U.I.A.A. Mountaineering Commission

June 2002

REPORT

of the

LEGAL EXPERTS
WORKING GROUP

on

Current Liability Issues
Relating to Mountain Sports

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SECTION 1

OVERVIEW & RECOMMENDATIONS

1.1 INTRODUCTION

The Legal Experts Working Group first met at the Mountaineering Commission meeting in Granada in November 1999. It has subsequently met five times at approximately 6 month intervals. The group has been chaired by Giancarlo del Zotto (CAI). The BMC has provided secretariat support with Martin Wragg acting as Secretary to the Group and author of some of the case studies, and Anthony Rich acting as the initial author of the interim Overview Paper, of the other case studies and this report.

The full report is available from the UIAA Office to member associations. It is also on the web site with limited access. It is not on release to the general public. An abbreviated report containing only the first 3 sections will be given a wider distribution.

Section 2 contains our Subject Summary Papers dealing with five areas of law we considered relevant.

A list of those attending meetings is at Section 3 with a list of the papers received.

Section 4 contains the main submissions from the individual nations on which we worked. Section 4 is held only at the UIAA Office and on the web site on limited release to member associations and their professional advisors.

Our recommendations and an executive summary are at the end of this section.

1.2 PRINCIPAL LIMITATIONS ON OUR WORK

We are aware that the result of our work has been heavily weighted by the law in North America and Western Europe. We accept that there are many great systems of jurisprudence whose views are not reflected in our work. We believe that for this reason also the work of the Group should continue and other associations encouraged to contribute to it, especially from Asia.

We have encouraged associations in Asia to contribute to our work, so far without success. They tell us that this is largely because they have no reported cases specific to mountaineering.

We have not examined the comparative amounts of compensation payable when liability attaches nor have we considered insurance costs and trends. These may be areas for further research.

This report should not be seen as being an encyclopaedia of mountaineering law. Firstly the submissions have tended to be summaries and cannot always set out all of the exceptions and qualifications that may apply to a general rule. Secondly laws change, sometimes very rapidly. If legal advice is needed to deal with a specific case the reader should always seek local legal advice in the relevant country on the precise facts.

1.3 OVERVIEW

When we started our work we had hoped to identify a number of different mountain activities and examine the law relating to each. It soon became clear that there is no separate body of "mountain law" in any country. Nations have instead adapted their more general laws to the specific activities concerned. Ski-ing is a major exception. For example several European countries and states of the USA have passed laws specifically relating to the ski-ing industry. It also follows that our position as mountaineers has similarities in many respects with the positions of other outdoor activity sports participants.

All countries differ in terms of the actual legal procedures they follow both in respect of criminal cases and in respect of claims between private citizens and/or businesses.

We noticed how similar many substantive national laws were.

For example all countries distinguish between liability arising out of a contract or agreement on the one hand and liability in tort (the law of civil wrongs) on the other. All countries separated civil law (i.e. claims for compensation etc) from criminal law (i.e. punishment for unacceptable behaviour).

However it was also clear that while the general approach to the problems of contract and tort were similar there were major cultural differences as to the ways in which those apparently similar laws were applied in practice.

An example is the doctrine of "assumption of risk". In the United States it provides a good defense to most claims. This has included a defense to a claim based on fault because, in the United States view, the assumption of risk included the assumption of risk of the other person's fault. In England and most European countries, by contrast, the courts have a very much more restricted view and will not usually find that assumption of risk extends to include the risk of mistakes or errors by others.

We have also noticed that there is a trend for judges in many countries to be far more ready to impose liability, both civil and criminal, than they have been in the past.

1.4 DIFFERENCES BETWEEN JURISDICTIONS AND EFFECT UPON MOUNTAIN SPORTS

As we say the laws relating to compensation claims between private individuals and businesses were broadly similar. Liability depended on fault or the breaking of an agreement by the person against whom the claim was made. The United States has the most limited regime because their doctrine of assumption of risk will stop many claims that would succeed elsewhere.

