



# **RISK MANAGEMENT**

## **RISK MANAGEMENT**

### **BEST PRACTICES**

#### **RISK MANAGEMENT SPECIAL INTEREST GROUP**

This document is a suggested Best Practices in Ski Industry Risk Management.

To become part of the Risk Management Special Interest Group (SIG) or to participate in any best practices, please contact the Risk Management SIG Chair.

Risk Management SIG Chair

[Risk-SIG@fips-skipatrol.org](mailto:Risk-SIG@fips-skipatrol.org)



## RISK MANAGEMENT

As was put forth by the Supreme Court of Norway - if we look at personal risk management - skier responsibility code, etc. - it boils down to we should be teaching patrollers and the skiing public that risk management is simply skiing in a manner that you don't injure yourself or others. If you do injure someone, you need to be aware that you are civilly liable for damages, and in some parts of the world you may also be liable criminally. Some states'/countries' laws look at skier collisions as being no different than if you ran into someone with an automobile. Thus the application of the law is the same for both.



## What is Risk Management'?

---

- Many definitions, often times specific to the particular industry involved.
- Generally, involves limiting a business' *financial* exposure by identifying and reducing financial risks and liabilities.
- KEEP YOUR MONEY IN YOUR POCKET.
- "The skill or job of deciding what the risks are in a particular situation and taking action to prevent or reduce them."

Collins Dictionary

<https://www.collinsdictionary.com/>

- "Skill"= What department at the resort is the highest skilled?
- "Decision Making" = What department at the resort is faced with making the most significant, time-sensitive, risk-sensitive decisions on any given day at the resort?
- "Taking Action"= What department at the resort is required to take action (not mull over and methodically analyze) when it comes to responding to, and mitigating, risks?

**PATROL!!**

## Five Ways a Business Generally Manages Risk

### **1. Accept Risk**

---

Some risks, particularly small risks, are worth simply accepting and dealing with. Often better use of resources to accept small risks pay for themselves as they arise.

### **2. Avoid Risk**

---

For larger risks, it may make sense for a company to develop risk avoidance strategies. (Avalanche Control Work: Resort doesn't allow public into AC prone terrain after recent snow until AC work completed. Placement of signage: Resort doesn't allow public on hill until signs and barriers erected. Resort's perspective = avoidance; Patrol's perspective= mitigation.)

### 3. Transfer Risk

Common when there are various parties involved in a project or enterprise containing risk.

- Contractual risk transfer - release of liability.  
**Question:** *What are the transactions at a resort in which a guest agrees to accept a transfer of risk from the resort to themselves individually?*  
Signed Release of Liability, Unsigned Release of Liability, Inherent Risks.
- Insurance risk transfer - transfers financial responsibility of a "covered" risk on insurer, removing it from insured.

What are some problems that may arise with transferring risk via contract or insurance?

### 4. Mitigate Risk

Most common risk management technique.

Limit the impact of a risk so that if it occurs its impact is smaller and easier to manage.

We'll spend most of our time discussing this aspect as it is what we, as Patrollers, do.

**Question:** *What are some examples of how ski patrols mitigate risks at a resort?*

### 5. Exploit Risk

Some risks are actually positive, which a company will want to exploit. For example, the risk that we have such a good winter we have *more* skiing/sliding guests than we anticipated!

- Hire more personnel.
- Purchase more materials/inventory.
- Increase training to address increased business.

## How Does Patrol Fit in to Resort's Risk Management Plan?

- In a very significant way!
- It lands down to the resort's highest-level department vis-à-vis managing risk.
- SP = front line for managing *on-hill* risks.
- **Question:** *Of the above-listed 5 risk management techniques, which one(s) are Patrol most involved in?*
- **Question:** *Do a ski patroller's risk management duties end when the patroller*

*steps off the mountain?* Examples of "off hill" risks ski patrol manages.

- No more important department at a resort for managing risk from risk identification through addressing and monitoring the risk.
- **Question?** *What other departments at a resort have arguably the highest exposure to, and ability to reduce, risk? Why?*

## **Five Steps to the Risk Management .Process**

### **1. Risk Identification**

How do we as Patrollers identify risks? What process(es) are used?

### **2. Risk Analysis**

Determine severity of risk. What dictates how severe?

### **3. Risk Evaluation**

What is the "rank" or "priority" of the risk?

Inconvenience= low; catastrophic= high.

Determine company's vulnerability to risks determining prioritization.

High vulnerability to low risk may be less important than moderate to low vulnerability to a very high risk.

How does Patrol go about prioritizing a particular risk?

### **4. Risk Treatment**

How can the risk be eliminated, reduced, contained?

