Waiting for Romeo

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Introduction

The theme of this paper is to analyse how the common law (that is, law made by judges) regulates liability in negligence of climbers and occupiers of land for ordinary climbing accidents. Other papers deal with the impact of Queensland statute law on the question. So far as I am aware, no land manager or landowner in Australia, Britain, the United States or New Zealand has ever been held liable for a recreational climbing accident. Some Australian land managers have been made liable for other types of recreational accidents. These cases provide a degree of guidance as to the types of climbing situations land managers might be responsible for in the future. The title of this paper Waiting for Romeo is a reference to an appeal now before the High Court - Romeo v Conservation Commission. This case is one of the most important for decades so far as land managers are concerned, as it involves liability for an accident arising from a known and obvious risk which the manager concerned did nothing to increase. The case may have further implications for land managers who wish to regulate climbing by applying risk management principles. The appeal was heard by the High Court starting 30 September 1997, with a decision expected possibly by the end of this year.

After stating some basic principles of negligence law, this paper examines how the common law regulates liability for ordinary climbing accidents by applying to the subject three distinct levels of analysis. The first level concerns accidents which result from the inherent risks of climbing (for which no-one will be held liable). The second looks at accidents caused by the negligence of climbers and for which they themselves will be responsible if legal proceedings are taken. The third looks at the position of land managers and landowners by reviewing a number of recent Australian cases (including *Romeo v Conservation Commission)* and any problems or uncertainty these cases may create. Comments follow on what is certainly one of the most difficult and far-reaching issues in this entire area - liability for bolt failure accidents. Some possible legislative responses to liability are considered (based on successful US models), and tentative conclusions drawn on the main issues.

Basic principles - a crash course in negligence law

When a duty of care arises

The common law imposes liability in negligence where someone owes a duty of care to another, there is a breach of that duty, and damage is caused by the breach. To whom is a duty of care owed? The classic answer was given by the House of Lords back in 1932 - `You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour ... [that is] persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation ...' - Donoghue v *Stevenson* [1932] AC 562 (at 580). For a duty of care to arise under Australian law, there must now be shown to be sufficient `proximity' between the parties - physical, circumstantial or causal. The importance of each type of proximity varies from case to case, but the main indicator of proximity is reasonable foreseeability of a real risk of injury to the person concerned. A risk is regarded as foreseeable in this context where it is not far-fetched or fanciful - *Wyong Shire Council v Shift* (1980) 146 CLR 40 (at 48). Once a duty of care exists, the standard of care required to meet it turns on what response the reasonable person would be expected to make in the all the circumstances. This may depend on economic factors, aesthetic considerations, environmental matters, community values, and other things.

Sport and recreation

There is a vague populist notion the law of negligence has no proper role to play in these spheres of human activity. For some climbers the very thought the law may apply to them at the crag is pure anathema. In the wake of *Hedley v Cuthbertson* (1997), for example, one climber wrote to *The Guardian* (24 June 1997) -'Making difficult decisions in the face of danger is an integral part of climbing in big mountains. Fatally wrong decisions are to be expected, not made the subject of legal actions'. But the law has long applied to sporting and recreational pursuits, and climbing is no exception. Weaver *v Ward* 80 ER 284 (decided back in 1616) was concerned with liability for a kind of sport - skirmishing with muskets (a historical antecedent of 'paintball' it seems). Last century, an English judge stated -'No rules or practice of any game whatever can make that lawful which is unlawful' - R *v Bradshaw* (1878) 14 Cox CC 83. The American case of *Nabozny v Barnhill* (1975) 334 NE 2d 258 illustrates some of the policy factors -'The law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However we also believe that organised athletic competition does not exist in a vacuum. Rather some of the restraints of civilisation must accompany every athlete onto the playing field'. Closer to home, in Rootes v *Shelton* (1967) 116 CLR 383 (at 387), Kitto J said -'I cannot think that there is anything new or mysterious about the application of the law of negligence to a sport or a game'.

Grievous fallacy

Bernard Gross QC explains further - `Because tort law condemns unreasonably dangerous activity off the playing field, it is inconsistent to give someone a licence to completely disregard the safety of another merely because the two are involved in a sporting event'. Another commentator (J Neville Turner) summed it up by saying - `it must be categorically said that those who believe that sport is above, beneath or beyond the law are guilty of a grievous fallacy'. There is no doubt that sporting participants generally, and climbers on the same rope in particular, owe a legal duty of reasonable care to each other. The recent English case of *Hedley v Cuthbertson* (1997) confirms the duty of climbers in this respect (both guides and amateurs). Climbers on the cliff also owe a duty of care to members of other parties who may also be there. What standard of care does the law expect of sporting and recreational participants? At one time and in some jurisdictions, nothing short of conduct amounting to recklessness was enough

to make a sportsperson liable in negligence. The position in Australia is that issues of liability in negligence are now to be approached on the basis of a generalised duty of care - how would the reasonable person have behaved in all the circumstances of the defendant? - *Frazer v Johnston* (1990) 21 NSWLR 89 (at 94). This is also illustrated by the recent trotting case, *Hargreaves v Hancock* (1997) unreported.