We have no evidence that the risk of climbers having to pay compensation if, by their own fault, they injured others has yet had any significant impact on mountain sports. In practice the financial consequences of findings of civil liability can usually be dealt with by insurance and many member associations provide this to their members as one of the benefits of membership. Nevertheless vigilance is needed to prevent the spread of a "culture of blame" and to create a judicial climate in which the risks of the sport are recognised.

The problem becomes more complicated because many jurisdictions are increasingly imposing strict liability (that is responsibility for paying compensation even though there is no fault) on occupiers of land and public authorities (or requiring only minimal "fault"). It is of increasing importance that participants are informed of the nature and extent of the risks; the doctrine of informed consent.

At the same time land owners and public authorities often perceive the risk to themselves from compensation claims (or in France criminal prosecutions) arising out of mountain sports as being greater than it actually is and this leads them to needlessly restrict access.

For example in France the public authority has a duty to keep the roads and ski pistes clear and safe and this places great pressure on the local authorities to close off access to large areas of land often at short notice. The British experience has also been that landowners have often used either simulated or real fear of court cases to deny access to land.

The BMC found that a policy of offering to help landowners politically by supporting reductions in land owner's liabilities in exchange for greater rights of access was successful. They also found that the preliminary work of this Group, and the exchange of legal experience it generated, helped greatly in this task. They used international experience to great effect in lobbying for improved rights of access.

Member associations may wish to consider campaigning for legal reform to grant greater immunity to the landowner or user and local authority so as to encourage improvements in access. The Group can also assist with this if requested and if it is continued.

Whilst civil liability has had an unwelcome intrusion in to mountain sports the increasing use by the authorities of criminal law after an accident is of great concern.

There was general agreement amongst the different legal systems that extreme carelessness or exceptionally grave fault leading to human death was a serious criminal offence.

We have received reports from many legal systems, especially those operating in the European Alps, that the authorities will increasingly use the criminal law against climbers who have had an accident even though the fault or neglect was not of an extreme degree. We strongly believe that this trend is growing and presents a major threat to the freedom of mountain sports.

Often such criminal law issues are brought in to play by industrial or commercial health and safety law. Those laws were designed and intended for work places with controlled environments very different from the situation in which mountaineers find themselves whether on a commercial or private basis.

The UIAA believes that the basis of participation in mountain sports is knowledge of and acceptance of the risks and hazards of participation. This can include the risk of human error. If prosecuting authorities do not recognise such risks and insist on bringing criminal proceedings whenever there is an accident, even if the degree of fault is only minor, it will rapidly discourage anyone from leading parties, especially parties of novices or youth. It will also inhibit the provision of facilities. This cannot be in the interests of the sport.

For example in some jurisdictions the test for criminal liability is the same as civil liability. This has potentially very serious consequences for, for example, those operating huts at high altitudes. They may be responsible for the paths leading to the hut and if someone is injured because the path is in poor condition then the owner of the hut can find himself facing criminal proceedings. This is an obvious disincentive to providing access.

Whilst it is usually possible to insure against the financial consequences of civil liability it is not possible to insure against the risks of a criminal prosecution and resulting punishment.

We recommend that the UIAA continues to monitor the situation and provides advice and assistance to member associations facing difficulties in this area.

1.5 RECOMMENDED STRATEGY TO ADDRESS THE PROBLEMS OF LIABILITY

As identified above we believe that the greatest threat to the sport comes from the criminal law followed by the risk that local authorities and land owners may face civil liability without fault (or may have reasonable fears that they do). The significance of claims as between participants in the sport is often limited by insurance but again useful steps can be taken to influence public and judicial opinion so as to prevent the extension of civil liability rules to the point where they affect the sport or cause insurance costs to rise unduly.

