and evaluated as essential to the achievement of program objectives, but which the agency or board does not have the financial capacity to retain. All too often, agencies and boards have insured themselves against the relatively more frequent but less significant losses (e.g., broken limbs) and left themselves unprotected from the large, catastrophic losses (e.g., quadraplegia, paraplegia, major burns, etc.).[56]

Types of Insurance Coverage

It should be remembered that not all risks can be transferred to an insurer through any single policy. It is up to the purchaser to find the policy, or combination of policies which best cover potentially catastrophic losses. It is not the intent of this thesis to deal with the various insurance contracts available in any depth; there are certainly as many policies as there are insurance companies to write them.

Virtually every policy written has one or more exclusions; even so-called 'all-risk' contracts. While 'named-peril' contracts identify the risks the insured is protected against, all-risk policies merely spell out the "exclusions rather than the perils of coverage; and any peril not excluded is covered."[57] This does not mean to say that an outdoor education/recreation delivery agency or board cannot purchase sufficient comprehensive general liability insurance to protect itself. While speaking to an Alberta Recreation Board Members' Seminar, Power stated:

> Liability insurance, when properly written, will ensure a boards' legal liability exposures to loss resulting from bodily injury or death to persons (other than employees, directors and officers of the board).[58]

In the case of outdoor educators and guides, where program premises often cannot be specified precisely, coverage must be general enough to cover the leader

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[54] Ibid.
[55] Power, supra n. 52.
[56] Roose, supra n. 53.
[57] Bell, supra n. 50.
[58] Power, supra n. 52.

wherever he may be working.

In addition to insuring the agency, provision must be made for employees and volunteers working for the agency. A "cross liability clause" is required when there is more than one name (entity) insured by a policy. [59]

Perhaps an example will illustrate some of the more important types of coverage. The Canadian Ski Association (C.S.A.), in addition to a one million dollar automobile liability policy, carries a one million dollar per occurrence (twenty-five hundred dollar deductible) Comprehensive General Liability Policy for bodily injuries resulting form the tortious acts of downhill ski

> Instructors, coaches, members, competitors, race officials and their aides, while acting withing the scope or their duties on behalf of and under the direction of the Named Insured. [60]

This policy includes a cross liability clause which makes the policy applicable to:

> ...each of the insureds named herein to the same extent and in the same manner as though a separate policy had been issued to each such insured... [61]

One million dollars is the recommended minimum limit of such comprehensive policies and the policy should be written on an 'occurrence' as opposed to an 'accident' basis "as the definition of an "occurence is much broader." [62]

In addition to the comprehensive protection afforded through this policy, the C.S.A. also carries a nine million dollar Umbrella Liability Policy (ten thousand dollars deductible), to cover any losses over and above those covered through the general policy described, the general policy to be applied first. Although each policy has a number of exclusions, some mutual and some not, together they provide relatively good protection for the insured individuals named.

The cross-country ski tour leader certification program, also under the auspices of the C.S.A., has just purchased a separate two million dollar policy to cover certified tour leaders in Canada. [63]

In summary, purchasing insurance to cover unretainable risks can be a difficult venture, complicated by the tremendous variety of policies and clauses available. The best

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[59] Ibid.
[60] Sun Alliance Insurance Co., Comprehensive General Liability insurance contract for the C.S.A.; Form 30487 (11/77), Endorsement No. 5.
[61] Ibid.
[62] Bell et al., supra n. 51, at p. 7.
[63] John Newton, (Executive Director of the C.S.A.), in a Personal Interview, Ottawa, June 25, 1982.

advice one can give the outdoor agency or board is to:

1. Identify and evaluate risks to determine which require transfer;
2. Employ legal assistance to determine what types of coverage are recommended;
3. Shop around to see what protection is available on the insurance market, and at what price;
4. Carefuly review all contracts to be sure of all exclusions; and
5. Ask lots of questions to clarify areas which appear unclear.

Insurance is a necessary measure designed "to protect the assets and earning capacity of the entity"; [64] the peace of mind it offers the agency or board and the individual employee are usually well worth the premiums. Again, and especially as insurance companies lean toward preferred risks, the emphasis must be placed on sound staff selection and the development of practical, positively affirmative outdoor programs, employing insurance coverage as a support system and not as a panacea. As the earlier sections of this chapter indicated, agencies and boards must be prepared to settle claims resulting not only from personal errors made in the administration of their outdoor programs and residential sites, but also for those arising from the negligent conduct of any employees of the agency or board.

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[64] Roose, supra n. 53, at p. 3.

VIII. MOTOR VEHICLE LIABILITY

One need only refer to any provinces' civil court reports to see that the vast majority of negligence actions arise out of motor vehicle accidents. The substantial travel component present in many (if not most) outdoor education programs makes an understanding of the statutory and common law related to the vehicular transportation of students/participants, an essential element of any discussion concerning liability. It is common knowledge among outdoor educators that of all serious accidents occurring during outdoor programs, most are likely to transpire during this travel to and from program sites.

A. Liability For Accidents Occurring During Travel

Actual liability for injuries sustained by participants during travel to and from or between program sites will depend on the relationship between the driver and the passengers at the time of the accident and who the vehicle used was owned and insured by.

The only way an agency or board may completely avoid incurring liability for accidents occurring during travel by employing an independent contractor to drive his or his company's vehicle while transporting students or participants. Chartering buses or taxis or using public transit buses where convenient, are all examples of transferring to others the risks involved in transportation. The degree of organizational control the agency or board holds over the driver of the vehicle will be the the criterion used to establish whether he indeed was employed as an independent contractor. In Baldwin v. Lyon, [1] a school board was held not to be vicariously liable for a bus accident. The board had little control over the driver, as it merely recommended the route and the exercise of caution and discipline by the driver. However, in Tyler v. Board or Ardath, [2] the school board was vicariously liable as it "controlled the route and was empowered to discontinue use of the van at any time without notice to the contractor" and to prohibit the driver's assigning the contract without consent. [3]

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[1] [1963] 36 D.L.R. 244 (S.C.C.).
[2] [1935] 2 D.L.R. 814.
[3] Ibid., at pp. 814-15.

As the employment of independent contractors is not always convenient, and often totally unfeasible for remote programs, outdoor educators should use agency/board owned and insured vehicles as their next preferred option. The agency will almost always be vicariously liable for accidents eventuating out of the negligent operation of its own vehicles used by its employees in the course of their employment. [4] In many cases this protection will extend to participants and others who may not be directly affiliated with the agency but who may be involved in one or more of its sponsored events. [5]

Even if the agency does not possess its own fleet of vehicles, it is encouraged to purchase non-owned automobile liability insurance to protect itself and its employees when its servants use an automobile not owned by the agency (e.g., employee-owned, leased, rented, borrowed, etc.), but at the time of an accident "being used in the business of the agency." [6] For example, the Canadian Ski Association (C.S.A.) carries one million dollars third party liability, non-owned automobile insurance "for bodily injury to or death of any person or damage to property of others not in the care, custody or control of the applicant." [7]

This type of policy may also be utilized when a staff member or participant is using his own private vehicle to transport others involved in one of the agency's sponsored programs. However, it should be remembered that the driver's personal automobile insurance will be applied to all accidents first, [8] with the agency or board's policy covering damages exceeding the limits of the driver's insurance protection.

The instructor/leader who often or even only occasionally drives participants should make sure he carries sufficient liability insurance; one million dollars is a recommended minimum. [9]

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[4] John Barnes, "Tort Liability of School Boards to Pupils," in Klar, Studies in Canadian Tort Law, (Toronto: Butterworths, 1977), p. 206.
[5] Richard Whitehouse, (Manager of Risk Management of the Government of Alberta), in a Personal Interview, Edmonton, September 14, 1982.
[6] Michael Power, "Recreation and the Law", Paper presented to the Recreation Board Members' Provincial Workshop, Alberta, March 17, 1978.
[7] Sun Alliance Insurance Co., Standard Non-Owned Automobile Policy, Form 30491 (11/78).
[8] Dwight Daigneault, "Teachers and Liability," The Forum, (Ontario Secondary School Teachers' Federation), May-June, 1978.
[9] Whitehouse, supra n. 5.

When program logistics necessitate that students/participants drive each other, the leader would be especially prudent if he took the time to screen the drivers' records, check the condition of the vehicles ("especially the lights and brakes"), designate the "route, speed limits and driving conditions" and "make certain that there is appropriate and sufficient insurance coverage on the drivers and the automobiles." [10] One writer has even recommended that where private vehicles are used, the agency require drivers to "sign a statement verifying that their insurance covers liability for injury to passengers." [11]

B. Gratuitous Passenger Status

Where staff or participants voluntarily utilize their own vehicles to transport others involved in a particular program, the question they most often want answered concerns the limits of their liablity for their passengers, if the latter are completely gratuitous and/or if they share in the vehicle expenses incurred over the trip.

According to recent statutory reenactments in many provinces:

> No person transported by the owner or driver of a motor vehicle as his guest without payment for the transportation has any cause of action for damages against the owner or driver for injury, death or loss, in case of accident, unless
>
> (a) the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle, and
>
> (b) the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought. [12]

However, due to apparent inconsistencies in the statutes, even within the same act, the author questions the internal acceptance of this section. Earlier in the Alberta Highway Traffic Act, for example, it states:

> Nothing in this Act shall be construed to curtail or abridge the right of *any person* to prosecute an action for damages by reason of injuries to person or property resulting from the negligence of the owner or operator of any motor vehicle or from the negligence of any agent or employee of the owner. [13](emphasis added)

The statute excluding the right of gratuitous passengers to legal action against the driver was intended not only to protect "generous drivers" from litigation and to keep

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[10] Donald E. Arnold, "Legal Aspects of Off-Campus Physical Education Programs", Journal of Physical Education and Recreation, April, 1979, p. 22.
[11] Patricia McNulty, "Legal Liability in Physical Education and Recreation," Canadian Coach, Vol. 6, No. 3, 1975. p. 8.
[12] Highway Traffic Act, R.S.A. 1975, (2) c. 56, s. 160.
[13] supra, s. 156.

insurance premiums down by restricting recovery, but to eliminate "collusion between driver and passenger in seeking satisfaction from insurance companies in a situation where it is not in the former's interest to resist allegations of negligence for the sake of protecting his own purse." [14] Professor Linden criticizes these explanations, saying that insurance premiums should reflect the cost of compensating unfortunate victims and that punishing all guest passengers because of a few fraudulent imposters "is using nuclear weapons to do a job for which more traditional artillery would suffice." [15]

He goes on to say that fortunately, most Canadian courts have "consistently sought methods of restricting the application of the immunity," [16] often by rather loose interpretation of the term 'gross negligence'. As some provinces, for example British Columbia, have abolished their gratuitous passenger legislation and others such as Alberta are considering its abolition, the reader is encouraged to check his province's statutes for the relevant legislation.

Occasionally, it must be established whether the passenger was in fact riding in a gratuitous capacity. In the leading Canadian case in the area, Oulette v. Johnson, [17] the Supreme Court of Canada found a driver liable when he charged the plaintiff for regularly driving him to and from work. The two dollars the passenger had paid for each round trip was based on the amount previously charged by the driver for this service and not on the actual cost of gas and oil. Judgment for the plaintiff was upheld on the grounds that at the time of the accident, the vehicle was being "operated in the business of carrying passengers for compensation." [18]

However, if a passenger merely shares the calculated gas and oil expense of a trip, the courts may uphold the driver's immunity. In Teasdale v. McIntyre, [19] the Supreme Court of Canada upheld the driver's immunity to his gratuitous passenger based on the fact that the two students had agreed to equally share the expenses they would incur in taking an automobile holiday together. Spence J. commented in regards to the social rather than commercial intent of the venture.

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[14] John G. Fleming, The Law of Torts, fifth edition, (Sydney: The Law Book Co., 1977), pp. 457-58.
[15] Allen M. Linden, Canadian Negligence Law, third edition, (Toronto: Butterworths, 1982), p. 614.
[16] Ibid., pp. 614-15.
[17] [1963] S.C.R. 96.
[18] Ibid., at p. 100.
[19] [1968] S.C.R. 735.

> ... I am unable to regard the evidence in this case...as showing that there had occurred 'an arrangement of a commercial nature'...There was in my opinion, no element of a contract of carriage. The arrangement, rather in my view, was that of a joint adventure, not, in this particular case, an adventure in trade but an adventure in recreation.[20]

Therefore, as long as money contributed by passengers is based on actual gas and oil expenditures for the trip and not on an arbitrary figure, the driver may technically remain immune from legal liability should his negligence result in injury to his passenger(s) (in those provinces retaining gratuitous passenger legislation). However, when one considers the rarity with which this statute actually prevents litigation,[21] due to a common law and judicial hesitance to prevent worthy compensation of innocent accident victims, drivers are again encouraged to carry sufficient liability insurance to cover such events.

The writer believes that those designing their transportation operations in order to take advantage of such statutory immunity (i.e., not allowing drivers to collect contributions until after trips and then only on calculated gas and oil expenditures) may be acting within the law, but they are evading their moral and ethical responsibilities to those they carry. The piece of mind and clearness of conscience found in the knowledge that a victim has been fairly compensated is well worth the increase a negligent driver may face in his insurance premiums. Although this may be called 'collusion' by some, the author prefers to think of it as rightful accountability, or more simply, justice.

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[20] Ibid., at pp. 740-41.
[21] Whitehouse, supra n. 5.

IX. RESCUE AND EMERGENCY SITUATIONS

Due to the inevitability of backcountry accidents and the relative unavailability of immediate support systems (i.e., search and rescue, ambulances, etc.), the outdoor educator must be prepared to deal with any of a variety of potential emergency situations which may eventuate while he is running programs in various wildland settings. Because of the actual and perceived superior knowledge and experience his participants and other backcountry users acrue him, he will usually be expected to assume the primary leadership role in any emergency which occurs in his general proximity.

In this chapter the writer would like to take a look at the legally defined duties of the outdoor educator to initiate and carry out rescues and/or first aid measures with his own participants and others. As well, his duty to others who may intervene to help rescue a participant who has been placed in a dangerous position due to his own or the outdoor educator's negligence will be reviewed. Finally, a brief discussion will be presented of the limits of liability imposed upon a negligent outdoor educator or other, when a rescuer is injured while attempting a hopeless rescue or while failing to perform a rescue in a reasonably rational manner.

It is hoped that an understanding of the content of this chapter will encourage outdoor educators to face their moral and in many cases, legal obligations to be prepared to handle the various emergency situations which may foreseeably present themselves. As will be seen, the law in this area has changed much over the last century and is now at a point where altruism is supported by tort compensation when a rescuer is injured and where "good Samaritans" are usually protected from litigation when their rescue attempts are unsuccessful.

A. The Outdoor Educator as Rescuer

The duty to initiate rescue attempts or to provide first aid measures will depend upon the relationship (and subsequent duty of care) of the outdoor educator and imperiled person or persons.

Duty to Rescue Participants

It stands to reason that when an outdoor educator places his participants or students in a dangerous situation, or allows such a situation to develop without

intervening, he can not evade his responsibility to assist those he has placed in peril. [1] However, in reality, the leader would have this duty regardless of the cause of the accident and the presence or absence of negligence on his behalf. The outdoor leader-client relationship would be viewed in the same light as that of shipmasters and their passengers and other such associations where the former has an imposed duty to take affirmative action for the benefit of those he has accepted responsibility for.

This duty was first identified in the Canada Shipping Act, [2] where it was stated that

> The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers, if any, render assistance to every person... who is found at sea and in danger of being lost, and if he fails to do so he is liable to a fine not exceeding one thousand dollars. [3]

And although this statute imposes a generalized duty to aid anyone in trouble, over the years, strong support grew for a more limited

> duty of affirmative care, including aid and rescue, incidental to certain special relations, like that of employer and employee, carrier and passenger, and occupier and his lawful visitors, [4]

and others who the law

> has come to attach exceptional obligations of protective care, because of the peculiar vantage by one party to such a relation in preventing accidents and a corresponding dependence by the other on such help. [5]

Professor Linden attributes this obligation to the fact that the individual assuming the duty "normally derives some economic advantage from the relationship" [6] He also discusses the concepts of misfeasance and nonfeasance and the present trend in Canadian courts toward categorizing rescuer conduct where an affirmative duty exists as misfeasant rather than nonfeasant. Misfeasance may be differentiated from nonfeasance in that it involves the affirmative negligent creation of a dangerous situation, and not simply the failure to prevent its transpiration. [7] In the outdoor education context, an example may include a situation where an outdoor leader discovers a tree across a

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[1] Allen M. Linden, "Rescuers and Good Samaritans", Alta. Law Review, Vol. X, 1971, p. 90.
[2] R.S.C. 1952, c. 29.
[3] Ibid., s. 526 (1).
[4] John G. Fleming, The Law of Torts, fifth edition, (Sydney: The Law Book Company, 1977), at p. 146; adopted in Matthews et al. v. MacLaren et al. and Horsley et al. v. MacLaren et al. (1969), 2 O.R., at p. 143.
[5] Ibid.
[6] Linden, supra n. 1 at p. 90, from Bohen, "The Moral Duty to aid Others as a Basis of Tort Liability" (1908), 56 U.Pa.L.Rev. 217.
[7] Linden, supra n. 1, at p. 90.

cross-country ski trail, around a sharp corner and at the bottom of a relatively steep hill. If he were to negligently fail to remove the hazard or to at least attempt to warn his participants of its presence, he could be guilty of misfeasance should one of his participants be injured. The courts would interpret his act of continuing on down the trail as negligent, positive conduct rather than a mere failure to respond. [8] He may also be misfeasant in the same manner if he were to fail to attempt to provide first aid attention to the participant injured due to a fall caused by said tree.

Because of the obvious duty to care for participants in the outdoor educator's charge, liability for misfeasance, which indicates the existence of a greater standard of care than nonfeasance, will usually be imposed upon him if he is negligent. As will be demonstrated in the following section, the reason for defining such failures to take positive action as misfeasance lies in the underlying premise that there is generally no liability for nonfeasance. [9]

The Standard of Care Expected in Emergency Situations Involving Participants

Having established a legal duty to initiate rescue operations or first aid measures in the event of an accident involving an outdoor educator's participants, the next issue to be addressed concerns the standard of care which the leader's emergency responses are required to meet. The query raised in a recent Canadian boating rescue case was:

> What would the reasonable boat operator do in the circumstances, attributing to such person the reasonable skill and experience required of the master of a cabin cruiser who is responsible for the safety and rescue of his passengers? [10]

In this, the case of Matthews et al. v. MacLaren et al. [11] also called "The Ogopogo", the defendant took some friends for a ride on his cabin cruiser named The Ogopogo. When one passenger Matthews, unexplainedly fell overboard into the seven degree celcius water of Lake Ontario, another summonsed MacLaren who immediately put the boat in reverse and backed up toward Matthews, cutting the engines so the boat could drift to him. MacLaren repeated this procedure again when the boat drifted away and as the life rings and other personal floatation devices thrown to Matthews by other

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[8] see Freedman, J. in Oke v. Weide Transport Ltd. (1964), 4 D.L.R. (2d) 53, (Man. C.A.).
[9] Allen M. Linden, Canadian Negligence Law, third edition, (Toronto: Butterworths, 1982), p. 301.
[10] Matthews et al. v. MacLaren et al., Horsley et al. v. MacLaren et al. (1969), 2 O.R. at p. 144.
[11] Ibid., at p. 137.

passengers went unnoticed by the apparently unconscious man in the water.

As the craft again drew close to Matthew's still unresponsive body, another passenger, Horsley, removed his clothing and without notice or explanation dove in to attempt to rescue the first victim. Unfortunately, it appears that the shock of the cold water caused him to have a heart attack and although MacLaren recovered his body reasonably quickly, Horsley could not be resuscitated. Although Matthews' body disappeared from view and was never recovered, it was assumed that his heart also succumbed to the icy water upon immersion.

At trial, Matthews' family was denied recovery on the grounds that "the defendant's negligence... was not the cause of Matthew's death and there can therefore be no liability." [12]

After it was somewhat extraneously proven that MacLaren had a legal duty to initiate the rescue he voluntarily undertook, the court settled down to establish whether or not he had been negligent in performing this rescue. Although it was agreed that MacLaren could in no way be faulted for Matthews falling overboard, serious questions were raised concerning his sobriety at the time of the accident and the errors in judgment he showed in repeatedly backing the cruiser to the victim rather than approaching him 'bow-on' in the approved procedural fashion. Expert police testimony also stated that MacLaren was intoxicated at the time of the accident and he himself admitted to committing an error in judgment in his selection of an incorrect rescue procedure. [13] However, the pathologist's report forced the court to conclude that "on the balance of probabilities, it had not been shown that Matthew's life could have been saved" [14] through the employment of the recommended procedure and the defendant was therefore relieved of liability.

