

The Mountaineering Council of Scotland (MCofS)

SAFETY & LIABILITY for CLUBS

Introduction

1. The MCofS receives a growing number of inquiries from its clubs (i.e. its “Club Members”) concerning possible liability in respect of club meets and the informal tuition of members. In response, this paper aims to provide club office-bearers, committees and members with useful information.
2. The paper covers the nature of the legal risks and the “duty of care” which clubs and their members are likely to encounter in mountaineering and associated activities (such as running a hut or a social meet), the steps which clubs should take to mitigate (i.e. reduce or avoid) these risks and their consequences and the extent to which such risks are covered by the Civil Liabilities Insurance (CLI) policy issued through the MCofS. An Annex contains details of mountaineering qualifications, further references and contact addresses.
3. The content of this paper is not, of course, legally definitive. However, every effort has been made to apply the lessons learned over the years, both on the hill, and in negotiating the outcome of unfortunate events. Feedback as to the usefulness of this paper will be welcomed.
4. The Council strongly recommends that club committees discuss the information in these notes, and ensure that their members are made aware of them. The intention is not to constrain clubs or their members in their activities, but to allow them to manage their affairs in such a way as to help manage risk and liability. It is important to both avoid legal risks and also to manage the risks 'on the hill'. The measures necessary for the former will often contribute to the latter. In particular, new and prospective members should be left in no doubt about the risks involved, their responsibilities for their own safety and that deciding to rely on more experienced members is part of the risk they accept.

Safety and Risk

5. The “Participation Statement” of the UIAA (Union Internationale des Associations d'Alpinisme or the International Climbing and Mountaineering Organisation) states that:

“Climbing, hill walking and mountaineering are activities with a danger of personal injury or death. Participants in these activities should be aware of and accept these risks and be responsible for their own actions and involvement.”

This statement is regarded by the Council as a useful basis for the consideration of safety and risk in the sport.

6. Over the last decade, court cases and fatal accident inquiries have accepted the unpredictable nature of mountaineering. Nevertheless, experienced mountaineers and climbers should make novices aware of the risks involved and take reasonable steps to ensure that both parties have the skills and knowledge to manage these risks.
7. If an incident occurs that could lead to a claim against a club, then, as soon as possible:-
 - (a) all possible detail should be recorded in writing: e.g. date, time, place, names, addresses and roles of personnel (those directly involved and witnesses), any injuries and/or losses.
 - (b) the insurance company should be informed; it may not provide support if a claim is put in at a later date, although complainants have 3 years to raise a court action after the date of the incident. Contact details for the insurance company are:-

The Sports Team
Perkins Slade Ltd.
3 Broadway
Broad Street
Birmingham B15 1BQ

Tel: 0121 698 8000
Fax: 0121 625 9000

email: sports@perkins-slade.com

Copies of the master policy with details of all exclusions etc. are available on request from the MCofS office and on the website at:-

<http://www.mcofs.org.uk/civil-liability-insurance-for-clubs.asp>

The Law

8. Every incident is different and the law itself is constantly changing. Indeed, recent cases have shown that there is still some uncertainty as to what a court might decide in the circumstances of a particular incident. Relevant differences between Scots and English law are subtle and for the purposes of these notes are not of concern.
9. Criminal Law is made by Act of Parliament and by common law. Cases are brought by the Procurator Fiscal (in Scotland) or the Crown Prosecution Service (in England).
10. Civil Law is made by Act of Parliament and by common law, but precedents may be set by court decisions. Cases are brought by individuals or by companies. The burden of proof is less than for cases under Criminal Law, but there is a need to prove liability (see below), for which the following must be established:-