We commend to the UIAA the strategy adopted by the American Alpine Club faced with a public increasingly ready to find fault after accidents and increasingly ready to resort to the law courts. The AAC firstly developed a network of experienced liability lawyers and expert witnesses who were able to assist in cases where climbers were facing claims. Secondly they correctly identified those cases that needed to be contested in order to establish a favourable judicial climate in which liability was not extended and the hazards of the sport understood. This in turn meant that the cases were defended by experienced liability lawyers who were themselves mountaineers from the national association and understood the concepts involved and were supported by experienced and impressive expert witnesses from the same source.

They were not defended by insurance companies or insurance lawyers. As the British experience has shown there is a grave risk that insurance companies will tend to think in the short term and may settle for reasons of economics claims that ought to be fought rather than spending the money needed to fight to establish a favourable precedent or doctrine.

We believe that the UIAA could usefully build up a similar body of expertise so as to ensure that if any member association is facing a significant claim it has the experience of the whole of the UIAA to call upon to persuade the local judicial authorities of the wisdom of an approach to liability that recognises the reality of the mountain environment.

The Austrian Alpine Club, in conjunction with the German Alpine Club, has also launched a training programme in which judges are invited to a course in which they are taken on alpine tours, and the risks explained. The judges are also invited to give papers to the clubs explaining the law as it applies to mountaineering. Such an approach may be one other national associations might wish to explore depending on local conditions.

The Austrian Alpine Club has also developed a Rapid Response Team to provide members with immediate legal, technical, and other practical support (including psychologists) in the aftermath of an accident and such an approach may well be of interest to other associations.

1.6 EXECUTIVE SUMMARY AND RECOMMENDATIONS

The threats to the sport that we perceive arise principally out of the criminal law and the application of strict liability to occupiers and local authorities. There have been significant limits to our work which needs to be continued both to extend research into areas we have not covered and to keep the information we have up to date. Our recommendations are as follows:-

1. Member Associations may find it advantageous to lobby governments to reduce the liability of landowners and occupiers in countries where this is a disincentive to access.

2. Member Associations may find it advantageous to formulate a strategy for defending claims and prosecutions.

3. Member Associations may find it advantageous to campaign against the automatic or inappropriate application of the criminal law in the aftermath of accidents.

4. In any litigation, both civil and criminal, lawyers and experts who understand both litigation and mountaineering are essential. Member Associations may find it advantageous to compile registers of such lawyers and expert witnesses in their own country.

5. There are advantages in the UIAA keeping its understanding of legal issues up to date and improving the exchange of information between a network of legal experts in Member Associations.

Legal Experts Working Group
The Hague
The Netherlands
31 May 2002

SECTION 2

SUBJECT SUMMARIES

SUBJECT SUMMARY

2.1 CIVIL LIABILITY OF INDIVIDUALS

In each jurisdiction there are two main types of legal liability:-

1 In Tort - principally the law of negligence

2 Pursuant to a contract

The Law has developed in different ways in different jurisdictions. However the jurisdictions can be classified in two main categories:-

a. Common Law Systems - Australia, Britain, Ireland, South Africa, Singapore and USA. The derivation of Norwegian law is unknown but it has striking similarities to the law applicable in the common law jurisdictions and is included in this group for convenience.

b. Codified Systems (derived variously from Roman/Dutch Law and Napoleonic Code) - Austria, Germany, Belgium, Luxemburg, The Netherlands, France, Greece and Switzerland.

Negligence

The basic principal in Common Law jurisdictions is that to bring a claim in negligence a victim must prove that the defendant owed the victim a duty of care, that there was a breach of that duty of care which caused loss or injury. The extent or degree of the duty of care will be variable from case to case and in a mountaineering context will reflect the differing levels of skill and experience between the victim and the defendant. Where the defendant is a professional guide or instructor and the victim is a client the duty of care will be greater than if the two participants were amateurs of equal ability and experience. Similarly if the victim is a minor (especially a child) and the defendant an adult, the adult will owe a more extensive duty of care than if they were of equal age.