As the duty of the outdoor leader directly parallels that of the ship's captain, it may safely be said that the outdoor educator will be held negligent if he does that which a reasonable outdoor leader with his training and experience would not do or if he fails to do that which the reasonably prudent outdoor leader would, given the same training and circumstances. As has been pointed out in previous chapters, because outdoor

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[12] Ibid., at p. 146.
[13] Ibid., at p. 145-6.
[14] Horsley v. MacLaren (1972), 22 D.L.R. (3d) 545 (S.C.C.), at p. 545.

educators as a group have such a tremendous range of qualifications and certifications, each case will of necessity have to be tried according to its particular fact situation and the qualifications of the individual(s) involved. However, it is safe to assume that the standard of care expected to be provided by someone with the knowledge and training of a certified Wilderness Emergency Medical Technician (equivalent to extensive ambulance paramedic training but with an outdoor accident orientation) will be somewhat higher that that expected of a leader holding only a general emergency first aid certificate (e.g., St. John's Ambulance or Canadian Red Cross emergency care). The lack of judicial precedent makes it impossible to identify the variations in the standard of care actually required by individuals with different levels of training and experience in this area. However, it should be remembered that all outdoor leaders will be expected to have acquired some training in this area, to act as the 'reasonable man' with like training, and certified or not, the question raised in court would be 'what was done and how did it affect the victim?'

In an emergency situation, the outdoor leader would be wise to have an assistant leader or participant record the leader's dictations of what he does and how the victim responds. In addition to the possibility of this record proving valuable once the victim has been handed over to other medical care, it may be vital in the ascertainment of whether the leader acted negligently or not, should a legal action be brought against him.

The writer is hopeful that rather than shying away from additional training in order to avoid the imposition of a higher standard of care, readers will see their moral obligation to achieve and maintain a high standard of excellence in the area of emergency rescue and first aid. The need for a high level of skill and knowledge in this area is as important as technical proficiency in the activity pursuit involved. The fact that the leader has a legal as well as a moral obligation to initiate emergency procedures in the event of an accident, carries with it the onus to be prepared to face this responsibility with the confidence attendant to competence.

The need for frequent, realistic in-service training was brought to bear in a recent swimming pool accident. On January 17th, 1975, a young girl drowned in a

supervised Y.M.C.A. swimming pool in west Edmonton.[15] At the subsequent public inquiry it was learned that the supervising lifeguard was adequately certified as a lifesaver, holding his Royal Life Saving Society Bronze Medallion, Bronze Cross and Senior Resuscitiation Awards, but that he should not have been allowed to work in the position of lifeguard because he did not meet the minimum age requirement of eighteen. However, even his extensive lifesaving qualifications were brought into question when a material witness stated that after pulling the victim from the pool, the young guard froze when she began vomiting and ceased to treat her. He was allegedly in such a state of shock that he could not even verbally respond to an onlooker, completely untrained in artificial respiration, when the latter took over resuscitation attempts.

An expert technical witness gave numerous recommendations, the majority of which related to the updating of standards for lifeguards and the legislation of these standards, increases in the frequency of mandatory re-certification examinations for all certified guards and the institution of in-service training at all pools to keep guards finely tuned.[16] All of these recommendations were adopted by the jury in delivering their verdict at the inquest.[17]

The duty of affirmative action owed by an outdoor educator to his program participants is not unlike that owed by a lifeguard to his pool's patrons. The results of this particular inquest, although not yielding binding law, apply directly to outdoor education and demonstrate that although the acquisition of emergency and first aid certification may prove one way of attaining the required knowledge and skill, only through continuous practise and retraining can the outdoor leader be reasonably confident of his application of that knowledge and skill in an emergency situation.

The Duty to Rescue Others

Although the outdoor educator has a relatively clear obilgation to protect his participants from harm and to care for them should they be injured or in some other danger, the same duty will not be owed a stranger who the outdoor leader finds imperiled. Historically, not only was the law not encouraging toward good Samaritans, it actually deterred them by exposing them to civil liability when their rescue attempts failed

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[15] Proceedings from the Public Inquiry into the death of M.L. Williams, held April 14, 1975, Edmonton, Alta.
[16] Ibid., per Ronald Kirstein, pp. 61-4.
[17] Ibid., at p. 70.

and by affording them no avenue of recompense should they be injured while attempting to aid another. [18]

Today, although both of these negative sanctions have been largely removed in both statute and common law, the individual is still under no legal obligation to come to the rescue of a stranger to whom he owed no initial identifiable duty [19] and which he did not through his conduct, place in harm's way. The most common examples of pure legally acceptable nonfeasance may be found in motor vehicle accidents where many people, including doctors and registered nurses have been known to pass an accident scene without offering aid. [20] Also, more than once a skilled swimmer has ignored a plea for help from a drowning person, [21] again without legal repercussion. It appears clear that although statutory and common law are "prepared to support altruistic action, they stop short of compelling it." [22]

Therefore, the outdoor educator leading a backpacking expedition who comes upon a solitary backcountry traveller who has fallen and broken a leg, could technically walk on by with no fear of legal reprisal. However, if his conscience leads him to help the unfortunate hiker, the law would support his assistive actions unless they proved grossly negligent and resulted in greater harm to the victim.

The Standard of Care Expected When Rescuing Others

The provinces of Alberta [23] and Saskatchewan [24] have enacted legislation to protect any person rendering emergency first aid assistance from civil liability actions, unless they are found grossly negligent. The Alberta Act, the first of its kind in Canada, states that:

> If, in respect of a person who is ill, injured or unconscious as the result of an accident or other emergency,
>
> (a) a physician, professional medical assistant, or registered nurse voluntarily and without expectation of compensation or reward renders emergency medical services or first aid assistance and the services or assistance are not rendered at a hospital or other place having adequate medical facilities and equipment, or
>
> (b) a person other than a person mentioned in clause (a) voluntarily

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[18] Linden, supra n. 1, at p. 89.
[19] Fleming, supra n. 4, at p. 144.
[20] Smith v. Rae (1919), 46 D.L.R. 518.
[21] Gautret v. Egerton (1867), L.R. C.P. 371.
[22] Fleming, supra n. 4, footnote 7 at p. 144.
[23] Emergency Medical Aid Act, R.S.A. 1970, c. 122, s. 3; 1975 (2), c. 26, s. 82 (2b).
[24] An Act Respecting Emergency Medical Aid, R.S.S. 1976, c. 17, s. 3.

> renders emergency first aid assistance and that assistance is rendered at the immediate scene of the accident or emergency,
>
> the physician, professional medical assistant, registered nurse or other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his part in rendering the medical services or first aid assistance, unless it is established that the injuries or death were caused by gross negligence on his part. [25]

And although most provinces (e.g., British Columbia, Ontario, Nova Scotia, etc.) do not possess such statutes, the common law may be relied upon to give guidance in these provinces. Case law has demonstrated that although a duty will be imposed upon a would-be rescuer to complete a rescue he has initiated, [26] the standard of care required in such situations appears quite low. As long as the defendant's conduct does not worsen the plaintiff's position noticably, thereby constituting misfeasance, the rescuer is under no legal obligation to significantly improve the status of the imperiled victim. [27] To hold otherwise "would have the undesirable tendency of discouraging assistance for fear of incurring liability if the most expeditious methods were not employed." [28]

The recent Canadian case of Horsley et al. v. MacLaren et al [29] also clearly demonstrates the favor the courts are currently showing would-be rescuers, even where their attempts fail. Although the plaintiff, Horsley et al., was denied tort recovery after Horsley died of a heart attack while attempting to save a friend who had fallen off a yacht into Lake Ontario, the Supreme Court of Canada did not base its decision on Horsley's negligence as a rescuer. Rather, the case was decided on the grounds that no blame for the initial accident could be attached to the defendant whose own rescue attempts, although showing poor judgment, were not legally misfeasant. The driver, MacLaren, could therefore not be held liable for injuries or death sustained by others who risked their lives attempting to rescue the imperiled man.

In the Court of Appeal, Jessup J. adopted the test set out in the East Suffolk Rivers Catchment Board case, contending that:

> ...where a person gratuitously and without any duty to do so undertakes to confer a benefit upon or go to the aid of another, he incurs no liability unless what he does worsens the condition of that other. [30]

Schroeder J. supported this position and stated that:

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[25] Emergency Medical Aid Act, supra n. 23, s. 3.
[26] East Suffolk Rivers Catchment Board v. Kent [1944] A.C. 74.
[27] Ibid., at p. 102.
[28] Fleming, supra n. 4, at p. 144.
[29] Horsley, supra n. 14.
[30] Horsley et al. v. MacLaren et al. [1970] 2 O.R. 487, at p. 500.

> ...if a person embarks upon a rescue, and does not carry it through, he is not under any liability to the person to whose aid he has come as long as discontinuance of his efforts did not leave the other in a worse condition than when he took charge. [31]

The purpose of the law cited in these cases, supporting statute in a few provinces, is to encourage rescue efforts by reducing the risk of liability for failing at such. The statutory exclusion of protection for grossly negligent rescuers helps deter the inept from engaging in careless or foolhardy rescue operations. As this appears to be a fairly sound way of encouraging would-be rescuers, while retaining some control over their conduct, the writer is hopeful that other provinces will see fit to enact such legislation.

Therefore in summary, if an outdoor educator is negligent in creating, or failing to reasonably foresee a dangerous situation which results in the imperilment of one of his participants or someone else, he will be legally obligated to assist them. As the law has created what amounts to a duty of affirmative action, a leader will have a duty to attempt to assist any of his participants who land in harms way. The legal position of the leader in rescuing participants who voluntarily place themselves in situations dangerous to themselves and any would-be rescuers will be discussed and clarified in the next section of this chapter. Finally, the outdoor leader is under no legal obligation to assist an imperiled stranger who he comes upon. However, others will turn to him for leadership in such situations and this fact combined with his conscience will often call him to action. As long as he does nothing grossly negligent, resulting in a significant worsening of the victim's condition, statutory and/or common law will protect him from liability and the latter will provide him with recompense should he be injured in his efforts to perform the rescue.

B. The Outdoor Educators' Liability For Other Rescuers

As the Horsley case so vividly illustrated, if the defendant's negligence cannot be shown to have been a contributing factor in an endangered person's plight, then that defendant cannot be held liable for the injury or death of a third party who attempts to rescue that person. [32] In that case, expert witnesses called upon to establish the defendant MacLaren's breach of duty in failing to adhere to established rescue

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[31] Ibid., at p. 502.
[32] Horsley et al., supra n. 14.

procedures, were not able to convince the Supreme Court of Canada that this failure construed more that an error in judgment, he was not found negligent. If he had been found negligent, it is very likely that Horsley's estate would have succeeded in attaining at least partial compensation. In some aspects this case demonstrated what Professor Linden described as rather "exceptional facts" [33] which may have lead to a very different decision today, especially with regard to Canada's current trend in apportioning liability.

Canada has been an international leader in rescuer compensation law. In the 1910 Manitoba Court of Appeal decision in Seymour v. Winnipeg Electric Railway, [34] Richards J. after recognizing that "the promptings of humanity towards the saving of a life are amongst the noblest instincts of mankind", stated that:

> ...the trend of modern legal thought is toward holding that those who risk their safety in attempting to rescue others who are put in peril by the negligence of third persons are entitled to claim such compensation from such third persons for injuries they may receive in such attempts. [35]

This was the first case known where a plaintiff rescuer was not barred tort recovery due to his voluntary assumption of the risk involved in the rescue or "on the grounds that the defendant was not the cause of their loss." [36] However, inspite of Canadian leadership in this area, it wasn't until the early 1920's that Cardozo J. established the precedent for all common law nations when he made the following oft-quoted statement:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer... The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had. [37]

Although Wagner was an American case and Cardozo's judgment therefore had no binding power on any commonwealth courts, the later cases in these countries which adopted it regardless, set their own precedents for future decisions in this area.

It is now generally accepted that if an individual breaches a duty owed another and the latter is subsequently placed in a position of danger, it is completely foreseeable that

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[33] Linden, supra n. 9, at p. 378.
[34] 14 W.L.R. 566.
[35] Ibid., at p. 568.
[36] Linden, supra n. 1, at p. 99.
[37] Wagner v. International Railway Co. (1921), 133 N.E. 437.

a third party happening upon the situation may attempt to render aid and may be injured as a result. The negligent defendant will be liable to both.

Therefore, in the outdoor education case of Moddejonge v. Huron County Board of Education et al. [38] the outdoor education program coordinator was held not only liable for the death of a non-swimming student who drowned due to his negligence, but also for a second girl who could swim, but who drowned when she attempted to rescue the panicking non-swimmer who had drifted out over her head. Even as recently as in this case the courts reiterated Cardozo J.'s statement in giving their decision and justifying it. In relating this precedent to the case at hand, Pennell J. claimed that:

> The initial act that set the events in motion was the negligence of the defendant. One of the links of causation was that someone might thereby be exposed to danger and that someone else might react to the impulse to rescue. [39]

As a natural extension of the law stated here, it should be noted that "a person is not only liable to those injured while rescuing persons that he places in danger, but, if he gets *himself* into trouble, he owes a duty to someone who comes to his aid." [40] This fact has several implications for the outdoor educator. Not only does it explain how he may acquire restitution should he be injured while rescuing another, injured or in danger through no fault of the outdoor leader's, but it is certainly of great relevance to the outdoor leader whose carelessness places his own person in a hazardous position. To hypothetically alter the facts of the Moddejonge case for example, if it had been the outdoor educator himself (a non-swimmer in the real case) who had been wading and drifted into deep water, he would have been liable for any injury to, or death of his would-be rescuer.

The same could be said of the leader who is careless in scouting a river and negligently allows himself to be pinned under a sweeper or log jam while paddling, or one who negligently skis across a known avalanche slope. Rescuers often place themselves in great risk attempting to recover people (or their remains) from such hazardous locations as the three illustrated. People who knowingly flirt with nature's powers must be prepared to accept responsibility for themselves and others injured in the process.

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[38] [1972] 2 O.R. 437.
[39] Ibid., at p. 444.
[40] Linden, supra n. 1, at p. 101.

Although people do not have a duty to preserve their own safety, "if by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone who he ought to have foreseen would attempt to come to his aid." [41]

The effect of the liability one owes to potential rescuers should instill an even greater moral responsibility to exercise prudence in outdoor leadership and activity situations than one would normally perceive. When a leader places himself and/or his participants (who may even voluntarily wish to assume the inherent risks) in a high risk situation, innocent others who may foreseeably offer their assistance when the leader and/or group overextends itself, must be considered in weighing the utility of that action versus its possible and probable costs. As the courts have repeatedly demonstrated, rarely will the defendant leader and/or participant be able to claim that the rescuer(s) voluntarily assumed the risks involved in performing rescue operations.

C. The Contibutorily Negligent Rescuer

The fact that few recent cases exist where an injured would-be rescuer has been denied recovery based on his voluntary assumption of risk, the defendant's lack of duty and/or the rescuer's own negligence in carrying out the rescue operation, does not make this result an impossibility. The courts have been largely reticent in finding altruistic rescuers who have been injured during their acts of heroism guilty of contributory negligence, especially when those they came to aid were imperilled through another's negligence. However, not all rescuers will necessarily find such legal shelter. Professor Linden points out that the common law will only protect those rescuers who respond to "some reasonable perceived danger to a person or goods" and whose conduct is "reasonable in the circumstances." [42]

In terms of the first criteria, it is not necessary for the plaintiff rescuer to prove that there was actual danger, only that there was a "reasonable belief that someone was in peril." [43] It would matter not if the rescue attempt had no hope of success because the

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[41] Barry J. in Baker v. Hopkins, [1958] 3 All E.R. 147, at p. 153.
[42] Linden, supra n. 9, at p. 373.
[43] Ibid., at p. 293.

party to be saved was already dead [44] or perhaps was never really in any danger. For example, in Ould v. Butler's Wharf, [45] a workman pushed a fellow worker out of the path of a crane hook he believed was about to strike him. Upon being pushed, the workman dropped a case of rubber he was carrying on the would-be rescuer's foot. Although in hindsight there was no danger to the workman, the courts allowed the rescuer to recover for his injury because although futile, his rescue attempt was not altogether unreasonable. [46] Again, it was felt that the common law should foster rescue efforts and not discourage them.

Also, it appears to matter little whether the rescuer responded instinctively or through a rationalized decision to act. "Courage deserves no lesser reward because danger is deliberately faced... [b]ut to be a 'rescuer', he must have acted in an emergency." [47] For example, in Brandon v. Osborne, Garret and Co., [48] a man's wife was injured when she attempted to pull her husband away after he was struck by glass, which, due to the defendant's negligence fell from a skylight in his shop. In passing judgment for the wife, Swift J. referred to the reasonable person test in these terms:

> If she [the wife] did something which a reasonable person in the circumstances ought not to have done she would not be entitled to damages, but if what she did was done instinctively and was in the circumstances a natural and proper thing to do, I think she is entitled to recover. [49]

In the Horsley case, [50] compensation was refused by the Supreme Court of Canada, not because his rescue attempt was perceived as "futile, reckless, rash, wanton or foolhardy," [51] but because the imperilment of the first man overboard could not be attributed to any negligence of the defendant. However, among a number of reasons the earlier Court of Appeal judges used to reverse the trial decision and deny Horsley's right to action included the fact that he was an unforeseeable rescuer who placed himself in the same situation as the victim he sought to aid, without taking any "precautions for his own safety by donning a lifejacket or attaching a rope to himself." [52]

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[44] Wagner, supra n. 37.
[45] [1953] 2 L.R. 44.
[46] Ibid., at p. 46.
[47] Fleming, supra n. 4, at p. 163.
[48] [1924] 1 K.B. 548.
[49] Ibid., at p. 552.
[50] Horsley, supra n. 14, at p. 548.
[51] Ibid., at p. 548.
[52] Horsley, supra n. 30.

Professor Linden referred to the Court of Appeal's findings as a sad misuse of the foresight theory. [53] Rather that dismissing Horsley's action, Linden advocated an apportionment of damages, thereby rewarding his admirable efforts while penalizing him for the contributory negligence he displayed. [54] As Canadian courts have demonstrated an ever-increasing tendency to divide assessments according to liability between the parties involved, this would be a more likely outcome in similar cases in the future.

In the Moddejonge case, [55] Pennell J. stated that:

> It was delicately argued that the efforts of Geraldine Moddejonge constituted a rash and futile gesture: that reasonableness did not attach to her response. Upon this, the rescue of Sandra Thompson is sufficient answer. One must not approach the problem with the wisdom that comes after the event. Justice is not to be measured in such scales. To Geraldine Moddejonge duty did not hug the shore of safety. Duty did not give her a choice. She accepted it. She discharged it. More need not be said. The law will give her actions a sanctuary. [56]

Undoubtedly, the Moddejonge girl was ignorant of recognized lifesaving procedures, or in the stress of the emergency presenting itself, did not take the time to wait for the drowning victim's panic to subside in exhaustion before extending a reaching assist or otherwise avoiding face to face contact with her. But the courts have been, and will remain reluctant to construe such errors in judgment as reflective of negligence.

In conclusion, as with all contributory negligency claims, the onus placed upon the defendant to prove that the rescuer was foolhardy or reckless will be a difficult one. The courts will continue to support rescuers by compensating them when they are injured risking their safety to assist others. It is hoped that the law in this area will likewise encourage people working or recreating in potentially dangerous areas, to take extra care to avoid accidents resulting in liability to other participants and/or to those innocent others who may come on the scene to render emergency aid.

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[53] Linden, supra n. 9, at p. 378.
[54] Ibid., at p. 296.
[55] Moddejonge, supra n. 38.
[56] Ibid., at p. 444.

X. DEFENSES TO TORTIOUS LIABILITY IN OUTDOOR EDUCATION SITUATIONS

Inspite of the high standard of care expected of those holding themselves out as outdoor educators, certainly not all claims of negligence brought against outdoor leaders and agencies in Canadian civil courts will succeed. The defendant outdoor leader and vicariously his agency, will have ample opportunity to review the situation with their counsel to determine whether they think they have any legally acceptable defense(s) to present in the case. As this chapter will illustrate, there are a variety of possible defenses to allegations of negligence. Although most function as total defenses (e.g., no breach of duty or voluntary assumption of risk), some may result in only partial protection (e.g., contributory negligence) and a subsequent apportioning of damages.

It is hoped that the reader will view all of the defenses discussed herein as last courses of action, and not as factors to build one's programs around. The first objective of all programs should be to promote an improved quality of life for all participants. This objective will fail if they are injured or killed and will fail doubly if the victim is denied tort compensation because of some obscure legal loophole.

