(1909) 2 KB 858 at 876 (per Falwell LJ). The duty to take due care to carry a passenger safety extends to providing safe access to and from the transport (*Longmore v The Great Western Railway Company 144 ER 757 and Craft v Metropolitan Railway Co* 1 LR-CP 300). The Court found that the defendant had breached its duty to a passenger by failing to adequately warn against common dangers, having regard to mistakes that passengers might make (per Pidgeon J at 61,653). Another useful authority is *Ratcliffe v Jackson* (1994) ATR 81-284, where the plaintiff alighted from a car when her cardigan caught in its door. The defendant drove the car away, causing the plaintiff to suffer injury. The Court applied the general principles of *Wyong Shire Council v Shirt* (1979-80) 146 CLR 40, finding that the defendant had breached his duty of care by not delaying "his departure until he had observed the (plaintiff) to be out of close proximity to the car or at least until there had been time for the (plaintiff) to move well clear, or, to attract his attention to her predicament ..." (per Car J at 61,481).

The principles of negligence specifically relating to the duty of care owed to skiers is still substantially untested in New South Wales. As the ski industry grows, attracting more skiers to its slopes, the plaintiff solicitor should be aware of these possible areas of claim. ■

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Note:

[1] Jim Chalat's "Ski Safety News" (http://www.skisafety.com)

Volenti on high? Voluntary assumption of risk in high risk adventure sports

Terry Stern, Sydney

Introduction

Hanging from a belay on the second pitch of a face climb at Mt Boyce I quietly contemplated whether the old Latin saying "Volenti non fit injuria" continued to have relevance.

I had taken a course of climbing instruction with a guide and had signed the usual risk release (or, at least, what I assumed was usual):

"In consideration of the instructors accepting my application for, and being permitted to go on the adventure trip/course/instruction, I, for myself my heirs, executors, and administrators agree to this release of claims, waiver of liability and assumption of risk (collectively this agreement). I waive any and all claims I may now and in the future have against, and release from liability and agree not to sue the instructors, agents or representatives (collectively, its staff) or any Licensor for any personal injury, death, property damage, or loss sustained by me as a result of my participation in an adventure trip with the instructors, due to any cause whatsoever, including without limitation, negligence on the part of the instructors, or its Staff, I confirm that I am at an age of legal consent (18 years or older) and that I have read and understand this Agreement prior to signing it. This waiver will operate for....., its principals, its instructors and agents.

Signature.....Date.....

(Parent or legal guardian if under the age of 18)"

After a short course on abseiling, basic knots and rope ascending (on prussicks) here I was on my first multi-pitch climb contemplating the legal consequences of a variety of possible disasters which I imagined could happen at any time.

The thought of the article I would write "Volenti on High" amused me and I relaxed.

Well, what would have happened if...

Volenti non fit injuria

Don't you know, when in Rome do as the Romans do? It's Australia isn't it? So what do we mean by Voluntary Assumption of Risk and does it continue to have much relevance in the modern law of Tort? Specifically, how does it apply in the context of high risk adventure sports? And does it matter any way?

Does it matter any way?

I was at a climbing gym in Sydney one afternoon. The walls were crowded with kids hanging off ropes, - the latest craze, a climbing party. Youngsters 11, maybe 12, belaying each other. No idea, no concept of danger, of risk. Presumably, the birthday boy's parent had signed them all in and signed some "communal risk release" for whatever worth or effect it had.

It occurred to me that, sooner or later, there'd be a nasty accident or two, or three, in rock climbing gyms.

Sure enough, in the Winter '97 edition of the climbing magazine, *Rock*, p. 11, a corespondent related that he was:

"...aware of several law suits against climbing gyms around Australia which involved customer accident arising from climbers becoming detached from their ropes purely because the karabiner becomes detached from the rope."

He was referring to accidents resulting because the "fail-safe" locking karabiner had unlocked from the climber's harness detaching the climber from the end of the rope.

You see it at some climbing gyms. ▶

The karabiner is permanently fixed to the top rope system in the gym and the climber merely clips into a karabiner on his harness. In other climbing gyms, you are required to tie into the top rope with a figure of 8 follow through knot, one of the safest climbing knots.[1]

In subsequent correspondence in a later edition of *Rock* a young girl related the tragic consequences of her climbing gym accident when, at the top of a climbing wall, it seems the karabiner gate opened and she dislodged from the rope, fell to the floor and suffered serious spinal injuries.

