

CIVIL LIABILITY OF MOUNTAINEERING CLUBS

**A Lecture by: Paul Debney LLB (Hons), Partner
Cartwright & Lewis Solicitors
100 Hagley Road
Edgbaston
Birmingham
B16 8LT**

CONTENTS

1. INTRODUCTION

2. NEGLIGENCE AND THE INDIVIDUAL

3. NEGLIGENCE AND THE CLUB:

- a. Hut Custodians
- b. Equipment Officer
- c. Meets Officer and Group Leaders

4. FACTORS TENDING TO DEFEAT LIABILITY:

- a. Contributory negligence
- b. Causation
- c. Foreseeability
- d. Volenti

5. THE ROLE OF INSURANCE

6. THE LIABILITY OF UNIVERSITIES

INTRODUCTION

1.1 SCOPE OF THIS PAPER

This paper intends to describe:

- 1.1.1 What duty the tort of negligence places on all individuals all of the time and why.
- 1.1.2 How the nature and scope of that duty can be modified by being a member of a Mountaineering Club.
- 1.1.3 The Defences that exist in relation to liability claims.
- 1.1.4 The importance of insurance.

1.2 The “law” dealt with is civil law as it applies to England and Wales only. Scotland has a different, although similar, system. This paper does not deal with criminal law, nor does it deal with the Adventure Activities Licensing Regulations 1996. Clubs should be aware that provision of adventure facilities to the under 18's for payment may require the club to be licensed and should seek advice.

1.3 Of necessity, this paper offers only a brief overview of the law as of October 1996, it can only be used as a general guideline. It is not intended to be a definitive statement and must not be taken as such. In the event of specific difficulties or queries I am happy to offer advice. Please contact me at my office.

1.4 This paper refers throughout to the BMC Club Guidance Notes, referred to as the ‘club notes’.

2. NEGLIGENCE AND THE INDIVIDUAL

- 2.1 As individuals we all owe a duty of care to our neighbours not to cause them injury by our negligent acts or omissions. Your neighbours are those people who, if you thought about it are likely to be injured by such acts or omissions. The law does not require you to guarantee the safety of your neighbours, merely that your actions are those of a 'reasonable person' with your particular skills and qualifications.
- 2.2 Part of the attraction of mountaineering in its widest sense is the lack of man's interference or control. It is not surprising that legal liability is the last thing on most mountaineers minds, (especially lawyers!), but these rules apply nevertheless. It is important to realise that, because then you start to see that being part of a mountaineering club does not actually alter the position a great deal.
- 2.3 It also helps to understand what the tort of negligence hopes to achieve and why the rule exists. The tort of negligence is a loss distribution system, a method of social insurance. It is distinct from the criminal law, which is punitive. Common law is compensatory in nature. Being on the wrong end of a negligence claim should have no great stigma attached to it. It is part of the risk of living in society. Car drivers are frequently involved in such proceedings, and in that context at least such proceedings are a normal everyday occurrence.
- 2.4 It is also important to realise that there is no positive duty to act, unless your own negligence has created a dangerous situation. Thus if you come across an individual in the hills who is clearly suffering from hypothermia, there is no duty upon you to give assistance, effect a rescue or even to tell anyone about it. Obviously one would assist and the level of care required would vary according to the extent of the medical knowledge or qualification of the "Good Samaritan".
- 2.5 When we talk about loss in mountaineering terms we are probably talking of physical injury and financial losses flowing therefrom.

