

Risk and Lost Opportunities

(one of a series of papers in the 2007 Conservative Child Wellbeing Study)

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Introduction

This short paper is framed on the premise that structured opportunities for children and young people to experience and handle physical risks are central to developing maturity, self-reliance and confidence. Giving young people the opportunity to take responsibility for themselves and others in challenging environments plays an important part in nurturing other important character traits too, including leadership and comradeship. In contrast, a lack of challenging opportunities can lead, in the case of less adventurous children, to obesity, idleness and fecklessness. More adventurous children will find their own ways of getting thrills - some of these will be dangerous and others deeply antisocial. This premise is explored in Section 1.

The central thesis is that the best opportunities for children and young people, especially those from more disadvantaged backgrounds, to test their boundaries, from boy scouting and girl guiding to canoeing and mountaineering, have been greatly diminished by two, parallel, legally-driven factors: the more important of these is the attitude of the courts, and wider society, to civil negligence claims. The second important factor is the growth and imbalance in (criminal) health and safety legislation. Well-conducted surveys, discussed in Section 2 below, show that the threat of civil litigation is the principal barrier to volunteering in adventure training and sport. Yet volunteering is the bedrock of these areas. In Section 3 we see how the threat of litigation has resulted in heavy rises in insurance premia and even in some cases, the withdrawal of insurers from the activity. At the same time, health and safety legislation has played a dismal role in discouraging more adventurous school trips, particularly for the most unruly pupils, and in removing opportunities for pupils to be given responsibilities for others. This is discussed in Section 4.

In both these areas, many commentators argue that the problem is more about perception than reality. This paper will argue that the problem in civil litigation is about reality and *not* just perception. The civil problems are grounded in a series of bad court judgements, combined with the high cost of the legal process. It is too early to tell whether, following the Government's very modest Compensation Act last July, pressure has eased at all; in the meantime, the calculations of insurance companies, which govern high premiums and withdrawal of cover, are based on solid legal advice *not* urban myths. Because litigation is so expensive (even where a case is won), most insurers follow a policy of paying up out of court. The one important exception, the Scouts who have their own in-house insurance, face 50- 60 claims a year and lose about a quarter of those they contest.

There is no doubt that the second problem, criminal health and safety legislation, is indeed partly about perception and often used as an excuse for inactivity by schools, and that in the last two or three years the Health and Safety Executive has tried to improve the position. Nevertheless some major weaknesses in the structure of that legislation are identified. Where schools do continue to provide a range of outdoor activities, these weaknesses tend to bias risk assessments for school trips against allowing the very youngsters who most need adventurous opportunities from being allowed to experience them. Finally, Section 5 looks at the progress made in two other

countries operating under the Common Law, The USA and Australia, before summarising and drawing some conclusions.

Section 1: The Need for ‘Vitamin R’

There is a powerful groundswell of concern that healthy physical risk-taking is being squeezed out of the lives of children and young people. As Sir Digby Jones has put it:

“Not enough people are coming into the world of work tooled up, understanding risk, prepared to work hard, or equipped for the world, in a century that belongs to Asia, where China wants your lunch and India wants your dinner... Kids prevented from being celebrated as winners at sports day races for eight-years-olds; kids not doing backstroke in case they bang into somebody; kids wearing goggles to play conkers in the playground...”¹

The importance of risk goes beyond the world of enterprise. Heinz Wolff, Professor of Biochemistry at Brunel University (and TV presenter), believes that the need for risk is inherent to all human beings, and most especially in children.

“Today's world is not, and cannot be, risk-free. The current attitude of society to many forms of risk is totally irrational, scientifically indefensible, and economically damaging. We have a biological need for risk in our lives - 'Vitamin R'. If not managed well by society -by providing enough legal risk - in schools, sports clubs, the arts- this need for risk will become mis-managed and cause risk-seeking behaviour by individuals, which could be antisocial, criminal or simply unhealthy: A Risk in Time Saves Crime!”