Who can best address treating the risk? Patrol? Another department?

Is there clear communication and delegation between departments?

### **5. Risk Monitoring**

How will the implemented risk treatment be monitored?

Who will monitor? What is the process?

**Like everything else we do - document, document, document!**

Because ... lawyer. If it's not written down it didn't happen.

### Insurance Perspective re: Risk

---

- Resorts all carry Commercial General Liability insurance. Generally, the highest or second highest annual expense, and can easily run into the millions per year.
- Resort's premiums are based on prior losses/claims.
- In order to keep the premiums down, a resort must keep its claims/losses down.
- In order to keep premiums down across the U.S. among many resorts, all resorts must keep losses down. While individual losses are important, so is the success of the industry nationwide.
- Losses impact the insurability of resorts.

### Legal Perspective re: Risk

---

- The worse the resort's risks are managed, the higher the likelihood of incidents.
- I like and appreciate risks, as do all of you (given what you do) and as does the industry (given the venue and service it provides). BUT they must be managed.
- In fact, two most important defenses to ski cases actually use the word "risk": Primary assumption of the risk and Express Assumption of the Risk. (Also, comparative negligence).
- **Question:** *Does anyone know what comparative negligence (CN) is and the law regarding CN in CA (P), WA (P) and OR (M, recovery if 50% or less at fault)?*
- Incidents = claims; claims often = litigation.
- **Question:** *What is the statute of limitations in CA to bring a personal injury claim? Oregon? Washington? What if injured party is a minor?*
- Litigation is about evidence. The better the evidence, the better the defensibility of the case (and visa-versa). Increases chances of prevailing at summary judgment/trial OR leveraging a favorable settlement.
- Evidence= documents (what was said but not documented pretty much doesn't count). Good evidence = good documentation; particularly INVESTIGATION DOCUMENTS. Bad evidence= bad documentation/investigation.

- *THE !IMPACT OF A POOR INVESTT GATTON ON DEFENDING A SKI CASE GOES BEYOND THAT IT IS MERELY BAD EVIDENCE, IT IS A FACT USED BY PLAINTIFF'S ATTORNEYS TO HIGHLIGHT A RESORT'S CULTURE OF CARELESSNESS/NEGLIGENCE.*

### Why Are Accident Investigations So Important?

- Investigations are Evidence.
- In litigation, good evidence is ammunition; the more ammo I have the more shots I can fire. One of my **very best** pieces of ammunition is a good investigation.
- Patrol documentation is analogous to Policedocumentation.
  - A "report" is filled out for every "incident."
  - "Major incidents" get an "investigation."
- "With Great Power Comes Great Responsibility"
  - Patrol: (1) receives a report of an incident and dispatches a responding patroller (and must document that process); (2) patroller responds to the incident (and documents the response); (3) likely will call for additional equipment to be brought by another patroller(s) (and documents that); (4) provides medical care and patient transport (and documents that); and (5) conducts investigations of more serious incidents (and documents that too).
  - POINT: Plenty of opportunities to miss something!!  
Plaintiff's counsel goes through *all* Patrol documents (and all other relevant documents) with a fine-toothed comb in search of mistakes, omissions, conflicting information, etc.
  - Investigations have to be conducted *thoughtfully* and reviewed *thoroughly*.

### A Great Investigation Contains (Non-exhaustive list):

- **Photos**
  - Must accurately depict the conditions as they existed at the time of the incident. So, get on the photos ASAP, delay is our enemy.
  - Show all safety, and other relevant, signage (trail, slow, boundary, etc.).
  - *Photos of signage should be from a distance (to show that it is noticeable to guests) and up close (to show the language on the*

sign). *On trail checks/opening make sure all montage, and other, signage is visible. Not covered with snow/rime.*

- Map
  - Warnings
  - Your Responsibility Code, Smart Style (terrain park)
  - Skier Statutes
  - Anything that would warn/inform the guest.
  - **Question:** *Can you name all 7 points in the NSAA Responsibility Code? I'll call on one person/point. Snacks involved.*
- o What did the plaintiff see/choices made on the *run* on which the incident occurred? Also, on the *day* it occurred.
- Path of Approach
  - Point of Problem
  - Point of Impact
  - Point of Rest
- o Radio Frequency ID can show us the route plaintiff took on day of incident.
- Photos of *all* the signage they would have seen is helpful. *If signage and/or view of particular feature involved in incident is visible from the chair plaintiff rode, take a chair ride and take photos.*
- o Should accurately depict the size of things. Use spatial references. Think about the shot you're taking. Will it convey information? Will it convey too much? Not enough?
- o Consider taking photos of plaintiff's equipment.
- o For every photo ask yourself, "Why am I taking this?" "What am I wanting to show?"
- o **Question:** *Is taking video a good idea?* It depends. Ask Risk Management. Is there a particular reason to take video? Generally, photos are enough.
- If taking a video, make sure the sound is off. Audio may render it inadmissible.
  - **THE PHOTOS SHOULD ACCURATELY DEPICT THE CONDITIONS OF THE SCENE OF THE INCIDENT AND THE CHOICES PLAINTIFF WAS CONFRONTED WITH MAKING WHEN APPROACHING / ENTERING THE INCIDENT SITE/CONDITIONS.**