Assumption of risk

Accidents are a price paid for the freedom to climb. Danger and the possibility of mishap no doubt account for some of the activity's primal allure (at least in the public imagination). The judge in *Hedley v Cuthbertson* (1997), for example, commented - `Mountain climbing is extremely dangerous. That is one of the reasons why so many risk their lives every year on mountains'. One way the law accommodates recreational activities involving the chance of serious injury is to make participants legally responsible for those risks which are expressly or impliedly accepted by them. In the jargon of the law, acceptance of risk is referred to by the Latin maxim - *volenti non fit injuria* (no wrong is done to one who consents). To show *volenti,* there must be a finding of fact that the injured person freely and voluntarily, with full knowledge of both the nature and extent of the risk, expressly or impliedly agreed to assume it. The defence is based on subjective appreciation of risks by the person injured, not foreseeability of those risks. A subset of the assumption of risk principle is that sports persons by their mere participation impliedly accept all the inherent risks involved.

Legal *effect of volenti*

Does assumption of risk by a climber prevent a duty of care arising, or simply deny negligence once shown? This issue can be left to legal theorists as both approaches lead to the same result - a complete defence. How might *volenti* apply in a climbing context? Assume belayer (B) is injured by rockfall. B sues leader (L) for negligently dislodging the rocks above. To establish *volenti,* L must show that B with full knowledge actually agreed to assume the legal risk of injury in the circumstances of the accident. Whether these requirements would be met depends on all the facts. Suppose L pointed specifically to the danger and recommended B move immediately. But B remained where he was, saying -'I will take the risk Lex, keep going'. If *volenti is* established on these facts, assumption *of* risk by B either prevents L owing a duty *of* care, or it relieves any negligence by L once shown. Either way, the end result is the same - L is not liable. To show *volenti* in the absence of some real recognition by B that he accepted the legal risk of negligence by L would be extremely difficult in practice. Courts generally interpret the defence strictly against the person seeking to rely on it (in this case, B). *Volenti* is very seldom successful as a defence to negligence claims these days, either in sporting cases or otherwise.

Contributory negligence

While it may be rare for *volenti* to succeed, an injured climber found guilty on contributory negligence will have damages reduced. `It is a principle of law that everyone must take reasonable precautions for his or her own safety, and a failure to do so is contributory negligence' - Hatch v *Alice Springs Town Council* (1989) 100 FLR 56 (at 63). Ignoring a warning to move from the path of imminent rockfall is an example. Failure to wear a helmet may be another. No law says you must wear one, but safety studies and codes of conduct suggest they are a good idea. After a leading helmet proponent was badly injured while not wearing one, he wrote - `I ignored my own published words that being in the vicinity of a cliff is like being in a war zone, and I almost paid for it with my life' - Baxter (1995) 22 *Rock* 3. Failure to wear a helmet by a moped driver has been found to be contributory negligence - *O'Connell v Jackson* [1972] 1 QB 270. Failure to wear a seat belt is another possible analogy. Australian courts

reduce damages awards where there is proof that wearing one would have lessened resulting injuries. The legal question for climbers is - what safety precautions would the reasonable climber take in the circumstances? As Royal Robbins said in *Advanced Rockcraft*' the decision about helmet use should be a rational choice, not one based on fashion or mystique'. If a law makes it an offence not to wear a climbing helmet, any number of responses are possible. After bike helmets were made compulsory in Canberra, for example, one local hell raiser challenged the law in the Supreme Court on the basis it breached the 1947 *Universal Declaration of Human Rights* (rejected) - *Van Schaik v Neuhaus* (1996) 87 A Crim R 57.

Special situations

Generally speaking, liability for omissions (failure to act in a particular way) is rare and only arises where there is otherwise a positive duty to act. A duty of this nature may arise where a person creates a situation of danger, or assumes responsibility for an activity or area. Rangers have no duty to rescue a fallen climber unless their actions increased the risk of accident in the first place. Sometimes a duty of care may be `non-delegable'. The rationale is that some obligations are so personal that liability cannot be shifted by delegating responsibility to others. In this situation, the duty is not just to take reasonable care, but to ensure that reasonable care is taken. When will a non-delegable duty arise? In *Kondis v State Transport Authority (1984) 154* CLR *672,* Mason J said (at *687), '...* the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised'. One situation where it arises is between teachers and students. On outdoor programs, for example, teachers (and their employer) owe a nondelegable duty to students. This is illustrated by the Cathedral Ranges case where a schoolgirl recovered damages for nervous shock after witnessing the accidental death of another student on an outdoor excursion - *Nicholas v Osborne (1985).*

Land managers and non-delegable duties

Some aspects of the duty of care owed by land managers to recreational users may be non-delegable - cf *Northem Sandblasting v Harris (1997) 146* ALR *572.* If NPWS made a decision to extend fencing at North Head, for example, it may not escape liability for negligence simply by engaging a competent contractor to do the work. The duty of NPWS here would not simply be to take reasonable care - it would be to ensure that reasonable care is taken. What is the test for someone being under a non-delegable duty? In *Bumie* Port *Authority v General Jones Pty Ltd (1994) 179* CLR *520* (at *556-557),* the High Court said - `... a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another'. Dangerous activities are not limited to operations which are inherently hazardous. They extend to `collateral negligence' - that is, to the manner in which the contractor carries out the task - McDonald & Swanton *(1995) 69* ALJ *323* (at *325).* This has possible implications where a land manager decides to install fixed anchors for the benefit of climbers (as has been done at Kangaroo Point). In determining liability, a court would look at the degree of control exercised by the land manager and any special dependence or vulnerability of climbers - cf *Northern Sandblasting v Harris (1997) 146* ALR *572.*

Occupiers of land

Prior to *1987* in some Australian jurisdictions (including Queensland), different common law rules applied to different categories of people coming onto land in determining what precise duty of care was owed to them by the occupier in the circumstances. A different standard of care was owed to trespassers from invited guests, for example, and the legal character of risk involved was critical in determining ultimate liability. Now the position is governed by the general principles of negligence law. Victoria, WA and South Australia each have their own legislation modifying the older common law rules. In *Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162* CLR 479, the High Court adopted a similar approach at common law. It said (at *488)* -

`All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiffs entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship'.