There has been a growing concern for several years that society is becoming averse to risk. Even the Royal Society for Prevention of Accidents (RoSPA), the excellent organisation whose mission is personal safety, has said:

"Parents have to accept that children may get hurt when they are playing, ... what we must strive to ensure is that those injuries are not too serious. But if we make playgrounds too safe, children will find them boring and they will go to play in places which are much more dangerous... play should be about children having fun and learning to manage risk through adventurous activity. This is an essential part of child development and important to the future health of the nation."²

Risk comes in differing orders of magnitude and can be as simple as allowing children out to play in their early years through to adventure training in their later ones. The social ills that come from denying children opportunities for risk, whether in play or in organised sports vary in scale from obesity to risk taking via anti-social acts. A risk-averse society is fundamentally at odds with our biological make-up.

This trend in the UK, at both the lower and extreme ends of the scale, is born out by a variety of figures.

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http://www.atl.org.uk/atl_en/resources/report/report_archive/Archive2006/october/financial_word.asp

² RoSPA press release 2nd June 2005

Obesity:

According to the European Association for the Study of Obesity (EASO) Childhood Obesity Taskforce (IOTF), England has one of the worst obesity rates in Europe amongst children and adolescents.

For example, among adolescent boys between the ages of 14 & 17 years England had the third highest percentage of obese and fourth highest percentage of overweight (including obese) children. Among girls in the same age range, England had the highest percentage of overweight children³.

In April 2005 (revised in 2006), the Office of National Statistics published a report, *Obesity among children under 11*. Focusing on children in England, the report showed that, between 1995 and 2003, the prevalence of obesity among children aged 2 to 10 rose from 9.9% to 13.7%.⁴ The public debate around obesity has focused almost exclusively on diet, which is undeniably an important factor.

Yet, in 2005 the BMI, in its report on preventing childhood obesity, found that over a third of children are not getting the Government's daily requirement of 60 minutes of physical activity per day. They also found that half were not getting the recommended two hours per week of physical education in school⁵.

They concluded that *"There are a number of explanations for the observation that children today may be more inactive than those of previous generations. These include the increased use of cars, the reduction in likelihood that children can 'play outside' (for safety reasons) and the increase in more sedentary activities such as playing computer games and watching television"*⁶.

They also noted that, *"Almost all young people now agree that it is 'important to keep fit'. The fact that motivation is high but engagement levels lower suggests that the facilities or the money required to access them are a significant part of the problem"*⁷.

The loss of these opportunities for constructive, structured risk-taking is a major factor in the growth in the number of disillusioned young people, especially young males, in Britain today. All too often, teenage gangs provide the only opportunities for excitement, risk-taking and comradeship for young people, who cannot afford to pay for the activities their better-off peers enjoy. The effect of this is seen in a growing international reputation for yobbish behaviour and, at the worst, in the

³ The European Association for the Study of Obesity (EASO) Childhood Obesity Taskforce (IOTF), <http://www.iotf.org/database/index.asp>

⁴ Obesity Among Children Under 11, National Office of Statistics, April 2005, http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4109410.pdf

⁵ 'Preventing Childhood Obesity', BMA, June 2005.

⁶ 'Preventing Childhood Obesity', BMA, June 2005, page 15

⁷ 'Preventing Childhood Obesity', BMA, June 2005, page 14 & 15

shootings and knifings which have become increasingly common in some of our large cities.

On the positive side, in April 2007, Professor Ann Buchanan delivered a speech on recent research into barriers to boys' attainment. Following on from the work of Epstein et al who suggested in their book *Failing Boys* (1998) that boys are victims of a feminised education system, she suggested that there is evidence that sport and the use of sport in the teaching of core subjects is a way of raising educational achievement of boys. She also believes that children from ethnic minority and poorer backgrounds benefit from the elevated role of sport in the Curriculum.

Park House School and Sports College in Newbury in Berkshire is a mixed comprehensive, which used to have a serious truancy problem, before it became a sports college. It has seen a fall in truancy from 10.6% in 2004 to 7.1% in 2006⁸. By that year, the proportion of children achieving 5 A*-C in 2006 had risen to 7% above the national average⁹.

At Brierton Community School, where the number of students eligible for free school meals is well above the national average, a project was established where all 224 students in year 9 were given a three-week intervention programme just before their SAT examinations. Each day, a sporting activity was followed by a healthy breakfast and celebration assembly, where certificates were given out. The remaining four lessons were in English, Maths, Science and ICT. In English, the numbers jumping from a level 4a to a level 5 in actual SATs increased by 30% from the jump pupils made in their mock SAT exams. In Maths, it increased by 33%.