The Common Law jurisdictions potentially afford a special defence of Volenti non fit injuria (voluntary assumption of risk). A victim injured in the course of a risk activity in which he voluntarily participates and understands the risk is taken to have accepted the risks integral to that activity. The doctrine is particularly important in the USA whose courts tend to adopt a very robust approach, although the application of the law will vary from state to state. Typically in the U.S.A. the risks assumed will include the risk of error or minor negligence on the fault of a fellow contributor whereas that situation would give rise to liability in other jurisdictions.

Both the Common Law jurisdictions and Codified Systems recognise a defence of Contributory Negligence where it can be shown that the victim was at fault as well as the defendant. If satisfied that there is contributory negligence the courts will apportion liability according to the degree of negligence of either party, as assessed by the court.

In the Codified jurisdictions liability is based upon a breach of the particular article of that code, or a breach of a principle deriving from that code or from jurisprudence. However each of the Codified jurisdictions appears to have provisions which are broadly similar to the common law concept of negligence. Liability is based upon the fault of the Defendant, as compared with the behaviour of the ordinary person in the same circumstance. There are three essential elements to a finding of liability - fault, damage and causation.

Contract

Potential liability in contract is based upon the premise that the defendant has contracted with the victim to provide instruction or a guiding service or to allow the victim the use of a climbing facility, whether indoor or outdoor. However in the latter scenario this note is not concerned with the law of occupier's liability which is dealt with separately.

In both the common law and codified European jurisdictions, the courts will imply terms into the contract (in the absence of an express term) to the effect that the defendant (supplier) will take reasonable steps to ensure the safety of the victim (customer). In considering whether the injury to the victim has been caused in consequence of a breach of that implied term the courts will take account of all relevant considerations including the following:-

1 Whether the defendant has complied with the normal standards of that "industry" or any relevant code of practice

2 In the case of guiding or instruction, whether there has been a proper assessment of the client's ability relative to the difficulty and seriousness of the climb

3 Whether it was reasonable to have a risk management policy and, if so, whether one was in place and whether it was properly applied

4 The nature and content of any warning or briefing provided to the victim

It is common practice for suppliers to use forms of waiver or release in which the customer is required to acknowledge that he is aware of and accepts the risks inherent in the activity, participates voluntarily and agrees not to bring any claim against the supplier in the event of loss or injury. In many jurisdictions a clause which seeks to limit or exclude liability for breach of contract or negligence resulting in death or personal injury is of no effect. However waivers can be useful in demonstrating voluntary assumption of risk and are widely used. As with the law of negligence the courts in the USA appear to apply the law more robustly than in other common law jurisdictions.

In passing it is noted that there may also be claims for loss or injury arising under the law of Product Liability. This is generally similar in all jurisdictions studied and enables claims to be brought by the victim against a manufacturer, retailer or intervening supplier of a defective product, use of which results in loss or injury. The development of European Community Law is becoming increasingly influential and is likely to result in increasing similarity between different European jurisdictions.

Conclusions

The laws of contract and negligence and their application are remarkably similar in all jurisdictions studied and most legal concepts in one jurisdiction have a counterpart in each of the others.

One worrying trend is apparent throughout the European jurisdictions including Britain, namely a growing tendency to criminalise an act of negligence which results in death or injury to another, particularly where the injured party is a client/student being guided or under instruction at the time. Traditionally in some jurisdictions the test as to what constitutes negligence sufficient to give rise to a criminal liability has been stricter than the test for civil liability whereas in other jurisdictions it is the same test. The threshold for criminal liability appears to be reducing and in many of the codified jurisdictions the test is the same in both civil and criminal law. Criminal liability is dealt with separately.