- (a) a duty of care must be owed.
 - (b) there must be a breach of that duty of care (act or omission).
 - (c) loss, injury or damage must have resulted from that act or omission.
11. Contracts are a complicated area of law but if you agree to look after a person or persons based on greater experience or knowledge, you might be deemed to be offering a contract to that effect.
 12. Under common law, there is a number of specific torts (wrongs) and a general tort of negligence, which rests on the foreseeable nature of the incident, and has to be a serious act or omission and not just be a simple mistake.
 13. There are a number of defences against negligence:-
 - (a) lack of foreseeability, i.e. the circumstances had never happened before. If a similar accident were to occur again, this defence might not be accepted.
 - (b) “*volenti non fit injuria*” (no wrong is done to one who consents), which incorporates the concept that a person who voluntarily undertakes an activity knowing the risks cannot claim for injury which is a natural part of that activity. For this defence to be effective, the following is required:-
 - (i) consent was voluntary.
 - (ii) the injured person had full knowledge of the risks involved.
 - (iii) the injured person was an adult.
 - (iv) there is no evidence of deliberate intent or negligence.
 - (c) contributory negligence: the injured person is also at fault (e.g. not wearing a helmet in circumstances where it might be deemed appropriate).
 - (d) a break in the chain of causation, e.g. an intervening and separate act or event caused the injury.
 14. The Health & Safety at Work Act, and its Regulations, do not apply to clubs, unless it is an employer in its own right, or has control over premises (e.g. its own climbing wall or hut). If a club contracts expert assistance from Mountain Guides, Instructors or Leaders for the purpose of providing instruction to its members, the professional’s health and safety responsibilities do not transfer to the club or its members. However, if a club organises a course that is available to non-members, and employs instructors, then the Act will apply.
 15. However, some aspects of the Health & Safety at Work Act and its Regulations seem useful to clubs, particularly the provision of information, opportunities to develop the ability to recognise hazards and risk assessments.

Duty of Care

16. Clubs have the common-law duty of care that every member of society has to all other members of society, that is, the obligation to exercise a reasonable degree of prudence and caution while performing any acts that could foreseeably harm others. This responsibility is reciprocal, in that each person is responsible for himself or herself, and should also ensure that his or her actions do not put others at risk. Duty of care is not diminished because of involvement in a hazardous activity such as mountaineering.

17. A general principle – the “neighbour principle” – has been formulated for determining whether, in any given case, a duty of care exists:

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbours. Who then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question” (Lord Atkin, in *Donoghue (otherwise M’Alister) v. Stevenson*, 1932).

18. Some examples of where a duty of care exists are: -

- (a) an experienced climber belays a novice.
- (b) a contractual arrangement, not necessarily involving payment, is in force (e.g. arrangements for specialist services).
- (c) an adult accepts, by verbal consent or action, responsibility for a child or young person less than 18 years of age.
- (d) teachers supervise educational activities.

19. It is impossible, however, to be categorical about the circumstances in which a duty of care will be held to exist. The court will take into account a range of factors, such as:

- (a) the age and experience of the injured party and/or the stated experience.
- (b) the age, experience and qualifications of the person who is deemed to have owed a duty of care to the injured party.
- (c) the season when the activity was undertaken, and the location (or premises) where it was undertaken.
- (d) the equipment taken and/or used.
- (e) the hazards (foreseeable risk of injury etc.) involved in the activity undertaken.

20. In the event of an accident, an action for negligence has to demonstrate how and to what degree the actions of one person damaged the interests of another and the degree of responsibility which all those involved carried for the outcome under consideration. If a person enters voluntarily and knowingly into a situation and has an accident, then the person injured may be held to be the author of their own misfortune or at least may share responsibility for the accident.
21. At common law, if an injured party has not taken reasonable precautions or if the injuries were caused partly by his or her own negligence, then he or she may find that damages are reduced or not awarded at all. In defence, a defendant may seek to prove that the injured party did not in his or her own interest take reasonable care of himself or herself and contributed, by this want of care, to his or her own injury.
22. A more experienced member of a group owes an extra duty of care to its less experienced members, irrespective of whether this responsibility is explicitly accepted or not. However, election to an organisational position within a club does not in itself imply either exceptional experience or a quality of expertise sufficient to hold the elected member as being responsible for the safety of other members of the club.