⁸ OFSTED, "RAISEonline 2006 Full Report: Park House School and Sports College", 16th April 2007, p.5.

⁹ Ibid., p.54.

Section 2. The Creation of a Risk Averse Society:

A large-scale survey in 2003 carried out jointly by Sport England and the Central Council for Physical Recreation suggested that, if we were to replace all those currently giving their time as sports volunteers with paid labour, it is estimated it could cost £14 billion. Sports and adventure training volunteers contribute an estimated 1.2 billion hours each year to sport, which is equivalent to employing 720,000 additional full time paid workers¹⁰.

There are approximately 150,000 voluntary sports clubs in the UK, catering to an estimated 10 million players and participants.

The single biggest area of volunteering is that focused on sport and outdoor adventure, with 26% of all volunteers citing sport as their main area of interest¹¹.

Litigation and the Blame Culture

However the same survey suggests that volunteers are under immense pressures, which threaten both those in volunteering and those considering taking it up. Eight were listed. First among the pressures on volunteering was **“risk, fear of blame and the threat of litigation”**¹².

These concerns are not confined to sports pitches and fields. Last year, the Scout Association undertook a similar survey. Of a survey group of over a thousand, nearly 50% agreed that the retention of existing volunteers was made more difficult because of the fears of being sued. When asked about how concerned they were about being sued for compensation while leading an adventure activity, only 5% responded that they were unconcerned. What is more, 69% thought that the recruitment of new volunteers was made more difficult because of the fear of being sued¹³.

After a period of decline, numbers in Scouting and Guiding are expanding again. Last year’s survey showed that two fifths of all young people aged between 13 and 18 are members of a youth or sports club, with Scouts and Guides accounting for one fifth of that total. In other words, the Scouting and Guiding movement embraces 1/12 of that age group. Nevertheless, there are 80,000 boys and girls unable to join either the Scouts or the Guides because of insufficient volunteer leaders. The same survey also found that 92% of those polled thought that risk-aversion is affecting the range and nature of activities being offered to young people¹⁴.

¹⁰ Ibid

¹¹ Ibid.

¹² Ibid

¹³ Compensation Culture? December 2005/Jan 06, Scout Association

¹⁴ Ibid

There has been widespread argument that this problem is almost entirely about perception rather than reality. Voices in the legal profession and their allies in Parliament point to the fact that the number of litigation court cases – overall – is much lower than in countries like America and has declined in the UK over the last few years. Thus, when the government introduced its very modest Compensation Bill in the House of Lords, Lord Goodhart said opposing it:

“There are, of course, reports of cases where damages have been awarded to people who are the authors of their own misfortunes. It is difficult to find authentic texts for these judgments and I suspect that some of them are urban myths. Some of them are reported; some were decided before the law was clarified in the Tomlinson case; and some are simply bad decisions, which are unavoidable in any legal system.”¹⁵

This however is to miss two vital points. First, there have indeed been a number of (mostly unreported) disastrous judgements and secondly the cost of defending an action, even successfully, is prohibitive so most are not defended. Six days after Lord Goodhart’s speech, and while the Bill was still before the Upper House, a court case took place in Manchester. In a letter to me, the Scouts’ legal adviser said:

“I attach a note of a recent case in which the Scout Association lost following an injury to a brownie attending a scout panto...chairs were set out in the village hall and the brownie was injured on allegedly sharp piece of metal protruding from one of the chairs...Apart from individually inspecting every chair with considerable resource implications endangering the running of such an event it is hard to see what more the group could have done. To add insult to injury the Judge awarded the claimant twice our counsel’s valuation of the claim and 20 per cent. more than the claimant asked for!”

It cost the local Scouts Association £15,000. They oppose all litigation cases where they feel that volunteers were not to blame. Yet they get 50 to 60 negligence claims a year of which around six go to court. They lose on average around a quarter of the court cases.

Let me give two further examples, out of a considerable list.

A Scout Group had organised a trip to visit the popular show cave at Gaping Ghyll. Some parents had gone along as additional supervising adults.

