Protecting your Organization: Risk Management, Negligence, and Screening

ADAM KLEVINAS
ULTIMATE CANADA CONFERENCE
NOVEMBER 19, 2017
Sport Law & Strategy Group

Providing strategic insight to the Canadian sport community through professional services in these areas:

- Legal Solutions and Policy Development
- Risk Management, Strategic Planning and Good Governance
- Communications, Facilitation and Integral Coaching™
- Event Management and Marketing
- Financial Planning and Human Resource Management
Some of SLSG’s Clients
AGENDA

Negligence and Liability

Risk Management

Screening
Why does risk management matter?

• We care about sport
  – Spending time dealing with negligence and liability issues takes time away from what matters

• We care about our stakeholders’ safety and well-being

• Liability can be a drain on financial/human resources

• Liability issues can damage an organization’s reputation

• Risk management is a way to safeguard against negligence and potential liability
What is negligence?

- Any behaviour or action that fails to meet the standard required by law
- Negligence can be simplified into the following three elements:
  1) Fault; and
  2) Injury/Harm/Loss; and
  3) Causation
NEGLIGENCE

Behaviour or actions are only negligent when the following four conditions are fulfilled:

1) A duty of care is owed to someone;
2) The standard of care imposed by this duty is breached;
3) A harm or loss is suffered; and
4) The breach of the standard causes/contributes to injury, harm or loss
DUTY OF CARE

To whom do you owe a duty of care?

“To anyone whom you can reasonably foresee may be affected by your actions”

• Coaches ➔ Athletes/Parents/Volunteers/Sport Organization/Spectators/Officials
• Club Administrators/Volunteers ➔ Participants
• Host Organizations ➔ Participants
STANDARD OF CARE

• Negligence is not simply owing a duty of care and the occurrence of an injury, harm or loss
  – Must also be a breach of the standard of care

• But what is the standard of care?
  – Behaviour required to meet the standard of care varies depending on the situation
  – Higher standard of care owed to children than to adults

• Standard of care is NOT perfection
  – It is a reasonable middle ground: what would a reasonable person have done in the circumstances?
  – Risk was appropriately managed
STANDARD OF CARE

Highest possible level of care
- risk is eliminated

Behaviour is not negligent

Reasonable standard of care in the circumstances - risk is appropriately managed

Behaviour is negligent

Failure to exercise any care
- risk is ignored
STANDARD OF CARE

Determined by:

- **Written/published standards**
  - Regulatory equipment standards
  - Organization policies & rules
  - Code of Conduct
  - Coaching/teaching/leadership manuals
  - Organization’s Risk Management Plan

- **Unwritten/unpublished standards**
  - Industry/professional practice
    - For example, helmets for bikes, accepted safety precautions for skiing

- **Case law**
  - Jurisprudence on similar fact situations as guidance

- **Common sense**
  - Intuition
  - Knowledge
  - Experience
  - Gut
CAUSATION

- Established duty of care and a failure to meet the standard of care
- But was there injury, harm or loss?
  - Scraped knees, bruised fingers and hurt feelings do not qualify
- If there has been an injury, harm or loss, did it result from a failure to meet the standard of care?
  - Or did it result from other factors?
  - **Proximate cause**: the “but for” test – but for the actions of the defendant, would the injury have occurred?
  - Possible that the injury, harm or loss did not result from the negligent actions of the defendant
LIABILITY

• Even if all four conditions of negligence are established, liability is not automatic
  – Negligence refers to actions and behaviour (i.e., failing to act in a certain way)
  – Liability refers to responsibility for the consequences of negligent actions

• Insurance policies transfer financial responsibility to the insurance company

• Valid waivers transfer liability for negligence back to the injured person

• Employee or volunteer negligence might be shared with the employer (vicarious liability)

• Contributory negligence – whole/partial liability of injured
NEGLIGENCE IN QUEBEC

• The law of negligence in Quebec is governed by the Civil Code of Quebec
• Art. 1457 C.C.Q:

“Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature. He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.”
REVIEW OF NEGLIGENCE

- Remember, the law does not expect perfection, only reasonableness
- Liability requires a fault, injury/harm/loss and causation
- Liability can be transferred
- Now that you know how negligence and liability works, how do you ensure that negligence does not occur?