3. NEGLIGENCE AND CLUBS

- 3.1 The important question to ask is, how does a member of a club modify a persons individual duty to others?
- 3.2 In the context of the negligence being a member of a club does not of itself alter the fact that every individual is still responsible for his or her own actions. Thus, if any club member is negligent then any action lies against that individual club member and not against the club itself.
- 3.3 The 'club notes' mirror this concept, they talk in the liability section at page 21 of 'individuals'. There is no delegation of duty to the club, every individual within the club is responsible for their own actions in the ordinary way.
- 3.4 A club is simply a group of people with a common interest or objective. An organisation that can pool the resources of its members and that is run by its members for the benefit of them. Relationships between members themselves are contractual and arise from the clubs particular constitution.
- 3.5 Although being an ordinary member of a club does not in itself cause additional responsibilities per se there are situations that will arise where certain members within a club will take on additional responsibilities. There are two main ways in which this might happen. Firstly, by being elected to the committee with a specific function to undertake which relates to safety and secondly by becoming the nominal or actual leader to a group of club members.
- 3.6 I would like to examine each of these areas in a little detail. To my knowledge the only reported case on the liability of a club officer to a member of the same club, is a first instance decision from 1950, which is not binding and to that extent the law is uncertain. That case said that ordinarily the committee members of a club owe no additional duty of care towards the club's members, since there is no real distinction between them, but it may be that an officer of a club such as a steward is personally liable to negligence to a member.
- 3.7 The court went on to explain that if an officer is appointed by all the members (either at a AGM or by the committee acting on behalf of the members) he may be deemed to be the agent of each member to carry out with all reasonable care those things that he is required to do. In this respect he owes a duty to each member to take reasonable care and to carry out his duties without negligence.

- 3.8 In that particular case the steward was responsible for the safety of the club premises. The exit to the premises was foreseeably dangerous and a member fell sustaining injury. It was held that the steward had been negligent in failing to ensure the reasonable safety of members and was liable to the injured member. There is effectively a legal duty upon the officers of the club to discharge their specific duties without negligence.
- 3.9 This in turn leads to the outline constitution and rules set out at page 35 to 37 of the 'club notes'. Paragraph 5 refers to the officers of the club and those with specific relevant duties would seem to be the Hut Custodian and Meets and Equipment Officers.
- 3.10 Holding one of these officers will increase the number of persons who are the officers neighbours and place additional duties upon the individual they must discharge without negligence.
- 3.11 The Hut Officers and Equipment Officers will owe duties in respect of specific identifiable items and I will deal with them first of all. The Meets Officer and Group Leaders owe a more general and arguably wider duty and I will deal with those later and together.
- 3.12 If you are the Hut Custodian your neighbours will include all lawful visitors and even trespassers at the premises owned by or in the physical occupation of the club. Your duty is to ensure the reasonable safety of the persons coming on to that property. You are not personally guaranteeing their safety but if foreseeably dangerous defects, such as rotten floor boards come to your attention (or ought to have come to your attention) either personally or via a complaint then you would have to take reasonable steps. Those steps would undoubtedly include the cordoning off of the affected area, the provision of warning either by notice or signs to people who might come in to the area and possibly even shutting down the hut until repairs can be effected and the area made safe.
- 3.13 A proper system would require a regular inspection of the property by the Hut Custodian, hopefully an inspection which is recorded in writing. It would probably also require a proper system for reporting defects and ensuring that a stock of essential safety items, such as light bulbs and perhaps candles are maintained at the club with all members being aware of where the safety items are. Depending upon the nature of the property it may also include putting the

put into a reasonable safe condition. Here the extent of your duty is what is reasonable having regards to the likelihood of any injury occurring, the severity of any likely injury and the cost of avoiding the same.

3.14 The Equipment Officer will owe duty to everyone using the clubs equipment. At common law the duty is to take reasonable steps to ensure that the equipment is reasonably safe for the use of the members. In addition to that common law duty the Equipment Officer would also be wise to be able to comply with the Consumer Protection Act of 1987. Section 2 of that Act effectively says that the supplier of equipment, (and for the purposes of the act that will include the Equipment Officer), may be liable for damage caused by a defect in equipment if the victim asks the officer to name the producer or importer of the equipment or the person who supplied the club and the Equipment Officer failed to comply within a reasonable time at all.

3.15 At this stage I refer to the club notes at page 23. This states that for pooled equipment:

3.15.1 It is important for a club to make it clear that users of pooled equipment do so at their own risk.

3.15.2 It is recommended that records are kept concerning the age and usage of pooled equipment, and notes kept of any inspections made.

3.16 So far as Meets Officers and Group Leaders are concerned, the general duties applying to them are similar and I propose to deal with them together as previously stated.

3.17 The Meets Officer should hopefully be a readily identifiable person but Group Leaders are not always so.

3.18 At one extreme a group of children on a school outing, accompanied by a teacher has a clear leader. At the other extreme a small team of identically qualified and experienced mountaineers may not. Refer to the section "Leadership and Duty of Care" in the club notes.