The party decided to eat their picnic lunch before undertaking the guided tour and walked a short distance up a footpath to some open land. One of the Scouts noticed a small cave opening across a stream and asked the Scout Leader for permission to explore it. The Leader refused permission, pointing out that caves could be dangerous. The Scout then moved away to where his father stood and repeated the request. His father, who had heard the leader’s ruling, gave permission, provided his son with a

¹⁵ *Official Report, House of Lords; 7 March 2006, Vol. 679, c.647.*

cigarette lighter for illumination and accompanied him into the cave. A short distance inside, the Scout slipped and fell down a 'chimney' leading into the main chamber of Gaping Ghyll. He fell 300 feet to his death.

The Father sued the Scout Association. His action was defended but the Judge found in favour of the claimant, stating that, as he was born in a city, he could not have been expected to recognise the dangers. He held that the Scout Leader should have prevented the father from entering the cave with his son and in failing to do so he breached his duty of care.

The older son continued as a member of the same Group for two years after the accident leaving when he reached 18 with his Chief Scout Award. The litigation did not commence until after he left.¹⁶

In a separate case, the skipper of a lightweight 25ft racing yacht was successfully sued by one of the experienced crew members after manoeuvring to leave a marina. The skipper, realising that the yacht had been caught by a gust of wind and might hit an adjacent moored yacht, asked an experienced adult crew member to run forward with a fender. The crew member stumbled going forward and three months later successfully sued the Skipper for damages claiming he had injured his leg.

After a five day trial the Court found the skipper liable on the grounds that a reasonably careful skipper should have pre-briefed the crew on this manoeuvre and had a crew member pre-placed.

The sailing fraternity was amazed at this decision as sailing is a rough and tumble sport and experienced crew are frequently asked to hurry forward or aft to deal with an emergency. It is up to the crew member to decide whether to obey the skipper on grounds of safety and how best to carry out that instruction.¹⁷

The second important point is that it is very expensive to fight cases like this even where the organisation wins because costs in cases like this are almost never awarded against the litigant. Courts are unwilling to make awards against members of the public who have sustained physical injuries, even if they have the assets to pay them.

The combination of bad judgements and the heavy costs involved in defending such actions has deterred nearly all insurers from allowing their clients to fight cases, thus fuelling the blame culture by out-of-court settlements while, perversely, contributing to the decline in the number of recorded civil cases. It was only the courageous decision of the Scouts to fight cases where they feel they are right - even though the process is so demoralising for the scoutmasters involved - which makes it possible to illustrate how bad the attitudes of our lower courts have become.

¹⁶ Judgement given by H H Judge Appleton in Preston, 17.11.00. Supplied by John Grantham Insurance Manager, The Scout Association

¹⁷ Richards -v- Wanstall, High Court, QB Division, Admiralty Division, (10th April 1995). Supplied by Edmund Whelan, Barrister, Head of Legal & Government Affairs, The Royal Yachting Association.

The importance of healthy outdoor adventure activity on the one hand and the increasingly hostile climate to it on the other, have led to the creation of an umbrella group the Campaign for Adventure. Its director is Ian Lewis and patron is the Duke of Edinburgh. Almost every organisation delivering adventure training and outdoor activity has affiliated to it. One of its board members is Randall Williams, chairman of the English Council for Outdoor Education, Training and Recreation. He has commented in a paper to this working party:

"... there is still a huge poverty gap, with many young people unable to afford the significant boost self-confidence that an adventurous experience so often gives".

There have been two developments which have marginally improved the legal situation. The first was the celebrated *Tomlinson versus Congleton Borough Council* ruling by the House of Lords in 2004. The claimant suffered a broken neck as a result of diving into a lake in a council-run country park. Swimming in the lake was prohibited and the defendants displayed notices reading "dangerous water: no swimming" and employed rangers with the duty of giving oral warnings against swimming and handing out safety leaflets. Unbelievably, the Court of Appeal had upheld the plaintiff's case against the council. Overruling them in the House of Lords, Lord Hoffman said,

"I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities... but the law does not require him to do so."

Welcome, as this ruling may be, it should be noted that the fatuous judgement against the Scouts in 2006, quoted above, came *after* this case. The second development is that the government introduced a small Compensation Act (which was billed at the launch as a response to my private members Bill) which invited the court to take account of the possible consequences for "desirable activities" in making a negligence award. A vigorous campaign led by David Hunt in the Lords inserted a further clause barring the courts from treating an apology per se as an admission of liability. In neither House, however, were we able to persuade the government to *require* the court to take the consequences into account; Ministers admitted that courts were already *allowed* to do so and so the act was really only a clarification of the existing law, except with regard to the Lords clause on apologies. Passed into Law at the end of July last year, this may have helped a little but the best source of information in this area, the legal adviser to the Scouts, tells me that there seems to be no reduction in claims, although it is too early to tell whether their success rate is improving in fighting them.