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Honorary Legal Adviser to British Mountaineering Council.
Vice President - Alpine Club
31 May 2002

SUBJECT SUMMARY

2.2 LIABILITY OF CLUBS, FEDERATIONS & ASSOCIATIONS

Legal Background

In the various countries and jurisdictions the words “federations”, “associations” and “clubs” do not always have the same legal meaning. In some countries there is no special difference, in other countries clubs and associations only have natural persons as a member (clubs being more informal than associations). “Federation” is used to describe the organisation which overlooks these associations like an umbrella.

In many countries most climbing associations are legal entities but this is not always the case with “clubs”. In some countries including Britain and Ireland it will be unusual for a club to be incorporated. As a consequence, the club or association cannot be sued for damages by its own members, if it does not have corporate capacity. The reasoning is that the club consists of all the club members together and a member cannot sue oneself! An unincorporated club cannot be sued by third parties either. However an action can be brought against the individual officers of the club or some or all of the individual members.

On the other hand, in the Netherlands and some other countries, when a group of people act and behave like a club, they become a corporate body in law in consequence of their behaviour as a group.

In the summary below, when referred to either “federation”, “association” or “club”, the words are used indifferently, irrespective their specific legal meaning. If not stated otherwise, a legal entity is meant.

For liability of clubs, associations or federations a distinction should be made between criminal and civil liability.

Criminal Liability

Under most jurisdictions neither incorporated, nor unincorporated clubs and associations can be prosecuted for criminal liability, only individuals. But the board member of an association can be held criminally responsible for illegal acts performed by him in his capacity as a member of the board.

In Scotland it is also possible to bring criminal charges against the leader of a group even if the accident was not directly attributable to his fault.

Recent changes in French and Belgium law have made it possible to hold organisations criminally responsible. In France, a court convicted an association of unintentional manslaughter after a fatal fall of two roped climbers who were young children aged 11 and 14.

We may conclude that, in most countries, organisations, associations and federations, may not be brought to court on criminal charges. However a successful prosecution of individuals working for or linked to an association may lead to civil liability for the association (and/or the individual members).

Civil liability

Civil liability of associations etc. is based on the same system and on the same principles as in the case of civil liability of individuals, i.e. on contract or on tort. But there are a number of specific issues which require closer scrutiny.

The main areas where civil liability of clubs or associations can be expected are:

- in the field of organisation
- in the field of maintaining paths, land, climbing walls or fixed protection used in climbing areas
- in the field of the choice of a mountain guide or a voluntary (club) (leader)
- in the field of equipment which belongs to the association or club

Associations which organise activities may be held liable if it can be established that the association has a contractual obligation or a duty of care, was in breach of that duty or obligation and the accident resulted from organisational mistakes or errors. For example, in the case of a climbing competition the stands for the public may have been placed too close to the (overhanging) wall resulting in a falling climber hitting and injuring a spectator.

If, as is often the case in Austria, it is a climbing or hiking association's duty to maintain the trails, bad maintenance or insufficient/unclear signing of the trail which results in damage to the user of the trail may result in civil liability of the association concerned. As it is not possible to permanently check on the state or quality of the trail, only gross negligence of the responsible entity will lead to liability. It may be possible to exclude such liability by putting up a sign indicating "at hikers' own risk"; however, the indication "for experienced hikers only" may not always be sufficient to shield the association from liability.

Similar situations may occur when responsibility for the maintenance/care of cliffs used for climbing is in the hands of an association (e.g. in Belgium), or even in cases where only access to climbing areas is provided but without proper warnings as to the dangers of rock climbing for untrained individuals.

Compare with the above remarks the subject summary on occupiers' liability.

In many countries, climbing associations organise courses, both with official mountain guides and with so-called voluntary leaders. The choice of a less than properly qualified guide may result in liability for the association if something goes wrong (see Kaunergrat accident in Austria. See also a gymnastics accident in the Netherlands where the supervising trainer/coach appointed by the association had insufficient qualifications). In fact, the above cases are examples of bad or insufficient organisation or management as indicated above.