3.19 In any group of people of mixed experience and skill, the most experienced and skilled are at risk of being found to be the actual or imputed Group Leader or Leaders. However, it would be very difficult to identify an individual leader if

there were several experienced people present none of whom were actually called the Group Leader and who took decisions corporately.

3.20 It would of course be for the Meets Officer to ensure that there are a suitable number of suitably experienced persons accompanying an inexperienced group.

3.21 At this stage I refer to pages 9 and 10 of the club notes and the sections entitled “Risk and Responsibility” and “Leadership and Duty of Care”. This gives helpful advice such as:

3.21.1 “Through a combination of personal experience and guidance from others, a novice becomes a competent climber or mountaineer.”

3.21.2 “Before joining a club, new outdoor users may gain experience in a variety of ways, sometimes in situations where someone else is partly responsible for their safety.”

3.21.3 “It’s important to state exactly what a club is providing, and to make clear that individuals have responsibility for themselves.”

3.21.4 “If a club member decides to organise a tripit could be on the basis that he or she is simply sharing his or her knowledge, and is in no way qualified or regarded by the club as an expert.”

3.21.5 “Someone may elect to be seen as the person in charge, and would be advised to read the section, *Leadership and Duty of Care*.”

3.21.6 “The main question over suitability to lead is that the objective is within the capability of the leader, and the physical and mental capability of the group.”

3.22 As you will see being an ordinary member of a mountaineering club does not generally affect your duties to others. Being an officer of the club with an identifiable safety function or a leader of a group may mean that you take on additional responsibilities and that you owe a duty of care to a wider group of people.

3.23 The next question which will undoubtedly be in the club members minds is what as an individual do I have to do to comply with the duty upon me. This will depend on a variety of factors which are helpfully set out in the club notes on pages 21 and 22.

3.24 Every individual has to assess all of the relevant factors. For example the experience, expertise and health of the persons involved. The difficulty, risk and

dangers of the planned activity. The likelihood of an injury occurring and the seriousness of any injury likely to occur. The suitability and indeed availability of equipment required.

- 3.25 When considering whether one's behaviour has been proper or otherwise, a Court will, as previously stated, look at the reasonable person with your particular skill and experience. If a Court does have to assess a decision that you have taken they will assess it in the light of the experience and skills which you possess and the knowledge which you have at the time when the decision was actually taken
- 3.26 It is also important to remember that if a club member is injured whilst on a club activity that does not necessarily mean that there has been any negligence and even if there has it does not necessarily mean there will be a claim.

4. FACTORS TENDING TO DEFEAT LIABILITY

- 4.1 Having considered the individual's general duty of care, we need to look at the factors which will tend to defeat liability claims.
- 4.2 These are set out in the first paragraph of page 22 of the club notes and listed as:
 - 4.2.1 Foreseeability.
 - 4.2.2 Volenti non fit injuria.
 - 4.2.3 Contributory negligence.
 - 4.2.4 Causation.
- 4.3 Contributory negligence is the odd one out being a partial rather than a full defence as the other three can be. Here, if the injured party has acted unreasonably and thereby either contributed to the occurrence of the incident or the extent of the injury then their overall damages may be reduced by the Court to reflect the extent of their own negligence.
- 4.4 For example, if a climber threw an item of equipment from the top of the crag without being sure that there was no-one below and it struck someone at the base of the crag injuring them, then the climber who threw it would be liable in negligence. If the person at the bottom of the crag was not wearing a helmet then a Court might decide that they have contributed to the occurrence of their injury if it came to the conclusion that they may not have been injured had they been wearing the helmet. A Court might reduce their total award for damages.
- 4.5 As far as causation is concerned, the breach of duty must cause the injury complained of. For example if a Group Leader negligently navigated so that his group were lost and one of them tripped over a rock breaking their leg then arguably the causative negligence was that of the person who fell over the rock. The fact that the leader had misled the group would be unlikely to be held responsible for the subsequent trip.
- 4.6 As far as foreseeability is concerned, the risk of injury must be one which should have been foreseeable by the person who is in breach of duty given the nature of this particular defence it is obviously difficult to give an example!