The columns of *High*, and any other climbing magazine you care to read, are scattered with obituaries. Climbing accidents resulting in injury, and worse, inevitably lead to litigation and, no doubt, there is already major litigation resulting from the disaster on Mt Everest of May 1996.[2]

Voluntary assumption of risk as defence to the tort of negligence in Australia

The relevance of Voluntary Assumption of Risk as a defence for a tort claim has been progressively attenuated.

In order for the defence to succeed, three elements must be established:-

- knowledge, almost akin to informed consent in the medical negligence context;
- understanding and appreciation of the risk;
- the assumption must be voluntary, i.e. free of actual or circumstantial coercion.[3]

Knowledge of the facts creating the risk

Notwithstanding that virtually every article of climbing equipment is sold with a warning that climbing is a high risk sport involving the danger of serious injury, or even death, notwithstanding the warnings in every climbing magazine, I wonder if there is any real appreciation of the risk involved in even basic procedures such as abseiling.

Given that even very young children are introduced to abseiling, one can infer that learners are not advised that abseiling is, in fact, a dangerous activity where many things can go very, even fatally, wrong with any lapse of concentration or failure to adhere to the necessary safety elements of the technique.[4]

Sharon (author's daughter) climbing at Mt York, Blue Mountains. Photographed by Terry Stern

Back up in the form of prussick loops or similar is commonly not used when the young adventurer is given the "abseiling experience", nor is any detail of the risks given. Indeed, one wonders whether even the basic A,B,C,D is always run through.[5]

Of course, there are a whole range of other risks which the learner climber won't have contemplated, let alone have had explained, including that a helmet only gives limited protection from rock fall and it certainly doesn't protect limbs from the same source of injury, that holds may break without warning, without negligence, that gear may fail, even though risk rated to an impressive number of kilo newtons, through faulty design or other cause, though rare, that anchors may fail, though they shouldn't, and so on. These, however, are all inherent and normal risks of rock climbing. Assume the risks have not been properly explained, appreciated and understood. Is the instructor liable if there is an accident?

There has been a trend towards the confinement of the defence.

In the late 1960's the High Court considered the case of a water skier who was performing a complicated cross-over manoeuvre with two other skiers. There were some inherent dangers and a need for careful judgement, without which a number of things could go seriously wrong. The source of the injury, however, a collision with a stationary boat was not part of the risk equation, nor in the contemplation of the actors. The boat was not seen by either the driver or the "observer" and the Court found for the plaintiff.

Barwick C.J. formulated the prinicple thus:

"By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime...there are risks inherent in the nature of some water skiing, which because they are inherent, may be regarded as accepted by those who engage in the sport. The risk of a skier running into an obstruction which, because submerged,..is unlikely to be seen by the driver or observer...may well be regarded as inherent in the pastime."[6]

He continued:-

"If it is said...that a participant in a sport or pastime has voluntarily assumed the risk which is not inherent...so as to exclude a relevant duty of care, it must rest upon the party who makes that claim to establish the case..."[7]

This formulation, however, would probably not help our young adventurer today.

Given that each of the risks referred to in the climbing activities is inherent, presumably a climber (or, more likely, his relatives) would not recover on the claim.

Other cases, however, support the proposition that, absent full comprehension of the extent of the risk, the defence will not apply.[8]

Understood and appreciated

What, then, of the victim who, was aware neither of the nature and the elements of the risk, nor appreciated its extent.

A thorough discussion of the issues in the context of motor accident claims (intoxicated driver and passenger) appears in the Supreme Court of Queensland Court of Appeal Decision of *McPherson v Whitfield*[9]

Leigh J noted the move towards the

requirement for an appreciation and full acceptance of the risks:-

"A successful plea of Volenti involves proof of two elements: firstly, an appreciation...of the risks...and secondly, full acceptance...of those risks...the emergence of the second of these factors...has led to the less vigorous use of the defence..."[10]

Leigh J continues:-

"...acceptance of a particular risk, may be expressed or implied where it is thought to be implied from the mere fact the plaintiff has undertaken the activity...it will often be difficult if not impossible to infer the plaintiff has...(taken the risk)...it has become harder for a defendant to satisfy the onus of establishing acceptance of a risk...the tendency being for apportionment..."[11]

Leigh J explained the rationale for the restriction of the Volenti defence, that it excuses a defendant from the consequences of conduct which might even be the substantial cause of a plaintiff's injuries and, therefore, a Court can be expected to require "very clear conduct before reaching the conclusion".[12]

Leigh J notes the contemporary view that the more equitable approach is for an apportionment to achieve a "fair and reasonable allocation of the responsibility..."[13]

By way of a rider, Leigh J notes:-

"It might, of course, be otherwise if, to the plaintiff's knowledge, the activity was so inherently dangerous that no amount of care could have made it safe."[14]