One could apply the same reasoning to associations providing unsuitable material or equipment to members or other users. We are not talking here about product liability arising from equipment that is intrinsically defective: it has to be established that the accident resulted from insufficient maintenance of the equipment (by the association concerned). There are some exceptions, such as in France and Luxembourg, when there is strict liability. For climbing ropes it will not always be easy to determine the 'history' of the use and maintenance of the rope. But if it has been established that wear and tear caused the failure of the rope liability of the association cannot be excluded.

Associations can and do warn against the dangers climbers and mountaineers may face; they may also try to avoid liability by demanding waivers from the individuals concerned. There is no guarantee however that these measures will always be effective. Moreover, if employees are held liable for damage caused through their negligence or fault their organisation will be vicariously liable.

Associations and similar entities should insure against such risks.

Renée Hopster-Arendsen de Wolff
Advocate/Attorney at law in the Netherlands
Member of the Legal Commission of the Royal Netherlands Climbing and Mountaineering Association (NKBV)
31 May 2002

SUBJECT SUMMARY

2.3 LIABILITY OF LANDOWNERS AND OCCUPIERS

All of the reviewed jurisdictions have adopted the principle that an occupier of land owes some duty of care to persons present upon the land. However, the extent of the duty varies considerably both within any particular jurisdiction (depending upon the particular circumstances), and between jurisdictions themselves. Further, most jurisdictions place the duty both on the actual occupier and the landowner, if different from the occupier.

Generally, a paying visitor is owed a higher duty of care than a non-paying visitor with trespassers generally receiving the lowest level of care. In Ireland liability to a visitor is only likely to be established in the presence of an intentional act causing harm, gross negligence or recklessness. In the UK there is no liability from a landowner to a third party for injury caused by natural hazards. This also appears to be the position in the USA where a landowner might be liable for injury caused by manmade hazards, unless they were obvious.

The liability of occupiers to compensate persons injured whilst on their land and access to that land are clearly inextricably linked. If occupiers are generally liable either they or their insurers will have a vested interest in restricting access or at least in restricting liability. This was clearly demonstrated in the UK when the recent Countryside Rights of Way Act was going through the process of becoming law. Occupiers pointed to their potential liability to third parties (and therefore increasing insurance premiums) as a reason why access should be denied. The BMC was advised that this argument would be neutralised if the statutory liability of landowners was amended to exclude liability to third parties arising from natural features. The BMC successfully recommended the adoption of that provision to the Government, and the right to access to become law.

In certain jurisdictions where occupiers are more likely to have to pay compensation to injured visitors the responsibility to maintain access has been passed to national mountaineering organisations, who also have to maintain insurance.

At the other end of the spectrum is the French model where the duty to ensure public safety is on the local Mayor of any district. This has lead to access being denied and climbing bans being put in place in certain areas, e.g. Verdon gorge. This can affect all mountain sports including skiing.

The potential liability of those responsible for land may be used as an excuse to deny or restrict access, or to pass responsibility on to mountaineering organisations. Generally the best access models are those jurisdictions where occupiers are not liable to visitors injured by natural features present on their land nor for injuries caused by obvious man made hazards.

The Legal Experts Working Group commends the strategies adopted by those jurisdictions with largely unrestricted access as possible methods of extending or at least protecting current access levels.

Paul Debney
Solicitor of the Supreme Court of England and Wales
Honorary Legal Advisor to the BMC
31 May 2002

2.4 CRIMINAL LIABILITY

Introduction

Reference was made to the impact of criminal law by the papers received from Austria, Belgium, France, Greece, Norway, South Africa, Switzerland, the USA, and the UK. Comments tended to be brief and most of the information emerged in the course of our discussions with lawyers and participants in the sport during our meetings.