- 4.7 Finally, I turn the concept of *volenti non fit injuria* which essentially says that where an injured party has voluntarily assumed the risk of injury as the result of negligence then, if that risk materialises, they will be unable to recover damages.
- 4.8 Again, we need to look at the outline constitution and paragraph 3.2 which contains the BMC participation statement. This says “*membership of the club shall only be open to individuals who recognise that climbing and mountaineering are activities with a danger of personal injury or death. Members shall be aware of and accept the risk and agree to be responsible for their own actions and involvement.*”
- 4.9 The Courts have said that “*The consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk and requires on the part of the Plaintiff, at the time at which he gives his consent, full knowledge of the nature and extent of the risk that he ran.*”
- 4.10 In the case of *Riggs v Shelton* it was held that where a participant in a pastime is injured by the act or omission of another participant the existence and extent of the duty of care are to be determined in the light of all the circumstances including the risks which may reasonably be inferred to have been accepted by the very fact of participation.
- 4.11 Important, the Court also said that “*The rules of the game are a relevant but not a conclusive factor.*” This probably includes guidance from governing or advisory bodies and any club affiliated to the BMC should adopt the club notes as a minimum standard and ensure compliance, because when asking whether as an individual has discharge their duty a Court might well refer to this document.
- 4.12 By way of example in the case of *King v Redlich (1986, Court of Appeal [British Columbia])* the plaintiff suffered a severe head injury during practise prior to an ice hockey match whilst not wearing his protective helmet. The facts were that as the plaintiff was skating out from behind goal the Defendant, who had delayed his shot momentarily to enable the Plaintiff to get clear, took a practise shot at goal. Unfortunately, the puck hit the post and ricocheted, striking the plaintiff. The Court held that the plaintiff should be deemed to have accepted the risk of injury in all of the circumstance.

5. THE ROLE OF THE INSURANCE

- 5.1 There is no doubt that in general this country is becoming more litigation conscious in all sorts of areas including sport.
- 5.2 Further, this is an uncertain area and even if you follow all of the guidelines set down by the BMC it is still possible that a Court would find that negligence was proven.
- 5.3 It is therefore imperative that members of mountaineering clubs are insured. Clubs that are affiliated to the BMC have the benefit of a very comprehensive policy providing cover of up to £2 million per claim with no excess or territorial limits. In addition, as a club member your actual premium is very much lower than the normal individual rate. For clubs that are not affiliated to the BCM I cannot stress enough how important it is that you check your insurance cover and if necessary upgrade it to a level at least as good as the BMC's own policy.
- 5.4 Finally I would conclude by saying:
 - 5.4.1 Be responsible;
 - 5.4.2 Adopt the guidance of governing bodies such as the BMC;
 - 5.4.3 Be insured; and most of all enjoy the sport!

6. THE LIABILITY OF UNIVERSITIES

The interrelationships between Universities, Students Unions, Clubs and members of them are extremely complex and unclear from a legal point of view.

In any given situation the relationship between those involved and the existence, nature and any extent of any duty of care owed will depend upon a close examination of all the circumstances including documentary evidence as diverse as the University Brochure/Prospectus, the constitution of the University and the constitution and/or Articles of Association of the Students Union and/or Club itself.

What is clear is that the more control a University attempts to exercise over its clubs and the way they operate, the more likely it is to be found to have adopted a duty of care and therefore be responsible in whole or in part for damage caused by any breach.

The fact that clubs are broadly financed by the University/Student Union is only one of the factors which needs to be considered.

Until there is clear law in this area then only the broadest of guidelines can be formulated. A middle line of involvement by Universities would seem the most sensible course at the current time. I would recommend that Universities ensure their clubs are affiliated and run in accordance with governing, advisory and representative organisation's guidelines. In the case of Mountaineering Clubs that means affiliation to the BMC and the adoption of their standards for clubs.

This has two important outcomes, firstly a club should adopt the "Club Guidance Notes" which make recommendations based on a wide fund of skill, knowledge and experience. Secondly, the club has the benefit of the BMC's extensive insurance cover.

If a University does more, then they run the risk of liability to club members if, for example, the Students Union Safety Rep is responsible for checking climbing safety equipment whilst having limited knowledge in relation to its use. The worst position for a University to be in would be one where individuals with little or no specific knowledge and experience of mountaineering are taking safety decisions.

Conversely, the best position is one where those with the most risk specific skills take responsibility and ensure clubs are run in as safe as manner as possible.

In the event of specific enquiries or problems please contact Paul Debney at the address mentioned previously.