

Managing Risk with Active Transportation

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Outcomes for Session:

1. Liability = responsibility
2. Define duty re: active trans
3. Legal perspectives: fact over fear
4. Put liability into context of recreation & active trans

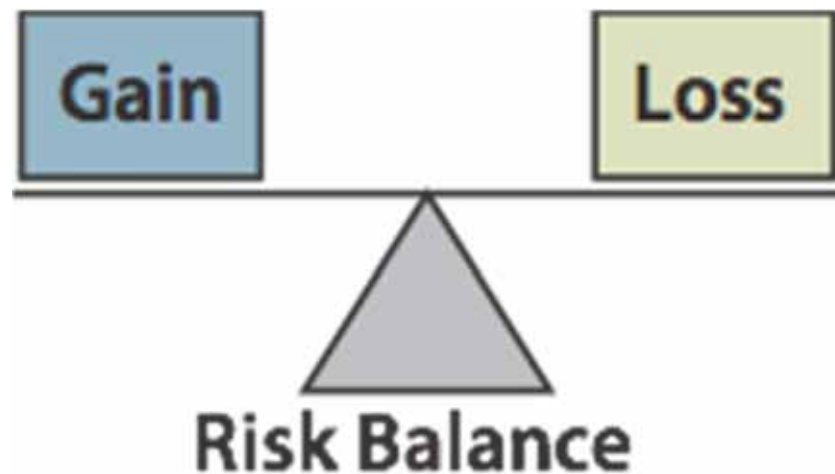
Question:

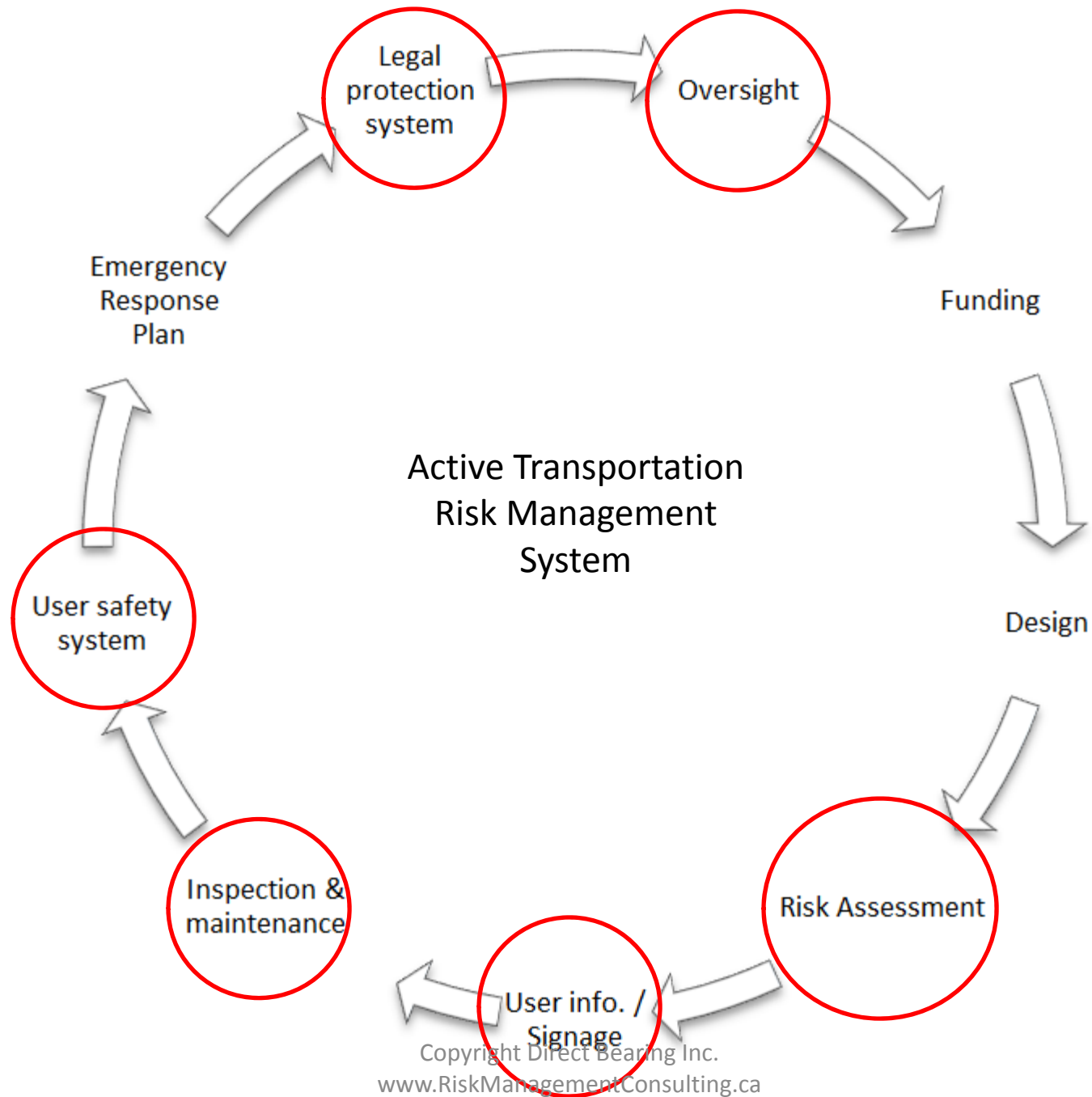
Is legal liability a concern in discussing Active Trans?