Effect of *Zaluzna case*

As was remarked in *Northern Sandblasting v Harris (1997) 146* ALR *572, Zaluzna* replaced categories in occupiers liability law with general concepts. This does not mean the same duty is imposed for every type of entrant onto land, or that a duty arises for every entrant. Nor does it mean trespassers are now more likely than before to recover compensation when injured. Generally, a contractual entrant on land (like a commercial operator) is owed a higher duty of care by the occupier. Where people lawfully enter on public or private land , this by itself is generally enough to create a minimal duty of care, the content of which depends on all the circumstances. These include - perceptions as to magnitude of the risk, degree of probability it may occur, and the expense difficulty and inconvenience which taking precautions would involve. Financial, aesthetic and environmental factors may have an impact on the question. Account must also be taken of the reason for entry onto the land, the skill level reasonably to be expected of the visitor, and the possibility of inadvertence on the part of that person. In this context, Michael Devery (DNR) raised the issue of who is to be regarded as a `climber' by land managers. The mere fact that a land manager may owe a duty of care to those lawfully on the land does not create liability for all accidents.

Public authorities

The High Court has confirmed that `governments and public officers are liable in negligence according to the same general principles that apply to individuals' - *Northern Territory v Mengel (1995) 129* ALR 1 (at *19).* However, there are some special rules which potentially limit the situations in which public authorities may be liable in negligence for recreational accidents. Invariably land managers responsible for climbing areas around Australia will be public authorities for legal purposes. Much climbing in Australia is done in national parks and reserves. In NSW, for example, the Director-General of National Parks & Wildlife has the `care, control and management' of national parks and is a public authority for legal purposes. Public authorities must exercise their statutory powers and duties with reasonable care. However, the law recognises limited resources are made available to public authorities by government and that difficult choices must inevitably be made as to how those resources are best used in satisfaction of statutory responsibilities.

Planning and operational decisions

As a basic principle, the distinction is drawn between the `planning' and `operational' decisions of public authorities (the latter being judicially reviewable, and the former not) - *Sutherland Shire*

Council v Heyman (1985) 157 CLR *424* (at *468-469).* This classification of derives from interpretation of the `discretionary function exception' to the *Federal Ton` Claims Act 1946* of the United States - *Dalehite v United States (1953) 346 US 15* (at *39-40).* Similar principles apply in many foreign jurisdictions, including Canada, Britain and the European Community - *Bienke v Minister (1996) 135* ALR *128* (at *149-154).* Planning decisions are based on policy options dictated by social, political, economic, environmental and other factors. The law regards them as non-reviewable on the basis that standards of negligence developed by the courts cannot be applied to them. As a rule, there must be satisfactory evidence that a proper policy decision was considered and made at a sufficiently high level and documented appropriately. Operational decisions of a public authority (conduct by which policy is put into action) are generally reviewable by the courts. Wilmot v *South Australia (1993)* ATR *181-259 is* a recent case where the decision of a land manager not to exclude trail bikers from Crown land was held to a non-reviewable planning decision. Brett Waring (DNR) has raised the practice of using planning decisions as a strategy for Queensland land managers.

Status of negligence cases

After *Hedley v Cuthbertson (1997),* in which an alpine guide was found liable for failing to follow an `accepted' safety standard, the British Mountaineering Council expressed concern the case would operate as a `precedent' in other climbing situations. It is clear enough that the popular idea of `precedent' in legal cases differs from the strict legal doctrine itself. Negligence cases depend very much on their own special facts and circumstances - Luntz (1993) 1 TLJ 199 illustrates. While similar circumstances may produce similar results, the mere fact a court reached one result on a set of facts does not legally compel the same or another court in the same judicial hierarchy to reach the same conclusion. In *Teubner v Humble* (1963) 108 CLR 491 (at 503), Windeyer J said -

Decisions on the facts of one case do not really aid the determination of another case. Observations made by judges in the course of deciding issues of fact ought not to be treated as laying down rules of law. Reports should not be ransacked and sentences apt to the facts of one case extracted from their context and treated as propositions of universal application ... That would lead to the substitution of a number of rigid and particular criteria for the essentially flexible and general concept of negligence'.

Reasoning by analogy

The comments of Windeyer J do not mean that cases based on similar facts are not relevant or helpful in the determination of other cases where the legal principles to be applied are comparable in material respects. Because the basic reasoning processes of the law are analogical, cases decided on similar facts under comparable principles will always be relevant to solution of the matter at hand. Justice and public confidence also require a high degree of consistency in judicial decision-making. What Windeyer J is saying is that similar facts do not compel a similar finding by the court and that care must be taken in selecting analogs to resolve issues on which there may be no judicial authority. Slight differences in the factual context may produce diametrically opposed results under identical legal principles. As I have already indicated, there are no cases where a land manager or landowner in Australia, Britain, the United States or New Zealand has ever been held liable in negligence for a recreational climbing accident. This observation alone is no `precedent' against a different conclusion in a future case. However, to comment on the prospects of liability in any particular case, it is necessary to resort to general principles and argument by analogy with cases dealing with other recreational pursuits (and perhaps in other jurisdictions). This is the general approach adopted in this paper.