Section 3: Impact of Compensation claims on Insurance

In 2004, when my private member's Bill was before Parliament, I received testimony from a number of sources of the growing problems with insurance. The National Caving Association suffered "a catastrophic interruption in its activity" when it found itself unable to obtain insurance at all. (At that stage cavers had not had a fatal accident in living memory.) Eventually it was able to find a new insurer at a cost of £18 per head, when only a few years previously it had been around £1 a head. There were a number of sad individual cases too. A teacher from Bishop's Stortford College wrote to tell me that after 60 successful expeditions by their college Expedition Society, they had to abandon plans to visit Greenland because of the inability to get insurance. CCPR reported on the folding of a roller-skating club in a deprived area of Kent because of huge rises in insurance costs.

In 2005, Volunteering England and the Institute for Volunteering Research carried out a Survey entitled '*Reasonable Care? Risk, risk management and volunteering in England*' this survey covered the full range of volunteering organisations, so the categories we are concerned with here "organisations working with youth and children, disabled people, sports, exercise and adventure, community development and support" composed only 15 to 17% of the sample. Most of the other categories were low risk, thus greatly diluting the findings. Nevertheless, of the respondents, 14% reported that their insurance premia had 'increased greatly', including over one fifth of the sport and adventure training organisations.

Perhaps more significantly, 11% of the total sample had recently 'had to renegotiate insurance against risk and liability in relation to volunteers' and 3% had been refused insurance or had had cover withdrawn altogether. These latter two statistics are not disaggregated by category but it is reasonable to assume that they relate disproportionately to the 15 to 17% of organisations organising the more challenging activities. This suggests that many adventure training activities have insurance problems.

Throughout the survey, it is reported that small organisations have had more problems than big organisations. Anecdotally, it appears that sports clubs affiliated to national organisations such as the Football Association, have largely escaped the problem. Instead insurance problems seem to have borne down most heavily on smaller community and school initiatives on the one hand and on those offering the most challenging activities on the other.

The British Gliding Association reported last month that their insurance premia had risen 150% in 10 years, despite that being a period of low inflation.

Section 4: School Trips and the perverse impact of health and safety legislation

Health and Safety legislation is often used as an excuse to cover inactivity by schools and others. The fear of criminal prosecution and of civil litigation have affected teachers and damaged field studies courses. Indeed, the NAS/UWT has issued guidelines recommending that its members do not participate in school trips at all.

The government commissioned a study by the National Foundation for Educational Research, which surveyed 3,500 teachers. The results were published last November. The study showed that the number of school trips was "stable and increasing", adding: "Head teachers say it is an integral part of pupils' development". However, it also found that the *nature* of outings had changed. Across all ages "visits to field studies centres, environmental centres and outdoor pursuit or adventure centres were relatively rare". Instead, many schools sought museums or "places of cultural interest"¹⁸.

The report said there had been an increase in activities based in or around school grounds and a decline in "off-site day visits" and "residential experiences". "The requirement to take responsibility for pupil safety and to manage risks" was listed as the second most important cause in this decline after cost. At the same time the government published its outdoor learning manifesto with a pledge of £2.5 million. This stressed the importance of outdoor experiences for children's development but sceptics within the adventure training industry pointed out that there are plenty of outdoor experiences from museum visits to pond dipping, which involve no significant element of adventure.

A representative of another teaching union, the National Association of Head Teachers, said that, while the association welcomed the new initiative, it was deeply concerned about the legal position.

"...NAHT is also concerned about the unrealistic expectations placed on teachers and the impact which litigation can have on their personal and professional lives... We live in blame/claim culture which places all teachers, but particularly those who engage in out-of-school activities, in a potentially vulnerable position. So we await with interest details about the guidance and support which Mr Johnson has promised"¹⁹.

