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RECREATION WITHOUT LITIGATION

BY

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ABSTRACT

Litigation is an important decision in considering the provision of leisure goods and services. Many professions have seen astronomical increases in liability insurance costs. The leisure industry must come to grips with this issue before these costs significantly influence the cost of operations to the point that it inhibits quality.

RECREATION WITHOUT LITIGATION

While playing baseball, an eight-year-old boy trips over the first-base bag as his attention is focused on a clean hit to left field. The boy breaks an ankle in the process, and his parents, encouraged to pursue a claim, sue the coach and league for failing to teach their son the proper techniques for running bases. Such lawsuits are becoming common in gyms, playfields, parks, and schools. Professionals in the recreation and leisure movement are concerned and confused. Serving the public and offering exciting recreation are a challenge in a day when litigation is prevalent.

Leisure movement leaders are everywhere struggling with increased responsibilities. In many instances workdays and workweeks, are shorter, and the result is that people have more leisure time. We're seeing an increase in the number of participants in leisure activities and in the frequency of participation. Greater participation usually means more accidents, and more accidents means a greater probability of lawsuits. With television's increased coverage of major sporting events, coaches and players struggle for higher levels of skill than ever before. Spectators demand that athletes push themselves to achieve. Whether it is possible to conduct "Recreation without Litigation" has become questionable, because of the number of variables that must be dealt with.

Financially, recreation departments are finding themselves with their backs to the wall as they struggle to pay enormous insurance premiums. Some cannot afford insurance at all, but these expenses are not optional. Recreation departments must be adequately covered. We

must financially protect ourselves, our organizations, and those who participate in activities under our direction. There are three ways we can do this:

First We can reduce accident-prone activities, or eliminate programs with a high potential for accidents. This becomes difficult, however, at a time when risky activities are very popular and attract a large number of participants and spectators. The National School Board Association, in an effort to reduce lawsuits, is considering recommending that schools remove all equipment from playgrounds, limit the use of buildings for nonschool activities, prohibit the use of gymnastic equipment, and curtail contact sports, such as football and wrestling. This rather severe approach will undoubtedly be considered by other park and school districts if conditions continue to deteriorate.

In the 1930's J. B. Nash, a noted philosopher in recreation, warned of a tendency to promote "Honey and Milk Toast" activities on our playgrounds. He noted the importance of the self-satisfaction that can come from overcoming risk and experiencing adventure. By removing the risk in order to curb accidents, do we lessen the satisfaction of an experience? This paradox causes a great deal of confusion and creates a dilemma among those responsible for planning recreation programs. Risky activities are not the only concern, however in reality, all activities are potentially dangerous and must be carefully planned and conducted. Court records indicate that accidents and lawsuits are occurring with greater frequency even in low-risk activities. The following cases support this fact: A boy hit in the forehead with a basketball died as a result of the injury; a broken piece of bat flew into a boy's eye, blinding him; a boy was seriously injured when he ran into a flagpole; a girl was killed when the cross piece of a swing fell and fractured her skull. These were not "high-risk" activities, yet these cases are representative of those pending in courts today. These cases suggest that it will be difficult, if not impossible, to conduct risk-free recreation without litigation.

Second We need to do a better job with the activities we conduct. Programs must be well planned, carefully carried out, and chosen for safety. As obvious as this seems, the safety of programs must continually be evaluated. Leaders will need to plan with greater sensitivity and use more explicit controls in activities. This step will improve the situation, but it will not be enough. In 1978 the California supreme court ruled that an agency, even if only one percent at fault, may be required under the "Deep Pocket" ruling to pay 100 percent of a settlement if the defendant lacks sufficient funds. This type of legislation may cause departments to be named as codefendants in cases and become the "Deep Pocket" from which settlement can be realized. Many California parks and recreation districts, and the California Parks and Recreation Society, currently support a bill, known as proposition 51, that would reform this "Deep Pocket" Bill. This will not be an easy task, however, since California's trial lawyer association has succeeded in blocking the reform for four straight years.

Next year, The Boy Scouts of America, in a continuing attempt to "Be Prepared," will impose a \$20 fee on every Boy Scout troop and Cub Scout pack in the country to cover the costs of liability insurance. The Boy

Scouts of American has always recognized the importance of conducting activities with great care; nevertheless, it is now essential that its organizations have adequate insurance coverage. This coverage, along with improved performance from leaders, is a positive step, one that must be taken.

Third The recreation profession desperately needs new supportive legislation. State, district, and national organizations must use their resources to lobby for laws that will provide some protection for those who diligently serve the public. Without supportive legislation, programs may of necessity deteriorate, becoming "Honey and Milk Toast" or even nonexistent. This was the case with the LaSelve Beach Recreation District in Watsonville, California. Insurance premiums increased until all facilities in that district were forced to close. California has seen some hope, however. In 1984 a law known as the "Hazardous Recreation Act" added a section to California's "Torts Claims Act" which governs public immunity and liability. This law returns some immunity defense in cases of "Hazardous Recreation Activities," except where gross negligence is exhibited by the agency or its representative. This somewhat re-establishes a balance of responsibility for injury between the sponsoring agency and the participant. Participants must accept some responsibility for the danger they face in activities classified as high-risk. This legislation is representative of what can and needs to be done. It is somewhat of a reversal from the trend to do away with all immunity and to hold sponsoring agencies responsible for patrons' actions regardless of the activity. Laws that allow and encourage exaggerated claims are a major problem. Such a law is the "Contingent Fee System," which permits claimants to hire lawyers on a commission basis with no immediate cash outlay. Accident victims are encouraged to pursue litigation with the philosophy "I've nothing to lose." It is encouraging to hear that the Reagan Administration has proposed to the congress that liability awards be limited to \$100,000 and there be a limit on legal fees. Maryland has already acted to limit awards to \$350,000 and other states are considering similar legislation. These are a few good examples of some positive proposals that need our support.

Professionals today must be concerned with the future of recreation as a career. There remain many questions to be answered. How do we view the future when we consider the possibly devastating effect of a "deep pockets," or the forced closure of a park and recreation district because of insurance problems? What has happened with our most recent complete defense known as "Contributory Negligence," in which if the plaintiff contributes to the injury, he or she is therefore personally negligent? What effect does "Comparative Negligence" and the proportionate awarding of damages based on this negligence standard have on the profession? In such instances, have we lost the possibility of a contributory negligence ruling? Without proper defenses, and it appears as though we are losing a few, are we jeopardizing ourselves and our agencies? How do we face these uncertainties in light of recent court rulings in which enormous dollar amounts have been awarded? These questions facing this profession must be resolved. The future will tell how successful we are in answering them.

In the 1788 case known as "Russel vs. the Men of Devon," it was determined that it is better that an individual sustain an injury than

that the public should suffer an inconvenience." This is no longer true. Some might argue that it would be more accurate today if it read, "It is better that the public sustain a settlement than an individual suffer an inconvenience." It makes one wonder! When leaders have a responsibility and fail to act, or act in a negligent manner, due process of the law should occur. That's not the issue. Professionals need hope. Hope that through diligent service and fair legislative protection, their future can be secure. This will come in the near future, because recreation is a vital part of the American lifestyle. In the meantime, the following suggestions will help carry us to that point in time: First : Reduce or eliminate liability-prone areas and activities. Second : Plan and conduct programs and activities with care and concern. Third Provide supportive legislation that will protect not only those being served but also those who serve. The pendulum has been allowed to swing too far in one direction. An adjustment appears necessary.