→ RISK MANAGEMENT

- **Successful risk management**: organization, staff, volunteers avoid negligence by meeting the standard of care in all circumstances/situations
Risk Management
RISK MANAGEMENT

• What is a risk?
  • The chance of injury, property damage or other loss
• Risk management: the way to ensure proper behaviour that meets the standard of care
• The process used to identify, assess and treat risks to achieve desired outcomes
RISK MANAGEMENT PROCESS

• The risk management planning process
  • Management and staff must participate
  • Must be specific to the organization’s needs and purposes
  • Must be ongoing
• Three tasks:
  1) Identify risks: what are the risks in your program/operations?
  2) Measure risks: how great are the risks?
  3) Control risks: what can I do about the risks?
RISK MANAGEMENT PLAN

STEPS FOR ORGANIZATIONS TO TAKE

• Establish your risk management goals – what are you trying to achieve?
• Do an inventory of all risks
• Identify measures to control risks
• Evaluate risk control measures in light of:
  – Magnitude of risk;
  – Standard of care; and
  – Organization’s resources
• Select appropriate mix of risk control measures
• Implement risk control measures
• Monitor risk management system continuously
IDENTIFYING RISKS

• No fixed list
• Constantly evolving
• Must engage in critical and ongoing review of potential risk areas
• Talk with staff, participants, volunteers to identify potential risks – consistent engagement is key
• Question of identifying *foreseeable* risks
IDENTIFYING RISKS

PHYSICAL RISK
The risks, dangers and hazards that are inherent in the sport activity. These risks are unavoidable, reasonable and in many cases, desirable.

LEGAL RISK
The risk that the organizers of the sport activity will behave negligently. This risk is not inherent in the sport, nor is it desirable, reasonable or acceptable.
IDENTIFYING RISKS

Potential risk areas

• Facilities
  – Playing fields, surfaces – ensure that safe

• Equipment
  – Ensure that fit for purpose and up to date

• Personnel
  – Ensure proper supervision, screening, instruction, preparation for emergency situations

• Program/event/activity
  – Event site: controlled access when necessary, overall safety/security of site

• Participants
  – Complete medical history, assessment of physical and mental readiness to participate
PERSONAL CHECKLIST

Facilities and Equipment

- Keep a written inventory of equipment and develop a system to ensure all equipment is regularly inspected and repaired/replaced
- Develop your own routine for inspecting a facility prior to every practice or training session
- Document all deficiencies in writing and provide promptly to the facility owner/operator
- Ensure the facility has a phone or carry a cell phone with you at all times
- Know what instructions to give to emergency vehicles
PARTICIPANT CHECKLIST

- Carefully monitor participants’ skill levels and skill development
- Group your participants appropriately
- Demonstrate a “safety attitude” in all your interactions with participants
- Take every opportunity to advise your participants about risks -- verbally, during instruction, with signage
MEASURING RISKS

• Must use experience and judgment to measure risk
• **Magnitude** of risk is comprised of two elements:
  1) **Severity**: seriousness of potential injury/damage/loss
  2) **Frequency**: likelihood of the injury/damage/loss occurring
• Often, low severity risks have high frequency (i.e., minor injuries on field of play)
• Severe risks have low frequency (i.e., serious injury or death)
EVALUATE RISK

**Minor:** will have an impact on the achievement of the objective that can be dealt with through internal adjustments

**Moderate:** will have an impact on some aspect of the achievement of the objective that will require changes to strategy or program delivery

**Serious:** will significantly impact the achievement of the objective and the organization

**Disastrous:** will have a debilitating impact on the achievement of the objective and the organization
CONTROLLING RISKS

Four ways to control risks:

- **Retain** the risk: do nothing because the risk is inherent in the sport – absorb any losses;

- **Reduce** the risk: take steps to reduce likelihood of occurrence and/or the consequences by changing human behaviour;

- **Transfer** the risk: accept level of risk but transfer to others through contracts (insurance, waivers); and

- **Eliminate** the risk: decide NOT to do something but this means not engaging in the activity, discontinuing a program or closing a facility
RISK TRANSFER METHODS

WAIVERS
- have all participants in program sign a waiver agreement

INSURANCE
- review all insurance needs and renew policies appropriately

CONTRACT MANAGEMENT
- include proper indemnification provisions in all contracts signed by the organization

CONTRACT FOR SERVICES
- contract out work to other parties (instructional clinics, event management, security, catering/bartending, transportation)

JOINT VENTURES
- create separate corporate entity to host major events
WAIVERS

An intentional, informed and voluntary agreement to give up a known legal right
WAIVERS

CONTEXT – is the waiver being used in a setting that is appropriate for such use?

WORDING - is the waiver easy to read and understand?

CONTENT - are all activities, all parties, all risks covered (including negligence)?

