

# RISK, FREEDOM

WHO'S TO BLAME?



Society has become increasingly risk averse and your freedom is under attack. For example, risk and perceived risk has been virtually removed from children's play areas to the point where they have become regulated padded gardens in which young people can no longer learn about risk taking and the consequence of making a mistake.

**F**ears about liability are thus preventing young people from learning about risk and the real law of gravity. Whatever your age, there is no getting away from the simple fact that climbing, hill walking and mountaineering are dangerous activities with a risk of personal injury or death. The freedom to face, assess and manage this risk, is one of the factors that attracts people to the sport.

As participants we assess and mitigate the risks, for example, by carrying adequate clothing and proper navigation equipment to avoid getting lost and hypothermic, or by using ropes or bouldering mats to reduce the consequences of a fall. We recognise and accept these risks every time we go to the hills or climb. Essentially we are performing a risk assessment before and during all our activities. In performing such an assessment we are analysing the risks and we take action according to the outcome of the assessment – in other words, we take the responsibility for our own actions based on an assessment of the likely dangers and outcomes of our activity. Sounds good, but what about the law and how does it affect our recreation?

### Our sport is not above the law

First, we have to remember that sport is not above the law and therefore neither are climbers or walkers. Secondly, the law is not static but changes to reflect society. For example, at one time it was not illegal to drive under the influence of alcohol, you did not need to wear a seat belt, and motorcyclists did not have to wear helmets; but society changed its view and so did the law. Hence, as society re-evaluates acceptable risk it seems we increasingly assume that somebody is to blame when an accident occurs. We are even encouraged by claims management organisations in their adverts telling us that "where there's blame there's a claim". Obviously individuals need to be protected against the negligent acts of others, and when injury results, should be in some cases compensated. However, the culture of 'an accident equals blame then claim' is completely contrary to the ethos of personal responsibility and self reliance that would seem to be normal characteristics of a healthy society.

### Whose fault is it?

Another point to remember about the law is that it is about fault, about the consequences of actions (this is called the chain of causation) and if your actions have led to actual

(LEFT) Breaking the rules on the Isle of Wight, Credit: Ian Butler. (RIGHT) Warning sign, Skaha, Canada. Do we need signs like this all over our countryside?



damage to another it is possible that you are at fault and then you may be liable. Luckily it is not as simple as that and there are all sorts of questions to be satisfied before you start to panic. For a successful claim to be made for negligence the claimant has to demonstrate firstly that a duty of care was owed, that the duty of care has been breached, and that actual damage or loss have been sustained as a result of that breach of duty of care. One of the first defences is the BMC Participation Statement; an experienced climber would find it hard to show that he/she is unaware of the normal risks associated with outdoor recreation.