Following a brief explanation of a number of the possible defenses, a short section will be included describing the steps to take in the event of an incident which may lead to tort litigation. While certainly not encouraging any form of intentional deceit to improve the leader and agency's legal position, care should be taken not to prejudice this standing before relative fault and damages have been ascertained by those skilled and experienced in this area (i.e., lawyers and insurance agents). It will be shown that the things said and done during and immediately following an incident, may have tremendous implications on the defendant leader and agency's likelihood of success in the courtroom and/or during settlement negotiations.

A. The Defenses

In chapter three of this thesis, five criteria were outlined for a cause of action to proceed in negligence law:

1. The defendant must have had a duty to care for the plaintiff,
2. The defendant must have breached that duty through a failure to meet an established standard of care,

3. The plaintiff must have incurred one or more physical or mental injuries,
4. There must be a proximate connection between the defendant's conduct and the plaintiff's injury(ies), and
5. The plaintiff must not have conducted himself in a manner prejudicial to his action (i.e., volenti). [1]

Each of these will be considered individually in the manner in which they could be employed as defenses.

No Duty of Care

Claims that no duty was owed the plaintiff may be made by either the leader, the agency or both. The leader and agency may, for example, collectively and severally claim that the accident occurred at a time and/or in a place where they were not responsible for the plaintiff.

That an agency cannot be liable for injuries to a plaintiff outside the time period for which they have accepted this duty was shown in Scoffield et al. v. Public School Board of No. 20, (North York). [2] Here a young girl was injured in a tobogganing accident which occurred on school property fifteen munutes before school was scheduled to start for the day. The case was dismissed on the grounds that teachers did not have a duty to supervise the schoolyard at that time and because there was no evidence to show that supervision could have prevented the accident. [3]

Therefore, an outdoor educator may expect to be liable for his participants twenty-four hours a day when running extended programs, especially with children, but he will not be responsible prior to or following the time identified for participants to be under the direction and supervision of himself and/or the agency. It is accepted as law in Canada that unless a school is conducting an off-area field trip, it is not liable for injuries sustained by students occurring outside the school grounds. [4] Use of this defense by an outdoor educator would depend greatly on where the program was being run. Although in some special circumstances (i.e., running a program in a park campsite area or other location where a different occupier may be liable for visitors' injuries caused by site

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[1] John G. Fleming, The Law of Torts, fifth edition, (Sydney: The Law Book Co., 1977), pp. 104-5.
[2] [1942] O.W.N. 458 (Ont. C.A.).
[3] Ibid., at p. 458.
[4] Pearson v. Vancouver Board of School Trustees et al. [1941] 3 W.W.R. 874 (B.C.S.C.), at p. 876.

related factors which that occupier had or should have had knowledge of), the outdoor leader is normally responsible for taking the environment as he finds it and protecting his participants from or warning them of obvious hazards.

Agencies such as municipalities often reduce or eliminate their duty to care by contracting themselves out of liability, especially in such 'high risk' program area as outdoor education/recreation. "The municipality remains liable for defects in the premises" (e.g., municipal parks) but other more specialized activity groups indemnify the municipality "through the provision of their own liability insurance" for activity related accidents. [5] This same approach has also been adopted by countless school boards over the last decade, probably in outdoor education more than in any other area of the curriculum.

In sum, although there are a few identifiable circumstances which may place the duty issue in question, in the majority of situations the relationships between the defendant outdoor educator and his agency of employ and the plaintiff are relatively easy to ascertain.

No Breach of Duty: Meeting the Required Standard of Care

Once a relationship between the plaintiff and the defendant has been established, the courts must ascertain whether the defendant met the standard of care required in the situation. Most often this will be accomplished by listening to the testimonials of 'expert' outdoor educator witnesses, called by either the plaintiff or defense to determine whether the outdoor leader and/or agency were performing their duties in a manner which the witnesses would consider reasonable given the defendant's particular situation.

In the recent Canadian case of Sholtes v. Stranaghan et al. [6] for example, a guide/outfitter was taken to court by the experienced woodsman who hired him "for breaching his duty of care to the plaintiff" [7] by allowing him to go out in the bush alone where he was subsequently mauled by a grizzly bear.

In deciding the case, the British Columbia Court of Appeal held that the "guide was justified in permitting the woodswise plaintiff to photograph and to fish alone." This judgment was based on the grounds that the "standard of care imposed on a

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[5] Barbara Brown, "Risk Recreation – A Challenge for Municipal Departments," Recreation Canada, Vol. 5, No. 36, 1978, p. 67.
[6] (1981), 8 A.C.W.S. (2d) 219 (B.C.C.A.).
[7] Ibid., at p. 219.

guide/outfitter depended upon the knowledge and experience of the person who hired him." [8] In this particular case the guide did not breach his duty to care for the plaintiff and so the latter was barred from recovery.

Often, in order to show that the required standard of care was met in the circumstances, the defendant must call in one or more reputable outdoor education practitioners to testify that the methods employed by the defendant at the time of the accident have been used by themselves and/or other agencies which they are aware of, over a significant period of time and without serious mishap; in other words, to illustrate a *custom.*

The more established the custom, (i.e., the greater the number of outdoor leaders using it and the greater the length of time it has been in use), the greater the likelihood of it providing the defendant with a valid defense. However, the courts will not accept an inherently dangerous practice, regardless of how widespread its application. Here the defendant will likely be made an example to all practitioners using the disapproved method.

Also, because of the tremendous variability in environmental situations, outdoor leadership and participant skill levels, teaching methodologies used and so on across the country, adherence to custom is often a difficult thing to prove (or disprove). Occasionally a very good practice will be adopted because it suits a particular leader or agency's situation, but because it lacks widespread application, it may be more difficult to justify in a court of law.

Therefore, in brief, although the outdoor leader and/or agency may on occasion be called upon to justify a particular act or practice and show that it met the standard of care required in a particular situation, most cases will involve the defendant in proving that he adhered to an established custom previously regarded as being safe and sound.

The Absence of Legitimate Damage

Rarely is the existance of physical injury a disputed aspect of an education/recreation related case. There do not appear to be any cases considering the issue of questionable damage in this area.

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[8] Ibid., at p. 220.

In terms of mental and emotional damages, the potential defendant should be aware that where the plaintiff demonstrates one or more physical symptoms resulting from nervous shock (e.g., cardiac arrest, a miscarriage or an identifiable psychiatric illness), traceable to the incident, the defendant may be liable for damages. [9] However, the courts do not permit claims for fright, sorrow, sadness or other such temporary emotional upsets resulting from a traumatic experience. [10] Therefore, if the required medical and/or psychological examinations do not yield evidence of a legitimate illness deemed worthy of compensation, the defendant need not fear continuance of the case to trial.

No Proximate Causation: Meeting the Foreseeability Test

As was discussed in chapter three of this thesis, application of the foreseeability test involves an evaluation of the likelihood of the reasonable outdoor educator pursuing the activity in the manner of the defendant after assesssing the magnitude (i.e., likelihood and potential gravity of injury) of risk present for each participant.

If the accident was caused by one or more factors which were not reasonably foreseeable by the outdoor leader, then he will not be liable. If, for example, a healthy looking tree unexplainedly cracks in the cold and falls across a cross-country ski trail, injuring a skier, it is likely that this freak accident would be viewed as an *Act of God*, beyond the foreseeability and hence the control of the ski leader.

However, those who hold themselves out as outdoor educators are expected to possess some knowlege and experience in reading environmental conditions and the signs of natural hazards. Therefore, if the leader is ignorant of, or fails to properly assess environmental conditions and subsequently takes participants "into a hazardous situation occasioned by the natural elements, then there is liability." [11] For example, the outdoor leader must be able to read the weather and know where to pitch camp (and where not to pitch camp) when a thunderstorm is imminent; he must understand snow deposition, structure and metamorphism well enough to know when a given slope may be prone to avalanche, and so on. For although lightning and avalanches may be considered

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[9] Cecil A. Wright and Allen M. Linden, Canadian Tort Law: Cases, Notes and Materials, (Toronto: Butterworths, 1981), at p. 10-9.
[10] Allen M. Linden, Canadian Negligence Law, third edition, (Toronto: Butterworths, 1982), at p. 400.
[11] Betty van der Smissen, "Minimizing Legal Liability Risks," Journal of Experiential Education, Vol. 2, No. 1, 1979.

completely natural phenomenon, hazards such as these usually identify themselves in advance, and the leader who is aware of the predisposing signs can consistently prepare for or avoid these hazards.

Not all unforeseeable accidents need be related to Acts of God. So-called 'freak' accidents may occur due to human error alone (leader and/or participant), for example where a canoeist tips on a relatively easy stretch of river, but is seriously injured when his head strikes a large rock on the bottom. Or they may be due to human error acting in combination with man-influenced environmental factors. For example, in an unlitigated incident in 1979 in Alberta, a number of pre-teen schoolchildren were scalded in a wilderness steambath when one student, either accidentally or while acting on a dare, threw a bucketful of water on the red hot rocks. No one had previously foreseen the potential hazards of allowing youth to control the temperature of their own steambaths, but now many outdoor educators, hearing of this incident, have prevented its recurrence by tying the water bucket near the entranceway to the steambath and only allowing partipants to use a cup or ladle to carry water from the container to the rocks. [12]

In sum, if the leader can demonstrate that the accident occurred as a result of the rapid onset of some unpredictable natural phenomenon or was otherwise the freakish catastrophic result of some unforeseeable (at least previously unforeseen) chain of events, then the outdoor educator may be able to show that he was incidental to an inevitable accident. If his conduct or lack of foreseeability is not the proximate cause of the accident, then he will be successful in his defense. However, if the accident was foreseeable either through simple prediction by reading the natural signs, or through another imposed duty such as that requiring the leader to know the abilities and propensities of his participants, then the defendant's conduct may be held as the proximate cause of the accident and he will be liable.

Prejudicial Conduct on the Part of the Plaintiff: Voluntary Assumption of Risk

When a plaintiff voluntarily assumes a risk and/or "the consequences of being exposed to the risk," [13] he is said to be volenti and will not have a right of action.

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[12] Mors Kochanski, (Freelance Outdoor Educator), in a Personal Interview, Edmonton, October, 1981.

[13] Sandra Kalef, "Volenti Non Fit Injuria", in March et al., Legal Liability in Outdoor Education in Alberta, (Calgary: Alberta Law Foundation, 1981), p. 1.

In chapter three the writer outlined the two bases for claims of volenti; either a) the plaintiff was not owed a duty by the defendant or b) the plaintiff waived his legal right to action while participating in an activity where he knew and appreciated the risks to which he was exposing himself.

Volenti in the first instance would simply be an example of the application of the first criteria discussed in this chapter; the need to prove the existence of a duty of care at the time and in the place where the accident occurred. Although defendants in common adventure situations may state that injured co-recreationists were volenti on this basis, most physical education/outdoor education cases will be argued on the grounds that the plaintiff voluntarily assumed the consequences of risks which he knew of and appreciated. [14] In so doing, it would be claimed that the plaintiff waived his right to legal action, even where the defendant may have negligently breached a duty owed to him.

In order to prove this very rarely accepted defense, the defendant will usually first try to show that the plaintiff was injured by something inherent to the activity (e.g., falling while learning to ski), and not by something not normally encountered by individuals engaged in that particular activity (e.g., skiing into a barbed wire fence the leader knew of but neglected to warn participants of). If he fails in presenting this defense, the defendant can next argue that the "plaintiff knew of the physical risks involved in the particular situation, even if these were unusual, that he appreciated their nature, that he voluntarily incurred them, and that he therefore expressly or impliedly agreed to assume the legal risk and waive any right of action." [15] There are Canadian outdoor education/recreation related cases which have been won by defendants on the grounds that the plaintiff was injured due to an assumed risk inherent to the activity, and by those who could prove that the plaintiffs waived their legal rights to action.

To illustrate the first type of volenti defense, in Dodd v. Cook, [16] falling was held to be an inherent risk to skaters. In making its decision, the Ontario High Court stated that:

> Skating is not a dangerous sport in itself but the risk of being tripped or thrown off balance by other skaters and caused to fall is an ever present hazard. In skating as in any other game or sport the voluntary participant is assumed to take risks which are the necessary incidents thereof. [17]

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[14] Harrison v. Toronto Motor Car et al. [1945] O.R. 1, at p. 9.
[15] Kalef, supra n. 13, at p. 8.
[16] (1956), 4 D.L.R. (2d) 43 (Ont. H. Ct.).
[17] Ibid., at p. 57.

But in a more recent skating case with a very similar fact situation to that in Dodd, the British Columbia Supreme Court in Siddal v. Corporation of District of Oak Bay [18] held that although the twenty-six year old plaintiff was aware of the "risk of being bumped by someone while skating, she did not expressly or impliedly agree to accept the risk of a blow inflicted by the negligent defendant who was skating erratically and at excessive speed." [19]

This same position has been applied in a number of downhill ski accidents. In Fink v. Greenlaus, [20] a skier was held negligent when he failed to take greater care skiing through a blind spot and subsequently collided with another skier.

In dismissing the defendant's claim of volenti on the part of the plaintiff, Van Camp J. stated:

> There was no evidence before me to support a finding that the plaintiff had voluntarily assumed the risk of the negligence that has been found. There was no express agreement nor can I imply it from the mere presence of the plaintiff on the slopes. [21]

Although the defendant proved that the plaintiff was fully aware and appreciative of the "nature of the risk she ran in crossing the slope, there was no evidence that she had released him from his responsibility" to ski with care. [22]

The Siddal and Fink cases both illustrate that a plaintiff may voluntarily assume risks inherent to the sport, while not necessarily assuming the consequences of those risks; in both examples, the plaintiffs retained their legal right to action.

In Turanec v. Ross, [23] the courts further reduced the scope of volenti to the acceptance of risks which are obvious and essential to the activity. While the facts again revolved around a collision on a ski hill, the courts held that volenti did not apply:

> The key words qualifying the application of the principle of "volenti" are the words "obvious and necessary" That is, before the principle applies the risk being assumed must be "obvious" i.e., foreseeable", and "necessary" for the accomplishment of the purpose of the sport. The risk of falling with the resultant injury is both foreseeable and necessary if one is to learn how to ski, skate, ride, tumble, etc.
> Turning to the present case, skiing is not a "bodily contact" sport... There is nothing about the sport of skiing that renders skiing in close contact with

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[18] [1980] B.C.D.Civ. 3374-09.
[19] Kalef, supra n. 13, footnote 50, at p. 14
[20] (1973), 43 D.L.R. (3d) 485
[21] Ibid., at p. 496.
[22] Ibid., at p. 496.
[23] (1980), 21 B.C.L.R. 198 (B.C.S.C.)

another skier either "obvious" or "necessary"; rather the converse applies... [24]

In this particular case the courts found the plaintiff twenty-five percent contributorily liable for failing to "ski under such control and keeping such lookout" that the defendant would have been unlikely to collide with him. [25]

It appears that inherent risks, those deemed obvious and necessary to the activity, will only be held as adequate defenses to negligence when the accident "is of the type that happens frequently, regularly and normally in the particular activity." [26] For example, many people fall down and injure legs or ankles while skiing; these are common injuries resulting from an inherent risk of skiing.

Even where the risks involved are inherent to participation in an activity at a certain level, (for example, the risk of being trapped in a hydraulic keeper increases with the grade of whitewater paddled), participants can only be held responsible for assuming those hazards for which they were of sufficient age and experience to perceive, understand and appreciate. This places a tremendous onus on the outdoor educator to communicate with participants in a continuous fashion, explaining hazards, procedures for avoiding or reducing them and the dire consequences of failing to so recognize and deal with them. Explanations and warnings of this nature "should encompass the way in which a skill is performed, the necessity of warm-ups and progressions, reasons why certain safety rules have been set forth, and so on." [27] Leaders can help insure that participants comprehend these explanations and warnings by quizzing their understanding of and responses to new or hypothetical situations based upon the real ones seen and experienced.

It is established in law that the older, more experienced and more skilled the participant is in the particular activity, the greater his responsibility for himself and the more risk he may be held to have assumed. [28]

> Therefore, rather than the more difficult and demanding risk sports being of greater risk liability-wise to the sponsor and leader, just the reverse is true. If only those who have the appropriate skill and experience level are allowed to participate, they assume most of the risks inherent in the activity for they are knowledgeable of the conditions under which they participate, the nature of the activity and its requirements of them. The greater peril in sponsoring

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[24] Ibid., at pp. 201-02.
[25] Ibid., at pp. 202-3.
[26] Kalef, supra n. 13, p. 15.
[27] Betty van der Smissen, "Legal Liability", Coaching Women's Athletics, Vol. 5, No. 1, Jan.-Feb. 1979, p. 50.
[28] Sholtes, supra n. 6, at p. 2-16.

activities is with the beginners, where very competent leaders are required. [29]

For example, in Tomlinson v. Manchester Corporation, [30] a twelve year old girl very inexperienced in gymnastics was injured attempting a vaulting progression exercise. The teacher was held liable for failing to directly supervise such novice students who obviously lacked the skill and confidence to practise alone on the apparatus. [31] However, in Butterworth v. Collegiate Institute Board of Etobicoke, [32] where a fourteen year old grade ten boy with some gymnastics experience was injured when he fell while attempting a vault, the courts held him volens. In this case, the absence of the teacher could not be cited as the cause of the accident and the court said this of the youth's assumption of the risks of the activity:

> ...the infant plaintiff was conscious of the fact that previously he had been clumsy, and also conscious of the fact that on previous occasions boys had been helping, yet on the occasion of the accident knowing he had been clumsy, knowing the horse, and knowing that there were no boys posted, he attempted the exercise.
>
> I am of the opinion that this goes far beyond mere knowledge of the danger. I think there is a clear perception of the existence of the danger, and also a clear comprehension of the risk involved. [33]

and later,

> Boys of fourteen years of age are capable of and indeed should be held to exercise reasonable intelligence and care for their own safety. [34]

It should be noted that this position was not supported in the recent Supreme Court decision in Meyers v. Peel County Board of Education [35] where a fifteen year old gymnastics student was seriously injured in a fall from the rings. The teacher and school board were found liable for failing to properly supervise and to provide adequate protective matting and in dismissing claims of volenti on the part of the student, the court said:

> Although [the plaintiff] may have assumed the risk of falling off the rings, he was entitled to expect that the defendants would provide adequate matting so that he would not injure himsef in such a fall. If the plaintiff accepted the physical risk, he did not accept the legal risk to give up any right of action which he had. [36]

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[29] van der Smissen, supra n. 11.
[30] (1947), 111 J.P. 503.
[31] Ibid.
[32] (1940), D.L.R. 466 (Ont. C.A.).
[33] Ibid., at p. 472.
[34] Ibid., at pp. 472-3.
[35] [1981] S.C.R. 3081.
[36] Meyers v. Peel County Board of Education [1980] 2 C.C.L.T. 269 (Ont. H. Ct.), at p. 289.

However, in Sholtes v. Stranaghan, the woodsman plaintiff failed in his claim against his guide because the courts felt he was old enough, and of sufficient intelligence and experience to assume the inherent risks wildlife present to travellers in the wilderness.[37]

In narrowing the scope of adult assumption of risk even further, previous experience has been shown in at least one case, not to constitute a particularly important consideration when the plaintiff is a mature adult and therefore deemed of sufficient age and intelligence to appreciate the risk as the reasonable man would. In Gilbert v. Lamont,[38] the plaintiff sought damages from the defendant stable owner when she fell off a horse she rented from him. She claimed that the horse was of nervous temperment and that it veered off the trail, causing her to fall. The action was dismissed because it was felt that she had received adequate instruction, and that even if she hadn't, controlling and steering a horse with reins was presumed to be obvious to any mature adult. Here the adult plaintiff was held to be a novice horsewoman who voluntarily accepted the risk of the injury she sustained when she rented the horse to go riding.[39]

In all of the cases discussed to this point, the defendant has claimed that by mere pursuit of the activity in question, the plaintiff has impliedly agreed to accept all risks inherent to the activity, including the legal risks involved. However, as the success rate of the defendants in these cases has indicated, only when the accident is the direct result of the plaintiff assuming a physical risk which is completely inherent to the activity at the plaintiffs' level of participation (e.g., falling while learning to ski), is there any possibility of winning such counterclaims. This implies that while a participant may accept some risks, he may reject others. In Ainge v. Siemon,[40] for example, the courts distinguished between those risks a snowmobile passenger normally assumes such as falling off the machine, from those which he does not usually lay claim to, in this case being run over by a second snowmobile.

A participant may willingly accept risks inherent to the activity, but not those related to the employment of defective or inadequate equipment. In Piszel v. Board of

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[37] Sholtes, supra n. 6.
[38] (1981), 29 Nfld. and P.E.I. R. 258 (P.E.I.S.C.).
[39] Ibid., at p. 258.
[40] [1971] 3 O.R. 119 (Ont. H. Ct.).