Appeal procedures

Negligence cases are usually heard before a single judge of a State court sitting without a jury. The task of the judge is to find the facts according to evidence presented by the parties and to apply to those facts the law as it stands at the time. This basic process is called a syllogism. Appeals on either the facts as found by the judge or the legal principles applied to them are taken (usually) to an appellate tribunal of a Supreme Court. Although appeal courts have a duty to find the true facts of a case as well as determining the legal principles to be applied, persuading them to interfere with fact-finding by the trial judge is very difficult in practice. Appeal courts are generally loathe to impose their views as to facts on a trial judge who saw the witnesses give their evidence and was able to observe their demeanour. Appeal courts are more likely to allow an appeal on the basis that the trial judge applied incorrect legal principles. State appeal courts usually represent the last chance a party has to have an unfavourable decision reversed, unless the High Court grants special leave to appeal. Gone are the days when anyone could appeal any case to the High Court. As the High Court has said, in many

instances State appeal courts will be courts `of last resort for all practical purposes - *Nguyen v Nguyen* (1990) 91 ALR 161 (at 178). Appeals to the High Court (other than in constitutional cases) are now regulated by the special leave procedure.

Public importance

The High Court must be convinced that the case raises a matter of public importance before it will grant special leave - section 35A of the *JudiciaryAct 1903.* As a former Chief Justice has observed, `a grant of special leave `is only justified by the existence of a need to clarify the law for Australia'- Mason (1984) 58 ALJ 537 (at 543). The mere fact a decision may be wrong in law (even obviously so) is not sufficient of itself to justify special leave being granted. Neither should any grant of leave be taken as alay down misere' the appeal will be allowed. The High Court sometimes grants leave only to later dismiss the appeal. When refusing special leave, the court often uses a form of words like - the decision below `is not attended with sufficient doubt' - *Wilmot v South Australia* (1994) illustrates. Statements of this nature are not to be taken as affirming the correctness of the earlier decision - *Mihaljevic v Longyear* (1985) 3 NSWLR 1 (at 25). Mason CJ has said however that statements like this `may have persuasive value' - Mason (1988) 4 ABR 93 (at 98). To summarise, a grant of special leave doesn't necessarily mean the decision below is wrong just as a refusal doesn't mean it is necessarily right either. There will be room for debate in every case.

Inherent risks (first level of analysis) - no person liable

Basic rule

Participation in a sport or recreational activity involves acceptance of all the risks inherent in the activity itself (but not the risk that someone else may be negligent). This rule is illustrated by *Rootes v Shelton* (1967) 116 CLR 383, where Barwick CJ said (at 385) -'By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime'. Taylor J said (at 391) -'There can be no doubt that a participant in a sport or game voluntarily assumes such risk of injury as is inherent in the sport itself. His participation precludes him from asserting otherwise'. Assumption of inherent risks is an inference properly to be drawn from the fact of ordinary participation in any sport or recreational activity (including rockclimbing and mountaineering). This does not mean climbers are taken to assume the risk of negligent conduct on the part of other persons (whether as a climbing partner, commercial operator, land manager, private landowner, manufacturer of equipment, rescuer, or

sandbagger). Sometimes this accords with the popular view of what risks are legally accepted - cf Hechtel (1997) 81 *Rock & Ice* 6.

Inherent risks of climbing

There is little in the Australian cases which throws much light on what are to be regarded as inherent risks of climbing. In *James v Fullerton* (1983) 77 FLR 321 (at 328), there are remarks that `slipping, or being struck by falling stone' are to be regarded as inherent climbing risks. Though much may depend on the precise facts of any particular accident, ordinary experience will often indicate what risks are inherent in a given climbing situation. A complicating factor is that what may be considered inherent in one situation may not be in another. Things like rock-type, location, weather conditions and a range of other factors may also be important in some cases in determining what risks are inherent. Breaking a hold, slipping, and `pumping out' would seem to be squarely within the category on all occasions. Getting off-route, belay failure, becoming benighted, or not having the right equipment might be inherent risks in some cases but not others. The chance a lead climber could inadvertently dislodge something above which injures the belayer (as happened to Chris Baxter a few years ago) might be regarded as an inherent risk in some circumstances. But if the leader carelessly tossed down large blocks without warning, it is hard to see how this could be seen as an inherent risk for the belayer. Legal proceedings were once commenced against a climber on the East Buttress Route 5.10c in Yosemite Valley who dislodged a rock which injured a climber in another party below - Vogel (1989) 115 *Climbing* 130.