In discussion, ROSPA emphasised how counter-productive attempts to eliminate risk entirely can be. The table below shows child accidents in a 2002 survey. Accidental or sudden death amongst young people (up to the age of 19) approximately:²⁰

¹⁸ The Daily Telegraph, 29 November 2006

¹⁹ Mrs Fern Turner, NAHT Northern Ireland Regional Officer, 30 November 2006
Belfast Telegraph

²⁰ Figures supplied by the AALA

<u>Cause:</u>	<u>Number:</u>
All accidents	1420
Main causes	
Road Traffic Accidents	700
Accidents in the home	220
Skin cancer	200
Suffocation	140
Poisoning	125
(25% from Class A drugs)	
Suicide	110
Drowning	90
Fire	80
Falls	70

By comparison the numbers killed on School visits was 3. Only one of those was killed undertaking Adventure Activities on a school visit- the others were traffic deaths.

The point comes sharply into focus if we look at swimming, which has been subject to a great deal of bad publicity recently and overzealous interpretation of HSE regulations. A ROSPA survey showed that in 2002 there were a total of 426 drownings; of those only 15 drowned in swimming pools²¹. In essence, by not risking teaching our children to swim –or at least frightening groups leaders and teacher out of doing so- we don't decrease the risk of them drowning, in fact we *increase* it, not just in childhood but also adulthood.

In recent years, the Health and Safety Executive has sought to recognize the role of healthy risk-taking in its guidelines. In a welcome statement, Bill Callaghan chairman of the Health and Safety Commission²², has said:

"Thousands of school trips take place every year without any incident, and pupils benefit from taking risks in a managed way, helping with their learning, social skills and understanding of risk...It is important that children are made 'risk aware' by involving them in practical decision making in a challenging environment. This allows them to develop the attitudes and attributes that enable them to function in a risky and uncertain world."

There was a recent debate organised by the Parliamentary arm of the Campaign for Adventure, the All-party Group for Recreation in Society (A RISc). Stephen Pointer, representing the Health and Safety Executive, pointed out that prosecutions of teachers were exceptionally rare and convictions had averaged less than one per year over the last few years. Nevertheless, Madeleine Abas, Chairman of the Health and

²¹ <http://www.rospace.com/waterandleisuresafety/drownings/2002statistics.htm>

²² Governors' Agenda Magazine Feb 2007

Safety Lawyers Association testified that there had been a sharp increase in the number of *investigations* under health and safety legislation over the last few years although this was not reflected in numbers of either prosecutions or convictions. She pointed out that such investigations, even where they lead, as in most cases, to no prosecution, were deeply stressful. (No separate figures for investigations of teachers were available). While the new approach of the Health and Safety Commission is welcome, it appears that its messages have not reached all the branches of the HSE yet.

In the guidelines for educational visits and off-site activities from Kent county council (in many respects a model Council) one is left with a depressing feeling that it would be much easier for those in positions of leadership to walk away from the whole problem. Even middle category activities, such as walking in non-remote country or camping in lowland areas, require the prospective leader to have:

- Recent relevant experience
- engaged in additional activity and/or *site-specific* training
- and to hold either a relevant qualification, or be judged as appropriately competent by the outdoor education adviser and head of establishment

There are also two serious problems with existing health and safety legislation. In all areas, it is sometimes objected that the health and safety implications of *not* carrying out the activity itself cannot be weighed in the balance. Thus a decision may be legally required to close a section of the railway line on "health and safety grounds" even though the likely increase in road traffic deaths is likely to far exceed the number of lives put at risk by leaving the station open.

This general, arguably unsatisfactory, aspect of such law has a particularly unfortunate application in the case of school trips. Any risk assessment must take account of the "past form" of the children concerned. If it shows that, for example, a child has a persistent record of disobedience, the implication must be that either considerable extra resources for supervision must be available for that child (unlikely) or the child should be left behind. Thus the very children who are most at risk of substance abuse, antisocial behaviour and crime are those most likely to be denied opportunities for the very kinds of adventurous activities which provide character development, on the grounds that it would be too risky to give them the opportunity. The likely risks of *not* doing so cannot be taken into account by the courts.

The second problem which a number of headmasters have expressed concern over, on informal occasions, is that the law nowhere recognizes the value of giving teenagers opportunities to take responsibility for other teenagers, to develop leadership. If something goes wrong, for example on a night patrol, in the Cadets or Scouts, the argument will be put in court that there was a lack of adult supervision even where, for example, a 16-year-old has been thoroughly trained in the task. Thus opportunities for developing leadership and responsibility have been greatly diminished.