Points Noted

All jurisdictions had a clear distinction between civil and criminal law. All the jurisdictions regarded the accidental killing of another as a result of negligence as being a criminal offence that would attract criminal sanctions. The degree of negligence required did appear to vary between jurisdictions. On the one hand, common law jurisdictions such as the UK would refer to “gross negligence” whereas some of the alpine nations would apply a simple test of negligence, similar to that used for compensation cases.

Anecdotal evidence suggests that the authorities in mountainous areas are becoming increasingly ready to prosecute for a criminal offence if there is an accident causing death and there is evidence to suggest that the degree of negligence required for an offence to be established is reducing, especially if the victim is a youth or child.

The nations differed as to the criminal consequences of accidents where personal injury short of death was caused. The general trend we noted was again that the alpine nations and other nations with a jurisprudence based on Roman law were increasingly ready to attach criminal law sanctions to accidents causing injury short of death especially where negligence was involved. To quote one paper “the slightest carelessness can be an offence if injury is caused”. Case reports also tend to suggest that there is an increasing readiness to bring prosecutions in the event of accidents causing injury short of death and with a lower degree of fault necessary before the authorities will take action. A prosecution also seems to be more likely if the victim is a youth or a child or a novice.

We have also noted the impact of European Union law on those states that are members of the EU. This includes a significant drive towards harmonisation of EU health and safety law by means of the relevant directives which are frequently enforced by criminal sanctions. The tendency, however, is for this area of law only to come into play in respect of professional mountaineering activities where money is changing hands so that the group leader can properly be said to be at work.

We have noticed that whilst in some jurisdictions there is no positive duty to go to the aid of fellow mountaineers in distress in many jurisdictions, especially the alpine countries, there is a positive obligation to do so backed by the full weight of the criminal law to deter those who do not.

Finally we note in passing that some nations, in some circumstances, impose criminal liability on the occupiers of premises or land. This can include the local authorities or officials as the notional occupiers of the mountain. The increasing trend towards prosecution of accidents also poses a significant risk to access as local officials, such as the local mayor, risk their personal liberty if they allow access when conditions are dangerous. Their natural response is to deny access even when it could be granted safely.

Discussion

Whilst we can see the need for criminal sanctions in cases of extreme negligence, or a similar degree of lack of respect for the rights of others, the trend that is developing presents great dangers for the mountaineering community.

Public authorities are increasingly ready and intent on bringing prosecutions when there is an accident causing injury including injuries short of death. This trend is spreading.

This trend has the capability of interfering with the mountaineer's freedom to decide what level of risk he and his climbing partners are prepared to accept and also threatens to deter those who involve youth in the sport. This in turn will make it harder to attract youth to the sport, or to train and develop those who do come forward.

It is not possible to use insurance or indemnity to avoid the threats to a mountaineer's personal liberty from authority's increased readiness to prosecute. We have also noticed that when bringing prosecutions the judicial authorities increasingly refer to standard routes and techniques. This risks imposing a culture of "norms" on the practice of mountaineering that is quite alien to it. It also threatens to impede the development of new techniques.

We have already referred above to the threats to access that an over zealous application of the criminal law can cause.

Conclusion

We conclude that further adverse development of the criminal law, or over vigorous application of it, has the capability to cause significant interference with:-

(a) The mountaineer's access to the mountains
(b) His freedom to choose the level of risk he will accept and the techniques he will use
(c) His ability to develop new techniques when there
(d) The willingness of mountaineers, especially volunteers to accept responsibility for encouraging youth participation
(e) The willingness of clubs and volunteers to train novices entering the sport in the finest traditions of the sport, including the calculated acceptance of risk

Anthony Rich
Solicitor of the Supreme Court of England and Wales
Honorary Legal Adviser to the BMC
31 May 2002

SUBJECT SUMMARY

2.5 MOUNTAIN RESCUE

Introduction

Unfortunately many of the written submissions did not comment in detail on the position of mountain rescuers. Those papers that contain most on this topic are those from Australia, Belgium, Ireland, Norway and the United Kingdom. We were also given guidance on the situation in Switzerland and France in the course of our discussions. The writer has also had previous experience of working with a legal adviser to the American mountain and wilderness rescue community. The issue of the responsibility of rescuers was also raised in one of the theoretical case studies and discussed by the Group. We also had a written response setting out the French view on the study concerned.