The Roles of a Meet Organiser, Co-ordinator or Supervisor

23. A member of a club designated as a meet “organiser” or “co-ordinator” should not be given responsibilities such as “*to ensure the safety of the members on a meet*” or “*to check route plans, clothing, gear and competence to fulfil the objective*”. This may imply a greater role, status and expertise for that person than they actually have. The term “supervisor” should in particular be avoided.
24. If a club designates a person as “Meet Organiser” or similar to arrange one or more meets, the responsibilities of that person – in addition to arranging accommodation, transport and sometimes food – may include the dissemination of information about the area to be visited, possible objectives, and the requirements needed by all individuals for participation (e.g. appropriate equipment and skills for a winter or rock climbing meet). This information should be distributed prior to the meet allowing the less experienced to discuss it informally with other members of the club and to decide for themselves whether they are competent to attend.
25. On the day(s) of the meet, the Meet Organiser should not then take on a role of supervision. He or she should express concern if a member of the club ignores the requirement outlined in the information which has been disseminated and ventures out to tackle something which others feel is outwith that person’s level of experience, but it is ultimately that individual’s responsibility and the Meet Organiser should respect that decision.

26. If a member of the club repeatedly gets into difficulties, the Club should consider means of expressing its concerns, possibly through withdrawal of membership of the club. Any actions taken should be in line with the principles of “natural justice” i.e. absolute fairness to both sides. It is usually a lack of fairness which leads to problems, with the “accused” sometimes taking legal advice which may lead to the club becoming embroiled in litigation.

“Leaders” etc. within Clubs

27. Clubs should also avoid using the terms such as “instructor”, “leader”, etc. and similar words (“leadership”, “led”). These words have ambiguous meanings, and consequently misunderstandings can occur when individuals have different ideas about the level and nature of what is being provided. Terms such as ‘Meet Organiser’ or ‘Meet Co-ordinator’ should be used.
28. If a member of the club accepts responsibility for an activity, it should be on the basis that he or she is only helping by sharing his or her experience, and may not be qualified or regarded as a ‘technical expert’ in any way. Any less-experienced members of the club accompanying this more-experienced member should be made aware that they take any advice on this basis, and that the onus of responsibility for deciding whether or not to rely on any such advice lies with the less-experienced member.
29. Some experienced mountaineers have expressed concern about the responsibilities they carry for people attending club meets who wish to be led and who decide to take very little responsibility for themselves. Such people may have a considerable history of participation but remain novices in all essential aspects, and they should be so regarded by the club. The information issued by the club should reflect the basis outlined in the previous paragraph.
30. Meets which include some form of training should concentrate on the sharing of knowledge and skills, but not as “instruction”. Such meets may be advertised within the club as with any other normal meet but with an indication that the opportunity exists for beginners to gain experience and knowledge from other members of the club in a particular activity. For example, a meet at the beginning of the winter might include a practice session in ice axe or crampon use. A night meet could allow teams of members to test their navigation as a fun exercise or competition.
31. Members of a club who have one or other of qualifications such as the Mountain Leadership Award (ML; see Annex) may, of course, assist fellow-members in their club activities. However, they should not:
- (a) be regarded by the Club or members of the club as “leaders” of particular meets or activities.
 - (b) be regarded by the Club as the only persons suitable to take out beginners or minors.
 - (c) be paid by the Club to act as a leader.

Equipment Pools

32. Many clubs operate a pool of gear that can be borrowed by members. Members who borrow the equipment have a responsibility to check it before use, to use it in accordance with the manufacturer's instructions, and to report any damage or misuse. This is not the responsibility of the club's "equipment member" or equivalent.
33. The club should maintain a record of all equipment (e.g. manufacturer, date and source of purchase, use and misuse). Clubs should note that, if equipment is hired out on a financial basis rather than loaned for free, there may be a more stringent responsibility to ensure that the equipment is fit for purpose and clubs should take this into account when putting procedures in place.