Section 5: **Lessons from abroad: progress in Australia and America**

In both Australia and the United States (where there certainly is a compensation culture) legislation has been introduced to protect the sport and adventure training sector, from unreasonable and frivolous negligence litigation.

Both countries share our common law tradition, although, unlike the UK, both have a State governmental and legal system. Both also passed their legislation primarily through the state legislatures. In addition, both sport and sporting prowess are an integral part of their national culture and identity.

It is worthwhile examining some of detail of both countries' legislation to see how they have tried to reinsert common sense and the notions of personal responsibility into negligence law.

Australia:

The Western Australia CIVIL LIABILITY AMENDMENT ACT was introduced in 2003. The objective of the Bill was to help change social and legal attitudes toward the assumption of liability and risk. Key tenets of the Bill were;

- There will be no liability for harm resulting from a risk of a recreational activity that was the subject of a risk warning;
- There will be a legal presumption of contributory negligence in circumstances where a claimant is under the influence of drugs or alcohol;
- Where good Samaritans come to the assistance of a person in danger they will be protected from civil liability when acting in good faith.

In defining the principles by which a court will test whether a defendant is liable for harm, they *must* also consider the '*social utility of the activity that creates the risk of harm*'²³. This, in effect, forces judges to consider any consequences to the community of a finding of negligence. In contrast, the government's Compensation Act last year merely tells the court that it *may* take account of the effect on a "*desirable activity*", something which courts have always been allowed to do.

The Bill also stated that '*a person (the "defendant") does not owe a duty of care to another person (the "plaintiff") to warn of an obvious risk to the plaintiff*'²⁴. It essentially states that there is no duty to warn if the risk is obvious, what might be thought of as the 'caution, this cup of coffee is hot' syndrome. For dangerous

²³ <http://www.austlii.edu.au/au/legis/wa/bill/clab2003251/> , page 7

²⁴ Ibid, page 16

recreational activities²⁵ this distinction between obvious inherent risks and risks that clearly should be avoided, such as using a damaged rope which breaks, is important.

Similar legislation, although with some differences, has now been enacted in most Australian states

USA:

In the US, the home of the compensation culture, they have gone further. Peter Charlish, Senior Lecturer in Law at Sheffield Hallam University, wrote to us saying;

“...the Courts in the United States have now recognised the rather special position that the sports and recreation play in the nations well-being. In most states, in order to be liable in negligence, in a sporting or recreational setting, the defendant must have shown a ‘reckless disregard’ for the safety of the claimant...”

Reckless disregard requires a much higher burden of proof than ordinary negligence as it is necessary to show deliberate intent or at least that a reasonable person must have known that he was behaving recklessly. Some states appear to have introduced this legislation in response to particular problems, for example a dreadful series of payouts by the skiing industry in the USA. According to Peter Charlish nearly all States in the US have now put reckless disregard into statute for disputes against sports participants, if their courts had not already done so, except Wisconsin.

Ironically, in the UK a case was heard in 1963 where the standard of reckless disregard was used (*Wooldridge V Sumner*, 1963, 2 QB 43 - a photographer was kicked by a horse at a racing event), but we have since retreated from this standard for sports disputes, as a result of a series of court decisions rather than any act of Parliament.

Recently even Wisconsin has enacted statute law specifically in response to a case which had bucked the trend to reckless disregard in the US. The case which caused the problem was *Lestina v West Bend Mutual*, which set the standard of care for sports activities at ordinary negligence. In the aftermath of this decision, Wisconsin enacted statute law limiting the liability of a whole range of sport and recreation providers, in a different way from other parts of America.

This new legislation states that, a participant engaged in a recreational activity on premises owned or leased by a person who offers facilities to the general public for participation in recreational activities must;

- Act within the limits of his or her ability.
- Heed all warnings regarding participation in the recreational activity.
- Maintain control of his or her person and the equipment, devices or animals the person is using while participating in the recreational activity.

²⁵ Ibid , page 10

- Refrain from acting in any manner that may cause or contribute to the death or injury to himself or herself or to other persons while participating in the recreational activity;

And that a violation of this subsection constitutes negligence²⁶.