Education of Etobicoke, [41] a high school student was injured during a wrestling match when the wrestling mats separated just prior to his attempting to take down his opponent, with the result that he landed on his elbow on the hard gymnasium floor. The courts held the school board liable because the accident did not occur due to a risk inherent to the sport, but due to one over which they had control and ultimately, responsibility. [42] Also, in Delaney et al. v. Cascade River Holidays et al., [43] the defendant whitewater rafting agency was found negligent in failing to provide lifejackets with sufficient buoyancy for use by passengers it took running whitewater rivers in British Columbia. [44]

Outdoor educators who provide their participants with technical and safety equipment may be held liable if a participant is injured due to a malfunction of this equipment. Where the problem can be traced to a fault in the manufacture of the piece of equipment which could not easily have been inspected and noted by the outdoor agency handing it out, the injured party may sue the manufacturer. [45] But where the fault lies in poor maintenance or improper use (for example, using light touring ski equipment for heavy duty backcountry expeditioning), liability will remain with the outfitting agency.

The Legal Validity of Waivers

One way many outdoor education/recreation delivery agencies attempt to exclude themselves from liability and place this responsibility on the individual participant is through the use of 'exculpatory waivers', otherwise called 'disclaimers', 'responsibility releases' or 'exemption clauses'. Such waivers are an attempt to contract out liability to the participant and as such, are governed by the dictates of contract law. Whether found in fine print on application or registration forms, on entry tickets or on warning signs, they all attempt to expressly transfer liability to the participant. [46] When it can be shown that the release was express in its terminology and that it was drawn to the attention of the adult plaintiff prior to the accident, then regardless of whether the defendant was negligent or not, the waiver may protect him from legal action.

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[41] (1977), 16 O.R. (2d) 22 (Ont. H. Ct.).
[42] Ibid.
[43] (1982), 34 B.C.L.R. 62.
[44] Ibid., at p. 67.
[45] McAllister (or Donoghue) v. Stevenson [1932] A.C. 532 (H.L.).
[46] Kalef, supra n. 13.

> A person who makes an agreement with another, either expressly or by implication, to run the risk of injury caused by that other, cannot recover for damage caused to him by any of the risks he agreed to run. [47]

Rarely however, have disclaimers of any description been held legally binding by the courts. In an effort to continue facilitating compensation of victims injured by another's negligence, the law honors exclusion clauses only when there can be no question as to their intent and parameters. That is, their wording must be very precise and specific, the plaintiff must have been aware of and understood the clause and must have made a free choice in participating in the activity. [48]

Signed documents have a much greater chance of forcing the courts to find the plaintiff volens than do releases on tickets and/or posted signs. In two recent Canadian cases involving downhill ski operators who placed liability disclaimers on all ski tow tickets, neither defendant was successful in stating that the plaintiff voluntarily assumed the risks. In Wilson v. Blue Mountain Resorts Ltd. [49] it was held that the ticket waiver used was inadequate because it had not been drawn to the attention of the plaintiff skier. In Lyster v. Fortress Mountain Resorts Ltd., the courts found the ticket disclaimer invalid because it did not explicitly address the issue of the defendant's negligence.

> ...there is nothing in its wording which expressly exempts [the defendant] from the consequences of the negligence of its employees, and any doubts as to its being wide enough to cover such negligence must be resolved against the resort. [50]

The exclusion power of signage, like ticket disclaimers, depends on the language of the sign and the certainty with which it has been drawn to the attention of the plaintiff and others in his class. In Sturdy et al. v. The Queen, [51] the Crown successfully defended itself against a claim by the plaintiff who was mauled by a grizzly bear near a garbage dump in Jasper National Park. The plaintiff stated that the Parks department failed in its duty to protect him from or at least warn him of the danger of bears at the site. The Crown won the case on the grounds that there had been no previous attacks by bears in that area, that bears did not constitute an unusual hazard in this semi-wilderness area and that general warnings about bears were distributed in brochures at entranceways to the Park and on highway signs. However, inspite of the Crown's absence of liability in this

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[47] R.A. Percy, Charlesworth on Negligence, sixth edition, (London: Sweet and Maxwell, 1977), p. 745.
[48] Fleming, supra n. 1, at p. 279.
[49] (1974), 49 D.L.R. (3d) 161 (Ont. H. Ct.).
[50] Ibid., at p. 350.
[51] (1974), 47 D.L.R. (3d) 71.

case, the court held that this was not due to volenti on the part of the plaintiff. Even though Sturdy may have, by implication, agreed to accept the risk of physical injury by walking near the dump,

> ...there was no consent or agreement, implied or expressed, that he waived any right of action in case of injury by a bear. [52]

In Saari v. Sunshine Riding Academy Ltd., [53] a sign posted at the academy stating, "Riders Ride At Their Own Risk" was not held to provide adequate warning to patrons. When the academy was taken to court for failing to provide competent riding guides, the court determined that the sign had not been properly drawn to the attention of the plaintiff, or to other riders for that matter. In addition:

> Even if such had been the evidence, it is doubtful whether the words used are wide enough in their ordinary meaning to cover negligence on the part of the... Academy. [54]

The use of written waivers has been illustrated in two recent cases brought before the British Columbia Supreme Court. In Smith v. Horizon Aerosports Ltd. et al., [55] the plaintiff read and signed a 'hold-harmless' agreement, but it was later found invalid because it did not specifically exclude the agency of liability caused by its own negligence. However, in Delaney et al. v. Cascade River Holidays Ltd. et al., [56] the drowned plaintiff's estate was barred from recovery solely because such a clause had been included in the disclaimer. The standard liability release form signed by all clients prior to departure read in part:

> **Disclaimer Clause:** Cascade River Holidays Ltd. is not responsible for any loss or damage suffered by any person either in travelling to the location of the trip, before, during or after the trip, for any reason whatsoever including negligence on the part of the company, its agents or servants.
> **Agreement:** I agree to assume all risks involved in taking the trip including travelling before and after, and agree to pay the cost of any emergency evacuation of my person and belongings that may become necessary. I agree to Cascade River Holidays Ltd. its agents and servants relieving themselves of all liability for losses and damages of all and every descriptions. I acknowledge having read this Liability release and that I am of the full age and my acceptance of the above disclaimer clause by my signature and seal. (Parents or Guardians please sign for minors) [57]

Therefore, even though the defendant rafting agency was proven negligent and its negligence was shown to be a proximate cause of the plaintiff's death, he had effectively

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[52] Ibid., at p. 98.
[53] (1967), 65 D.L.R. (2d) 92, (Man. Q.B.).
[54] Ibid., at p. 100.
[55] (1980), 130 D.L.R. (3d) 91.
[56] Delaney et al., supra n. 43.
[57] Ibid., at p. 65.

barred himself and/or his estate from any recovery in tort or contract law by signing the release clause.

In reflecting upon the implications of this case, the writer would first like to remind outdoor education/recreation agencies and boards that this case is an isolated example and that courts remain reluctant to honor such waiver forms. Outdoor practitioners should also remember their professional, if not legal, obligations to their participants. While participants should be expected to assume risks inherent to the activity, it is not right that they be barred recovery when they are injured due to human error not of their own origin. Rather than employing disclaimers of the sort illustrated above, it is recommended that agencies do not attempt to exclude themselves from accidents caused by their negligence and that they purchase liability insurance for the purpose of covering such claims when they are legitimate. The agency/board is a much more realistic vehicle for the purchase of risk activity insurance; very few individuals will have the time or inclination to take this upon themselves and it is unrealistic to request that they do so.

It would be better for all parties concerned if agencies willingly accepted legal accountability for their or their servants errors or omissions. As more individuals become aware of the potentially legally binding status of such express disclaimers, many are likely to refrain from participating in outdoor activities rather than relinquish their legal rights by signing them away. One or two more incidents like the Delaney case may be all it takes to seriously deter people from activities involving not only what they perceive to be great physical, but also great legal risks. Such waivers may amount to the participant legally sanctioning agency (or servant) irresponsibility and negligence, and no profession or para-profession should be permitted such total freedom from accountability.

The Special Rights of Children

The courts hesitance to observe helplessly as individuals sign away their legal rights is carried to its extreme in the case of the child plaintiff. Only contracts made by or for the benefit or prejudice of an infant may be valid and binding. [58] A release given by a minor is prejudicial against and of no possible advantage to him and is therefore void.

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[58] Butterfield v. Sibbit and Nipissing Electric Co. [1950] 4 D.L.R. 302 (Ont. H. Ct.).

An infant cannot contract himself out of his legal rights. [59]

In referring to the limited power of disclaimer forms used by school boards across the country, it has been stated that:

> The legal effect of such waivers may be questioned for the simple reason that it is doubtful whether one person can sign away another's rights of action, even where the parties involved are parent and child. Apart from this objection, the strict interpretation which release forms receive and the near impossibility of excluding liability for injury caused through negligence make such waivers little or no bar to actions. [60]

The reader may well wonder why almost all educational and recreational agencies dealing with potentially risky activities continue to use waivers cloaked in legal terminology, which so obviously offer little or no legal protection to the negligent defendant. While some agencies may use them in an attempt to bluff injured participants into believing they have no legal recourse following an accident, most are used to ensure parental consent and/or participant recognition of the existence of physical risks and his requisite preparation for these.

It has been suggested that these almost fraudulent statements of legal position could be replaced with:

> Participant acknowledgements, which give some documentary evidence of the recognition of potential risks in a general way and agreement to abide by safety rules and regulations...The first part of such acknowledgment statements should set forth the nature of the activity in which an individual is to be participating (this also informs the parent), and the second part should indicate agreement by the participant to follow the leaders' directions and the established rules and regulations. Failure to do the latter is evidence of contributory negligence. [61]

The writer would view such a movement favourably as it would remove the false air surrounding the present use of most waivers, while still accomplishing the objectives most agencies desire of them. The bottom line here is that while outdoor educators cannot be insurers of safety from inherent risks, neither can they absolve themselves of responsibility through exculpatory statements when their negligence results in harm to a participant.

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[59] Ibid., at p. 302.
[60] John Barnes, "Tort Liability of School Boards to Pupils," in Klar, Studies in Canadian Tort Law, (1977), 189, at p 211.
[61] Betty van der Smissen, "Where is Legal Liability Heading," Parks and Recreation, Vol. 15, No. 5, May 1980, p. 51.

Contributory Negligence

As defined in chapter three of this thesis, contributory negligence is "conduct on the part of the plaintiff, contributing as the legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." [62] The defendant who claims that a plaintiff was contributorily negligenct retains the onus of proving that the plaintiff acted unreasonably in the circumstances and that his failure to take greater care for himself was a proximate cause of his injury(ies). [63]

Although the term 'negligence' normally implies a breach of some legal duty to care, in the case of contributory negligence it refers only to the plaintiff's failure to meet the standard of care required of him for his own safety. That contributory negligence cannot be construed as implying a breach of duty owed the negligent defender by the plaintiff was best clarified by Lord Simon when he said:

> When contributory negligence is set up as a defense, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defense is to prove... that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care, to his own injury. [64]

Professor Charlesworth points out that a plaintiff will not be contributorily negligent "if the risk is one created by the negligence or breach of statutory duty of the defendant, and it is one which a reasonably prudent man in the plaintiff's position would take." [65] The 'rescue' cases identified and discussed in the preceding chapter provide a number of cases in point.

Further, traditionally if one negligently placed another in a perilous position from which the latter was forced to react promptly to save himself "it was not contributory negligence if that other failed to act in a way which was shown on reflection to have been the best way out of the difficulty." [66] The courts historically granted plaintiffs placed in emergency situations great latitude in the "degree of judgment and presence of mind" they were expected to demonstrate, allowing the "actual standard of care" they exhibited to be "appreciably lower" than that of their defendants. The rationale was of course closely tied to the promotion of unprejudiced recovery by injured plaintiffs, especially

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[62] William L. Prosser, Handbook of the Law of Torts, fourth edition, (St. Paul: West Pub. Co., 1971), p. 417.
[63] Nance v. British Columbia Electric Railway [1951] A.C. 601, at p. 611.
[64] Charlesworth, supra n. 46, at p. 718.
[65] Ibid., at p. 719.
[66] Fleming, supra n. 1, at p. 268.

where the defendant was insured or an otherwise "suitable channel for loss distribution." [67]

Today, with the institution of apportionment legislation, contributory negligence is no longer considered a complete bar to recovery. As a result, the courts have become somewhat less biased towards plaintiffs and are now more apt to allow the damages to be divided in relation to where the fault lies. As stated in the province of Ontario's statutes:

> In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.
>
> If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent. [68]

Two rather recent Canadian Supreme Court decisions illustrate the employment of this type of legislation.

In Henricks et al. v. The Queen, [69] the plaintiff sued the defendant Crown for failing to replace signs on a navigation buoy indicating the presence of a weir downstream. An accident resulted when Henricks, his wife and another passenger drove their motorboat to within fifty feet of the weir before perceiving the waterfall it created and attempting to take evasive action. In their haste to turn or reverse the small craft, it overturned with the result that the plaintiff's wife was drowned.

The Crown was held liable, under the tenets of the Crown Liability Act, [70] for placing in the "navigable water a menace to navigation and in failing to replace the warning signs... to adequately warn of the menace." [71] However, the courts, under the Tortfeasors and Contributory Negligence Act, [72] held that the suppliant and his wife were contributorily negligent in their failure to keep a proper lookout and in their "failure to keep the boat in control during the progress forward from the point of turning to the

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[67] Ibid., at p. 269.
[68] The Negligence Act, R.S.O. 1970, c. 296, s. 4-5.
[69] [1969] 9 D.L.R. (3d) 454.
[70] 1952-53, (Can.) c. 30.
[71] Henricks et al., supra n. 68, at p. 454.
[72] R.S.M. 1954, c. 266.

moment when, all too late, they appreciated the danger." [73] As a result, negligence and subsequent damages were apportioned equally "between the suppliant and the Crown." [74]

A similar fifty-fifty division of damages was again found by the Supreme Court of Canada in the case of Holemus v. Dubuc. [75] Here, the defendant was found negligent after the amphibious plane he was attempting to land on a wilderness lake in British Columbia, struck an unseen object while taxiing along the surface. The collision tore a gaping hole in the passenger compartment and as the plane began to fill with water, three passengers leaped out of the aircraft into the icy lake. Although two of the three were subsequently rescued, one passenger, Holemus, drowned.

The court held that the defendant's negligence lay in his failure to warn his passengers of his plan to land and to instruct them in how to behave in the event of an emergency "arising when the aircraft became waterborne." The deceased plaintiff was held contributorily negligent, not for evacuating the aircraft, as this was perceived as certainly within the realm of reasonable conduct in the circumstances, but in his "failure to take with him one of the clearly available lifejackets." [76]

Although both of these cases have implications for outdoor educators, the general issues of the Holemus case should ring especially close to home. The outdoor educators' duties to assess risk, warn participants and instruct them in emergency procedures closely parallel those responsibilities the court identified as belonging to the pilot. Also, the standard of care the mature participant is expected to exercise for his own protection is also clealy illustrated. "A person's duty to take reasonable care of himself is enhanced by his knowledge of the risks involved." [77] Therefore, although the test for contributory negligence is based upon the objective criteria of the reasonable man acting in similar circumstances, factors such as age and experience in the activity will be considered.

Outdoor education thrives on placing people in unfamiliar situations in what is often an unfamiliar environment. The novice outdoorsman cannot be expected to understand and appreciate risks with the same level of comprehension as a seasoned

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[73] Henricks et al, supra n. 68, at p. 472.
[74] Ibid., at p. 473.
[75] [1975] 56 D.L.R. (3d) 351.
[76] Ibid., at p. 351.
[77] Charlesworth, supra n. 46, at p. 723. See also Hicks v. British Transport Commission [1958] 1 W.W.R. 493.

outdoor pursuitist.

The test meets its subjective limits when dealing with child plaintiffs whose conduct will be evaluated according to that expected of a youth of like age, intelligence and experience, acting in the same situation.[78] In chapter four of this thesis, a number of cases were reviewed involving youth who were found contributorily negligent for their injuries. One of the most notable of these was the Meyers[79] case, where a fifteen year old gymnastics student was held twenty-percent contributorily negligent for injuries he sustained in a fall from the rings. Another was the case of Ryan et al. v. Hickson et al.,[80] where a nine year old boy fell off a snowmobile he was a passenger on while turning to wave at the driver of a second snowmachine. When he was run over by the second snowmobile the courts apportioned the damages in this manner: thirty-three and one third percent to each of the two infant drivers and their respective fathers and thirty-three and one third percent to the plaintiff for failing in his duty to hang on to his driver.[81]

In sum, the introduction of apportionment legislation has resulted in a much greater tendency for courts to hold plaintiffs responsible for negligent conduct on their part which contributes to their injuries. In outdoor education situations the likelihood of contributory negligence being found against a plaintiff increases with the individual's age (to adulthood) and his experience in the natural environment and in the activity being pursued at the time of his accident.

Other Defenses

In addition to defenses related to one of the five criteria of the test of negligence and to contributory negligence, there are a few other defenses which a defendant outdoor educator or agency should be aware of and which may apply to a wide variety of situations. These include a violation of the statutes of limitations for the action, conductance of an unauthorized activity outside the employees' scope of duty and last but not least, error in judgment.

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[78] McEllistrum v. Etches (1956), 6 D.L.R. (2d) 1, at pp. 6-7.
[79] Ibid. n. 35.
[80] (1974), 55 D.L.R. (3d) 196.
[81] Ibid., at p. 196.

Statutory Time Limitations

Each province has its own Limitations of Actions Act, [82] which serves to establish the time period within which most types of civil actions must be commenced. Generally, a plaintiff will have two years following an accident to initiate an action in tort, but there are a number of notable exceptions.

In Alberta, for example, the Municipal Government Act, [83] serves to bar all actions against municipalities;

> ...unless notice in writing of the accident and the cause of it has been served on the municipal secretary or municipal solicitor within six months of the happening of the accident. [84]

The following subsection further clarifies the above subsection and allows an action to be commenced past the limitation period if the plaintiff is dead or if the

> court considers there is reasonable excuse for for the want or insufficiency of notice... [85]

Actions against teachers and/or school boards must, according to most School and Public Authorities Protection Acts, also be commenced within six months of the accident. The School Act of Saskatchewan, for example, states that:

> No action shall be brought against a school district for the recovery of damages after the expiration of six months from the date upon which damages were sustained... [86]

A case which employed similar legislation was Levine et al. v. Board of Education of Toronto, [87] where a boy injured during a school sponsored athletic meet failed to commence his action against the board until five years later. The Ontario Court of Appeal dismissed the case, holding that the school board was in this case protected by the six month time limitation stated in the Public Authorities Protection Act. [88]

In the extreme case, the federal Crown Liability Act, [89] stipulates that for an action to proceed against the Crown, a written notice of the injury and claim must be presented to an administrator and employee of the department controlling the land or activity within **one week** of the accident. The Attorney-General of Canada must also be notified, usually

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[82] R.S.N.S. 1967, c. 168; R.S.A. 1970, c. 209.
[83] R.S.A. 1970, c. 246, s. 385.
[84] Ibid., s. 385 (1).
[85] Ibid., s. 385 (2).
[86] R.S.S. 1965, c. 184.
[87] [1933] O.W.N. 238.
[88] R.S.O. 1970, c. 374.
[89] R.S.C. 1970.

by registered mail. Although a succeeding subsection mitigates the severity of this limitation (i.e., where the victim is deceased or where the Crown would not be prejudiced due to a lack of notice), it still serves to bar many potential claims against the federal government as most plaintiffs are not aware of this statute. Ignorance of the law is rarely viewed as a viable excuse for breaching it, even when the law is recorded in rather obscure legislation.

In brief, as a defendant the outdoor educator and/or agency should be aware of the length of time following an accident in which they are open to litigation. This information will normally be contained in the province's Limitations Act, but may also be found in other acts specifically related to the agency.

Unauthorized Activity

This defense is available for use by employer agencies only, not by outdoor leaders working in the field. It would be relevant in the rare instance where an accident occurred when a leader had taken participants on an outing not sanctioned by the agency the individual was working for. He may have taken participants out during a time, to a place or to engage in an activity which was not within his scope of employment and which the agency had expressly prohibited. As discussed in chapter seven of this thesis, an employer will remain vicariously liable for his employees' unauthorized actions only where the latter "are so connected with the acts which he has authorized that they might rightly be regarded as modes, although improper modes of doing them...".[90] In establishing whether a leader's conduct fell within this definition, the courts would review the decision-making autonomy normally granted the leader, the scope of employment of employees performing similar jobs in other agencies and the duties and decisions foreseeably incidental to performance of the duties expressly authorized by the employer.[91]

In the case of Beauparlant v. Appleby Separate School Board of Trustees,[92] an accident ensued after a group of teachers, unbeknownst to the principal, board or parents, granted their students a half-day holiday to attend a concert and attempted to transport them to it in an overloaded truck. In this particular case the action was

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[90] Poland v. John Parr and Sons [1927] 1 K.B. 236, at p. 240.
[91] Patrick S. Atiyah, Vicarious Liability, (London: Butterworths, 1967), pp. 51-69.
[92] [1955] 4 D.L.R. 558 (Ont. H. Ct.).

completely defeated because the plaintiffs had dropped their action against all but the defendant school board, which was not found liable. Had the plaintiffs retained the teachers involved as defendants they would have won their suit. As the teachers were acting beyond their authority and outside their scope of employment, they would have been personally liable for injuries resulting from their negligence. [93]

Outdoor agency directors reading this thesis may decide to protect themselves from vicarious liability by expressly delimiting their employees' scope of duties. Although this is a valid practice within limits, it must be well-tempered with opportunities for mature, experienced leaders to exercise some autonomy in the manner in which they perform their jobs. Staff morale will suffer greatly where leaders perceive they are not trusted to make any decisons for themselves.