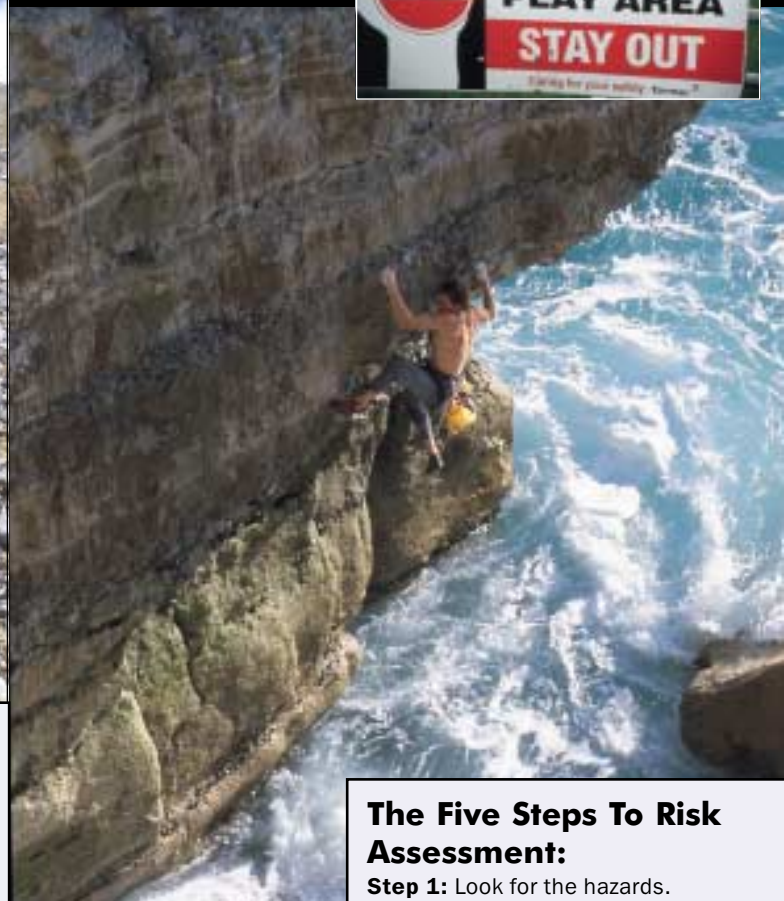
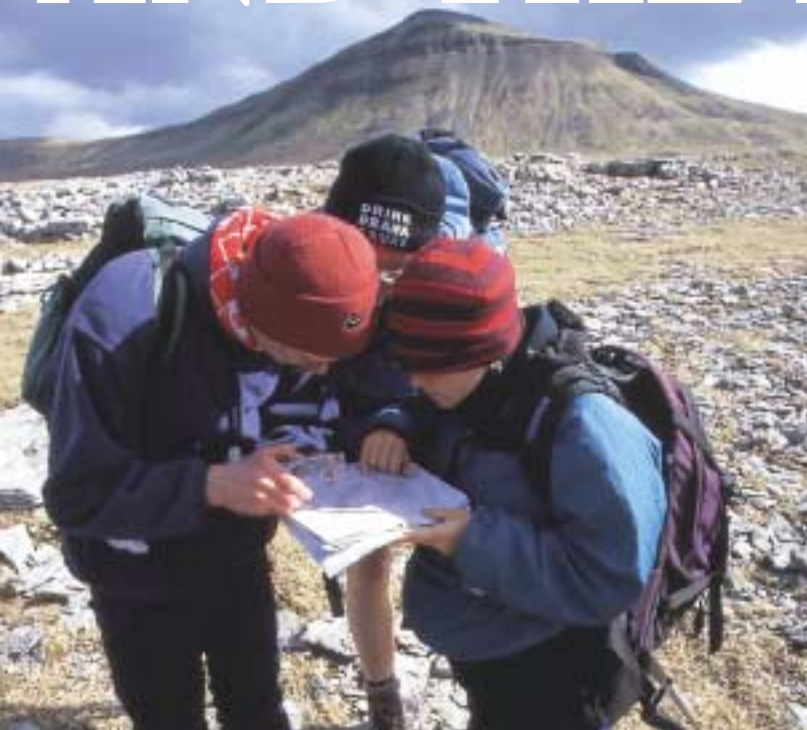
### The standard of care

The standard of care owed to a novice is obviously higher than to an experienced participant. Hence, it is wise to ensure that a novice has been made fully aware of the relevant risks involved. Climbing walls, outdoor centres and ski slopes might achieve this by an introductory session outlining

### The Duty of Care

For a person to be liable, they've got to breach a duty of care that they owe to the injured person, and the damage must result from that breach of duty of care. As a climber you owe a duty of care to others who are so closely and directly affected by your actions, that you ought reasonably to have them in mind as being affected by those actions. So when belaying your partner, you owe a duty of care to he or she because they are closely and directly affected by your actions to such an extent that it is quite reasonable to have them in mind when you are belaying. This means as a belayer you must be taking reasonable care, but it does not mean there has been negligence or you are liable if a mistake and accident occurs.

# AND THE LAW



## The Standard of Care

The crucial part of all this is what that standard of care will be. In the context of a group (two or more climbers), the standard of care owed to other(s) will be higher for the more experienced member. The practical result of this is fairly obvious, whereas you would not routinely check your experienced partner's harness buckle and knot, you would be expected to do so for a novice who has only recently learned 'the ropes'. There are a number of other factors that must be taken into account before deciding what the standard of care should be, including the dangers of the particular activity (climbing, etc. are dangerous activities and a responsible adult would be expected to be aware of the potential for injury), the foreseeability of the accident (e.g. getting caught out by the weather in Britain).

the specific risks involved. In America it is becoming the norm that documentation is kept that shows that participants are aware of the normal risks of participation and are willing participants (in fact it is being found that activities where risk recognition is being verified are becoming more popular).