²⁶ http://www.americanwhitewater.org/resources/repository/Wisconsin_Recreational_Use_Statute.htm

Summary, Conclusions and Policy Recommendations

Society needs to accept that accidents happen without it always being someone's fault. This must be combined with an acceptance of personal responsibility. To achieve both these things we have to look at the system. To see how this might be done we can look abroad and at aspects of best practice at home.

We must follow the example set by the US and Australia and realise the social utility of sport and adventure in the development of teenagers and children. Learning to manage risks in a well structured environment develops confidence, comradeship and self-reliance. Without such opportunities, the less motivated can become feckless and frequently are obese. The more active are likely to make their own choices, which will often be dangerous and sometimes deeply antisocial. By its very nature, adventure training cannot be made entirely risk-free. Society must establish the principle that accidents can happen without it being somebody's fault, and re-establish the principle of personal responsibility.

Today 40% of all young people aged between 13 and 18 are members of a sport club or youth organisation, with the Scouts and Guides making up 1/5 of the total - and their numbers are growing. Nevertheless, 80,000 youngsters are on waiting lists for the Scouts and Guides, because of a shortage of volunteers. The threat of being sued and dragged through the civil courts is now the greatest barrier to volunteering in the sport and adventure training world. This is not just a problem about perception; there have been a string of bad judgements, where organisations have defended their volunteers and employees. The cost of defending even successful actions is now so high that most insurance companies force their clients to settle out of court, thus further feeding the problem and increasing insurance premia. The Scouts, who handle their own insurance, routinely handle 50 to 60 litigation claims a year, of which around 6 go to court. The law needs rebalancing so that frivolous law suits are discouraged and, when they do occur, fighting them should be made a more attractive option.

One of the best ways to present children with adventure opportunities is via their schools, as this is the most common point of regular contact with the largest number of children. While the number of school trips being organised is steady, or even increasing, evidence shows that they are becoming less adventurous, focused more on museums and places of cultural interest and less on more adventurous activities, especially those involving overnight stays.

There is clearly a difference between the stated aspirations of the HSE of not wanting to curtail adventurous activity and the way in which their procedures and inspections are carried out at the local level.

Risks assessments are a means to ensuring activities are carried out in a responsible way. However human nature being what it is, if this is too difficult or onerous a task busy teachers (and volunteer group leaders) may decide not to undertake activities.

Criminal ‘Health and Safety’ legislation is the bogey man that inspires inactivity, by presenting either an excuse not to do something or allowing urban myths to develop that have the same effect. The HSE’s remit has been safety in the work place, but has now spread to include first schools and more recently activities and sport, with the subsuming of the Adventurous Activities Licensing Authority (AALA).

Recommendations

The Civil Legal System:

- Establish in statute the notion of ‘reckless disregard’ as the standard in civil negligence claims for sport and adventure activities, subject to individuals and parents signing waivers for the activity; this raises the bar for such claims;
- Instigate training for judges who sit on cases relating to civil negligence claims involving those organising, running, and leading sport or adventure activities;
- Place in statute a requirement that Judges ‘must’ consider the social utility of any activity in which risk is an inherent part, and the effect a negative judgement may have on the activity;
- Place into statute, that there is no obligation to warn of an obvious risk;
- Place in statute that there will be a presumption of contributory negligence if any individual participating in sport or an adventure activity ignores risk warnings, or was under the influence of alcohol or drugs;

In Schools:

- Ensure all children get the recommended two hours per week of physical education in school;
- Introduce a requirement for field trips to be included in the curriculum (this is already the case in Wales);
- Make risk management training for adventurous out of classroom trips a requirement of teacher training, administered through the teacher training colleagues;
- Encourage best practice by creating a knowledge database for teachers to network, interact and seek advice from colleagues who still do trips successfully. An online forum would be most practical.

The Health and Safety Executive and Criminal Law:

- Separate the Adventure Activities Licensing Authority from the HSE and provide it with a remit to oversee all sport, adventure and playground activities, including those in school and on school outings. Provide it with a positive name to provide a positive public image and place in its constitution a requirement to encourage these activities;
- Write into the law, both criminal and civil, that it is in the public interest that teenagers learn leadership and, with suitable training, should be given opportunities to take responsibility for each other;
- Write into the law, both criminal and civil, that in making risk assessments, giving opportunities to those with a proven record of irresponsible behaviour is important. The court should take into account the dangers such youngsters face, if they are *not* given opportunities for excitement and challenge in a structured environment.