Error In Judgment

And finally, where an outdoor educator and/or agency has inspite of their concerted efforts to provide an enjoyable, safe outdoor experience, made one or more mistakes which resulted in an injury(ies), they may plead that they made an error in judgment. Outdoor educators are only human and hence subject to human error. The Temiscaminque [94] and Cairngorm [95] tragedies discussed earlier in this thesis both illustrate disasters which culminated from a number of leader errors in judgment. And although neither resulted in legal action, the outdoor leader who studies the causal links to these accidents will learn much from the inquest and enquiry findings and recommendations presented by the analysts.

Although a pleading of error in judgment may provide a leader with a judicially valid defense (or partial defense) in certain circumstances, it is certainly not one which outdoor educators should rely upon in planning and executing their programs. In addition to the strong possibility of the courts finding negligence anyway, enroute to attempting to compensate the innocent victim, the writer is sure that no outdoor educator would want to be forced to live with his own conscience after his 'error' caused someone else to be seriously injured or killed.

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[93] Ibid., at p. 240.
[94] Stanislas Dery, Coroner's Report of Lake Temiscaminque Drownings, Inquest held by the Province of Quebec, June 28-9, 1978.
[95] "The Cairngorm Tragedy: Report of the Public Enquiry," Mountain, No. 20, 1972.

In summary, the reader can see that once a case is taken to court, the plaintiff must demonstrate that the defendant leader and/or agency was negligent according to the five criteria contained in the test for negligence. The defendant in turn, will attempt to refute this evidence and/or show that the plaintiff did not meet the standard of care required for his own safety, that the action was brought outside of the statutory time limitations, and/or that the alleged negligence did not consist of more than an error in judgment.

B. What to do in the Event of a Potential Lawsuit

Inspite of the apparent plethora of defenses at the outdoor educators' disposal, one's chances of being successfully sued for some negligent act or omission are steadily growing. If and when a situation arises which has the potential to lead to litigation, there are a number of things the leader/instructor and/or agency/board can and should do to protect their interests before the incident goes to trial.

Care for the Victim

If, after a leader/instructor's best efforts to run a safe, enjoyable program fail and someone is injured, the first priority must always be the initial care and evacuation of the injured person(s). The need for suitable first aid equipment and the knowledge required to use it, as well as the imperativeness of adequate communications systems and/or quick evacuation routes may all be essential to ensuring that a relatively minor accident occurring in the backcountry does not turn into a more complicated situation, with more serious consequences. An efficient, confident and sincere approach to the situation will also reassure the victim and reduce the likelihood of him considering suing.

Employment of a Scribe

As the leader will undoubtedly be busy (i.e., doing first aid, planning and executing an evacuation, keeping other participants busy and so on), an assistant leader or other participant should be given the job of *scribe*. As the leader and/or first aider works, he/they dictate information to the scribe who records it on paper. All potentially relevant information should be recorded at the scene: what happened (i.e., where, when and how the accident occurred); the condition of the victim (including any changes in response to the first aid administered); all remedial steps taken (i.e., first aid, evacuation procedures,

etc.) and a timeline of these steps; and the names and addresses of all witnesses.

After the situation is under control and the victim is stable, the leader should review this record and fill in any potentially important details (e.g., weather, water level, subjective impressions of the accident and his handling of it, etc.). What seems irrelevant at the time could be crucial information in court. Photographs taken during the rescue or as soon as possible afterwards may also provide vital information and evidence. This should all be done in addition to the completion of standard agency accident report forms.

Contact of Employer

The director of the agency responsible for the program must be notified of any accidents as soon as possible. Again, a good communications system or quick evacuation route which messengers may take is essential. A minimum of two capable people should be sent for help, complete with a written description of what happened, suspected injuries and grid coordinates of the victim's location.

Contact of Insurance Agent and Lawyer

The agency director will normally be responsible for contacting the agency's insurance agent and lawyer "in that order." [96] This will allow them to investigate the incident immediately and to preserve facts and evidence while they remain fresh. It will also prevent the leader/instructor or agency director from pursuing any course of action that could prejudice their "postion at a later date." [97]

Avoiding Discussion of the Issue

Although sometimes difficult to do when emotions are running high, it is a wise defendant (or potential defendant) who avoids making any public statements, especially to the media, regarding the particulars of an incident which has not been settled. No verbal admission of guilt should be made from the time of the accident until the agency's lawyer has suggested such be made.

Avoiding Operational Changes

Unless an obvious, unnecessary risk has been exposed through the accident, (one likely to lead to additional foreseeable accidents) the agency would be legally wise not to

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[96] R. Gerald Glassford et al., "Physical Activity and Legal Liability," C.A.H.P.E.R. Reseach Council Monograph, 1978.
[97] Ibid., at p. 6.

change the manner in which it directs its staff or operates its programs until after the matter is settled. Any immediate changes may be construed by the courts as indicative of an admission of error, corrected in hindsight.

Trying to Settle Out of Court

If the injured party threatens to sue and the leader and/or agency do not have an iron-clad defense, it is best to meet with the agency's insurance agent (or an adjuster) and lawyer and make a concerted attempt to settle the matter fairly out of court. Litigation is often a 'zero-sum' game; there is one winner and one loser (except where damages are apportioned). Lawyers thrive on the financial return they accrue through fighting the issue aggressively for as long as it takes to settle satisfactorily. And although this is occasionally necessary, especially where no legal precedents prevail, the agency director may save much time and legal costs if he and his insurance adjuster and lawyer work out a fair compromise based on the damages the plaintiff will claim in his pleadings, and if he directs his lawyer to work toward this settlement. Most suits are settled before they end up in court, "but usually not until both sides have wearied of the escalating costs and the disruptive influence on operations." [91]

In addition to the conservation of money, time and human resources, early out-of-court settlement will do much to prevent the unfavorable publicity a drawn out litigation is likely to cost the agency, regardless of the outcome of the case.

Out-of-court settlements may on occasion also leave the plaintiff (or his estate) in a better position financially than an arbitrated court assessment. Ironically, the results of damage assessments are one of the prime reasons that few cases have been taken to court and hence, few precedents exist in outdoor education. Unlike gymnastics or football injuries where the plaintiff is likely to have been seriously injured and perhaps rendered a paraplegic or quadraplegic, in outdoor pursuits the tendency is for accident victims to die by drowning, exposure, burial in an avalanche or from a serious fall off a mountain. More often than not, the deceased is under eighteen years of age and the assessments for fatal accidents to children are so low (presently in the order of ten thousand dollars), that the bereaved parents normally avoid the additional trauma of a court case and settle out of court or do not attempt to make a claim at all.

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[91] Ibid., at p. 5.

The author is aware of a number of such instances, the most famous recent one being the 1978 canoeing tragedy on Lake Temiscaminque where twelve boys and one leader drowned. As has been described earlier in this thesis, the coroner's inquest revealed quite conclusively that the school and instructors had been negligent in a number of ways,[99] yet not a single parent sued. The religious basis of the St. John's private school and the trust the boys' parents had in the institution's judgment also influenced these particular parents not to sue. However, as was pointed out in the introduction to this thesis, as societal attitudes toward legal rights grow more individualistic and as the expected standard of care of professionals continues to increase, this trend of non-litigation will definitely end and Canada will see a swing of the pendulum toward increased legally-enforced accountability in all areas, including outdoor education/recreation.

In the following chapter, the writer will illustrate specific leader preparations and program operations which may help both the individual outdoor educator and program delivery agency conduct themselves and their programs in a manner which will shield them from such legal actions.

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[99] Dery, supra n. 93.

XI. AVOIDING LEGAL LIABILITY: PROPOSED STANDARDS FOR OUTDOOR LEADERSHIP AND PROGRAMMING

Although this thesis has dealt with such legally oriented concerns as avoiding litigation through proper handling of accidents, the carrying of sufficient insurance and encouragement of out-of-court settlements whenever practicable, the overall emphasis has been placed on the running of reasonably safe, well-constructed programs.

At present, due to the relative youth of outdoor education programming, very few provinces have addressed the issue of consistency of outdoor education procedures employed within their boundaries and no standards are nationally recognized to date. Many educational/recreational agencies and boards in Canada are still running outdoor programs on a completely ad hoc organizational basis, making program initiation difficult for enthusiastic but relatively untrained leaders and yielding few customs to protect the agency/individual from legal reprisal should an accident occur.

In an attempt to help rectify this lack of standards, the writer has developed a set of suggested guidelines and procedures based on the description of the outdoor leaders' legally defined duties and pertinent standards of performance outlined earlier in this thesis. These pre-determined duties include:

1. The duty to be qualified,
2. The duty to navigate and guide,
3. The duty to supervise,
4. The duty to instruct,
5. The duty to provide adequate safety measures.

Where statute and case law have not prescribed the related leadership and programming parameters, the writer relied upon a personal collection, review and synthesis of the standards established and currently employed by a large number of boards, agencies and certifying bodies across Canada; the present custom in the land.

The result was a reasonably complete set of *leadership* qualifications (e.g., a canoeing instructor must be able to swim one hundred meters) and *programming* guidelines (e.g., all participants must wear Ministry of Transport approved lifejackets when canoe tripping) which vary with the type and intensity of activity being pursued. The activity areas included were hiking and backpacking, canoe and kayak instruction and

touring and cross-country ski instruction and touring.

The writer would like to point out that these guidelines are just that, *guidelines* for reasonably safe, low-liability programming. They are not intended to be a set of hard and fast rules whose violation will certainly result in needless accidents and subsequent damnation by the Canadian legal system. However, these guidelines were drawn in practical support of the content of this thesis which is based on the statutory and common law responsibilities of outdoor educators and they are therefore worthy of review and thought, if not implementation.

The standards suggested herein are nationally relevant **minima**; outdoor educators in each region must assess their own risk elements and adopt higher standards where a particular risk is great or where a number of risks overlap in a unique fashion.

Only safety-oriented standards have been discussed; the quality of leadership and programming has been left to another work.

Also deliberately avoided was a listing of residential camp standards. It was observed that the directors of such camps have almost invariably been guided by provincial camping and/or health and sanitation standards. The writer was more concerned with the random type of camping which occurs through many schools, scout and guide groups, recreation agencies, clubs and so on.

And finally, these suggested guidelines are only the first step; they must be evaluated and modified by outdoor education practitioners who may then internalize them and take them into the field for testing and eventual national acceptance. Only then will they become a useful tool for those initiating outdoor programs, and for those seeking a legal shield through the common law power of custom. But not until such adoption and implementation has occurred, can outdoor educators hope to achieve recognition as a credible para-profession within education/recreation circles.

A. The Duty to Provide Qualified Leadership

Leadership Qualifications

It has been stated that potential outdoor educators and the agencies/boards hiring them are responsible for ensuring that the leader possesses not only the technical skills

but also the experience, judgment and sensitivity needed to take people into the outdoors.

The means by which the individual leader attains the knowledge, skill and experience he/she needs may vary greatly. Although certification programs are an efficient method of developing skills and learning some of the factors which require assessment and judgment, their typical weekend course format largely precludes the opportunity for candidates to attain sufficient experience and subsequent judgment and sensitivity.

The writer will not attempt to stipulate any single mode of achieving sufficient leadership qualifications. Theoretical and technical knowledge and skill acquisition may be achieved through any or a combination of the following:

1. certification programs,
2. university courses,
3. workshops or clinics, seminars, conference sessions,
4. agency or board inservices,
5. personal reading, and of course
6. practise.

Ideally, the writer would advocate a system of leadership development involving these types of learning combined with extensive apprenticeship and the keeping of detailed personal development logbooks (see Appendix 1) chronicaling the individual's acquisition of knowledge, skill and experience in the field.

Although many schoolteachers, scout leaders and other volunteer leaders may feel this system would be excessively demanding, if one intends to accept responsiblity for others, he/she had better be able to demonstrate that he can handle foreseeable eventualities. Leaders must not overextend themselves; they must not find themselves too mentally, physically or emotionally taxed by the situation to sensitively deal with problems their participants may have.

The experience and other qualifications a leader must have to lead an extended wilderness expedition will vary greatly from those one needs to take a group of children on a nature hike in an urban park. In order to differentiate these, the writer has rather arbitrarily delineated four types of programs based on the relative time it would take to

summons needed support services (e.g., ambulance, search and rescue, etc.) or to evacuate one or more accident victims to medical aid. The categories are:

1. **Day Instruction** – usually occurring in or near an urban or rural center; single site oriented; less than one-half hour from support services.
2. **Day Tripping** – also usually quite close to a municipality, but involving some travel through a parkland area; one-half to three hours from support services.
3. **Overnight Tripping** – usually occurring on public lands (e.g., national or provincial parks) which are some distance from the nearest municipality; three hours to twelve hours from assistance.
4. **Extended Tripping** – often occurring in wilderness regions, isolated from well-populated areas; more than twelve hours from support services.

The more isolated a travel area and the longer support services are estimated away, the more competent and confident the leader must be in assessing the risk to each participant present in a given situation and making decisions concerning what risks to avoid (e.g., portage), reduce (e.g., set up throw line stations below rapid) or retain (i.e., paddle on). A leader who does not feel such competence should restrict his/her programs to more predictable environments (e.g., with less major rapids, less avalanche prone, etc.) and closer to support services (e.g., shelter, vehicle, phone, etc.).

Conscientious risk and participant capability assessment is undoubtedly an involved, time-consuming process, but efforts taken at this stage may pay many dividends in time and energy saved in rescuing an unnessary accident victim, sending for help and/or transporting out a leader's mistake. Even if an error in the assessment is made and an accident occurs, the courts would certainly act more positively toward a leader who demonstrated that he had thought about and rationalized the situation before deciding and not simply gone ahead blindly. Following is a list of questions a leader must be able to confidently answer favorably before making a decision to retain a given risk:

1. Am I as a leader experienced and competent enough to properly assess this type of risk (e.g., weather change, water level variation, avalanche hazard, etc.) in relation to my own abilities and those of the group I am leading?
2. Do I as an outdoor leader have the ability to deal with this risk easily or does its presence challenge my skills?

3. What is the real risk of harm (physical, psychological or social) to the individual participants engaging in the activity at this time?
4. Is acceptance of this risk essential or highly desirable to meeting the objectives of the program and of the participants or is it extraneous or irrelevant?
5. Is the overall risk caused by a single risk or a combination of interacting or independent ones?
6. Is the risk readily avoidable (e.g., walking around a questionable rapid)?
7. Are the participants physically, mentally and emotionally prepared to deal with the risk present in the situation? Are they of sufficient age, intelligence and experience to personally assume the risk.
8. Does the group have the proper equipment to deal with the risk and any accidents which are foreseeable eventualities of accepting it?
9. Do I as a leader have sufficient emergency, first aid and survival training to deal with any accidents which are foreseeable eventualities of accepting the risk?
10. Has the agency granted me permission to make such decisions or is this risk of the type which I should discuss with my superiors (if practicable).
11. In addition to my moral and ethical obligations to the participants, will the acceptance of this risk violate any legal duties I or the agency I work for have for the participants (e.g., driving participants in an underinsured vehicle)?

In addition to risk and participant capability assessment skills, the outdoor educator must have relevant experience, skills and knowledge to lead others in the outdoor environment. These faculties are intimately related, as only with experience and comprehension does one develop the ability to make consistently wise decisions in variable situations.

Following is a list of leadership guidelines for those leading various outdoor programs in a range of settings. These are things the leader candidate should know or be able to do to prevent and/or manage accidents or mishaps which may foreseeably occur during the course of the type of program planned. Although only three activity types have been delineated, it is hoped that the reader can apply these guidelines to other relevant forms of outdoor programming. For example, although cross-country skiing is the only winter activity discussed, any teacher or leader taking people out in winter (e.g.,

snowshoeing, winter environmental studies, etc.) must be able to recognize and deal appropriately with insidious hypothermia and frostbite, both of which may occur in a schoolyard as easily as in the wilderness (perhaps moreso as participants are less likely to be dressed properly or aware and concerned about these conditions).

Program Specific Standards for Leadership

Hiking and Backpacking

Daytripping

Experience – Has as least ten days personal and/or leadership hiking and/or backpacking experience over the last five years.

Fitness – The level of cardiovascular and muscular endurance required will vary with the duration and intensity of the hike planned, but they must be well over and above that required to complete the trip. The leader must have sufficient mental and physical energy reserves to deal with any emergencies occurring at or near the end of the day.

Navigation – Has travelled the route previously and/or studied topographical map and talked to reliable others who have been there within the preceding year.

– Based on previous experience in the area and/or map reading, can select a safe and appropriate route for the group and the time available.

– Must have strong map reading and compass skills if going off-trail and/or in unfamiliar terrain (see 'Duty to Navigate and Guide', in this chapter).

Environmental Factors – Is familiar with any potentially hazardous spots along the route (e.g., ledge walks, creek crossings, etc.) and is prepared to deal with these.

Emergency Training For:

Physical Injury – Knows A.B.C's of basic life support; can deal with interruptions in airway, breathing and circulation.

– Can recognize and treat common hiking related injuries (e.g., blisters) and conditions (e.g., dehydration, sunburn, hyperthermia, hypothermia, etc.).

– Knows how to deal with conditions peculiar to group members (i.e., can perform C.P.R. if leading the aged or those with known heart conditions; knows how to deal with an epileptic seizure, diabetic reaction or allergies if participants with these conditions are known to be present.

– Knows how to deal with hazards unique to the area (e.g., poisonous snakes,

insects, plants, etc.).

Lost Participant – Has an understanding of basic search procedures, demarkation of search areas and allocation of priorities. Can assume a leadership role in organizing available people toward finding a lost member without endangering or losing them also.

Group Lost or Stranded – If becoming lost or otherwise delayed so as to be caught out overnight is at all possible, the leader must be prepared to employ his available resources to shelter the group, keep them warm and set up a distress signal if necessary.

Overnight Tripping: All of above plus:

Experience – Has spent a minimum of ten nights camping out (preferably logged in the last five years) in the type of terrain and weather likey to be encountered.

– Has lead at least five day trips in similar terrain.

Navigation – Is competent with map and compass and can select and follow appropriate route on maps.

Environmental Factors – Knows area's prevailing weather pattern and can recognize signs of pending foul weather (e.g., wind direction and intensity, cloud types, humidity changes, etc.).

Emergency Training For:

Physical Injury – Can recognize and treat exhaustion, dehydration, joint injuries (sprains, dislocations), fractures, various wounds and especially burns and scalds (e.g., from campfire, campstoves, lanterns, candles, etc.).

Campcraft – The leader must have a degree of skill in shelter construction, fire building, cooking and so on as determined by the type of camping being done (e.g., tent versus lean to or bush shelter, open fire versus gas stove, etc.).

– All leaders must be competent in the safe handling and maintenance of knives, and also of axes and saws if these are to be used by staff and/or participants.

Extended Tripping: All of the above plus:

Experience – Has camped out a minimum of twenty nights (logged in last five years).

– Has lead at least five overnight campouts within last five years.

Navigation – Must have excellent navigational skills. Is able to follow a compass bearing in

darkness, bad weather or thick bush where visibility is limited.

Environmental Factors – Should be famliar with prevailing weather pattern and reasonably accurate and consistent in predicting the weather in the upcoming twenty-four hour period (seventy-five percent accuracy desirable). Although environment office and media forecasts can be relied upon to a substantial degree for day or overnight trips, the leader must function as group weatherman more often on longer trips where no radios are carried.

Emergency Training For:

Physical Injury – The leader must be a competent first aider capable of dealing with the tremendous variety of foreseeable accidents and illnesses participants may incur.

– He/she should be capable of assessing the potential consequences of foreseeable injuries and illnesses and judging when to send for help and when to evacuate an injured or ill participant.

Loss of Food Packs – The leader must know how to string food up away from wildlife and should have an emergency contingency plan to deal with the loss of one or more food packs.

Canoeing and Kayaking

Instruction (open water)

Experience – Has paddled enough to feel comfortable in and around small craft.