Expert evidence

Sometimes, the expert evidence of other climbers will be crucial in determining if a risk is inherent or not, as it was in Hedley v *Cuthbertson* (1997). There is a Queensland case where climbers were called to give expert evidence (though not on inherent risk). After a bizarre incident on Mount Cordeaux in 1979, an army officer (Captain Tony Cremer) stood accused of the murder of his male companion - a classic `did he fall or was he pushed?' situation. Central to his defence was Cremer's story that, after the victim fell, he himself soloed down the cliff looking for the body then soloed back up and raced off to sound the alarm. Robert Staszewski gave evidence for the prosecution indicating (in his view) the impossibility of this account. David Moss and Brian Springall were retained by the defence. They discovered an easy way down the (at first sight) grade 19 face. Springall soloed up and down the 10m section to show it could be done. The climbing evidence took up almost half of the two week trial and Cremer was acquitted - White (1981) 2 Wild 3. Staszewski later received a letter of commendation from police commissioner Terry Lewis. Expert evidence has been given by climbers in other situations as well. Keith Lockwood, for example, appeared at the 1990 coronial inquest into the climbing deaths of Dennis Kemp and others. American Alpine Club luminaries Jim McCarthy and Jed Williamson were each retained by the defence in the important Tetons rescue case - *Johnson v United* States (1991) 949 F 2d 332 (discussed below). Connecticut climber (and bolt-chopping extremist) Ken Nichols was involved as an expert witness in recent product liability litigation concerning the *Gibbs* Ascender.

Inherent risk in America

Similar principles apply in America, but a different terminology is used. What we call `assumption of inherent risk' in Australia is usually called `primary assumption of risk' by the Americans. The famous judge Cardozo CJ said in *Murphy v* Steeplechase Amusement Co (1929) 250 NY 479 -'One who takes part in such a sport accepts the dangers that inhere in so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his

antagonist ... The antics of the clown are not the paces of the cloistered cleric'. Stimson v Carlson (1993) 14 Cal Rep 2d 670 illustrates application of the principle. A crew member was struck heavily by mainsheets attached to a swinging boom on the yacht Cosmic *Muffin* and suffered injury. The judge said (at 673) -

`Particularly in the area of athletics and recreation, the doctrine of primary assumption of risk prevents lawsuits among participants who are knowingly engaged in the normal activities, and inherent risks, of an active sport. By eliminating liability for unintended accidents, the doctrine ensures that the fervour of athletic competition will not be chilled by the constant threat of litigation for every misstep, sharp turn and sudden stop ... the freedom to enjoy such activity is preserved through application of the doctrine of primary assumption of the risk'.

Anchor failure in practice

A recent case underlines the fact that nobody will be held liable for accidents resulting from the inherent dangers of climbing - University of California v Roettgen (1996) 48 Cal Rep 2d 922. Commercial guides engaged by the university set up a top rope anchor comprising four individual pieces in a single crack. They personally tested the system and later gave evidence that it was (in their opinion) 'bombproof. Several clients climbed and were safely lowered on the system before Norman Roettgen took his turn on a `placing protection' exercise. While being lowered, the anchor failed completely and he fell 30m to his death. There was a suggestion that `course protocols' required a multiple anchor to be arranged between at least two cracks wherever possible. Roettgen's wife sued the university and other parties for wrongful death alleging their negligence was the substantive cause. It seems an earthquake or tremor may have triggered the accident - `a large piece of the mountain face shifted'. An appeal court granted summary judgment on the basis that Roettgen had assumed all inherent risks involved in top roped climbing. Summary judgment is granted only where the defendant shows the case has no merit due to the presence of a complete defence - in other words, Mrs Roettgen never made it to first base.

Personal responsibility

The appeal court held that Roettgen had assumed all the inherent risks of climbing by his mere participation in the university climbing course. Commercial operators have a duty not to increase the risks inherent in a sporting or recreational activity but have no duty to eliminate any inherent climbing risks. It was said (at 925) that the overriding consideration is `to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature'. Further, the `rules of liability must not interfere with the natural fervour with which athletes, amateur as well as professional, engage in sports activities'. This reflects a policy of essential non-interference with recreational pursuits freely chosen. The court also said (at 925-926) -'Falling, whether because of one's own slip, a co-climber's stumble, or an anchor system giving way, is the very risk inherent in the sport of mountain climbing and cannot be completely eliminated without destroying the sport itself. This is some recognition that regulation of climbing to impose legal sanctions for belay failure and the like (in the absence of proven negligence) would inevitably reduce the activity to nothing. The appeal court's finding is fully consistent with a policy recognising the wider value of responsible risktaking (about which Dick Smith has written much).

Importance of Roettgen case

The appeal court stated (at 926) - `Inherent in the sport of rockclimbing is the fact a fall can occur at anytime, regardless of the negligence of one's co-participants'. The importance of the case lies in the manner in which the inherent risk rule was applied, and the overt policy of

Californian courts not to impose a duty of care which is likely to impede participation or alter the fundamental nature of rockclimbing. This case sends a clear message that the concept of inherent risk in California will be liberally construed and that climbers themselves must be prepared to accept the consequences of accidents resulting from those inherent risks. The emphasis is on personal responsibility. How would an Australian court decide a case based on similar facts and circumstances? First, the inherent risk rule applies here in similar terms. The death of Dennis Kemp at Arapiles in 1990 is evidence enough that seemingly `bombproof belays can fail without fault on the part of anyone. Second, if an earthquake or tremor was the ultimate cause of the accident, it is difficult to see how a commercial operator might be found liable in negligence.