A concern for who?

What is Risk Management?

- *Risk management is a systems based approach to sustainably managing uncertainty within an operating environment.*





Potential legal issues:

- Trespass
- **Injury**
- Access rights
- Criminal
- Alcohol
- MoL charges
- Other examples?



Could I be sued if...?



Duty of Care:

- Duty of care: yes or no
 - “...reasonably foreseeable that a careless act by X could result in injury to Y”

Anns/Kamloops test (Anns v. Merton London Borough Council, adopted in Kamloops (City of) v. Nielsen [1984]).

- Statutory standard vs. common law

(s. 44 of Ontario's [Municipal Act](#))



Transportation vs Recreation



Standard of Care



“the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety.”

...“repair” is a relative term, and hence the facts in one case afford no fixed rule by which to determine another case where the facts are different.” *Housen v. Nikolaisen*, [2002]; *Partridge v. Rural Municipality of Langenburg*, [1929]

Supreme Court of Canada
Barratt v. Corporation of North Vancouver, [1980]



- Cyclist on municipal road; pothole

“The method of exercising its power to maintain the road was a matter of policy to be determined by the municipality itself and the municipality could *not be held to be negligent because it formulated one policy of operation rather than another*”

Supreme Court of Canada
Barratt v. Corporation of North Vancouver, [1980]



“If, however, its servants had acted negligently in the implementation of its policy, causing damage, liability could have arisen.”

“The municipality was under no duty to institute a system of continuous inspection and immediate repair to ensure that no possible damage could occur from the existence of a pothole and, in the absence of such a system, was not liable if damage did occur.”



Transportation vs Recreation



Occupier's Liability Act, R.S.O. (1990)

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- 4(1) Duty does not apply ... risks willingly assumed (recreational activity);
- in that case duty to not act with reckless disregard



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- 3(1) An occupier ... owes a duty ... reasonably safe while on the premises.
- 4(1) Duty does not apply ... risks willingly assumed (recreational activity);
- in that case duty to not act with reckless disregard
- (4) The premises referred to in subsection (3) are
(f) recreational trails reasonably marked by notice as such. [R.S.O. 1990 c.O.2](#)



Common law:

[Herbert v. Brantford \(City\)](#), 2010

cycle path, steep bank w rebar

60/40 contributory negligence

[Kennedy v. London \(City\)](#), 2009

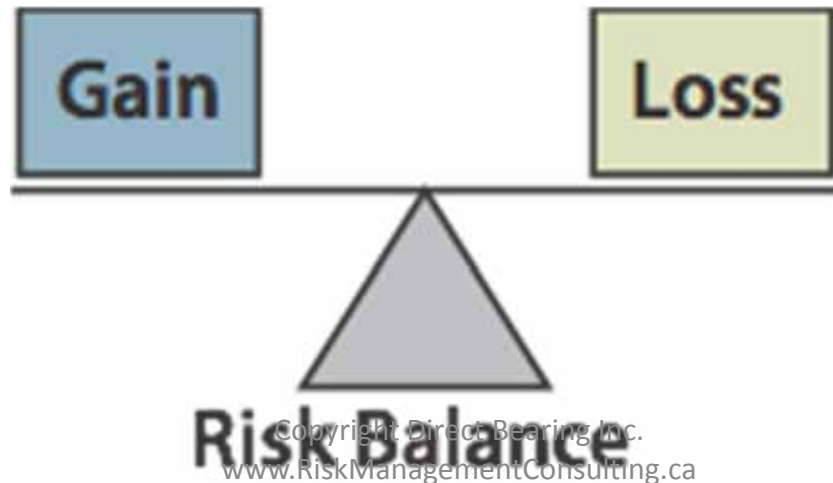
cycle path, post w no sign in middle of trail