Skills – Is a capable paddler (i.e., can steer a canoe from stern or solo or has complete directional control over kayak.

Emergency Training For:

Aquatic – Understands and can perform the heat escape lessening position (H.E.L.P.) for three minutes.

– Can swim one hundred meters clothed and wearing a lifejacket.

– Can perform a reaching assist from a dock and from a small craft, subsequently towing the swimmer to safety.

–Can swim fifty meters clothed and wearing a lifejacket, towing another person similarly dressed.

– Can perform a towing rescue of another craft.

Physical Injury – Knows and can confidentally deal with airway, breathing and circulation problems.

– Can perform mouth to mouth resuscitation on land and in shallow water.

– Understands hypothermia (both immersion and insidious), its causes, prevention, signs and symptoms and can treat someone suffering from it.

– Is aware of signs and symptoms and emergency treatment for any conditions unique to participants (e.g., epilepsy, diabetes, etc.).

Day Tripping: All of the above plus:

Experience – Has at least ten days of personal and/or leadership experience in the last five years, logged while paddling on the type of water the trip is to be taken on (e.g., river, lake).

Fitness – Has sufficient upper body strength and endurance to have energy in reseve at the end of the paddling day to deal with contingencies occurring then.

– Must not have problems 'keeping up' with group due to a lack of fitness or paddling skill.

Navigation – Has travelled the route to be taken previously and/or has spoken to reliable others who have travelled the route within the last year, and under similar water conditions.

– Can select an appropriate map and follow a planned route while paddling (i.e., knows where group is on the map at all times).

– If paddling on a lake or river without easily distinguishable landmarks (e.g., islands), good map and compass skills are necessary (see 'Duty to Navigate and Guide', in this chapter).

– If paddling on a river with bends and partial obstructions, can read the river well in advance and lead the group down the safest channel; knows when and where to stop and scout.

Environmental Hazards – Understands water hazards typical of the area; winds, electrical storms, tides, currents and underwater dangers; rocks, deadheads, logs, drop-offs and holes and how to avoid or deal with each.

– Must know water conditions (i.e., low, high, in flood) and how this will affect the reaches navigability.

Emerency Training For:

Aquatic – Can perform appropriate rescue of dumped or swamped craft (own or other).

– Can perform artificial resuscitation from a canoe or kayak (if lake or ocean paddling).

Physical Injury – Understands potential hyperthermia illnesses (i.e., sunburn, heat cramps, heat exhaustion and heatstroke), their prevention, signs and symptoms and treatment.

Overnight Tripping: All of the above plus:

Experience – Has spent at least ten nights canoe/kayak camping within the last five years.

– Has lead a minimum of five day trips.

Navigation – Skills must be at or above Day Trip leader level, depending on area travelled. Route following ability is crucial if paddling a lake system with poorly identified portages and especially if on a river with rapids or falls requiring scouting and/or portaging.

Environmental Hazards – Knowledge at or above day trip leader level, commensurate with demands of route and region.

– Knowledge of area's prevailing weather pattern and indications of a pending storm (e.g., wind direction, humidity changes, common cloud types).

Emergency Training For:

Aquatic – Able to organize and execute the rescue of one or more boats and/or swimmers in difficulty, in the type of water the trip will take place on (e.g., river, lake, etc.).

Physical Injury – Can perform a secondary body survey and treat fractures, wounds and burns foreseeably occurring in or around camp.

Lost Participant – Has an understanding of basic search procedures, demakation of search areas and allocation of priorities. Can assume a leadership role in orgnizing available people toward finding a lost member without endangering or losing them also.

Survival – Can light a warming fire quickly and confidently.

Campcraft – Is competent in the use, care and maintenance of knives, and saws and axes if these are to be used by staff and/or participants.

Extended Tripping: All of above plus:

Experience – Has canoe/kayak camped a minimum of twenty nights logged within the last five years.

– Has lead at least five overnight canoe/kayak trips over last five years.

Navigation – A competent navigator, able to follow a river route precisely on a map and able to take and follow a compass bearing on water or land.

Environmental Hazards – Cannot rely on regional long range weather forecast; must be able to read signs and to predict local weather over upcoming twenty-four hour period with reasonable accuracy (seventy-five percent desirable).

Emergency Training For:

Physical Injury – The leader must be a competent first aider, capable of dealing with the tremendous variety of foreseeable accidents and illnesses participants may incur while paddling or camping.

Loss of Gear and/or Food Packs – The leader should know how to tie in and check that gear and food are secured in boats.

– The leader should have contingency plans to deal with the potential loss of one or more boats and/or their gear.

Cross-Country Skiing

Instruction

Experience – Has skiid enough to feel comfortable on skils on the terrain where the class will occur.

Skills – Can ski well enough to safely negotiate terrain covered in the class. Can ski at or above level of average skier in the group.

Emergency Training For:

Physical Injury – Can recognize and deal with airway, breathing and circulation (bleeding, shock) problems.

– Understands hypothermia and frostbite causes, prevention, signs and symptoms and treatment.

– Is aware of signs and symptoms and emergency treatment for any conditions unique to participants.

Day Tripping: All of above plus:

Experience – Has at least ten days of personal and/or leadership skiing experience logged in the last five years.

Fitness – Has sufficient total body strength and endurance to keep up with the group and have a reserve left over at the end of the day to deal with contingencies.

Skills – Is able to perform a diagonal stride with weightshift and is able to stop at will on a downhill run using a snowplow or other breaking technique (other than falling down).

Navigation – Knows area from previous experience and/or is able to follow route on trail or topographical map.

–Must have very strong map and compass skills if going off established trails (see 'Duty to Navigate and Guide', in this chapter).

Environmental Hazards – Must be extremely competent and experienced if planning to lead groups in terrain where judgment decisions must be made concerning potential avalanche slopes or any other natural hazards peculiar to the mountains; such as crevasses, corniced cliffs or exposed routes with a high degree of committal.

All leaders should be aware of and prepared to encounter fallen trees or branches, ice patches or other obstructions or hazards on the trail, especially where these may occur at the bottom of a hill with a blind corner. He/she should either ski the trail just prior to the scheduled group trip or should personally scout any potentially tricky hills, to determine the best way for each section of the group to descend.

Emergency Training For:

Physical Injury – Should be prepared to treat fractures, sprains, dislocations and wounds which may foreseeably result from falls.

Overnight Tripping: All of the above plus:

Experience – Has spent at least ten nights out winter camping in the mode the group will use, logged within the last five years.

– Has lead at least five winter day-trips.

Skills – Must be a proficient skier on flat and hilly terrain, able to steer and stop at will while descending hills with a pack weighing one quarter of the leader's body weight.

Navigation – Must be competent with map and compass, able to travel day or night (see 'Duty to Navigate and Guide', in this chapter).

Environmental Hazards – Able to recognize foreseeably hazardous areas from a safe distance and avoid them (e.g., by selecting an alternate route) or reduce their potential impact (e.g., sidestepping down a very steep, windy trail or wearing avalanche cords and transmiter–locators when crossing a potential avalanche slope).

– Should have some understanding of the area's prevailing weather pattern and indications of a pending storm (e.g., wind direction, humidity changes, cloud types).

Emergency Training For:

Physical Injury – Must be a competent first aider able to deal with injuries foreseeably resulting from falls while skiing or from cuts, burns or scalds sustained in and around camp.

– Has procedures and training in victim evacuation.

Survival – Can light a warming fire quickly and confidently.

–Should be able to construct a winter survival shelter (e.g., snow cave, trench, igloo, quinzee or lean to).

Campcraft– Is familiar with the mode of camping being used and can organize set–up and break–down quickly.

– Is competent in the safe use and care of knives, and saws and/or axes if these are to be used.

Extended Tripping: All of above plus:

Experience – Has spent a total of at least twenty winter nights out in tents, tarps and/or snow shelters, logged over the last five years.

– Has lead at least five overnight tours.

Navigation – The leader must be a highly skilled navigator, able to draw and then follow a route suitable to the group's skill and time available.

– He/she must be extremely competent with both map and compass.

Environmental Hazards – Cannot rely upon regional long range forecasts; leader must be able to read indicators and predict weather over upcoming twenty–four hour period (seventy–five percent accuracy desirable).

Emergency Training For:

Physical Injury – Extensive first aid knowledge and training is a prerequisite to leading anyone any appreciable distance from medical support services in

winter conditions.

Search and Rescue – If skiing in mountainous terrain, avalanche search and rescue training and procedural knowledge is essential.

Campcraft – Leader must be a highly skilled outdoorsman, especially in areas such as fire–lighting and shelter building, cooking and equipment maintenance and repair.

Leader to Participant Ratios

All schools and outdoor programming agencies are faced with the task of establishing leader–participant ratios for their various outdoor programs. Although many factors may require consideration in arriving at reasonable limits, the most important of these are:

1. The nature of the activity (i.e., the activity pursuit, location, duration, season),
2. The degree of real risk likely to be encountered,
3. The experience and expertise of the staff,
4. The age, intelligence and experience of the students, and the
5. Time and distance the group will be from support services.

An extensive review of ratios currently employed by a wide variety of boards and agencies across Canada has lead to the recommendation of the ratios presented on the following page.

The ratios have been seasonally categorized, with somewhat less leadership staff required for summer programs (e.g., hiking and backpacking, canoeing, etc.) than are necessary for winter outtrips (e.g., cross–country skiing, etc.) where cold weather and snow automatically increase the real risk present in the situation.

Although one leader may suffice for on–site instruction, a minimum of two people should accompany groups on day trips, overnights and especially on extended outings. In addition to sharing group management and leadership responsibilities, this could prove crucial should the designated leader be injured or become ill. Wherever possible, if the participants are co–ed, the leader and assistant(s) should represent both sexes.

Table I. **Recommended Outdoor Education Participant - Leader Ratios**

Activity Parameters	Participant Age	Summer Ratios	Winter Ratios
Day Instruction	<10	10:1	8:1
	10-12	12:1	10:1
	13-15	15:1	15:1
	16-17	20:1	20:1
	18>	20:1	20:1
Day Tripping	<10	6:1	6:1
	10-12	8:1	8:1
	13-15	12:1	10:1
	16-17	14:1	12:1
	18>	16:1	16:1
Overnight Tripping	10-12	6:1	5:1
	13-15	8:1	6:1
	16-17	10:1	10:1
	18>	12:1	12:1
Extended Tripping	13-15	8:1	6:1
	16-17	10:1	10:1
	18>	12:1	12:1

Adequate staff ratios are of crucial concern. As some variations will exist between programs (e.g., novice kayakers require a lower ratio than canoeists), agencies and leaders are advised to verify their ratios with experts in the activity pursuit in question.

Assistant Leaders

As a general rule, no trip should have more than one leader; any and all others must act in an assistive capacity for that particular outing. Roles may be switched on subsequent trips, but a clearly defined hierarchy of leadership is essential, especially in emergency situations where autocratic decision-making must dominate. And while some leadership functions may be shared where the groups' skill level is high and the risk level is low, one individual must still be the designated leader and assume the role of group manager in the case of an accident or mishap.

Usually the most the most skilled and experienced person is the designated leader. Although he/she is often the oldest adult supervisor, this is not always the case. The leader should be at least sixteen (and preferrably eighteen) years of age and have met the leadership standards outlined earlier in this chapter.

Assistant leaders, on the other hand, may be somewhat younger (again at least sixteen) and less experienced and skilled. Individuals acting as assistant leaders should have participated in at least three similar trips and must have sufficient skill and fitness such that they will not find the travel excessively taxing. Like the leader, they must have reserves of physical, mental and emotional energy remaining at the end of each day to cope with possible emergencies. They must be able to read and follow along on the map they will be travelling with and must have advanced navigation skills if assisting on an extended expedition. Assistant leaders must be familiar with the type of terrain and inherent hazards they are likely to encounter, and know how to recognize and deal with these safely. Finally, they must have at least basic rescue, lifesaving and first aid skills and these should understandably be well-developed if the individual is to assist on an extended expedition.

Once an individual has assisted experienced leaders over a number of logged trips and his/her theoretical knowledge, technical skill, experiental judgment and group sensitivity have had sufficient time and opportunity to develop, he may become a primary leader. The leadership development cycle is completed as he begins to spend some of his time helping to develop other potential leaders functioning as his assistants.

B. The Duty to Navigate and Guide

The second major area of duty an outdoor educator has is the duty to navigate and guide his charges. While the duty to navigate is relatively straight forward as it relates to specific route finding and following skills, the duty to guide is somewhat more nebulous in definition. It pertains to skills involving group management, both on and off the trail and in camp, including such varied aspects as daily planning and organization and individual and group motivation, problem solving, counselling and debriefing where these are appropriate. These are skills which develop slowly over time, are only indirectly related to the safety of the group and will therefore not be discussed further.

Navigational Skills Required of Off-Trail or Isolated-Area Trip Leaders

In this section the writer will concentrate on specific, assessable navigational skills which leaders should feel confident with before undertaking the leadership of others on off-trail or isolated-area trips. These situations may occur on daytrips, but they grow increasingly likely as the trip length increases. Before attempting such an excursion, the leader should be able to:

MAP

- Read and interpret access and topographical maps and their legends
- Oriente map to ground
- Point out features map to ground and ground to map
- Navigate cross-country using map only (no compass) when visibility permits
- Measure distances on maps according to their scales
- Name points on a map by grid reference
- Select map(s) of appropriate type and scale for terrain and trip duration

COMPASS

- Measure bearings from map
- Convert grid bearings to magnetic and vice versa
- Explain difference between true north, grid north and magnetic north
- Locate direction of travel
- Follow a bearing and maintain direction even in bad weather or limited visibility (e.g., white out, darkness, thick bush)
- Fix position by taking bearings on known features and triangulating

ROUTE SELECTION

- Identify safe routes on the map appropriate to the group's objectives
- Locate and indicate evacuation routes, sources of help, etc.
- Make out route cards (see Appendix 5)
- Make realistic time and difficulty appraisals

C. The Duty to Supervise

Standards for Program Supervision

In addition to the maintenance of adequate leader–participant ratios, leaders must also take care to set up a supervision schedule which provides extra close supervision where:

1. weaker, less knowledgeable and/or less skilled participants are attempting somewhat risky activities, and/or
2. participants are engaged in an activity in a more inherently hazardous area (e.g., stationing a leader with a throwbag just downstream of the rapids most likely to produce swimmers).

Only mature, competent outdoor students should be allowed to engage in any outdoor activity without direct, close supervision and the leader must ensure that the soloing individual or group has an emergency signal system for summonsing leader assistance should it be required.

Another aspect of supervision pertains to the use of agency equipment (e.g., canoes, skis, ropes courses, etc.) during non–program times. Whether locking such equipment up to prevent its unsupervised use (e.g., chaining canoes together) or warning participants to stay away from certain areas or apparatus (e.g., permanent ropes course), a system must be established which is suitable to both the equipment and the participants likely to be attracted to it. For example, where a warning may be adequate for adult participants, young children may require more stringent enforcement to keep them from such attractive nuisances.

D. The Duty to Instruct

Standards for Program Instruction

Instruction may involve the teaching of background theory, physical skills and/or safety procedures. In each case, instructional techniques and methodologies must be appropriate to the age and ability level of the participants The methodology employed should involve:

1. A visual example, (e.g., demonstration, film clip, illustrations, etc.),
2. An explanation of what the participant must do, how and why,
3. Progressions, in both learning the basic skill and being able to apply it in increasingly demanding environmental situations (e.g., practising turns while skiing down open, easy slopes before trying to manoeuver through trees).
4. Time for each participant to master each progression before being moved on to riskier ones,
5. An avoidance of any elements of competition during the cognitive (trial and error) and associative (feedback) phases of learning; only those who have mastered skills at the autonomous (automatic) level should be allowed to test their skills against the clock or others.

E. The Duty to Provide Adequate Safety Measures

Programming Standards

Before dealing with guidelines specific to individual activities' relative intensities, it would be wise to enhance brevity by listing precautions common to all. Following this general listing, more specific program differences will be elaborated upon.

A decision to offer a particular outdoor education program (i.e., day trip, overnight or extended outing) must not be made until the following justificational, logistical and economic factors have been considered:

1. Would the proposed trip help the agency or board meet its pre-determined goals and objectives (e.g., cognitive, affective and/or psychomotor development) (see Appendix 2 for Some Goals and Objectives of Outdoor Programs).
2. Is the proposed trip suitable for participants of the age, intelligence and experience expected to participate (e.g., seven year-olds should not be taken on extended

winter camping expeditions in wilderness terrain)? If not, participants must be screened or a more suitable (e.g., shorter, less hazardous) route must be found.

3. Is a qualified leader (see 'Leadership Standards' in this chapter) and one or more qualified assistant leaders (see 'Assistant Leaders' in this chapter) available?
4. Has the proposed route been reviewed and preferrably pre-travelled so hazards may be assessed and alternate routes looked at if necessary? Is the trail or topographical map to be used accurate? If not, make any additions or corrections necessary.
5. Is potable water availabe in sufficient quantity (at least two liters per person per day) along the route or must it (or fuel to melt or boil it) be carried?
6. Does the group have adequate personal, group and safety equipment to attempt the trip, and if not, can it be obtained prior to departure?
7. Is insured transportation (i.e., vehicle and mature, qualified driver(s)) available for participants and equipment to and from the route? A public carrier should be used wherever possible and if private vehicles are driven, the driver and vehicle should be insured for at least one million dollars personal liability and personal indemnity.
8. Is the trip economically feasible? Consider transportation, food, leadership, equipment and other sundry expenses. Who will pay for these expenses, the participant or his parents, a sponsoring body or some combination thereof?

Once these questions have been satisfactorily answered and a decision made to proceed, the program must be advertised or if it is a school sponsored program, parents must be notified. Information written on advertising material or letters to parents should include the following:

1. Name of the sponsoring agency or school
2. Type of trip or activity
3. Name of leader and assistant(s)
4. Goals and objectives of trip or activity (see Appendix 2 for Some Possible Outdoor Program Objectives)
5. Dates and times (including a safety margin for lateness returning)
6. Location (i.e., trip route)
7. Pre-requisites where these exist (e.g. age, experience, fitness etc.)

8. Nature and scope of known and suspected risks
9. Rules and regulations concerning participant conduct (e.g., no alcohol or drugs, etc.)
10. Cost to the participant, if any
11. Roughly, the equipment the participant must provide (e.g., all, just personal clothing and sleeping gear, etc.)
12. Date, time and location of participant and or parent pre-trip meeting if one is to be held

(See Appendix 3.1 for Sample Information Sheet)

A program registration form or section usually accompanies the program information and in addition to the standard information collected (i.e., name, address, phone number, sex and age), a participant acknowledgement form or section should be included. Here, the individual signs and dates his understanding of the program's pre-requisites and his agreement to abide by the rules and regulations outlined. If the participant is under eighteen years of age, his parents' signature provides permission or consent for him to participate and for the agency to obtain medical care in an emergency, in the event the parents or guardian cannot be contacted. Neither signature (participant or parental) reduces the agency's legal responsiblity to the participant should the agency or one of its employees be negligent.

(See Appendix 3.2 for Sample Participant Acknowledgement Form)

Yet another important element of pre-trip administration often accompanying program information and acknowledgements is that pertaining to the participant's current health status. Statement of health forms should request the following information:

1. Medical information including recent illnesses as well as chronic conditions (e.g., allergies, epilepsy, diabetes, etc.) and any medications being taken.
2. Any potentially limiting disabilities (e.g., chronic bad knee).
3. Any phobias which may relate to conditions or hazards which are likely to be encountered on the trip (e.g., acraphobia, agoraphobia (open places), claustrophobia, hydrophobia, etc.). An individual who cannot sleep in a tent with others could become accident prone after a few restless nights.
4. The individual's provincial medical health care number.
5. The name and phone number of the individual's family doctor

6. Emergency contact numbers (preferrably parents, guardians or relatives).
7. Requirements for a pre-trip medical examination, if this is a policy. This could be desirable if engaging in an extended expedition or if participants are from special groups such as the aged or disabled.

(See Appendix 3.3 for Sample Health Record Form)

Once the number of participants and the leadership has been established, the leader(s)/organizers must do their more detailed route planning, program instruction and supervision schedules, as well as menu planning, group equipment and vehicle checking and preparation and first aid supply checking and restocking (See Appendix 4 for suggested equipment lists).

While studying the route (whether out and back, loop or point to point), one or more sets of emergency procedures pertinent to mishaps occurring at different points along the route must be established (i.e., what situations the leader can deal with, where and when attempts will be made to evacuate versus sending someone for outside help). All access and egress points must be noted along the route and for extended trips, copies of this map must be left with the leader's supervisor as well as with representatives of the most likely support rescue service(s) in the area of travel (e.g., National or Provincial Parks Department, Provincial Forestry Service, etc.). For overnight or longer trips, the route map should be accompanied by a route card indicating likely stopping points (e.g., points of interest, camp), horizontal distances between these points, elevation gained (if hiking or ski touring) and lost and realistic estimations of travel times based on these factors as well as the size (the larger the group the slower it travels), fitness and skill of the group. (see Appendix 5 for Sample Route Card form)

Although normally prohibitively expensive and unnecessary, those leading extended trips in isolated areas with few evacuation points may need to look into carrying a two-way radio or otherwise arranging a communications system with the outside world.