- **Witness Statements**
  - Identify as many witnesses as possible and secure as many statements as possible. Make a concerted effort here, very important.
  - Difference of opinion re: who writes the statement, Patrol, or witness. Advantages/disadvantages to each (legibility, confirming statement is theirs, etc.) Facts/circumstances may dictate. Whatever the method, get them signed!!
  - *Individuals involved in incidents are often with a friend who can provide a good account of what occurred. Never forget to get this person's statement. People generally ski/ride with others.*
  - The injured party is a witness, get as much information as can be reasonably be obtained from that individual.
  
- **Patrol/Employee Supplements**
  - These can be essential in defending a case. Depending on the facts of the case, witnesses may be biased toward a "sympathetic" plaintiff and their statements will reflect that bias (i.e., poorly on the resort). Often our best defense is to rebut those biased statements with our own employees.
  - **Question:** *Doesn't the "bias" thing cut both ways? Wouldn't all our employee statements also appear biased if they are defending the resort's employee's actions? We'll certainly face that allegation, but if written properly and objectively (with supporting evidence), we can mitigate those allegations. Patrol can (and should) assist other departments in filling out documents.*
  - Be factual, but if the facts include commenting on plaintiffs demeanor then do so. "Uncooperative," "using foul language," "yelling," etc.
  - In order to be accurate, sometimes statements (and documents generally) have to "admit" certain things. Hopefully, those admissions are not material to defending a case.
  - Always be truthful, but also mindful about the best way to document a fact/condition.
  - Just the facts, ma'am. Avoid opinions.

- **Diagrams**
  - The best diagrams are clear, simple, and easy to understand.
    - "legend" to describe symbols, etc.
    - If the situation requires more than one diagram, make sure that measurements remain consistent between two.
    - Triangulated measurements off of fixed objects to nearest foot (or 6" per NSAA for terrain features).
    - Measurements of width of run, feature, measurements of widths, lengths, distances at scene of incident (take offs, tabletops, run outs, approximate heights, etc.).
- **Other Documentation**
  - There may be other relevant documents/reports to include in an investigation, for example: statements/documents/reports from other departments (grooming , lift ops, rental) or agencies (weather reports).
- **Additional Considerations**
  - A jury will review all of these documents at trial, but before that occurs plaintiffs, their lawyers, experts, etc. will review it and determine the strength of our case... and theirs.
  - Strong documentation (along with good facts, good case law and a strong defense) intimidates plaintiffs' attorneys, particularly those who are not skiers/snowboarders.
  - Of all the documentation, it is really the photos (followed by witness statements) that tell the story of what happened and who may be at fault.
  - **Investigations should be conducted by an experienced, trained team.**
  - Investigations, and incident documentation generally, should highlight the true fact that patient care/first aid and transport were Patrol's first and primary concern.
    - It is a fact that I rarely find myself defending a Patrol's alleged negligent care or conduct. Even plaintiffs, Patrol are often times viewed as the heroes in an otherwise terrible and unjustifiable incident which occurred at a chaotic, dangerous, parking lot carnival of a ski area.



- In CA, Cal. Health & Safety Code sections:
  - o 1799.108 - Immunizes Pro Patrol - those who have been certified to provide prehospital emergency care from civil damages unless acts or omissions were performed in a grossly negligent manner or not in good faith.
  - o 1799.102 - protects volunteer/national Patrol. "not for compensation and in good faith" is standard. No "gross negligence."