EXECUTION - does person have authority to sign a contract, did they have an opportunity to read and understand the contract, did they sign the contract voluntarily?
3 ESSENTIALS FOR VALID WAIVERS

- Description of risks you are asking participant to accept - including both physical risks of the sport and legal risk of your negligence

- Participant’s “release” or “waiver” of liability - the backbone of the waiver is the participant’s knowing relinquishment of their right to sue you

- Participant’s acknowledgement - that they have understood the terms of the waiver and are signing it voluntarily
RISK MANAGEMENT PLAN

Some thoughts…

- A way to show a court that organization striving to meet the ‘reasonable standard of care’ required by law
- An appropriate, reasonable and affordable mix of strategies
- Must be suited to organization’s needs – beware of following others
- Plan must change as your organization’s needs and circumstances change
- But be careful to assess the change that one element of the risk management plan can have on overall risk management program
- Also be careful not to focus too much on retaining and transferring risks – this does not reduce risk, only addresses the financial consequences for negligent behaviour
Screening
SCREENING

- Tool for providing a safe sporting environment
- Part of organization’s risk management plan
- Common practice amongst sport organizations that provide programs and services to the community
- Not a question of whether you screen – widely accepted that it must be done
- Question is how to do it
Organizations have discretion to determine who is subject to screening and what level of screening they must undergo.

Balance duty of organization to provide a safe environment and practical limit of what the organization can do.

Organizations should have a Screening Policy that indicate who must be screened and how the screening procedure works.
SCREENING

• Who should be screened?
  – Not applicable to all individuals
  – Not all positions within an organization pose a risk of harm to the organization or its participants
  – Screening should be conducted on anyone who will come into contact with participants who may have difficulty protecting themselves due to age, disability, handicap or other circumstance
  – Anyone who is in a relation of trust or authority that could deal with finances, supervision, young people or people with disabilities
  – Screening will depend on level of risk
LEVELS OF RISK

• Low – Level 1:
  – Individuals involved in low risk assignments
  – Not in a supervisory role
  – Not involved in directing others
  – Not involved with financial management
  – No access or involvement with minors or people with a disability
  – For example, parents or volunteers with limited, irregular and informal involvement
LEVELS OF RISK

• Medium – Level 2:
  – Individuals involved in medium risk assignments
  – May be in a supervisory role
  – May direct others
  – May be involved in financial management
  – May have limited access to minors or people with a disability
  – For example, coaches, athlete support personnel, coaches under supervision of other coaches
LEVELS OF RISK

• High – Level 3:
  – Individuals involved in high risk assignments in positions of trust/authority
  – Supervisory role
  – Direct others
  – Involved in financial management
  – Have access to minors or people with a disability
  – For example, full-time coaches, coaches who travel with athletes, coaches who could be alone with athletes
SCREENING PROCEDURE

• Low risk (Level 1) individuals should:
  – Complete a Screening Disclosure Form
  – Complete an application form indicating that they are aware of and understand the organization’s policies and procedures

• Medium risk (Level 2) individuals should:
  – Complete a Screening Disclosure Form
  – Complete and provide a Police Record Check
  – Complete an application form indicating that they are aware of and understand the organization’s policies and procedures
  – Provide one letter of reference
  – Participate in orientation
  – Provide a driver’s abstract
SCREENING PROCEDURE

- High risk (Level 3) individuals should:
  - Complete and provide a Police Record Check and Vulnerable Sector Check
  - Complete a Screening Disclosure Form
  - Complete an application form indicating that they are aware of and understand the organization’s policies and procedures
  - Provide one letter of reference related to the position sought
  - Participate in orientation
  - Provide a driver’s abstract

**Note:** a Vulnerable Sector Check is secondary to the Police Record Check and is for individuals who are volunteering in a vulnerable sector (i.e., with minors or persons with a disability). Also searches for existence of any pardoned sex offences/charges
SCREENING DISCLOSURE FORM

- Whether individual ever convicted of a crime
  - Nature of the offense, year convicted, any penalty or punishment imposed and allow the individual to provide explanations
- Whether individual has any criminal charges or sanctions pending or threatened (sport organization, private tribunal or government agency)
- Whether individual ever sued in relation to sport or coaching
- Whether individual ever subject to a settlement agreement, plea bargain or had charges stayed in relation to a coaching or sport position
- Whether the individual ever dismissed from coaching position
- Whether individual ever sanctioned or disciplined by a sport governing body
- Whether individual has been subject to any other disciplinary action
SCREENING PROCEDURE

- Screening Disclosure Forms and PRC or PRC-VC should be valid for three years
- Failure to participate in screening process → individual is ineligible for position sought
- False or misleading information → immediate removal from position and potential for disciplinary action
- Applications should be assessed by a Screening Committee (3-5 members) that is independent from the organization’s Board of Directors
- For all applications, Screening Committee may approve, deny or approve with appropriate conditions
- Screening Committee may request that individual provide a PRC or PRV-VC at any time for review and consideration
- Process must be confidential
SCREENING – FINAL THOUGHTS

• Screening must balance an individual’s right with the organization’s need to protect clients, participants and the public
• Develop a ‘sliding scale’ for screening based on risk level
• More than just a police check – a thorough assessment by an independent committee
• Screening process is risk management
• Screening procedure is specific to your organization and circumstances
For more information:

www.sportlaw.ca

647-348-3080