In addition, the location, phone number and quickest route(s) to the nearest phone(s), transportation and medical aid (i.e., doctor, hospital, ambulance) must be noted.

Everything done in preparation for the trip should be logged in writing and dated. This provides a useful planning resource as well as a potentially important legally

recognized document should an accident occur due to circumstances which imply inadequate preparation

The agency director and trip leader must have the following information recorded before the trip leaves:

1. Registration forms, including emergency contact numbers
2. Statement of health forms and consent for medical care
3. Information on staff members, including statement of health records, next of kin and emergency contact numbers
4. Staff contracts
5. List of people travelling in each vehicle (if more than one is being used)
6. Personal and clothing description of each person
7. List of support services in the area (e.g., police, hospital, etc.); names and numbers where possible
8. Map and route card
9. Estimated time of arrival and date and time to begin search operations if group is late

The leader must carry blank accident report forms (see Appendix 6 for a Sample Accident Report form) and the agency must file all completed forms in case of subsequent legal action. The agency must also carry a liability insurance policy which covers foreseeable catastrophic eventualities.

At this point, participants must be given detailed personal equipment lists and a time one or two shopping days before the trip must be set aside for leaders to check participants' clothing and equipment to make sure it is adequate. This is especially important on overnight or longer out trips where the leader cannot supply enough extra clothing and gear to outfit those who come underprepared. (See Appendix 4 for Suggested Equipment and Supply Lists)

The weather forecaset for the travel area should be checked the day before and then again just prior to departure at which time a decision to proceed, postpone or cancel must be made.

Participant Preparation

In addition to taking care of this plethora of administrative details and ensuring that they are qualified to lead the excursion, the leadership team must ensure that the participants have the requisite safety knowledge, fitness and technical skill to go on the trip. If they do not, the area selected must be changed, the activity modified or the participants restricted.

For day trips, regardless of activity or season, the leader must review with the group:

1. The proper care and use of all equipment (e.g., skis, boots and poles; boats, paddles and lifejackets, etc.)
2. Travelling skills appropriate to the environment (e.g., hiking single-file to avoid creating multiple trails) and respect for public and private property.
3. Emergency procedures (e.g., what to do if the participant becomes separated from the group and lost).
4. The causes, prevention, early signs and symptoms and treatment of hypothermia (year round) and hyperthermia (summer).
5. A safety briefing explaining in detail all of the inherent risks the participants may be exposed to (e.g., water hazards, inclement weather, wild animals, etc.), and the rules and regulations being enforced which were designed to avoid or minimize the potential effects of these risks (e.g., no food stored in tents).

For overnight or longer duration outings this information should be supplemented with the following outdoor living skills instruction and preparations:

1. Participants should learn the route and how to read the map they are travelling on. On extended trips, map and compass instruction may be a prerequisite or form part of the trip program itinery.
2. Participants should be taught the skills they will need to set up and break camp (e.g., tent erection, wood cutting and fire lighting and/or the use of stoves and/or lanterns), basic knots and lashings, personal and group sanitation procedures (i.e., washing dishes and clothes, garbage and human waste disposal) and packing methods suitable to the type of travel (e.g., efficiency of transport, dryness, etc.)
3. The group must be briefed concerning its approach to wild

observe from a safe distance, don't disturb unnecessarily and take proper care of foodstuffs to avoid attracting wildlife into camp.

4. Although the leaders may take primary responsibility for menu planning, participants on extended trips should be exposed to the basic theory behind such planning (e.g., four to seven thousand kilocalories per participant per day depending on exertion required; increase carbohydrate and fat intake and decrease proteins, etc.) as well as meal preparation.
5. The A.B.C's of basic life support (i.e., restoration and maintenance of airway, breathing and circulation) should be taught, in addition to training in the care and prevention of sunburn, burns, lacerations and insect bites and stings (summer).
6. Participants must demonstrate or be given time and opportunity to develop sufficient physical conditioning and skill to meet the requirements of the out trip.
7. Every participant should carry a whistle and be taught a consistently used emergency communications system (e.g., one whistle blast means 'attention', two means 'I'm coming' and three means 'I need help').

The leader should keep a checklist of each student's pre-trip exposure to these items for filing by the leader and/or supervisor prior to departure.

In addition to these general concerns and preparations relevant to all types of outdoor travel, following are a number of more activity-specific ones pertinent to daytrips, overnights and extended expeditions.

Program Specific Standards

Hiking and Backpacking

1. Participants with recent or chronic knee injuries or other joint problems whose recurrence is likely to restrict the individual's mobility should not be allowed to participate on extended expeditions without a doctor's approval.
2. Because of the potential additional risks of acute mountain sickness and/or pulmonary edema, only extremely experienced leaders and groups should hike above ten thousand feet (three thousand meters).
3. All equipment must be checked for its suitability to the participant and the type of trip (e.g., light hiking boots versus heavy-duty climbing/mountaineering boots for trail walking).

4. If steep slopes (especially ones which are slippery if wet or icy) are to be climbed, descended or traversed, the group should be roped up. When doing so, the leader must decide on an appropriate distance to place the hikers apart (one falling should not jeopardize others).
5. Consideration must be given to party size and distribution when hiking up steep scree slopes.

Canoe/Kayak Touring

1. If faced with a large group (i.e., more than sixteen people) boats should be organized into floatillas of six or less craft with one boat designated as lead and one as sweep in each group.
2. Where the physical fitness and/or technical skills of the group vary, each boat and each group should be heterogeneous with respect to physical strength, endurance and skill (i.e., weaker paddlers matched with strong).
3. The responsibilities paddlers in each group have for one another should be outlined as well as the proximity they must maintain between craft (e.g., all boats stay between their group's lead and sweep boats and keep the boat behind them in sight at all times).
4. The leader and assistant(s) should be distributed through the entire group (i.e., at the front, middle and rear).
5. If canoeing, each boat must be equipped with adequate floatation, a spare paddle, a bailer, a noisemaker (i.e., whistle or horn), bow and stern grab loops and a stern painter (eight feet of light rope loosly attached to the boat). If kayaking, floatation, a bailer, a noisemaker and bow and stern grab loops are essential. One spare paddle should be carried for each six paddlers.
6. All leaders and participants should wear Ministry of Transport approved lifejackets whenever they are on the water. Personal floatation devices may be adequate for kayaking when used in conjunction with a wetsuit.
7. Wetsuits are highly recommended for training runs in cold water, especially where immediate rescue may not always be possible.

8. All closed boat (i.e., kayak, C1 and C2) paddlers must wear helmets and spray skirts are highly recommended.
9. Paddling should be avoided when winds are high (especially on open, shallow lakes and with inexperienced paddlers).
10. Boats should always be kept within two hundred meters of the shoreline.
11. A system of whistle and paddle signals must be established and known by everyone.

Participant Skills and Competencies

1. All participants **must** be able to swim one hundred meters, fully clothed and wearing a lifejacket.
2. All participants should be able to swim fifty meters in any fashion without a personal floatation device.
3. All participants must be able to demonstrate a reaching assist from land or boat.
4. All participants should be able to demonstrate the heat escape lessening position (H.E.L.P.) for at least three minutes.
5. All group members should be trained in the proper execution of direct method artificial resuscitation and be able to demonstrate and explain it.
6. Before going on a trip away from a designated instructional area, all participants should be reasonably competent in their handling of the boats they will paddle. If canoeing they should be able to perform a forward stroke, reverse, sweep (bow and stern), draw, pry and ideally a 'j'. If kayaking, the canoeing 'j' stroke should be replaced with high, low and recovery braces.
7. If open canoeing, at least half of the group must be competent stern paddlers (able to steer using 'j' stroke and others as needed).
8. Everyone should be able to paddle a swamped craft, and know what to do if their own or another boat swamps.
9. All participants must know and have practised emergency procedures for one or more overturned boats, their own and/or others.

Cross-Country Ski Touring

1. Before heading out for an overnight or longer trip, the leader must make sure that

any access roads used will be plowed by the Department of Transport (or other responsible body) in the event of a heavy snowfall.

2. Vehicles used on winter trips must be in excellent running condition, be good cold weather starters and be equipped with snow tires, jumper cables, shovels, chains, tools, 'quickstart', etc.
3. Skis and poles should be carried outside of the passenger section or lashed down well.
4. For ski travel, a buddy system should be established where each set of partners keeps a close watch on each other for signs of exhaustion, hypothermia and frostbite.
5. Water crossings should be carefully noted on the map (especially creeks running under thin ice and snow bridges). These should be carefully tested and crossed only when it is safe to do so. Hip belts should be undone to allow quick release of pack if necessary.
6. Equipment used should be suitable for the skier (e.g., properly sized) and the type of terrain being covered (i.e., light, high performance racing skis are not suitable for backcountry bushwhacking).
7. The group should be equipped with a rescue toboggan, shovels and sufficient first aid equipment and knowledge to deal with winter casualties efficiently.

Participant Skills and Competencies

1. Participants should be taught the basics of skiing diagonal stride on flats and gentle uphills, herringbone and/or sidestepping up if steeper hills must be climbed and snowplow for slowing and stopping on downhills.
2. Participants should be taught a simple waxing system and application techniques.
3. Groups must learn proper trail etiquette (e.g., yielding 'track' to faster skiers or those coming downhill towards one, filling in sitzmarks, etc.).
4. Participants should remove pole straps for downhill runs, especially if skiing through trees or shrubs.

Although perhaps appearing somewhat inhibitory at first glance, it is hoped that both the serious and casual outdoor leader will understand and appreciate the need for these leadership and programming guidelines in the outdoor education area. Most of the proposed standards listed and discussed pertain to procedures already adopted by a significant number of practitioners in the field. Little, if anything contained herein is new, but perhaps the organizational format of the guidelines proposed has made them easier to understand and lent credence to their necessity.

Those accepting responsibiltiy for taking others outdoors for educational purposes must be made aware of the full scope of the duty they accept. The existence and availability of a clearly delineated set of leadership and programming standards cannot help but enhance this understanding, and thereby facilitate an accountability commensurate to the responsibility invited.

XII. SUMMARY, IMPLICATIONS AND RECOMMENDATIONS

A. Summary

In this thesis the author presented a review of statutory, common and case law as they pertain to the duties and subsequent liability for negligence of individuals assuming the outdoor educator role in Canada's outdoor education/recreation delivery agencies and school systems. From this factual legal base, combined with existing custom and ethical responsibilities where legal precedent was wanting, the writer developed a set of suggested outdoor education leadership and programming guidelines. These recommended standards were included to illustrate the outdoor leader's duties so that he may better understand these obligations, and thereby avoid situations where he may be found legally negligent in the performance of them.

At this time, the writer would like to quickly review the content of this study and point out some of the more important points and conclusions which were drawn in some of its chapters.

After devoting some time to providing the reader with a fundamental understanding of the Canadian legal system and tort law, a close look was taken at how children and adults are differentially viewed within this system. As most outdoor educators deal with children and youth, it is important that they understand and appreciate the higher standard of care they must exercise in caring for their young charges. And while no clear cut age has been established to delineate participants capable of assuming risks from those who are not, it should be noted that in applying the criteria of participant age, intelligence and experience, children will rarely be found volenti in outdoor education situations.

A variety of statutory acts and by-laws were mentioned to give the outdoor educator an idea of where to look in his/her own region for relevant legislation. Most of this section dealt with regulations concerning the consumptive and non-consumptive use of publicly and privately owned and/or managed wildlands. The most important conclusion to be drawn here is that there are laws or regulations governing virtually all land to a greater or lesser extent and the onus falls on the user to inform himself of what those laws or regulations are.

Next, the duties of the outdoor leader and his tests for liability were presented. The duties of the outdoor educator identified include:

1. Leadership qualification, including the ability to do risk/participant capability assessments,
2. Navigation and guidance,
3. Supervision,
4. Instruction and
5. Provision of adequate safety measures.

The reasonble man and careful parent tests were described and discussed along with the five criteria of the negligence test:

1. Duty to care,
2. Breach of duty,
3. Legitimate damage,
4. Proximate causation of damage by the defendant, and
5. No prejudicial conduct by plaintiff.

The vicarious liability of program delivery agencies and certifying bodies was discussed in light of the test for vicarious liability of their outdoor leader staff. This was shown to include proof that: a) the agency or board maintained organizational control over the outdoor educator, and b) that the outdoor leader was functioning within his scope of employment. This chapter also included a discussion of the importance of purchasing insurance as a means of transferring the risk of certain types of potentially catastrophic losses.

One short chapter was devoted to special considerations related to motor vehicle liability. The most important area discussed here was the controversial status of the gratuitous passenger. Although statute law in many provinces attempts to preclude his right to legal recompense in an accident, the common law appears to favor him as a worthy victim in tort, and to find ways to make his compensation possible.

In discussing the moral, professional and legal obligations of the outdoor educator in emergency situations, the law was shown to be sympathetic towards those in jeopardy, but not towards those who place others and/or themselves in precarious positions.

A full chapter was devoted to looking at the defenses potentially available to an outdoor educator accused of negligence. It was shown that for a case to proceed, the plaintiff must prove the five criteria for negligence described earlier. In addition to discussions of defenses such as custom, lack of foreseeability and assumption of inherent risks, the legal and moral considerations surrounding the use of waiver clauses in claiming volenti was disclosed. Express disclaimers were shown to have effectively excluded adults in certain situations, but have been and will continue to be void when signed by or for child plaintiffs. However, contibutory negligence was shown to be a very reasonable defense to tort in Canada regardless of the plaintiff's age, if only partial in its protection of the defendant. After describing a few other less frequently employable defenses, a section detailing the outdoor educators' actions in the event of a possible lawsuit was included so that they may avoid prejudicing their and their agency's legal status in the event of an accident with possible legal repercussions.

And finally, a set of outdoor leadership and programming standards were presented. These were based on the content of this thesis and a review and synthesis of standards already employed by a number of professional associations, certifying bodies, and program delivery agencies and boards across Canada. Although programming standards have been reasonably well established, few agencies appear to have paid as much attention to the personal and leadership experience and qualifications of their staff. Many appeared satisfied if they met the leader/participant ratios by which they were bound. Although this is changing in many agencies who are heavily involved in outdoor education programming, casual leaders such as school teachers and scout leaders are still as a whole largely underqualified to take groups out on daytrips, let alone on more extended excursions

B. Implications

If the content of this thesis could be brought to the attention of such leaders, and also of their often outdoors-ignorant employers or supervisors, then steps could be taken toward improving their standards of leadership and subsequently the level of safey present in their outdoor programs. This would obviously lead to not only a reduction in the number and seriousness of accidents occurring in outdoor programs, but would also

do much to improve the legal position of these agencies and their employees. The more widely accepted and adopted these standards (or a modified version of them) became, the greater the legal protection they could afford practitioners through the defence of custom. Conversely, if an agency and/or its employee(s) were sued and they had not followed provincially and preferrably nationally recognized standards, then the wronged plaintiff may have just recourse to compensation by illustrating this failure to comply (i.e., if the practices of the agency in question were not safety conscious). In either case, justice would be furthered and the credibility of outdoor education as a viable field would be enhanced.

Hopefully this thesis will lay the first brick on the path to outdoor educators coming to know, understand and appreciate their legal duty and more importantly, their public responsibility to conduct outdoor programs in a challenging, but conscientious manner.

C. Recommendations for Future Study

Although much time and energy went into the writing of this thesis as a general reference there are a number of areas which will require further attention.

1. The suggested standards presented in this thesis will require extensive feedback and revision by practitioners in the field, who must then test and internalize them into their operations. This dissemination, study and internalization will certainly take a number of years.
2. A detailed study should be made into how and where outdoor educators (e.g., teachers, scout leaders, recreation professionals and so on) currently receive their technical and leadership training. The question to be answered is, "How can a province-wide (and preferrably a nation-wide) outdoor leadership development program be implemented, where interested people can develop technical and leadership skills and attain sufficient logged apprenticeship experience to demonstrate their knowledge and skill to prospective employers, or to a court of law?" The model format illustrated by the National Coaches Certification Program (with theory, technical and practical components) has potential application and should be studied closer.

3. A much closer look needs to be taken at the area of insurance and how it can be made more accessible to smaller clubs and groups of outdoor educators. Who can best provide it and at what cost per leader and/or participant per annum?
4. Much research must still be done in determining adequate safety specifications for outdoor equipment such as canoes, lifejackets and so on. Standards must be established and enforced, probably through government regulation.
5. As new legal cases occur in Canada, some of the more tentative principles and trends discussed in this thesis may become established as law, or may be refuted by conflicting precedent. In any case, replication of this or a similar study in five or ten years will undoubtedly yield slightly different conclusions. This is highly recommended as practitioners require current information to base their leadership development and program operations upon.

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XVI. APPENDICES

APPENDIX 1

THE KEEPING OF PERSONAL OUTDOOR LOGBOOKS

The Keeping of Personal Outdoor Logbooks

While a 'log' was historically the record of a ship's journey, it has been widely adopted among outdoor educators as a means of documenting their personal development in the field. It serves to provide a chronological record of the extent of one's outdoor experiences (eg. courses, workshops, personal and leadership instructing and tripping, etc.) which serves as a useful tool for illustrating the breadth and depth of these experiences to others.

Whenever a certification course, workshop, clinic or seminar is attended, the outdoor leader should enter a reasonably detailed outline of observations and knowledge or experience gained. The course conductor should then be asked to read and comment on the log entry, evaluate the participant's achievement in the course and then sign and date his endorsement at the end of the entry. A log with proper endorsements is the strongest proof of one's participation and development and they are already becoming important supplements to resumes by those competing for outdoor instructor/leader positions in many parts of Canada.

Trip logs also have other applications. A record of the following points can serve as a useful future reference to the leader who has written them or to other leaders proposing the same or similar excursions:

6 Course or trip expectations and objectives and later an evaluation of how these have been fulfilled or accomplished

7. Dates and departure and arrival times to establish a reasonably accurate idea of time required in making the trip at a given time of the year (eg. spring paddling of a stretch of river will usually be somewhat faster than a fall trip on the same reach)

8 Weather record as well as predictions for each twenty-four hour period. The record may bear a relationship to the distances travelled and morale of the group and a record of predictions will demonstrate the leader's attention and ability at making these.

9 Costs in terms of finances and personal commitment

10 Nature of the route, where it is, how long it is, what dangers, hazards and inconveniences were encountered; note good camping sites and drinking water availability. Identify who and what the route is best suited for.

11. In terms of liabilities, detailed circumstantial descriptions of any accidents and all actions taken in responding to them, both the log writer's and others observed. Noteworthy changes of personality in any participant should be recorded along with complaints or signs of physical, mental or emotional stress exhibited by one or more individuals. The more ominous the legal implications, the more care and detail the writer must take in making his log entries. The log is an important legal tool or document if it is recorded in an **intact, bound** volume. Legal validity may be impaired if words or sentences are erased or if pages are torn out.
12. Notes taken during courses and/or on trips should not be included in the log, but should be kept at the back of the same book.

Sample Trip Log Entry

May 16 – entered May 17, 8:00 a.m.
– located at mouth of Pinto Creek on Wildhay River

Weather May 16
– cloudy and cool all day (10 degrees celcius)
– 80% cloud cover presently
– Prediction for today – cool (8 degrees celcius), periods of rain and drizzle

May 16 – arose at 7:30 a.m. to thumping of grouse
– granola breaky and on the river by 9:00 a.m.
– breaks at 11:00 for tea, 1:00 for lunch and into camp by 5:00 p.m. Breaks about an hour each.
– paddled about forty-five kilometers from Jarvis to Pinto creeks; paddling time about 5 hours.
– demonstrated survival shelters for evening program
– Rick cut left index finger near the palm deeply (1/8th to 1/4 inches) with his knife while sharpening stakes. No loss of function or feeling. I let it bleed a bit, cleaned around it with soap and water, dabbed cut with Polysporin, placed two butterfly bandages across and wrapped with elastoplast tape to hold butterflies and splint.
– to bed by 11:00 p.m.

May 17 – up and at it by 7:00 a.m.
– oatmeal porridge again; today we ran out of sugar.

Evaluation

– Food is becoming very bland and boring. Eighty cents per person per day is not enough!
– Paddlers shaping up. Many tricky logjams yesterday but no incidents.
– Group two with Joyce is having a few social problems; Joyce tends to come across as quite an obstinate, self-centered person.