Safety standards

There remains one intriguing aspect to the *Roettgen case.* The court mentioned in passing (at 923) - `Top rope anchor systems are considered safe if the anchors within each system are themselves set in two or more separate crack systems in a mountain face'. Mrs Roettgen argued it was negligent to place four anchors in a single crack. This was not dealt with directly by the court except to point out that `course protocols' of the university were not authenticated and created no duty of care to students themselves. It seems no expert evidence was presented on the question so the court did not need to decide if accepted climbing safety procedures had in fact been met. Whether or not an anchor arranged between two or more cracks would have been likely to remain in place when `a large piece of the mountain face shifted' is another matter. In Australia, it may be assumed a similar case would prompt expert evidence from climbers for and against it being an accepted safety procedure to arrange a top rope anchor between at least two cracks whenever possible.

Climbers (second level of analysis) - liable for own negligence

Hedley v Cuthbertson

There is no doubt recreational climbers on the same rope owe a legal duty of care to each other. The prospect that professional guides may be liable for climbing accidents involving their clients is illustrated by a recent English case - *Hedley v Cuthbertson (1997).* Gerald Hedley was killed in *1990* on the North Face of *Tour Ronde* in the French Alps. His infant son sued the guide concerned (David Cuthbertson) in negligence under fatal accident legislation. The route attempted in this case was first climbed in 1886 (without ice-screws). It has an average angle of 52° and was ski descended in *1971.* Having attempted to place a second ice-screw, Cuthbertson had relied on a single screw belay high up on the face. He led *off* and was 20-30m up and left with no intermediate runners when a large sheet of ice gave way beneath him. In the resulting fall, the belay failed. Cuthbertson sustained a fractured knee and Hedley fell to his death. The reason given for the single screw belay was that Cuthbertson was attempting to move quickly to minimise the risk of stone fall. Other evidence and guidebooks tended to show the risk was not as great as Cuthbertson perceived it to be. The judge found there was no dire emergency of stone fall.

Chouinard for the defence

At any rate, he felt that the extra two minutes it would have taken to install and remove the second screw would not have increased the danger to any discernible degree. Defence counsel sought to rely on a passage from Yvon Chouinard's book, *Climbing Ice* (at 125) - `Unless time is an important factor, you should put in two pitons for a belay'. The judge did not regard this as assisting Cuthbertson, however. The words following the passage quoted say a runner should

then be placed a metre or two above the single screw belay (not done in this case). The judge also said -

I do not wish to suggest that there are absolutely no circumstances in which an alpine guide would be justified in allowing his client to be belayed to a single screw belay, but the importance of the two screw belay, which is universally recognised, means that there must be a powerful and overriding reason for making do with a single screw belay'.

Legal position of guides

The standard of care owed by Cuthbertson to Hedley on Tour *Ronde* was 'that of a reasonably careful and competent alpine mountain guide'. Dyson J referred again to the `universally recognised good practice that two screws should be used in making a belay' then found that the perceived risk of rockfall `whilst it was not groundless, came nowhere near to amounting to the kind of powerful and overriding reason which might, in an appropriate case, justify a guide in making do with a single screw belay'. In finding Cuthbertson negligent in the circumstances, Dyson J said - `Many accidents occur on guided climbs where no-one is to blame ... Anyone who climbs with a guide is, as a matter of law, treated as consenting to the ordinary dangers of mountain climbing. But it is the duty of a guide to take all reasonable steps to minimise the danger to his client of injury or death. If, but only if, he fails in that duty will a guide be liable for the consequences of any accident caused by his breach of duty'.

British Mountaineering Council

An important reminder from *Hedley v Cuthbertson* lies in the fact that a participant in climbing (whether as guide or recreational climber) may be liable where it can be shown they breached a duty of care owed to the injured party by not adopting generally accepted safety procedures. Failure to follow procedures of this nature is only one way of showing there was negligence. What is `generally accepted' by climbers is a question of fact to be resolved on the basis of expert evidence. The case itself attracted wide attention in the media, not all of it favourable to alpine guides. The British Mountaineering Council is concerned it may set a bad precedent. One person described it as a `grotesquely unjust verdict' and offered to contribute to a fighting fund. The fact that accepted safety procedures exist so far as alpine climbing is concerned was vigorously disputed. While an error in judgment may have been made, it was considered `incorrect to invest that error with negligence'. A press release said the judgment `was based on a misunderstanding of alpine climbing, its objective dangers, and decision-making in the mountains ... If Judge Dyson's view is allowed to set a precedent, and if the courts operate under the belief that a standard procedure exists for climbing, then the implications are very serious'. BMC president George Band wrote in *The Guardian (24* June 1997) -

`The judgment ... creates a misleading picture about safety and responsibility in mountaineering ... Falling rocks and ice are a regular and common danger on climbs of this type and speed is the way in which exposure to this hazard is minimised, whereas a fall is a very unlikely possibility ... Because an accident has occurred, it does not mean that any individual is at fault. Risk is inherent in mountaineering and it cannot be eliminated, only reduced'.