## A willing person cannot be injured

Another defence that is linked to the BMC Participation Statement is the principle of 'volenti non fit injuria' literally a willing man cannot be injured – this is a very old common law principle. It was 'passed' as a defence by the Occupiers Liability Act (1957) which does not impose any obligation on a landowner or occupier to a visitor who willingly accepts risks (see [www.thebmc.co.uk/outdoor/access/ol.htm](http://www.thebmc.co.uk/outdoor/access/ol.htm) for further details). The Occupiers Liability Act was amended by the Countryside and Rights of Way Act (2000) to remove occupiers' and owners' liability for anyone injured as a consequence of the natural features of the landscape such as falling down a cliff, pot hole or water fall. For further details on the CRoW Act see [www.countryside.gov.uk/access](http://www.countryside.gov.uk/access) or for Wales [www.ccw.gov.uk](http://www.ccw.gov.uk). The situation in Scotland is currently being reviewed by the Scottish Parliament with proposed new legislation.

## The chain of causation

The chain of causation means that the loss or injury has been caused by the act or omission in question, rather than by something else. In a negligence case, the negligent act must have caused the injury. If there is some other factor,

such as the action of another person (or the person who was injured), which caused the injury then the chain of causation between the alleged negligent act and the injury is broken and the person who committed the alleged negligent act will not be responsible for the injury.

For example: A is belaying T who is leading a bolt protected climb. T falls off a few feet above a bolt but A is not holding the rope but talking to G and allows a further 40 feet of rope to run out before the rope becomes tangled around a rock and arrests the fall. It means that T falls 50 feet instead of 10 feet. T has not tied his harness properly and when his fall is stopped it comes undone and he falls out of it, a further 20 feet onto the ground and breaks his leg and G's arm. Expert evidence shows that the harness would have come undone from the force of a 10 feet fall and that T would have fallen 10 feet in any event if A had been acting as a reasonable belayer. A is not liable for T and G's injuries as the chain of causation (between the negligent belaying and the injuries) has been broken by T's failure to do up his harness properly. But remember, each case depends on its particular facts.

## The Five Steps To Risk Assessment:

- Step 1:** Look for the hazards.
- Step 2:** Decide who might be harmed and how.
- Step 3:** Evaluate the risks and decide whether the existing precautions are adequate or whether more should be done.
- Step 4:** Record your findings.
- Step 5:** Review your assessment and revise if necessary.

Hazard means anything that can cause harm (e.g. rockfall or bad weather) Risk is the chance that somebody will be harmed by the hazard (e.g. that the rockfall will hit you or that the bad weather will cause hypothermia).

The process is quite simple and can be applied to anything from the simple day out on the hills to running an outdoor centre, although for a day out on the hills a mental assessment would suffice whereas for running an Outdoor Centre a formal written assessment would be required.

*From '5 Steps to Risk Assessment' HSE.*

Who's taking more risk here? (LEFT) The hill-walking leader, Credit: Alex Ekins, or (RIGHT) Martin Crocker making the first ascent of an E7 6c shallow water solo, Credit: Carl Ryan.



**Contributory negligence**

Contributory negligence is another factor that can reduce the liability. This concept is fairly simple, an example of which might be a member of a novice walking group forgetting to pack essential supplies despite being informed that they were required. Any negligence by the group leader may then be reduced depending upon the circumstances. Another example might be of a climber who negligently dislodges rock or drops equipment onto the belayer who, although aware of the possibility of rockfall is not wearing the helmet that is in his/her rucksack. If the evidence was that if the belayer had worn the helmet then no injury would have been sustained then the belayer and the climber are each responsible and there would be 25-50% contributory negligence upon the belayer.

