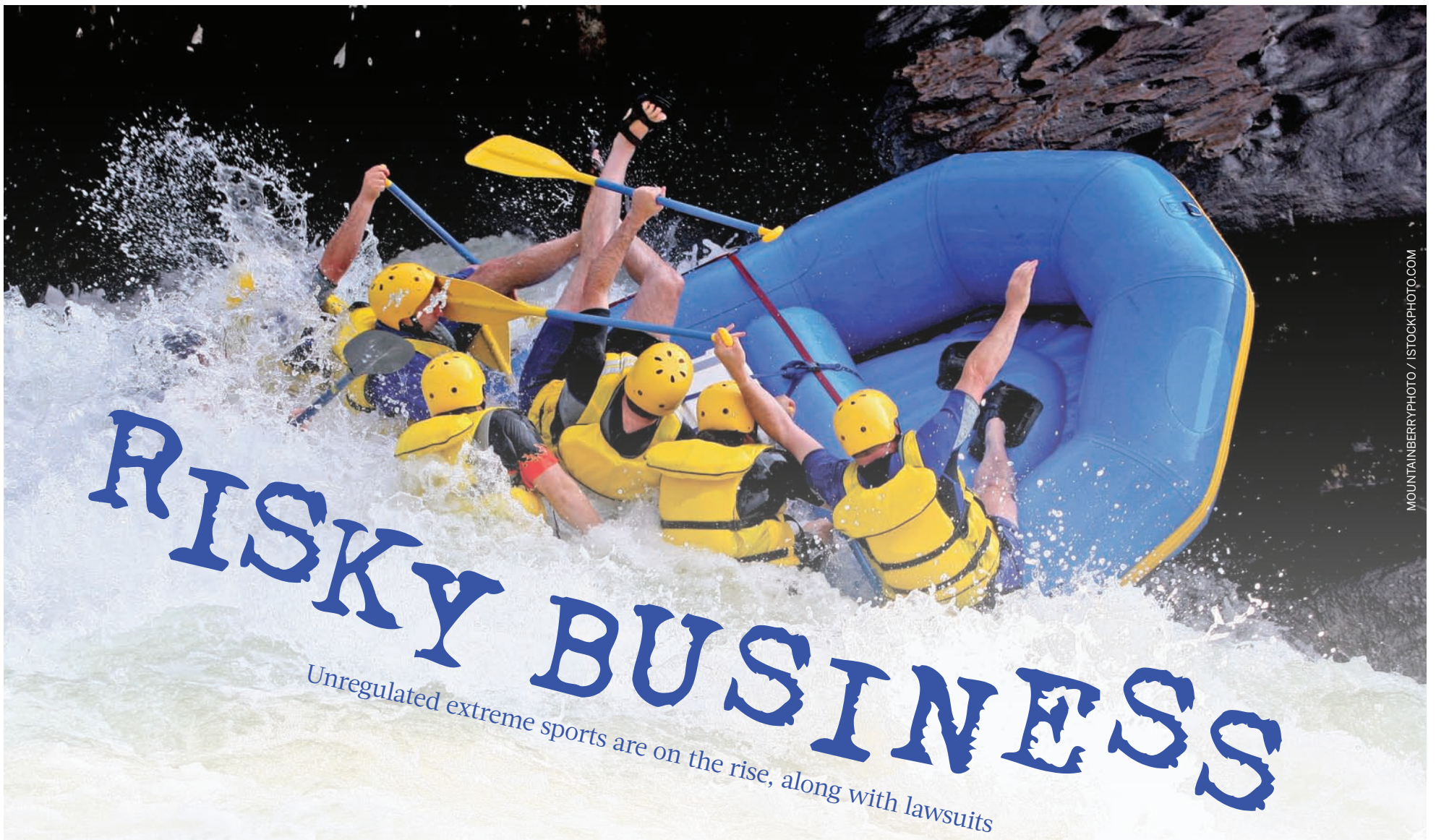
Focus
PERSONAL INJURY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RISKY BUSINESS

Unregulated extreme sports are on the rise, along with lawsuits

Patrick Brown

Extreme sports is a growing industry that is profiting from the human desire to experience the adrenaline rush associated with risk-laden activities. Whether it is racing down a ski hill on a mountain bike, falling from a white water raft, or climbing up a rock face, there is an increased appetite for such thrills. As the appetite grows, the number of private "pay to play" facilities looking to profit from the rush are on the rise — along with injuries and lawsuits.