Discussion

In many countries ultimate responsibility for the rescue of those in distress will fall either on the police or the local civil authority. In many countries those authorities will themselves delegate the conduct of rescue to either volunteer or paid rescue teams or accept the tradition of rescue by them (as in Switzerland and Austria, for example). In some countries, especially Switzerland, there is a continuing debate as to how and by whom the rescue service should be funded. In some countries rescue is provided free and in others the victim is required to pay for the cost of the rescue.

This background tends to mean that the responsibility of rescuers merged in to the general approach of the country concerned to the liabilities of its police and local authorities.

Nations vary greatly in the extent of the duty they place on the public authorities. In general terms it seems that a higher duty is imposed by countries with a legal system deriving from Roman law/Dutch law principles than in those countries deriving their laws from English common law. This may evolve further in the light of the European Convention on Human Rights.

There is also a similar philosophical divide. Roman law countries in general recognise a positive duty to go to the assistance of the injured and will impose both criminal and civil sanctions if this is not done unless the failure was justifiable in some way. This contrasts with the traditional common law view that there is no duty to go to someone's assistance but if you do go to help you must provide that help to a reasonable standard and without negligence.

However the information available is limited and if the work of the group is continued in some form it would be appropriate to research this area further in conjunction with IKAR and other concerned bodies.

A J E Rich
Solicitor of the Supreme Court of England and Wales
Hon Legal Adviser to the British Mountaineering Council, British Cave Rescue Council, Mountain Rescue Council of England and Wales, Search and Rescue Dogs Association (England).
31 May 2002

SECTION 3

PARTICIPATION

3.1 Members of Legal Experts Working Group

3.2 Schedule of Papers from National Bodies

3.1 MEMBERS OF LEGAL EXPERTS WORKING GROUP

The individuals listed below attended one or more meetings of the Legal Experts Working Group:

Gordon Brysland	Australia
Paul Debney	Great Britain
Andreas Ermacora	Austria
Bettina Geisseler	Switzerland
Renée Hopster	Netherlands
Pierre Humblet	Belgium
Jim McCarthy	U.S.A.
Anthony Rich	Great Britain
Olivier de la Robertie	France
Edward Vaill	U.S.A.
Martin Wragg - Secretary	Great Britain
Giancarlo Del Zotto - Chair	Italy

3.2 SCHEDULE OF PAPERS FROM NATIONAL BODIES

Country	Author	Date
Australia	Gordon Brysland	15 Sept 2000
Austria	Andreas Ermacora	June 2000
Belgium	Pierre Humblet	1999 & Update March 2002
France	Arnaud Pinguet	26 April 2000
France (Criminal Law)	Olivier de la Robertie	May 2002
France (Mountain Rescue)	Olivier de la Robertie	May 2002
Germany	Peter Boele	6 June 2000
Greece	Panos Giakas	5 May 2000
Greece	Gerard Auneau	June 1999
Ireland	David Walsh	5 May 2000
Italy	Giancarlo del Zotto	25 June 2002
Italy (AVS)	Gislar Sulzenbacher	21 April 2000
Leichenstein	Walter Segar	15 May 2000
Luxemburg	Pierre Humblet	May 2002
The Netherlands	Renée Hopster	July 2000
Norway	Helge Jakob Kolrud	11 May 2000
Norway	Pal Jenson	2000
Singapore	David Lim	2000
South Africa	Andre Schoon	25 April 2000
Switzerland	Peter Rothenbuehler	August 2001
U.S.A.	Edward E. Vaill and James R. McCarthy	9 Feb 2001
U.K.	Anthony Rich	27 July 2000 & Update March 2002