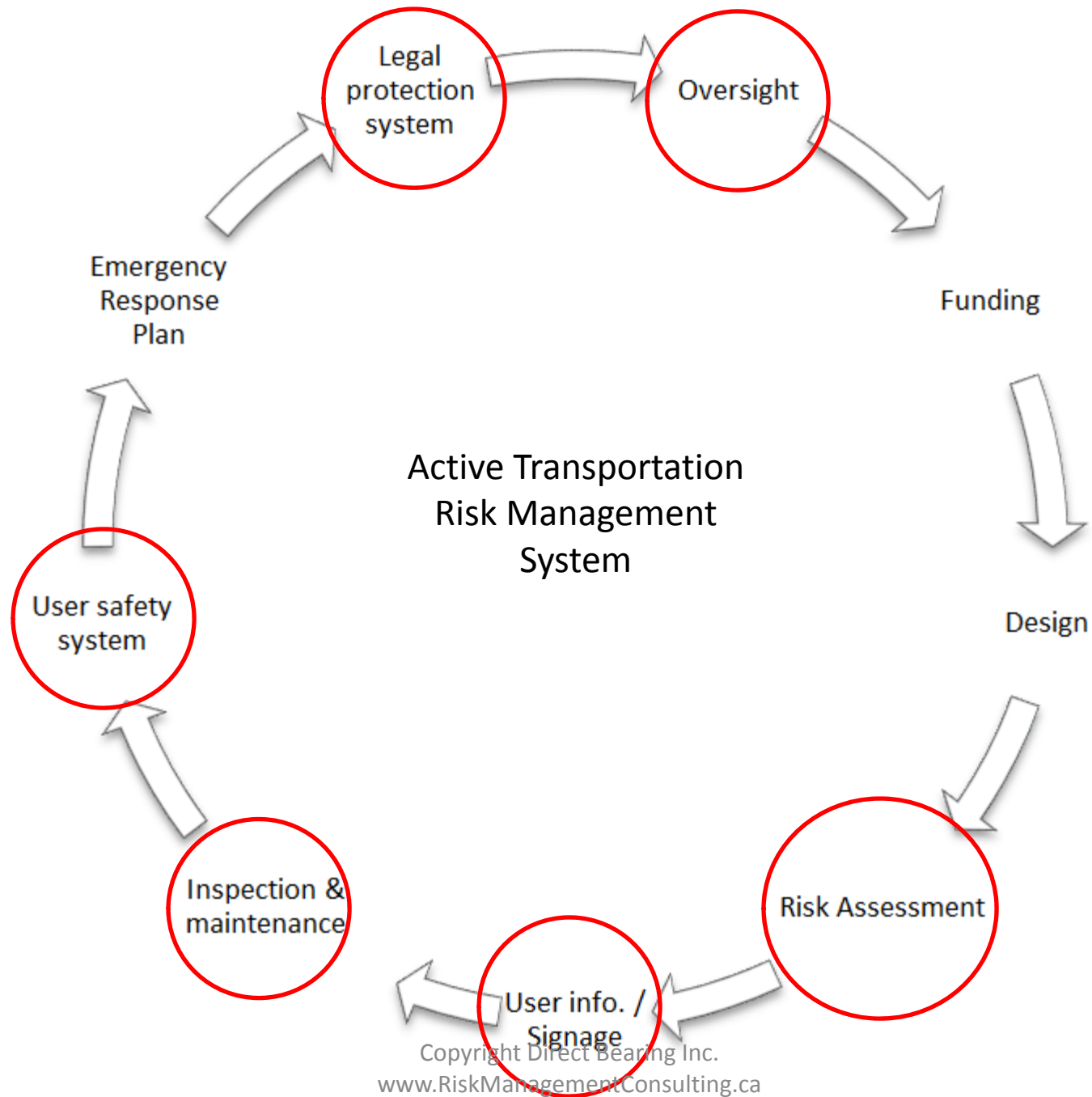
60/40 contributory negligence

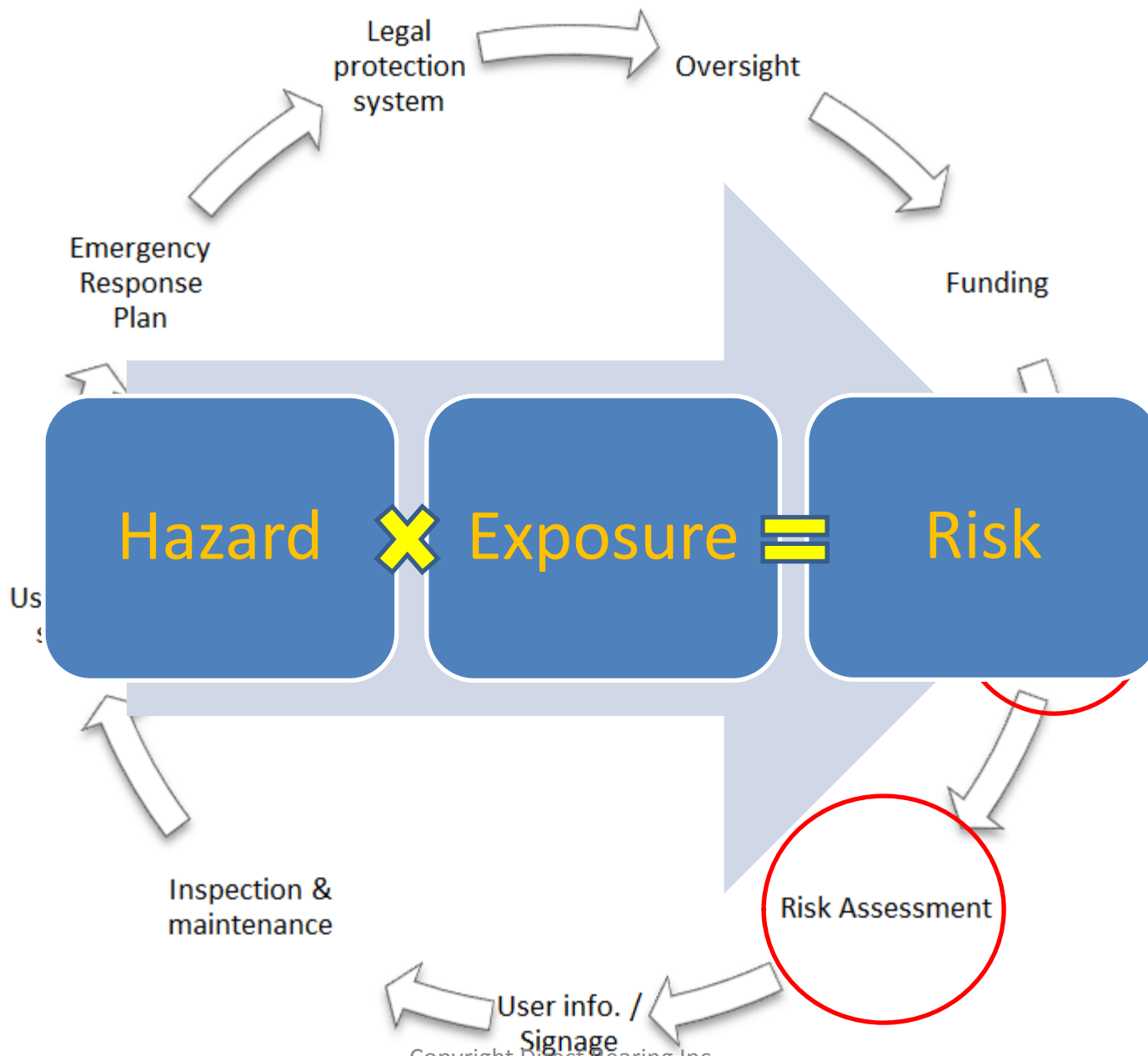


Legal take-aways:

1. Liability = responsibility
2. Duty is limited via Occupier's Liability Act
3. Standard of Care is reasonable and foreseeable (within reach of typical land agency)
4. Law biased towards use of public lands