No appeal taken

It was decided by the insurers (Royal & Sun Alliance) that no appeal would be mounted. Michael Tillett QC rated the prospects of success at only *25-30%.* In the circumstances, the predicted cost of an appeal (around £70,000) on top of substantial damages (around *£150,000)* was considered prohibitive. But there were grounds on which an appeal *could* have been mounted. Tillett QC thought the judge had been guilty of too much hindsight, had under-

estimated the stone fall danger and was not convincing in his preference for the plaintiff's expert witness (Allen Fyffe). It was also felt Dyson J relied too heavily on oral testimony and not enough on the written evidence of other climbers on Tour *Ronde* at the same time (Durran and Dumarest). The attendance note of Tillett QC's views says -'On balance, counsel believes an error of judgment has been invested with negligence'. However, a telling concession was also made at the trial which clearly should not have been. The expert witness for Cuthbertson (Fred Harper) was asked directly if two ice screws *would* have held (he answered `yes'). Not only was this wrong, but it contradicted the comments of French police. Unfortunately, Dyson J made a positive finding that two screws `would have withstood the force applied to them', something which hung heavily in the final balance . It is also possible Cuthbertson himself was not the best advocate for his own cause. The judge said he `frankly and freely accepted the general need for a second screw' and `did not think that there was an immediate or imminent risk of rockfall'. Given these factors and the general difficulty in overturning findings of fact made by trial judges, it is less than surprising prospects were rated lowly and insurers decided to bail out. There are now some concerns that insurance premiums will rise - cf Stephenson (1997) [...] *High 34. Now* a `lay jury' constituted by the Guides Professional Standards Committee (GPSC) has made a `finding' that Cuthbertson was `not at fault' - (1997) 8 *BMC Summit 4. All* the evidence was considered and Sir Chris Bonington acted as an independent observer. This reaffirms the view of many climbers that `good practice' means making the best judgment available at the time, not following some pre-determined `standard practice'. However, the GPSC exercise affects neither the legal proceedings nor the negligence test applied by the judge.

A precedent for the future?

What impact the case will have on climbing remains to be seen. Dyson J said the decision `should not be seen as opening the floodgates to claims against mountain guides whenever such accidents happen'. After the case, the plaintiffs solicitor (John Gillman) wrote -'The most important thing to emphasise is that this case has not set any form of legal precedent. The law which was used to decide this case was well established. The legal relationship between a climbing guide and his or her client remains unaltered by this judgment' - (1997) 7 *Summit 22.* Each of these statements is correct. Strictly speaking, the case does *not* set a `precedent'. Similar circumstances do not compel the same facts to be found, nor do single judge decisions compel other courts to reach the same result on comparable facts. But these comments present only part of a more complex picture. The most important fact found by Dyson J was that there exists a `universally recognised' safety standard. This finding followed an analysis of the expert evidence for and against that outcome, as well as a review of respected instruction books.

Other factors

It is true that another judge *might* decide no such safety standard exists. However, at least four factors would appear to work against that possibility. First, a finding that there exists a `universally recognised' standard transcends the facts of the *Tour Ronde* accident itself and invites a more general application. Two, because the reasoning and policy of negligence law is essentially analogical, the careful judgment of Dyson J will command respect and be of persuasive value in comparable cases. Three, judicial comity is likely to lead another judge to find for the standard unless strongly inclined in the opposite direction. Four, it is nothing new for safety standards to exist for risky activities - judges look for them as a legitimate means of determining if conduct was reasonable in the circumstances. Most judges would also be incredulous at the view that, with its long history and objective risks, alpine guiding could be conducted on any basis resembling a legal `free for all'. While John Gillman (a climber himself) may be strictly correct in saying that *Hedley v Cuthbertson* creates no legal precedent, the

practical outcome is less straight-forward. An added complication is that insurance companies will now tend to settle cases on the basis there *does* exist a two ice-screw safety standard until some appeal court finds otherwise.

Reflections on Everest 1996

The legal test applied in *Hedley v Cuthbertson* raises questions about the Everest tragedy last year, in which eight people (including guides Rob Hall and Scott Fischer) lost their lives. Much has been written about the events, and a Hollywood version is planned. The most reliable accounts of what happened are Jon Krakauer's book *Into Thin Air* and Michael Groom's autobiography, *Sheer Will. Two* commercial expeditions were caught out in a fierce (but not unseasonable) storm high on the mountain. Hall and a client (Doug Hansen) perished near the South Summit after reaching the top. Fischer (the last person to summit) and Andy Harris each were lost nearby to altitude sickness and hypothermia. Others died attempting to reach Camp Four on the South Col. In *Hedley v Cuthbertson,* Dyson J said clients consent to the ordinary dangers but a guide has a duty `to take all reasonable steps to minimise the danger to his client of injury or death'. Hansen had been guided on an earlier Everest expedition by Hall in 1995. For sound and obvious safety reasons, Hall enforced a strict `turn around' rule - his clients must begin their descent by 1 PM (no exceptions).

At the top

Krakauer wrote in an earlier magazine article, (1996) 21/9 Outside 46 (at 57) -

`Sticking to your predetermined turn-around time - that was the most important rule on the mountain. Over the previous month, Rob had lectured us repeatedly on this point. Our turn-around time, he said, would probably be 1 PM and no matter how close we were to the top, we were to abide by it'.

Hall had turned Hansen around in 1995 near the South Summit (about 100m vertically from the top). The hour was late and continuing was considered too risky. In any event, Hansen was exhausted and suffering from hypoxia. It was all Hall could do to get them both down alive. Afterwards Hall offered Hansen another chance, at a `significantly discounted' rate. This time Hall made a decision to leave Hansen (probably somewhere near the Hillary Step) and continued to the top alone (reached shortly after 2.15PM). No-one accompanied Hansen to the summit. Accounts vary as to when he finally joined Hall - some put it around 3.15PM, but Krakauer (at 202) and Groom (at 281) each suggest it was around 4PM. When Hansen got there, he was in much the same condition as the year before -'a real zombie', said Ed Viesturs. Unable to get his client down further than the South Summit (in a raging storm and without oxygen), Hall stayed with Hansen and they both died.