One of the difficulties in either bringing or defending a case for negligence is that climbing, hill walking and mountaineering do not have a body of rules that can easily be referred to. This is where expert witnesses come into the equation. In litigation it is up to each side to find an experienced, and respected person to provide expert advice. The legal system in the UK is still adversarial but recent changes have been made to reduce the use of court time and therefore the cost of bringing or defending cases. Increasingly there is a body of written rules and experts are requested by the court to verify and interpret those rules and apply them to the particular circumstances of the case in question. The experts will agree upon a list of points and then argue over the remaining issues. It might be that one expert can prove outright that their case is the strongest, or it might be that it transpires that there is more than one way to view the situation in which case the negligence claim may fail.

**The Mountain Guide**

There have been a number of interesting cases that have highlighted liability issues in the world of climbing and mountaineering and they each demonstrate different aspects of the complicated issue of liability. One of the most famous cases in recent years was the one brought against the mountain guide 'Smiler' Cuthbertson. The details of the case were very complicated with expert witnesses being employed by both sides. Smiler had, in the interests of expediency, taken the decision to only use one ice screw as a belay. When Smiler was 20-30m up the next pitch the ice gave way and the resulting fall ripped the belay and killed the client.

The fact that Smiler was with a client substantially increased the duty and standard of care that was expected. Similar circumstances involving partners of equal experience might have resulted in a different verdict due to the lower standard of care expected. However the judgement appears to hang upon a statement made by Smiler's expert witness under cross examination. In answer to a question about whether or not the belay would have failed if two ice-screws had been used he indicated that it would not have failed. It is difficult to understand how a definitive answer could have been given to that question, but it was and the judge relied upon it.

(LEFT) A young Richie Patterson attempting Cooks Leap, from the Valkyrie Pinnacle to the main cliff, Froggatt. Credit: Alderson. (RIGHT) The media always like an incident.

**The Hill walker**

Another case has some similarities. A few years ago a party of 8 hill walkers climbed up into Parsley Fern gully at the back of Cwm Glas in winter conditions. They had little winter equipment between them

and 2 of the women in the party fell, one of whom, aged 28 was killed. The nominal leader of the party was a male student. The level of responsibility and duty of care was investigated and there was no prosecution. A verdict of accidental death was given because the leader of the group was acting reasonably in accordance with his level of experience and the rest of the group made their own judgement to follow the nominal leader. If the leader had been qualified or more experienced and the group were all clearly novices, a different outcome may have been reached.

**The Climbing Wall**

In another example an accident occurred at a climbing wall involving an experienced climber falling onto matting. The climber had visited the centre many times before and had signed the appropriate forms. The thrust of the case was that the matting was unsuitable and therefore the owner of the wall was negligent. The Court decided that there was no evidence to indicate that one particular type of matting was more suitable than other types. This is an example of how there might be two different schools of thought, both respectable and it is not for the Judge to decide between them. The Court further went on to note that the claimant had accepted a voluntarily assumed risk and was fully aware of the dangers involved in his chosen activity and the case was dismissed.

Also, the principle of unforeseen circumstances is demonstrated in a case brought against the University of California in 1996. The claimant alleged negligence when a top rope anchor comprising several placements in the same crack failed. The Defendant proved that the rock had been fundamentally but invisibly damaged by a recent seismic tremor. The gist of the case was that a top rope anchor had failed due to seismic activity, clearly something that the instructor could not have predicted, and the claim failed.

**What now?**

The UIAA Legal Expert's Working Group is working on a number of case studies that will give guidance to both recreational and professional users of the mountains and crags. Each case study will look into a number of possible scenarios and will try and evaluate where liability exists. Specifically concerning liability and volunteer leaders, the BMC is hosting a conference at the Festival of Climbing on 7 December. This will have key-note speeches, expert presentations on risk, liability and insurance and discussion forums (registration details from the BMC office or web site).

Do we want to live in a society free from risk and adventure, where young people are not allowed to get a grazed knee in a children's playground? To protect the freedom to enjoy climbing and hill walking we must understand the law of negligence and liability; we must also constantly remind all participants about the hazards and risks, and actively promote the culture of personal responsibility and self-reliance. And we must also be ready for the odd 'grazed knee'.

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