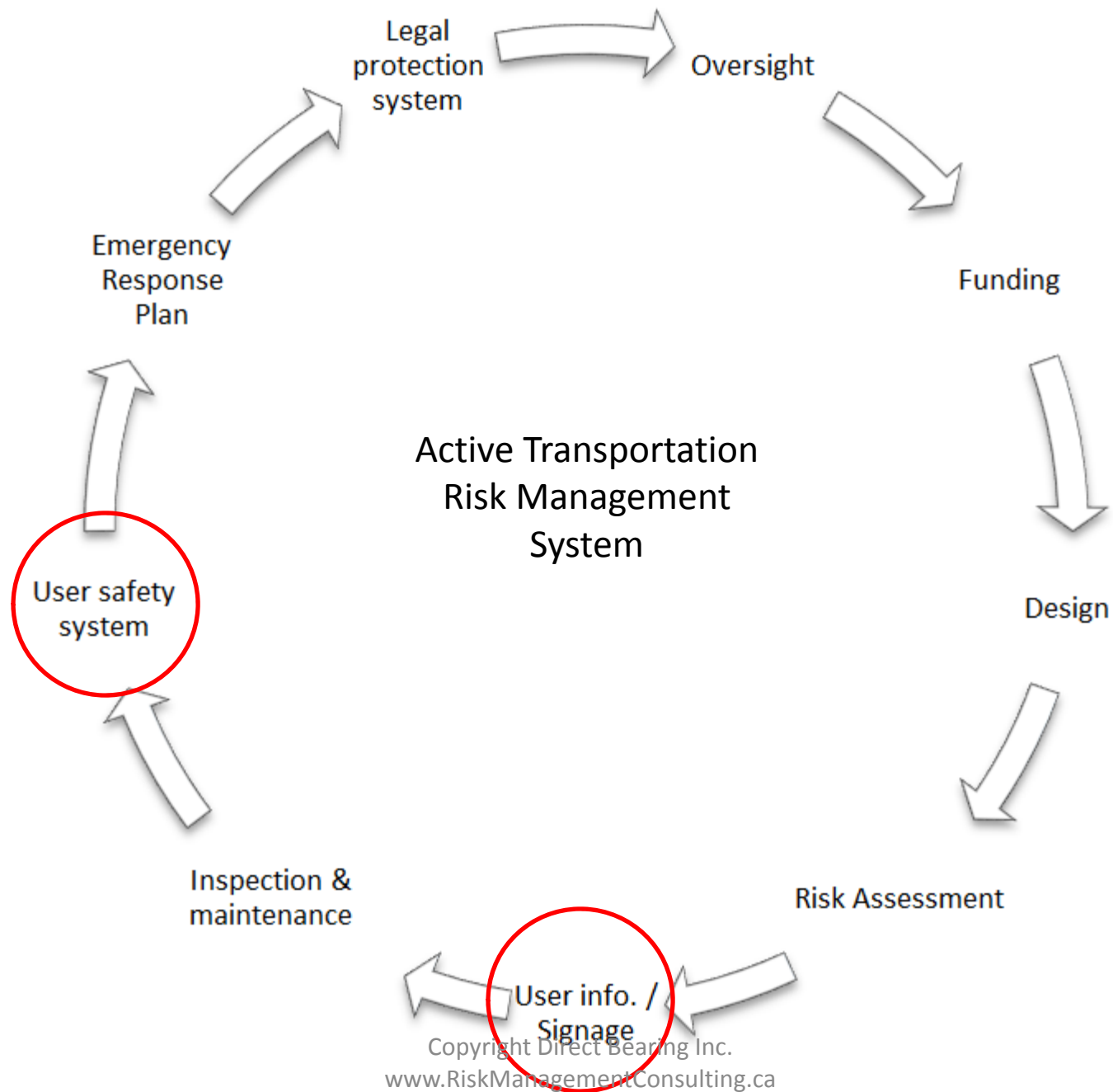




Operationalizing Risk

That's all very nice. But what do I do with it?

- Real world application:
Assess; Prioritize; Prevention/Control/Mitigation
- Due diligence:
Right person, Right action, Right record
- Reasonableness and Foreseeability