Government oversight control over the industry is lagging, with few standards to monitor and ensure basic safety requirements and no tracking of the number of injuries. Internal statistics are kept at some facilities, but are kept private. In Ontario, more regulatory controls are in place for carnival carney rides and bouncy castles, through the *Technical Standards and Safety Act,* then for extreme sports. A fender-bender on a residential road is reported, investigated and statistics kept, but not when a child is rendered a quadriplegic on a dirt bike plateau jump at a privately-run business.

Safety within the extreme sport is left to individual operators, creating a Wild West approach. Most come from an extreme-sports background, and the guiding philosophy that makes the sport extreme is "just do it." In many instances they adopt a reactive rather than proactive approach to safety, waiting until a participant is seriously injured before implementing safety guidelines and protocols. For this reason, admissibility of post-incident remedial changes plays a crucial role in these types of cases.

For those operators that do adopt a risk-management protocol, it is not always based on safety considerations, but rather is developed by their insurers and based largely on an assumption of defence risk. The focus is on waivers, releases and warning signs, rather than instruction, supervision and safety. The operator is more likely to have video evidence of the waiver-signing than the actual activity taking place, or the resulting injury.

This line of defence may have some limited success with adults, but is not effective with children. While waivers may be legally binding on adult participants, courts have traditionally taken a strict approach to upholding them. In *Gallant v Fanshawe College of Applied Arts and Technology* (2009) O.J. No. 3977, the court found that any ambiguity in the wording rendered the waiver unenforceable. The terms of the waiver must be expressly understood by the participant. Only in the rarest of cases will a plaintiff genuinely consent to accept the risk of the operator's own negligence. In the case of children, it is unlikely that a waiver would ever be enforceable. Courts have held that a parent or guardian may not sign away the legal rights of a child, nor do children have legal capacity to sign away their rights.

When seeking out experts, counsel should not restrict themselves to experts within

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Precautions: Children overestimate their skill levels

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the sport itself. Extreme sports lag behind traditional sports when it comes to safety and standards, commonly credited to their newness. Although that may be true, institutions such as Algonquin College in Ontario do specialize in teaching common risk-management protocol for outdoor recreational sports. Although defence counsel may seek to confine expert evidence to within the extreme sport itself, this may not be the best approach for the plaintiffs' case and a more holistic review should be conducted. The Internet has become a valuable tool in charting out what other operators are doing. For example, a risk-management protocol adopted by an indoor rock-climbing park may be applicable and relevant to white-water kayaking. Operators must look beyond their own personal knowledge and experience when it comes to safety.

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In cases involving children, additional special precautions should be in place at extreme-sport facilities, including skill assessments, supervision and restricted access to the more difficult aspects of the sport. Although the sport may be extreme, there is still an element of progression involved to avoid serious injury. Expert child psychologists point to established findings that young children, and especially boys, have an unrealistic understanding of their own skill level and fail to appreciate the risks that an adult would (the same can apply to someone who lacks capacity or is drunk). Special precautions for these vulnerable persons should be put in place by the operator, and failing to do so can create additional exposure. The duty of care is still mandated by *Crocker v. Sundance Northwest Resorts Ltd.* [1988] S.C.J. No. 60, where the Supreme Court stated, "the plaintiff's inability to handle the situation in which he or she has been placed — either through youth, intoxication or other incapacity — ...is an element in determining how foreseeable the injury is." Many parents have not participated in the sport, and are not always fully aware of the risks. Certain facilities allow parents to view a video of the activity, but data detailing the number and severity of injuries is not made available.

Lastly, extreme-sports injuries and fatalities usually take place far away from home. Where possible, special consideration should be given to determining the most advantageous jurisdiction in which to commence a civil action. A suburban or urban juror may have a very different take on a case than one who lives near a ski slope, for example.

Until those who profit from extreme sports spend the required time and funds to develop adequate and responsible safety protocols, a "just do it" and waiver defence will not decrease the number of injuries at their facilities — or the lawsuits that may follow.

Patrick Brown is a partner at McLeish Orlando and was counsel in McAdam v. Blue Mountain, in which a 13-year-old boy was rendered a quadriplegic when downhill mountain biking. Settlement was reached following preliminary trial motions last year.

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