Children and Young People

34. The MCofS hopes that Clubs accept young people as members in their own right, and believes that they should not be put off doing so for reasons of liability or fear of prosecution. However, children and young people (under 18 years) are not fully responsible in law for their actions, and in addition clubs may feel that their adult members and office-bearers take on an unacceptable duty of care when taking young people out climbing or hillwalking. They may feel that, in acting in *loco parentis*, they are liable for any accident to the young person, however it was caused. However, as long as the club or individual does everything 'reasonable' to ensure the safety of any young person accompanying them on climbing or hillwalking expeditions, then they should not fear being found negligent in the event of an accident.
35. The UN Convention on the Rights of the Child defines a child as some-one under 18 years of age. When acting *in loco parentis*, the duty is to take the care that one would expect a reasonably prudent parent to take. For club activities, written parental consent for a young person to take part should be obtained.
36. The Activity Centres (Young Persons' Safety) Act 1995 and the Regulations made under them are part of criminal law. The Adventure Activities Licensing Regulations 1996 (SI 1996/772) state:

A person is required to hold a licence in respect of the provision of facilities for adventure activities if that person provides such facilities in return for payment. ... A person is not required to hold a licence in respect of facilities for adventure activities where those facilities are provided by a voluntary association.

37. If a club sells such facilities, they will need a licence, but not if it provides facilities free, sells them to anyone over 18, or to under 18s who are their members (including the members of another voluntary association with which they have an arrangement), or to non-members who participate in events to encourage membership or interest in the club's activities during less than 3 days in any year, or who are accompanied by their parent or guardian.

38. The club should provide information to young people and their parents to ensure they are aware of the risks. This information should include the UIAA Participation Statement (see para 5 above) and summarise the details of meet organisation shown elsewhere in this document.
39. Office-bearers of Clubs should be conversant with the MCofS Child Protection Policy and Procedures, which is available on request, or have equivalent policy and procedures of their own. (see <http://www.mcofs.org.uk/policies.asp>)

University Mountaineering Clubs

40. University clubs differ from other mountaineering clubs in being transitional as students graduate and move on relatively frequently. University clubs may actively encourage students to participate, and it is important that the risks are made clear to all potential members. University Clubs often become active in the autumn, just as weather and conditions become wintry. The committees of University clubs should consider new members when planning meets, possibly by considering a progressive approach to trips. Committees and individuals should be objective, honest and realistic about their own level of experience; for example, the difference in experience between a fourth-year and first year student may, in reality, not be all that great.
41. University club committees should bring to the attention of all members the UIAA Participation Statement regarding risk and responsibility, and stress that the primary responsibility for safety lies with the individual participant. Membership application forms should include the Participation Statement. University club committees should communicate with the University Sports Union or Association and follow any safety procedures in place **which do not conflict with mountaineering good practice**. For example, there may be an appropriate trip registration system in operation. **University Sports Unions and Associations are encouraged to liaise with the MCofS regarding written safety procedures**. There may be a misconception by some students and parents that walks are guided or led. This is not the case and participants should be encouraged to inform their parents of the nature of activities, i.e. run by students for students with no qualified leadership - just sharing of experience by other slightly more experienced, but nevertheless, young students.
42. The responsibility for the safety of students involved in mountaineering activities has reportedly been interpreted as similar to, or an extension of, the University's responsibilities under the Health & Safety Regulations. As some first-year students have not yet attained the age of 18, the Activity Centres (Young Persons' Safety) Act may be relevant.