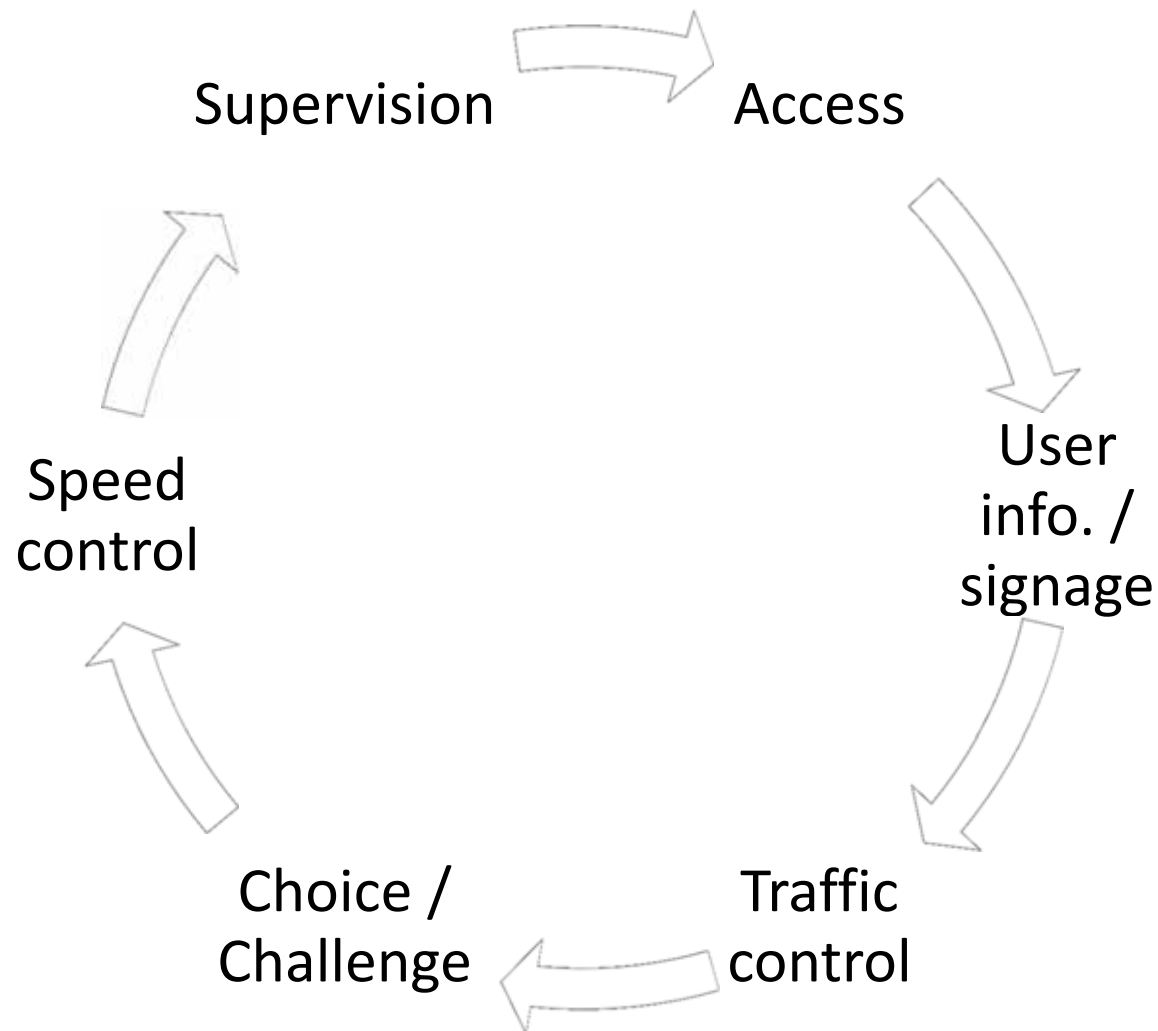
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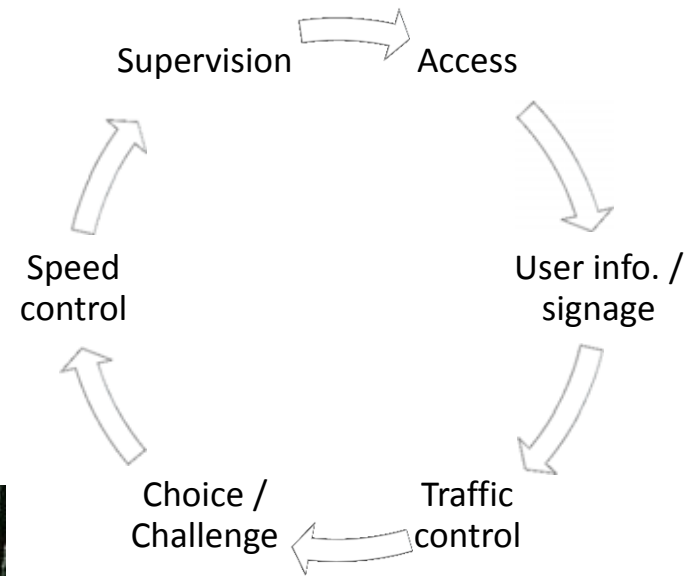
DAILY, WEEKEND OR ANNUAL MEMBERSHIP REQUIRED
KEEP TO THE TRAILS
USE TRAILS AT YOUR OWN RISK
RESPECT THE ENVIRONMENT & PROPERTY