APPENDIX 2

SOME POSSIBLE OBJECTIVES OF OUTDOOR PROGRAMS

Some Possible Objectives of Outdoor Programs

The determination of organizational goals and program objectives is crucial to the success and safety orientation of any activity. As the popular saying goes, "If you don't know where you're going, you'll probably end up someplace else." Following is a list of possible reasons for undertaking a given outdoor program or trip and possible group and participant objectives for becoming involved. [1]

Possible Reasons for a Trip

1. To develop social interaction skills in a group stress situation.
2. To develop feelings of self-confidence and self-determination and to challenge the spirit of initiative and improvisation.
3. To develop cooperation and unity within the school, club or agency.
4. To prepare participants for lifetime leisure pursuits.
5. To extend and apply concepts presented in the school curriculum, or other theoretical courses.
6. To use outdoor travel modes as a vehicle to reach otherwise inaccessible areas in order to study the out of doors using an interdisciplinary approach.
7. To develop and apply new skills not possible in an urban environment.
8. To provide first hand experience in dealing with the environment.
9. To formulate positive values and attitudes towards the environment.
10. To develop an awareness of the skills and knowledge necessary to cope with the safety aspects of outdoor living.
11. To create situations for participants to take on leadership roles and develop these skills.
12. To provide an opportunity for teacher/leader and student/participant to enjoy an informal relaxed living situation, without the day-to-day stresses, tensions and routines of modern society.

Possible Group and Participant Objectives

I. Total Group Objectives

1. To make decisions regarding the expectations of individuals on the trip.
2. To develop committees to take care of all or some aspects of the program.

[1] Modified from R.W. Binns, Canoe Trip Guidelines, Board of Education for the City of Hamilton, n.d., pp 2-3

3. Participants should contribute their share – monetarily, physically, mentally and emotionally.

II. Small Group Objectives

1. To carry out committee assignments (eg. food, equipment, transportation, etc.).
2. At the campsite, to be responsible for own cooking and cleanup.
3. To share and discuss common experiences in a natural environment.
4. To live harmoniously as a group.
5. To be responsible for at least one aspect of the large group program (eg. camp fire activities, games, etc.).

III. Individual Objectives

1. To discover how to gather useful information (academic or otherwise) from the out of doors.
2. To cooperate with the small and large groups.
3. To be sensitive to the needs of others in tent group and cooking group.
4. To contribute one's share in cooking and cleanup activities.
5. To be responsible for taking care of camping equipment.
6. To help protect and maintain the living things around the campsite.
7. To learn about oneself as he/she relates to others.
8. To be by oneself in a quiet, secure situation.
9. To develop physical and manipulative skills.
10. To develop the mental skills of problem solving and decision-making.
11. To acquire knowledge of the outdoor environment.
12. To develop a healthy attitude towards the environment.

APPENDIX 3

SAMPLE REGISTRATION PACKAGE

Outdoor Program Sample Information Sheet

WHO: The **Happy Outdoors Center** is offering a

WHAT: **Two Day Canoe Trip** and campout to interested intermediate level paddlers. Your enthustic trip leader will be **John Jones** and his charming assistant will be **Sue Smith** .

WHY: The **Objectives** of the trip are:

1. To help intermediate level canoeists further develop their skills in a closely supervised situation.
2. To provide participants with a natural history interpretive experience through an area which is otherwise largely inaccessible.
3. To help participants learn environmentally considerate camping methods and outdoor living skills.
4. To allow ample time and opportunity for socializing in an informal relaxed setting.

WHEN: The trip will be held the weekend of **June 18-19, 1983** . Departure will be at 8:00 Saturday morning and the group should arrive back at the center by 8:00 p.m. Sunday.

WHERE: The party will paddle the **Clearwater River** from the townsite of Zelda to Highway #21. Transportation to and from the area will be provided by the Center.

PREREQUISITES: All participants must be at least **sixteen** years of age, in very good health and have **intermediate** level paddling skills (i.e., can perform six canoe strokes, have had training in canoe rescue of self and others, are comfortable on grade two water). Participants must have been on at least **three** canoe day trips or overnights prior to registering for this excursion.

RISKS: This reach of river is relatively isolated and once paddling has started it will be difficult if not impossible for one to abort the trip. This is the major hazard to consider.

There are also four grade two to three level rapids which will require manoevering to negotiate (these may be avoided by lining).

RULES OF CONDUCT: The trip leader and assistant leaders have attempted to design a trip that will be safe and enjoyable for all participants. Their directions must be followed by all members of the party.

Center policy prohibits the consumption of alcohol or the non-medical use of drugs on all sponsored trips.

Failure to comply with these rules will result in restriction from participation in further Center sponsored programs.

COST: The cost per participant is **$40.00** which will include food and transportation for the outing.

EQUIPMENT: The Center will provide all technical paddling equipment (eg. canoes, paddles, lifejackets, etc.) and group camping equipmen (tents, stoves, etc.).

The participant will be responsible for providing his own sleeping bag, clothing and other personal gear. More specific lists will be mailed to registrants prior to the participant meeting.

PARTICIPANT MEETING: Participants and parents of those under eighteen will be required to attend an organizational meeting **Wednesday, June 15 at 7:30 p.m.** at the Center.

REGISTER EARLY! Only 20 participants can be accommodated

FOR FURTHER INFORMATION CONTACT: **Jane Doe** , Outdoor Program Director, Happy Outdoors Center; phone 424-1983.

Participant Registration and Acknowledgement Form

Participant's Name _____

Birthdate _____ Sex _____

Address _____

Postal Code _____ Phone _____

Program _____ Dates _____

Read each statement carefully before signing.

I, the applicant (parent or guardian of participant under eighteen) declare that:

1. The applicant has met all of the prerequisites required for participation in this activity.

2. The applicant agrees to abide by the rules and regulations imposed on participants by the agency and its staff.

3. (a) The applicant understands and appreciates that there are a number of inherent risks involved in the activity which are beyond the control of the sponsoring agency or its staff and agrees to personally assume such risks.
(b) The applicant understands that every care and attention will be given to the health and comfort of the participants, but the agency and/or leadership staff cannot be held liable for any injuries sustained which were not directly caused by their failure to take due care.

I hereby authorize the leader of the event to secure such medical advice and services as may be deemed necessary for the health and safety of myself (or my daughter/son/ward) and I agree to accept financial responsibility in excess of the benefits allowed by provincial health insurance plans:

4. where the health and well-being of the applicant is involved;
5. where medical advice has been such that further services are required - services which require the consent of the parent or guardian;

6. where all attempts to contact the parent or guardian have failed or where due to the nature of the emergency there is insufficient time to contact such parent or guardian;

it shall be at the discretion of the leader of the event as to what steps must be taken for the welfare and safety of the applicant.

Signature _____ Date _____

(parent or guardian of applicant under eighteen)

Sample Statement of Health Record

Name _____

Age_____ Sex_____ Height_____ Weight_____

Address _____ Phone_____

Provincial Health Care Number _____

Doctor's Name _____ Phone_____

Contact Person in Emergency _____ Phone(s)_____

Address _____

Health History – (Describe condition/treatment where possible)

Allergies (eg. insect stings, drugs, etc.): _____

_____

Conditions requiring regular medication (eg. diabetes, epilepsy):

_____

_____

Recent injuries, illnesses, operations: _____

_____

Other physical disabilities or chronic conditions (eg. poor eyes):

_____

Emotional or behavioral disorders (eg. phobias): _____

_____

Swimming Ability - (check most advanced level attained)

Survival____ C.R.C Junior (Blue)____ C.R.C Intermediate (Grey)____

C.R.C Senior (White)____ R.L.S.S. Bronze Medallion____

Other (specify) _____

I, the applicant (parent or guardian of minor applicant) assume full responsibility for the applicant's health being such that the activities will in no way aggravate any conditions present. If in doubt, medical advice will be sought and followed. The sponsoring agency will be notified of any changes in the applicant's health status prior to trip departure

I declare the statements on this form to be true.

Signature_____ Date_____

(parent or guardian of minor applicant under eighteen)

APPENDIX 4

SUGGESTED EQUIPMENT AND SUPPLY LISTS

Hiking and Backpacking Equipment Lists

Daytrip

Personal

- daypack
- lunch
- full water bottle or canteen
- personal first aid kit (eg. bandaids, moleskin)
- pocketknife (in group kit if participants under twelve years)
- waterproof matches or lighter (may also be kept in group kit)
- whistle

Clothing

- one pair good walking shoes or light boots
- one or two pairs comfortable, absorbant socks
- one pair long pants
- one long sleeved shirt or light sweater
- wind shell (nylon, 60/40)
- rain jacket and pants
- hat, visor or bandana

Optional

- sunglasses
- sunscreen
- insect repellant
- camera and film
- map(s) and compass
- note pad and pencil
- bathing suit and towel
- binoculars
- snacks

Group

- map(s) and compass (if any possibility of losing way or having to evacuate by alternate route)

- first aid kit (see Appendix 4.4)
- emergency space blanket and/or sleeping bag

Overnight Trip: Eliminate daypack and add to daytrip list the following:

Personal
- backpack
- sleeping bag
- sleeping pad (ensolite, thermarest)
- headlamp or flashlight and batteries
- eating utensils (cup, bowl, spoon)
- toiletries (toothbrush and paste, dental floss, comb, toiletpaper, etc.)
- waterproof stuffsacks or garbage bags (for sleeping bag and clothes)

Clothing
- change of footwear for in camp (eg. runners, moccassins)
- extra pair of socks
- warm wool sweater or jacket (for cool evenings)

Group
- tent(s)
- stove(s)
- fuel bottle(s) with fuel
- cooking pots (nesting)
- pot lifter (garbage mitts)
- can opener
- flipper
- water carrier(s)
- water purification tablets (if available water questionable)
- food
- repair kit (see Appendix 4.5)
- rope - 50 feet (for stringing food up at night) and cord or twine
- fly sheet, tarp or parachute (for making cooking shelter)
- biodegradable dish soap

Extended: Add the following to the overnight list

Personal
- extra batteries and bulb for headlamp or flashlight

	– map and compass
	– personal sanitary supplies
Clothing	– one change underwear
	– one pair gloves or mitts
	– wool hat or toque
	– one short sleeved shirt
	– one extra pair long pants
Group	– axe and/or saw
	– shovel

Canoe and/or Kayak Touring Equipment Lists

Daytrip

Personal
- lifejacket
- paddle
- daypack or carrying bag
- waterbottle or canteen full (if water paddled is of dubious quality)
- whistle
- personal first aid kit (eg. bandaids)
- pocketknife (in group kit if participants under twelve years)
- waterproof matches or lighter (may also be kept in group kit)

Clothing
- appropriate footwear (eg. wool socks and runners, neoprene booties)
- one pair long pants
- one long sleeved shirt or light sweater
- wind shell (nylon, 60/40)
- rain jacket and pants
- brimmed hat or visor

Optional
- sunglasses
- sunscreen
- insect repellant
- camera and film
- map(s) and compass
- notepad and pencil
- bathing suit and towel
- shorts and/or short sleeved shirt
- gloves or mitts
- bandana
- kneepads
- snacks
- elastic eyeglass tie and spare eyeglasses
- fishing gear

Group
- map(s) and compass

- first aid kit (see Appendix 4.4)
- emergency spaceblanket and or sleeping bag
- repair kit (see appendix 4.5)
- canoes and/or kayaks
- floatation bags or inner tubes (if running rapids)
- one extra paddle per canoe (one spare for every six kayaks)
- one bailer per craft
- grab loops (also stern painters for canoes)
- lining ropes (if necessary)
- throwbags and/or lines

Overnight Trip: All of daytrip list plus:

Personal
- duluth(s) or backpack
- sleeping pad (ensolite, thermarest)
- sleeping bag
- waterproof stuffsacks and/or garbage bags(doubled)
- headlamp or flashlight and batteries
- eating utensils (cup, bowl, spoon)
- toiletries (toothbrush and paste, dental floss, comb, toilet paper, etc.)

Clothing
- two extra pairs of wool socks
- change of footwear for in camp
- warm wool sweater or jacket for in camp

Group
- sufficient rope or shock cord to secure gear in boats
- tent(s)
- stove(s)
- fuel bottle(s) (full)

cooking pots

- pot lifter (garbage mitts)

can opener

flipper

- water carrier(s)
- water purification tablets (if water quality questionable)
- food
- repair kit (see Appendix 4.5)
- rope - 50 feet and cord or twine
- fly sheet, tarp or parachute (for cook shelter)
- biodegradable soap

Extended: All of the overnight list plus:

Personal
- extra batteries and bulb for headlamp or flashlight
- map and compass
- handcream
- personal sanitary supplies

Clothing
- one extra pair underwear
- one pair gloves or mitts
- wool hat or toque
- one pair shorts
- one short sleeved shirt
- one extra pair long pants

Cross-Country Ski Touring Equipment Lists

Daytrip

Personal
- skis
- poles
- ski boots (check for binding match on skis)
- waxes (a few to meet changing snow conditions over the day)
- cork
- scraper
- daypack
- lunch
- full thermos and/or insulated water bottle (hot fluids preferable)
- whistle
- personal first aid kit (eg. bandaids, moleskin, etc.)
- pocketknife (in group kit if participants under twelve years)
- matches or lighter (may also be kept in group kit)

Clothing
- long underwear (if less than −10 degrees celcius)
- pants or knickers (preferably wool or 60/40)
- two pair wool socks
- light wool shirt or sweater (acrylic blend satisfactory)
- wind shell (nylon or 60/40 anorak)
- toque (earband or earmuffs acceptable if warmer than −5 degrees celcius)
- mitts and/or warm gloves
- heavy sweater, vest or ski jacket

Optional
- gaiters
- sunglasses
- sunscreen
- camera and film
- map and compass
- note pad and pencil
- binoculars
- snacks

- overbooties

Group
- map(s) and compass
- first aid kit (see Appendix 4.4)
- emergency spaceblanket
- sleeping pad
- sleeping bag
- thermos of hot, sweet fluid
- shovels (at least two) (for making emer[illegible]y shelter or windbreak)

Overnight: All of daytrip list plus:

Personal
- backpack
- sleeping pad (ensolite, thermarest)
- winter sleeping bag (or two lighter one[illegible]
- headlamp or flashlight and batteries
- eating utensils (cup, bowl, spoon)
- toiletries (toothpaste and brush, dental [illegible], comb, toilet pater, etc.)
- waterproof stuffsacks and/or garbage [illegible]
- snacks

Clothing
- two extra pairs wool socks
- warm footwear (eg. mukluks, for in can[illegible]
- ski warm-ups or other warm pants for in camp
- one extra sweater (or pile or fleece jac[illegible]
- one turtle neck or scarf
- toque and/or bala clava
- gaiters
- extra wool mitts with nylon or leather [illegible]
- supergaiters or overbooties (or extra [illegible] wool socks to put over ski boots if feet get cold)

Optional
- gloves
- a book for the long night

- candle lantern and candles

Group
- tents(s)
- stove(s)
- fuel bottle(s) (full)
- cooking pots (nesting)
- pot lifter (or garbage mitts)
- can opener
- flipper
- food
- biodegradable soap
- rope – 50 feet (for stringing food up) and cord or twine
- snow saw
- repair kit (see Appendix 4.5)

Extended: All of overnight list plus:

Personal
- map and compass
- extra bulb and batteries for headlamp or flashlight
- personal sanitary supplies
- avalanche cord and transmiter/locator (if in mountainous terrain)
- shovel

Clothing
- one extra pair underwear

Optional
- climbing skins (if in mountains)

Group
- axe and/or saw
- two way radio (if in isolated area)

First Aid Kit Supply Lists

The lists included here were formulated from recommendations currently being made to Wilderness Emergency Technicians, and some items on the overnight and extended lists may therefore appear inordinately excessive. The reader is cautioned to only take those items he/she knows how to use and to know how to use everything carried. However, rather than advocating the carriage of minimal first aid supplies, outdoor leaders taking others into low life support situations should be reminded of their moral and legal responsibilities to be prepared to render adequate aid to those in need.

Special caution is extended concerning the inclusion of drugs (both oral and invasive), especially analgesics and antibiotics. These should not be administered unless the first aider is aware of all side effects the particular drug may have on the individual recipient. Individuals engaged in extended expeditions should be encouraged to provide their own emergency supplies of these drugs.

Daytrips

Quantity	Item	Use
4	triangular bandages	bandaging, splinting
1 3 inch	tensor bandage	sprains, strains
1 3 inch roll	gauze	dressings for wounds, burns, scalds, etc.
2	wound dressings	
12	bandaids	
6	butterfly bandaids	closing cuts (can make)
1/2 roll	moleskin	for covering blisters (or preventing them)
1 pair	scissors	cutting tape, moleskin, etc.
1 roll	athletic or hospital tape	taping dressings, etc.
3	safety pins	fastening tensors, etc.
1	pair tweezers	removing splinters
1 bar	cleansing soap	cleaning around wounds

1	first aid booklet	reference
Overnight Add:		
6 tablets	Aspirin, 222's, 292's or Tylenol	analgesics (beware of side effects)
6 tablets	antacids	upset stomach, nausea
6 tablets	antihistamines (eg. Benadryl)	insect bites or stings, rashes or itches
1 tube	Saavlon	antiseptic cleanser
1 tube	Gineoxide	sunscreen
1 small bottle	Immodium	diarrhea
1	oral airway	
Extended Add:		
1 tube	Polysporin or Sophramyacin	eye and ear injuries; external antibiotic
10 tablets	Ampicillan, Amoxacillan, Tetracycline (adults) or Erythromyacin (children and non-pregnant adults)	anitibiotic (beware of possible side effects)
6 Tablets	Morphine/Demerol	analgesic
10 Tablets	Salt	dehydration, cramps
	Sofracort	Snowblindness
1 tube	Flamazine	burns
1 small bottle or tube	toothache ointment	toothache
1	blood pressure cuff	monitoring victim's B.P.
1	stethoscope	

Repair Kit Supply Lists

It is not uncommon for equipment to suffer breakage while being used and abused on out trips. It is important that a leader carry sufficient materials and knowledge to repair foreseeable failures, at least to the extent that the group may continue on its way without excessive impairment.

Following are three lists, one for overnight or longer outings in each of the activity areas discussed: backpacking, canoeing and kayaking and cross-country skiing. Indespensable items are identified with a star.

Backpacking

Swiss army or other functional knife *

Fiberglass or duct tape *

Five-minute epoxy

Wire (bailing, snare, stove, etc.)

Spare pack parts (clevis pins, buckles, etc.)

Spare stove parts (generator, fuel intake lid, etc.)

Sewing kit (awl, assorted needles and threads, spare material pieces)

Canoeing and Kayaking

Swiss army or other functional knife *

Fiberglass tape

Duct (boat) tape *

Five-minute epoxy

Vice grip pliers

Wire (bailing, snare, stove, etc.)

Unidriver with assorted bits (include drill bit)

Assorted screws

A couple of large nails

Steel wool

Spare stove and lantern parts (generator, fuel intake lid, lantern mantels, etc.)

Sewing kit (awl, assorted needles and threads, spare material pieces)

Cross-Country Skiing

Swiss army or other functional knife *

Fiberglass tape *

Duct tape

Five-minute epoxy

Vice grip pliers

Wire (bailing, snare, stove, etc.) *

Unidriver with assorted bits (include drill bit)

Assorted screws

A couple of large nails

Steel wool

Spare stove parts (generator, fuel intake lid, etc.)

Sewing kit (awl, assorted needles and thread, spare material pieces)

Spare pole basket *

Spare bail(s) to fit type(s) of skiis being used and/or spare cables *

Spare ski tip *

APPENDIX 5

SAMPLE ROUTE CARD

ROUTE CARD

OBJECTIVE: _____ DATE: _____

LOCATION	GRID REFERENCE FROM	GRID REFERENCE TO	GRID BEARING	MAGNETIC BEARING	HORIZONTAL DISTANCE	HEIGHT GAINED	HEIGHT LOST	DESCRIPTION OF HAZARDS	TIME
TOTALS									

ESCAPE ROUTES

1.

2.

3.

APPENDIX 6

SAMPLE ACCIDENT REPORT FORM

Sample Accident Report Form

Name of agency or school _____

Course or program _____ Leader/Teacher _____

Name of injured person _____ M____ F____

Birthdate _____ Provincial Health Care No. _____

Address _____ Phone _____

Accident Date _____ Time _____

Geographic Location _____

Activity _____

Accident Description _____

_____

_____

Suspected Cause of Accident _____

_____

Suspected Nature and Extent of Injury (specific body part(s) injured etc.) _____

_____

First Aid Applied _____

_____

First Aider _____ Date _____ Time _____

Transportation _____

Referred to Medical Aid at (where) _____

Date _____ Time _____

Contact of Responsible Persons:

Trip Liaison _____ Date _____ Time _____

Next of Kin _____ Date _____ Time _____

Signed by _____ Date _____

Witnessed by _____ Date _____