### Random Risk Management Thoughts/Questions...

---

- *How does Patrol educate guests about risks at your resort?*
- *What is your resort's boundary policy?*
- *Smart Style, what is it?*
- *What is ATML?*
- *What are areas of a Patroller's expertise in terrain park risk management?*
- *What procedures should Patrol follow if exposed to a bloodborne pathogen?*
- *What is an IIPP? What is it for?*
- *What are examples of "red flag" incidents?*
- *What are additional examples of supplemental documentation to accompany an investigation?*

### Real Life Tales from the Trenches

---

- In CA, most ski cases are disposed of on summary judgment, or won at trial, based on solid facts (primary acknowledgement of receipt, express acknowledgement of receipt), solid body of pro-recreation case law, and solid lawyering. However, not every case goes this way. Sometimes cases proceed past summary judgment and/or are straight up lost. The following are some CA and national examples:
- Given the good protections afforded resorts, plaintiffs need to plead "creatively" to get past Summary Judgment. Now, plaintiffs often allege "willful misconduct" or "gross negligence," because of **City of S.B. v. Superior Court (Janeway).**

- **Solis v. Kirkwood (2001)**
  - Kwood places a race venue on "normal" run with jumps and features.
  - Pf skis onto run, hits a jump unintentionally and gets injured.
  - Kwood loses MSJ due to failure to adequately warn of the dangerous conditions on the run. Pf. "didn't assume the risk of skiing into the racing area."
  - *"When a resort turns part of a previously ordinary run into a significantly more dangerous racing area, it has a duty to warn its patrons."*
  - Adequacy of placing bamboo poles as notice of venue was disputed.
  
- **Van Dyke v. S.K.I. Ltd. (Bear Mtn.) (1998)**
  - Plaintiff strikes sign (padded) and sustains paralyzing injuries. "Be Aware Ski With Care."
  - MSJ reversed for Bear Mountain.
  - Black padding blended in with background trees.
  - Pf. successfully showed that Bear *"increased the risk of harm by placing a signpost in the ski run where it was virtually invisible to skiers..."*
  - Distinguished from lift tower (*Connelly v. Mammoth*)
    - Expert's opinion for plaintiff:
      - While directional signage is necessary it must be adequately marked.
      - Locate in a safer area- not middle of run.
      - Attach sign to lift tower.
      - Use "breakaway" posts
      - Make signs bright colors.
  
- **Tuey v. Mammoth Mountain Ski Area (2009)**
  - Pf. "fell" into "unmarked" halfpipe. Poor visibility.
  - Rode chair over terrain park
  - Pf and friend passed 3 signs when entering through 51' wide gate.
  - No flagging on deck, but signage at entrance to park
  - Plaintiff was "cutting through park" to get to Broadway chair.
  - Skied past man-made features. Friend was first, pf. second.
  - Half pipe (super pipe) was 450'x 60'x15'.
  - MSJ denied - *"A defendant who erects a structure in a skiing area may*

*not have assumed a heightened duty of care to the plaintiff if it can show that it gave notice of the structure that was adequate as a matter of law...Here, defendant has not established as a matter of law that its warnings at the entrance to and throughout the terrain park were sufficient such that plaintiff assumed the terrain park's risks as a matter of law."*

- Only 4 photos, despite no dispute about signage in place.
  - Didn't show size/language.
  - Plaintiff didn't "voluntarily" encounter the half pipe.

• **Salvini v. Ski Lifts Inc. (Snoqualmie/Alpental, WA) (2008)**

- o The plaintiff, 23 yr.old experienced skier, was night skiing at Snoqualmie in the terrain park.
- o Hardpack conditions
- o Various, but consistent, injuries were coming out of this park/jump (44, including 15 that season).
- o Ski Patrol posted sign, "*Terrain park Tip of the Week: Most injuries in the terrain park are as a result of the rider outjumping the landing. Thanks, your friendly Ski Patrol.*"
- o Jump built by cat operator at beginning of season and "grew" over course of season due to snowfall.
- o Other signage in place. No signage to indicate "start area."
- o Salvini carried a lot of speed into the jump (tabletop), lost control, backwards rotation and "overshot" landing, landing on his back. C-3/C-4 quadriplegic injuries.
- o This incident caused the "physics" of jumping and terrain feature design and building to come to the forefront.
- o Big legal fight about the jury instructions given to the jury (assumption of risk and failure to adequately warn of dangerous conditions - premises liability).
- o Evidence of prior accidents was admitted "*to put defendant on notice of a potential defect to warrant further inquiry into the design of the jump, or the reasonableness of the signage in light of the multiple injuries caused as a result of overshooting the landing of the jump in question.*"
- o \$31M plaintiff's verdict. After comparative fault reduction, \$14M.

• **Zhou v. Tuxedo Ridge (NY) (2017)**

---

- o 7 yr. old girl, first time skiing.
- o White PVC used as poles for making lift maze.
- o Hard and blended into background.
- o Girl strikes pole and breaks leg.
- o The ski area "hid" one of the risks of skiing. Nonnotice-she didn't assume the risk.
- o \$19M verdict. Up on appeal.

Discuss inbounds avalanches: Fleury (CO) and Barker (NV)

***Now, go manage those risks!***