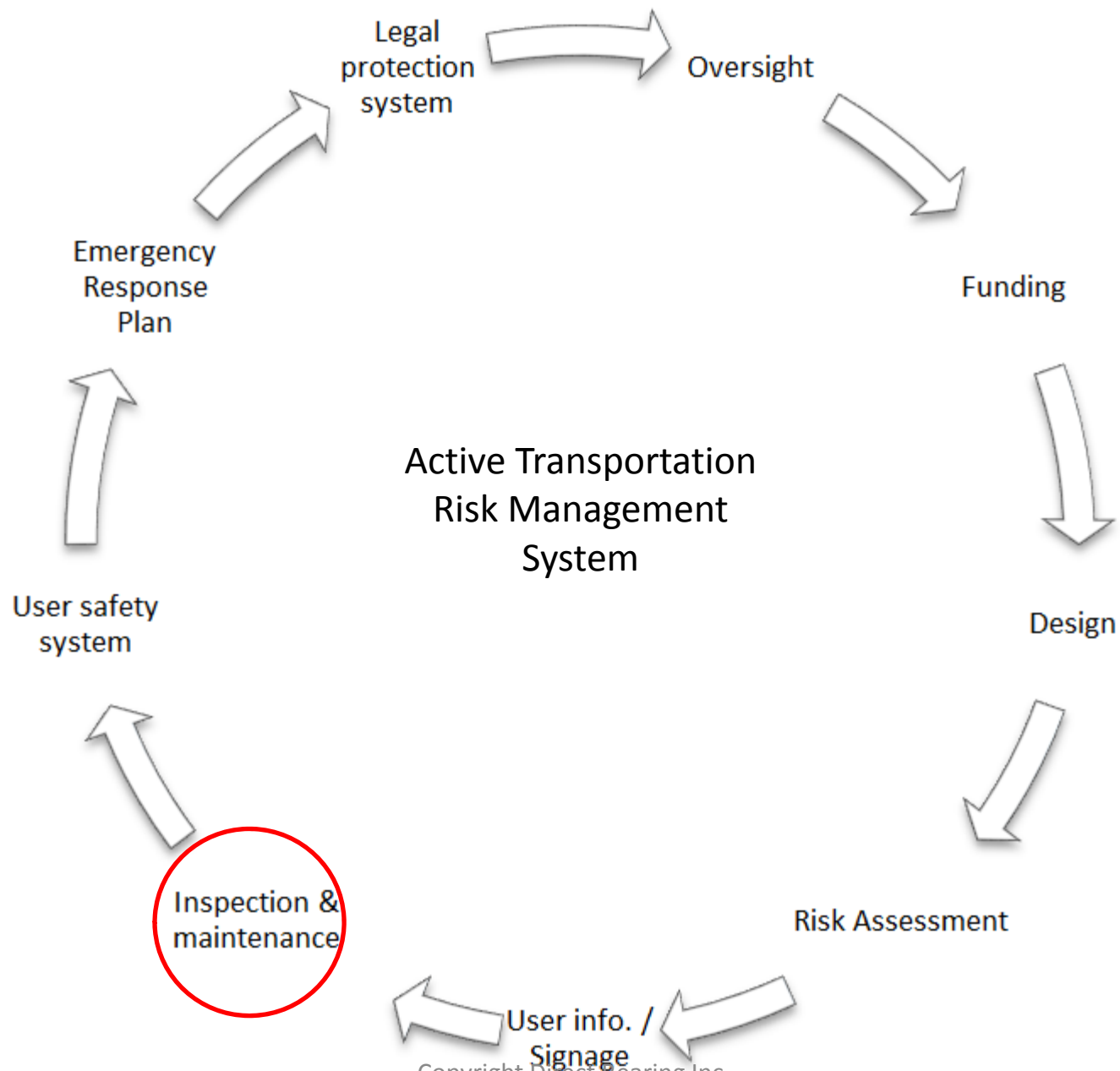


**EMERGENCY •
911**

User Safety System: Overview



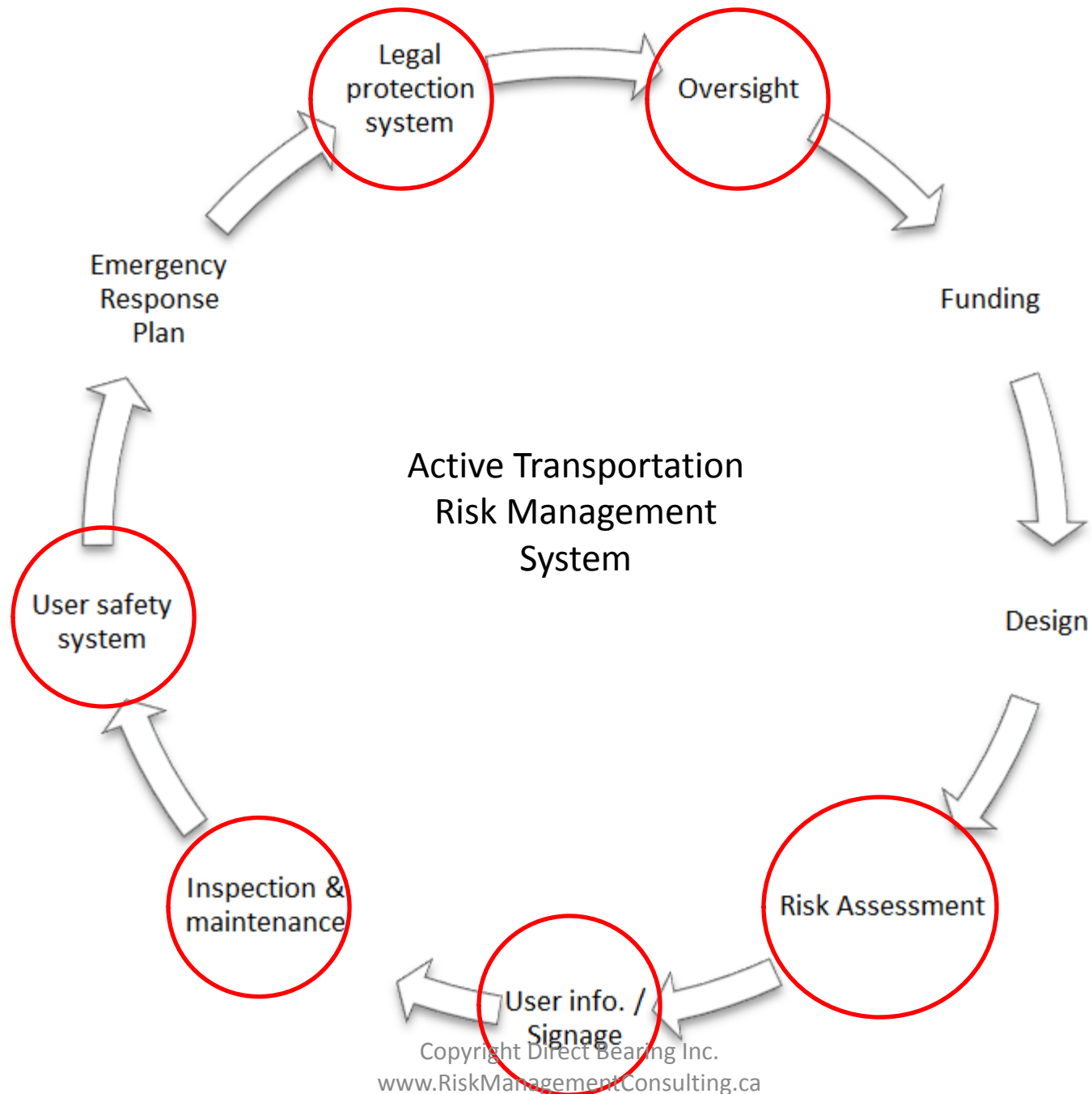




Inspection and Maintenance

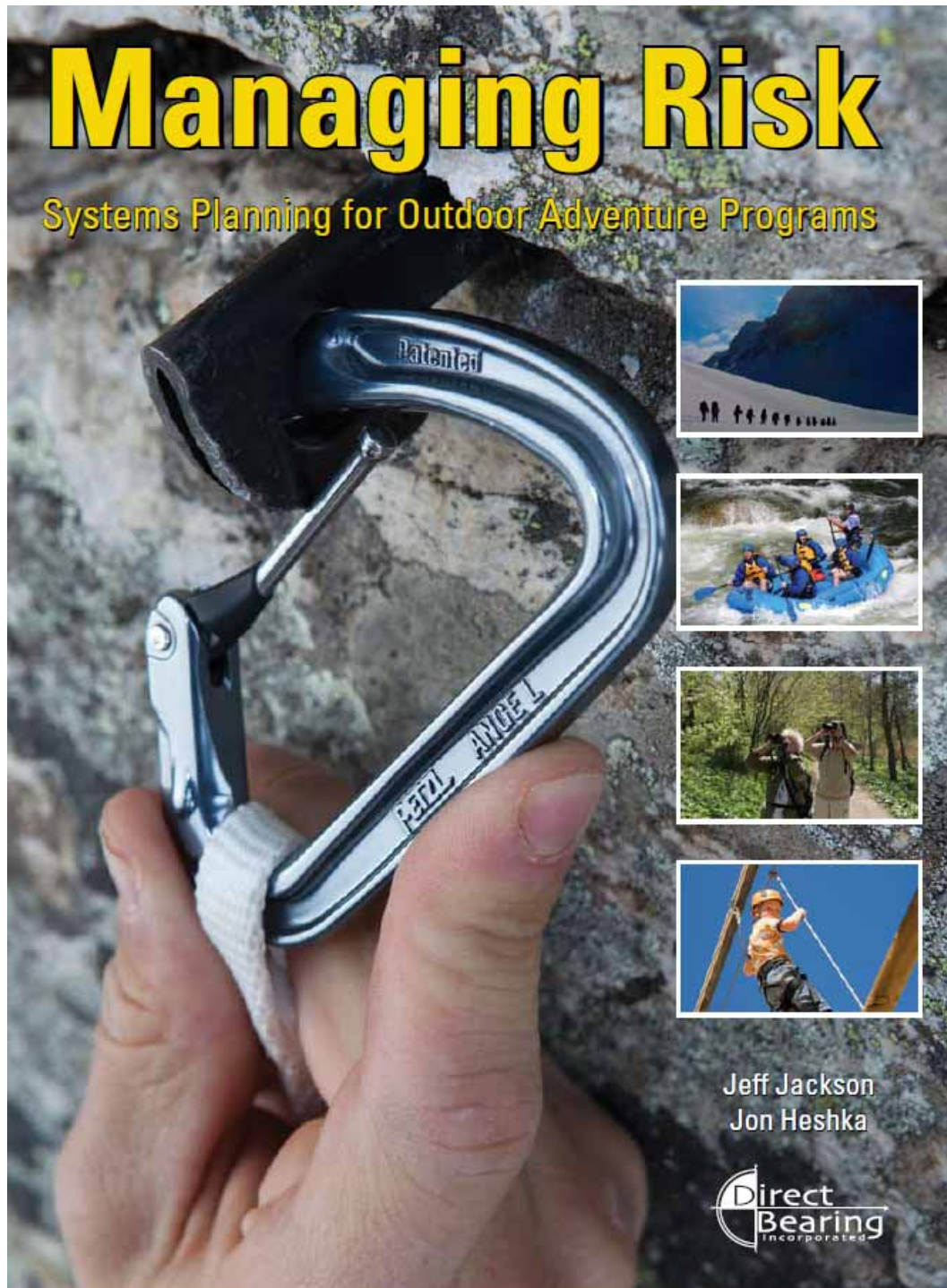
- Standards & Protocols
- Documentation!!!
- Reasonable and foreseeable





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Book info:

TheManagingRiskBook.com

Adventure
Risk Report

AdventureRiskReport.blogspot.com

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Defenses against Negligence

1. No duty, breach, injury or prox. cause
2. Trespass to Property Act
3. Occupier's Liability Act – defines Duty of Care
 - Section 4 specifically addresses recreational trails.
 - Provides that persons entering such premises shall be deemed to have *willingly assumed all risks*.
 - In these cases, the occupier only owes the person entering the trail *a duty to not create a danger with the deliberate intent* of doing them harm and to not act with reckless disregard of their presence.
 - **If user is paying to access the trail limited duty may not apply*

Defenses against Negligence

1. voluntary assumption of risk

- by choosing to participate, accepting inherent risk in activity

2. contributory negligence

- plaintiff's actions partly to blame

3. waiver form

- 'intentional release of known legal right'
- Loychuk v. Cougar Mountain Adventures Ltd (2011)

4. inherent risk