43. The Mountaineering Council of Scotland is adamant that the receipt of a grant for voluntary activities does not mean that University Mountaineering Clubs fall within the scope of either the Health & Safety Act or the Activity Centres (Young Persons' Safety) Act; nor does it imply that those who hold elected positions have similar duties to those specified in these Acts. The Council believes that University clubs should operate under the same procedures as any other voluntary club, and that, if the information contained within this guidance is adopted, then they will fulfil their duty of care and therefore their (and their University's) liability for accidents is likewise diminished.

Disabilities

44. In law, a "disability" includes impairments in mobility, vision or hearing, and suffering from diabetes, epilepsy, asthma or chronic depression. Thus some members of mountaineering clubs may fall into the legal category of being disabled.
45. The Disability Discrimination Acts 1995 and 2005 make it unlawful for any club, public or private, to discriminate against the disabled through its membership or use of club facilities. The responsibility lies on both sides – the individual must make its requirements known to the club, and the club must do what it can (make "reasonable adjustments") within budgetary and resource constraints to accommodate the needs of those members.
46. The most basic provision for the disabled could be making large-font newsletters available for visually impaired members or hearing induction loops available at AGMs or club functions for members with hearing difficulty. **sportscotland** provides example statements on the 'Help for Clubs' website at:-
<http://www.helpforclubs.org.uk/>
47. The social aspect of mountaineering clubs often encourages members to gather at a local pub or to hold a business or social occasion (such as an AGM or a holiday party) at a specific location. Locations should make it possible for all members and guests to attend without loss of dignity, e.g. having to be carried upstairs in the event of having no lifts available.
48. If the Club maintains a mountaineering hut with reciprocal rights, or lets the hut to the public, then the club must bring the hut to standards within the spirit of the Disability Discrimination legislation. Access audits, changes in signage, contrasting colours in door and window frames; ample seating and possibly grab bars for the more frail (perhaps older) members are examples of removing barriers. Many of these things can be incorporated over the years through thoughtful planning of maintenance work.

Civil Liability Insurance

49. Club Members of the MCofS are covered by third party civil liability insurance, which provides cover for clubs and members of clubs declared (usually by the club's secretary and according to MCofS rules) as active members to the MCofS. Copies of the master policy with details of all exclusions etc. are available on request from the MCofS office and on the website at:- <http://www.mcofs.org.uk/civil-liability-insurance-for-clubs.asp>
50. The policy covers Club Members for any claim made for any civil liability arising in connection with mountaineering or other club related activities. The cover has no territorial limits, with the exception of the United States and Canada which are specifically excluded, and is not subject to an excess. The limit of indemnity in respect of any claim made during the period of insurance is currently £5 million for any one event.
51. Cover is also provided for 'professional duty' but only in situations in which a member of a club provides tuition to fellow members on a voluntary basis. The policy does not cover a situation where tuition is provided by a professional who charges a fee for such a service (this should be covered by his or her own professional insurance).
52. The Club Member and its committee are insured for any mountaineering-related event or activity - social, business or sporting - that they organise and participate in. As individuals, members of the club resident in the UK and Eire are insured for liability claims made by third parties (including other members of the club) for any club activity, and also for climbing and mountaineering and all associated activities such as mountain walking or scrambling. Activities such as downhill skiing, ski mountaineering, mountain biking and caving are also covered, provided that the activities are non- competitive and are ancillary to the activities of the club (i.e. is not the main activity of the club).
53. A Club may also advise members to take out additional insurance, or warn them that life insurance policies often exclude mountaineering. Details of personal and travel insurance are available direct from the BMC (see Membership Services section at <https://www.thebmc.co.uk/>). The BMC recognises MCofS membership as equivalent to BMC membership for insurance purposes.