He continues:-

"...there may be cases in which....the risks attending a particular activity are so great that one who voluntarily undertakes (it) must be taken to have accepted those risks as the obvious and unavoidable consequences of it. In those circumstances, the necessary elements of the risk may well be inferred..: cf Jeffreys v Fisher (1985) W.A.R. 250, 253"[15]

There are many high risk sports, but not so many where the risk is so high that they would come within this latter formulation. One that comes to mind is base jumping but that, in any event, is illegal. Another, perhaps, is ice-climbing given the inherent deficiencies of anchor systems (ice screws, melt factor, etc) and the necessary exposure, particularly for the lead climber. There are, no doubt, other such activities, arguably, including ultra-light flying and para-penting (particularly when combined with mountaineering) to name a few.

The assumption of risk must be voluntary

It is beyond the scope of this paper to discuss this element. By definition, the participant in a high risk adventure activity will normally be a volunteer, though one can envisage circumstances in which there may be doubt as to whether the participant is a true volunteer. A case in point might be when our reluctant adventurer is required to participate as a result of some work team building activity, to take one possibility.

The cases suggest that if the participant is not a true volunteer, the defence may not be available.[16]

The relevance of risk release provisions

Generally, it will be necessary to consider the application and effect of a risk release. While a discussion of exemption clauses is beyond the scope of this paper, it is sufficient to note that parallel with the restriction of the doctrine of Volenti, there has been a restriction in the scope and application of exemption clauses, though requiring, in effect, informed consent.[17]

The scope and application of risk releases is further limited by statutory provisions including, in NSW, the *Contracts Review Act* 1980 and, in Australia generally, where the guide or instructor is employed by a company, *Trade Practices Act* 1974 Section 68 (1) together with (4) and Section 74.[18]

Volenti on high or pie in the sky?

There is still a limited role for the Volenti defence in the context of a high risk adventure activity. It will imply a full knowledge, appreciation and acceptance of the risks of which an inference could be drawn from the very nature of the activity.

However, if I am silly enough to want to do a guided ascent of K2 (hasn't happened yet, but it will) then I must accept all those objective risks and every other risk of things going wrong and out of control and if I get back alive and in one piece, I must be thankful for small mercies. ■

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Notes:

1 After attending a gym which has the first system I immediately decided it would be prudent for me and my tribe to use 2 karabiners gates opposed in the loop.

2 See, for example, High, August 1997 Issue No. 177 "Smiler Cuthbertson on trial for Negligence".

3 The Laws of Australia May 1997 LBC Information Services and the cases cited.

4 See, for example Rock Climbing by Don Mellor WW Norton & Company 1997 @ pg 152:
"Rapelling is one of the easiest - and most dangerous elements of climbing.....the process is so simple the climbers are lulled into a sense of false security.....a lot can go wrong; the gear might be set up improperly, the break hand might slip, the anchors could fail, the rope abraid on a sharp edge, the rope might not reach the ground, rocks could be dislodged from above. All of these things happen to climbers yet all are preventable.
It is vital to use some kind of backup when rapelling. It's just too casual to put all your faith in your brake hand alone."

5 The basic safety instruction A for Anchor; B for Buckle; C for Karabiner and D for Device and whether each of the four, and you, are properly linked into the rope system.

6 Rootes v Shelton 1967-8 41 ALJR 172 @ 173

7 Ibid

8 Demczuk v Polish Society Dom Mikolaja Inc. (1987) 46 SASR 223 @ 235

9 McPherson v Whitfield 1995 ATR 81-332

10 Ibid @ 62, 278

11 Ibid

12 Ibid

13 Ibid citing Pennington v Norris (1956) 96 CLR 10 @ 17

14 Leigh J ibid 62, 278

15 Ib Id 62, 279

16 For a general discussion of the requirement that the plaintiff must have voluntarily undertaken to run the risk, see the discussion in The Laws of Australia 1 May 1997 LBC Information Services @ (65) et seq.

17 For a most interesting discussion of risk releases and informed consent in the context of high risk sports, see "Playing with Liability: The Risk Release In High Risk Sports" California Western Law Review Volume 24 Pg 127 @ pg 145 et seq.

18 Section(4) "Services" includes
a contract for or in relation to
(i) the performance of work
(ii) the provision of, or the use or enjoyment of facilities for....., recreation or instruction;
Section 68(1):
"Any term of a contract.....that purports to exclude, restrict or modify.....
(a) the application of all or any of the provisions of this Division;.....is void
Section 74 provides:
(i) in every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill"