



Risk, Responsibility, Duty of Care and Liability Club Guidelines

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Risk, Responsibility, Duty of Care and Liability

1. Introduction

Fear of litigation has become very high profile over the last few years. Instances of litigation have been rare and personal responsibility has been recognised and balanced within many judgements, especially where adults are concerned.

Ensuring the use of the BMC participation statement and making sure that people are aware of it (for example, by including it on club application-for-membership forms) will help to perpetuate the ethos of personal responsibility and acceptance of risk which has been traditional within UK mountaineering.

Within that context, we also have to remember that we owe a duty of care to other people in many aspects of our lives.

In mountaineering, using common sense will go a long way to helping us fulfil that duty of care to others. This is especially the case in situations where members of any kind (club or individual) are voluntarily taking responsibility for novices or people with less experience than themselves.

- ✓ If you take on the role of introducing/mentoring novice mountaineers, make sure that the objective is well within your own technical capabilities and experience
- ✓ Make sure that the objective could reasonably be expected to be within the mental and physical capacities of the group

2. Detail

It is not just important that we take actions to reduce the risk of litigation against ourselves. We should also be taking actions to reduce in the first place the possibility of contributing any harm to others.

'Climbing and mountaineering are activities with a danger of personal injury or death', individuals should 'be responsible for their own actions and involvement'.

Taken from the BMC Participation Statement, this quote reflects the ethos within which hill walking, climbing and mountaineering have developed in the British Isles.

The BMC recognises the value of training and qualifications, it helped set up the Mountain Leader Training Board in 1964 and works closely with Mountain Leader Training bodies in England, Wales and Northern Ireland.

However, unlike some other sports which require that novices in clubs are *coached* by members who have qualifications appropriate to the level of activity, the BMC does not require volunteer mentors in a club environment to hold qualifications.

Clubs are not providers of hill walking, mountaineering or climbing courses. They are usually comprised of groups of people coming together at many different

levels of skill and experience. But many people join all types of amateur sports clubs wanting to learn. All of us were novices at some point and through a combination of personal experience and guidance from others, a novice becomes a competent climber or mountaineer. The BMC supports the principle that clubs can provide a framework for people to share their skills and learn from each other.

As part of this, the BMC has a duty to ensure that its members are aware of their legal and moral obligations. This includes publishing accepted good practice.

3. Duty of Care

When looking at the issues of risk, responsibility, duty of care and liability, there seems at first to be two apparently conflicting principles in English law:

Volenti non fit injuria – suggests that an adult taking part willingly in an activity, aware of the risks and accepting them, can't later seek compensation for an injury suffered as a result of participation.

The *neighbour test* – suggests that we all owe a duty of care to other people. This means that anyone involved in climbing and mountaineering should not only recognise the danger of personal injury and death to themselves but also that their actions or inactions may affect other climbers and mountaineers and possibly others passing by or living nearby. The standard of care must be that of the "reasonable man".

But are the two necessarily conflicting? When driving a car the driver owes his or her passengers and other road users a duty of care to act in a way which follows the conventions of the road. If a passenger gets into a car and the driver causes them injury by swerving all over the road and crashing into oncoming vehicles, can the driver argue that the passenger knowingly accepted the risk of injury by getting into the car in the first place?

The answer of course is no. This is because it is not possible to waive one's obligation *vis a vis* duty of care. A driver owes passengers and other road users the duty of care inherent in following the conventions of the Highway Code.

However, lack of foreseeability IS a defence against negligence. If an "unforeseeable" event happens, it is an accident (though this might not be usable as an argument if a similar accident has happened before).

So, when we partake in a risk activity, if we are aware of the risk, we accept that accidents can happen, but we are also expected not to act in a manner which a reasonable person could conclude puts other people recklessly at risk.

A competent belayer owes the climber a duty of care to belay appropriately and not recklessly endanger the climber's well being. This is different from an incompetent belayer, who may cause unforeseeable injury through ignorance, rather than negligence.

By following a few simple procedures, individuals, clubs and club members can reduce the likelihood of a negligent act arising in the first place and help ensure

that the traditional principles of personal responsibility and sound mountaineering judgement are maintained.

These procedures are especially important where the involvement of under 18s is concerned.

4. What Duty of Care do you have?

Everyone has a Duty of Care not to cause harm to others by their acts or omissions - when driving a car, lighting a bonfire – or when mountaineering.

Peer Groups

In situations where individuals of comparable experience climb or walk together (in a club situation or otherwise) there is often no discernable 'leader'.

Each individual is capable of making their own, informed decisions and each will owe the other an equal Duty of Care, but nothing more.

Different Levels of Experience

At times, individuals will find themselves providing informal advice, or more formal mentoring, to those less experienced than themselves. This could include introducing a newcomer to the sport, or taking a group to the mountains.

Less experienced adult group members are still capable (to a degree) of making their own informed decisions (appropriate to their knowledge), such as accepting reasonable responsibility for the situation they are in and will owe a reasonable duty of care to others in the group.

But in this situation the duty of care applies proportionally and the more experienced persons are expected to act within the context of their own knowledge or experience.

Within this type of situation, those with more experience have a duty to choose reasonable objectives and ensure that those with less experience are aware of the hazards and risks that may arise.

Put simply, the main considerations are that the objective should be demonstrably within the capability of the experienced member(s) and reasonably within the expected physical and mental capacity of the whole group.

The duty of care will be higher where under 18s are concerned.

In a mentoring situation make sure you follow these simple guidelines:

- ✓ To sustain the traditional principle of personal responsibility (*volenti non fit injuria*) make sure that members are aware of and accept the risks of mountaineering. Always include the BMC participation statement in club literature
- ✓ It is sensible for clubs to include a consent form with a BMC participation statement in application forms for the club. – (signed by parents if the club allows under 18 membership)
- ✓ Ensure that every person involved is aware (and accepts for themselves) that those perceived of as 'in charge', or even just leading a walk, are not necessarily qualified, do not need to be qualified, are not regarded by the club nor regard themselves as 'technical experts', but are amateur climbers, walkers or mountaineers with some experience who are happy to impart their knowledge and that any advice given be viewed with this in mind by the recipient.
- ✓ Plan activities which are, with reason, within your capabilities and could reasonably be expected to be within the capabilities of the group.

(In other words, using common sense goes a long way to fulfilling your duty of care)

More experienced individuals with groups of people less experienced than themselves in a club capacity should:

- ✓ Have an awareness of foreseeable hazards.
- ✓ Make those hazards clear to those involved.
- ✓ Manage those risks appropriately.
- ✓ Respond appropriately to changing situations.
- ✓ Be aware of appropriate actions to take if emergency situations do occur.

(In other words, only undertaking activities when you have sufficient experience and using that experience wisely goes a long way to fulfilling your duty of care)

5. Understanding Liability

The following is not a formal legal opinion, but is a summary of the BMC understanding, with advice from the UIAA lawyer, of issues relating to liability.

Individuals in any sport face a risk of injury as part of normal participation in that sport. However, if a person has been injured because of another person's negligence, and that negligence can be proved, he or she may seek financial compensation under civil law.

To establish that there has been negligence three factors must exist:

- (i) a duty of care must be owed in the first place
- (ii) there must have been a breach of that duty of care
- (iii) actual damage must have resulted from that breach of duty of care.

In law, under the "neighbour test", a duty of care is owed to persons who are so closely and directly affected by an individual's acts that the individual ought reasonably to have had them in contemplation as being affected when directing their mind to the acts or omissions that are called into question. Anyone involved in climbing and mountaineering should not only recognise the danger of personal injury and death to themselves but also that their actions or inactions may affect other climbers and mountaineers and possibly others passing by or living nearby.

When considering the nature of a particular duty of care the following factors should be considered:

- (i) the age of the persons concerned (e.g. with minors, a duty to take the care one would expect from reasonably prudent parents)
- (ii) the experience and expertise, or any other relevant characteristics, of the persons concerned (e.g. greater care would be expected climbing with a beginner than with an expert)
- (iii) the dangers of the particular activity
- (iv) the risks of the injury occurring
- (v) the foreseeability of the particular accident occurring
- (vi) the suitability of the equipment or premises.

A very clear duty of care exists between a qualified mountain guide or climbing instructor and those that they are professionally leading or teaching. Guides and instructors engaged in such work would normally have professional negligence or liability insurance. Amateur climbers must be made aware of and accept the risks of participation and be instructed to read the BMC participation statement. There are often situations where a group contains individuals with different levels of experience.

Where minors (those under 18 years of age) are involved in club activities parental consent must be obtained. Adult members of the club who accept responsibility for minors should be aware that they have the same duty of care as a reasonably prudent parent would have. Read the Child Protection Club Guidelines.

Expert legal advice would be necessary to defend any liability claim. However, the following defences are available in an action for negligence:

- (i) that the particular accident could not be foreseen
- (ii) volenti non fit injuria (a willing person cannot be injured in law)
- (iii) contributory negligence by the injured party
- (iv) a break in the chain of causation.

The Occupiers' Liability Act (1957) sets out the responsibilities of an owner or occupier to take care of the land so that visitors will be reasonably safe. This applies in particular, for example, to buildings, gates, roadways, etc. and any concealed dangers such as mineshafts or similar. However, the Act does not impose any obligation on an owner or occupier to a visitor who willingly accepts risks (*volenti non fit injuria*) on natural features such as cliffs, mountains, steep paths or slopes. The BMC and Country Landowners Association (CLA) has jointly published a leaflet with more information on occupiers' liability that is available from both the BMC and CLA.

The Occupiers' Liability Act also applies to climbing walls where wall managers have a responsibility to ensure that individuals are not exposed to hidden dangers or traps. Further information on legal responsibilities and climbing walls is contained in the joint BMC and Sports Council Climbing Wall Manual.