Qualifications

54. The MCofS recognises the following formal awards. Clubs officials should ensure that anyone who is paid to instruct or guide members holds the appropriate award. Details of award holders are available from the MCofS Office and on the website at: <http://www.mcofs.org.uk/how-to-find-instructor-guide.asp>

1. Walking Group Leader Award (WGL; Summer conditions in non-mountainous hilly terrain, known variously as upland, moor, bog, hill, fell or down)
2. Mountain Leader Award Summer (ML Summer; Summer only; excludes all climbing and planned use of the rope)
3. Mountain Leader Award Winter (ML Winter; Summer and Winter; excludes all climbing and planned use of the rope)
4. International Mountain Leader (IML; leading trekking parties to all mountain areas except on glaciers, and where the techniques or equipment of alpinism are required)
5. Mountaineering Instructor Award (MIA; summer climbing in the U.K.)
6. Mountaineering Instructor Certificate (MIC; summer and winter climbing in the U.K.)
7. British Mountain Guide (BMG; summer and winter climbing, Alpine and glacier work, ski-mountaineering)
8. Single Pitch Award
For the supervision of climbing activities on single pitch crags and climbing walls.
9. Climbing Wall Award
For the supervision of climbing activities on indoor or outdoor climbing walls and structures in the United Kingdom.

Useful Publications

Information Sheets and leaflets:

The following sheets and leaflets give detailed advice on pertinent safety issues. Members of the MCofS Executive Committee have compiled these with input from experts in the relevant field. They are not prescriptive and are offered only as guidance. The advice they contain is based on current good practice and the MCofS cannot be held responsible for any omissions. The information sheets can be found on the MCofS website at www.mcofs.org.uk.

Route cards

Freezing to Death

Guidance for Mountaineers Taking Instruction

Rescue and Self Reliance

Learn to Read or Get Lost

Avalanche Safety

Enjoy the Hills in Safety

Winter Essentials

Navigation on Ben Nevis

Books (official handbooks of the Mountain Leader schemes)

Hill Walking

Winter Skills

Rock Climbing

DVDs

Winter Essentials – film and 11 chapters dealing with skills and techniques for winter

Alpine Essentials – film and 19 chapters dealing with skills and techniques for alpine mountaineering

Water Hazards in the Mountains – film which raises awareness of the dangers of mountain streams and rivers

Aide memoire cards – plastic cards which can be carried on the hill

Avalanche awareness

Emergency procedures

Winter Check List

Useful Addresses

Mountaineering Council of Scotland (Mountain Safety Adviser): The Old Granary, West Mill Street. Perth PH1 5QP. Tel: 01738 493 942. www.mcofs.org.uk

British Mountaineering Council: 177-179 Burton Road, West Didsbury, Manchester M20 2BB. Tel: 0870 010 4878. www.thebmc.co.uk.

Scottish Mountain Safety Forum, c/o Mountaineering Council of Scotland

Mountain Leader Training Scotland: Glenmore, Aviemore, Inverness-shire, PH22 1QU. Tel: 01479 861 248

Mountain Rescue Committee of Scotland: www.mrcofs.org

sportscotland: Caledonian House, South Gyle, Edinburgh EH12 9DQ. Tel: 0131 317 7200. Website: www.sportscotland.org.uk

sportscotland Avalanche Information Service: Glenmore, Aviemore, Inverness-shire PH22 1QU. Tel: 01479 861 264. www.sais.gov.uk

Scottish National Outdoor Adventure Centre: Glenmore Lodge, Aviemore, Inverness-shire PH22 1QU. Tel: 01479 861 256. www.glenmorelodge.org.uk

Mountain Leader Training UK: Siabod Cottage, Capel Curig, Conwy LL24 0ES. Tel: 01690 720248.:www.mltuk.org

British Association of Mountain Guides: Siabod Cottage, Capel Curig, Conwy LL24 0ES. Tel: 01690 720386. www.bmg.org.uk

Association of Mountaineering Instructors: Siabod Cottage, Capel Curig, Conwy LL24 0ES. Tel: 01690 720314. www.ami.org.uk

British Association of International Mountain Leaders: Siabod Cottage, Capel Curig, Conwy LL24 0ES. Tel: 01690 720272. www.baiml.org