All reasonable steps ...

Did Hall take `all reasonable steps to minimise the danger to his client'? Krakauer had posed the question ... `Why did experienced guides lead rank amateurs into a mortal trap?' - (1996) 21/9 Outside 46. Hall had first-hand experience of Hansen's capacity at high altitude. Yet he still encouraged Hansen (then aged 46) to make one more attempt. Sir Edmund Hillary commented directly -'To take a man who'd had trouble back up a year later ... is taking a big risk, a considerable chance'- (1996) 19/9 Life 41. By ignoring his own time rule, Hall allowed Hansen to continue ascending for at least 2'/4 hours after the time had been reached when risks presumably became too great to run. Why Hall did this is a matter for conjecture. Krakauer wrote (at 66) -

`Given Hall's conservative, systematic nature, many people wonder why he didn't turn Hansen around when it became obvious that he was running late. It's not far-fetched to speculate that because Hall had talked Hansen into coming back to Everest this year, it would have been especially hard for him to deny Hansen the summit a second time - especially when all of Fischer's clients were still marching blithely toward the top'.

Hansen was left by Hall to undertake the last part of his summit bid alone. For about 1'/z hours, Hall sat on the summit either by himself or talking to other climbers. This prevented him monitoring the physical and mental condition of his client. It also effectively disabled Hansen himself from making a decision to turn back. By this stage Hansen was incapable of descending alone anyway. But there is a further factor to consider. Hall and Fischer were direct competitors in the high altitude guiding business. The ability to attract Everest clients (each paying around US$60,000) depended on a track record of getting people to a height of 8848m. Getting caught in a storm may be an inherent risk of mountaineering, but getting caught due to the negligence of someone legally responsible is not. It is an open question, therefore, whether taking Hansen up again, ignoring the time and leaving him to push for the summit alone (all in the context of a business rivalry with Fischer) satisfied the duty of care owed by Hall to his client. It is now thought that the Hansen family may have contemplated legal action against Hall's company, *Adventure Consultants.*

High altitude rules

Summing up on the Everest 1996 tragedy, Michael Kennedy said -'Everything that transpired during those storm-filled days on Everest was the result of a series of superficially innocuous miscalculations and seemingly harmless decisions, all made by people with the best of intentions' - (1996) 163 *Climbing* 94 (at 156). Back in Seattle, Fischer's business partner said the whole thing was `an act of God' - Dowling (1996) 19/9 Life 32 (at 42). It has also been suggested the traditional guiding relationship does not even exist at high altitude - Keaton (1997) 80 *Rock &* Ice 6. Russian guide Anatoli Boukreev (himself part of Everest 1996) maintains he is definitely *not* responsible for the welfare of his clients at altitude. These comments reflect an idea, that the extreme conditions of high altitude climbing (including hypoxia) absolve guides from all legal responsibility. An authority on high altitude physiology, Charles Houston, has said - `You just don't sense at this altitude. You can't make good decisions'. Climbers tested at Camp IV on Everest have taken 50% longer than a 6 year old child to understand a simple sentence. There is an early Scottish case suggesting hypoxia (in quite different circumstances) may be a defence in the nature of automatism - *HM Advocate v Ritchie* [1926] JC 45. As a general principle, however, defences of this type would seem to be excluded by the fact that guides are only too well aware of the effects of thin air. Their decision to take clients to the top of Everest and to voluntarily accept a degree of facultative impairment precludes any chance of reliance on hypoxia as a defence. High altitude guides who are negligent will find the general law applies to them, despite the fact their best intentions. There is no such thing as honest negligence - cf *R v Gylee* (1908) 1 Cr App R 242. Pretending that God or the dice are solely responsible for high altitude accidents only evades the issue.

Land managers (third level of analysis) - some anxiety

General observations

Whether a land manager will be held liable in negligence depends on the facts of each case. The judicial decisions reviewed below each illustrate the type of circumstances in which land managers may be liable for recreational accidents. All except the first case (a Queensland example) were decided after the High Court brought occupiers liability within the general

principles of negligence law in 1987. Not all of the cases are consistent in all respects, something which may be expected given the flexibility with which negligence law is expected to operate. One reason for discussing these examples is to provide background to the present anxiety felt by many land managers. They also give context to the case presently before the High Court, *Romeo v Conservation Commission.* In the majority of the cases discussed, the land manager concerned was held liable in negligence. The cases were partly selected for this precise reason and should not be taken as any indication of the general proportion of instances where land managers may be held liable in practice. There is no case in Australia of which I am aware where a land manager has been found liable for an ordinary recreational accident (including a climbing accident) in circumstances where the land manager did not actively promote or take special responsibility for a particular site or activity.

Schiller v Mulgrave Shire Council (1972) 129 CLR 116 - High Court

Early Queensland example

The prospect that a Queensland land manager might be found liable in negligence for a recreational accident raises nothing very new. In 1964, for example, a tourist was struck without warning by a falling tree and severely injured while walking along a rainforest path in a scenic reserve in North Queensland. The dead tree in question had stood over 10m from the path. The local council had statutory control of the reserve and was held liable in negligence for the consequences of the accident. The council had developed the area generally and provided picnic and other facilities. Although the council either knew or ought to have known of the danger which dead trees presented, it did nothing in practice to reduce the risk that someone walking along the track might be injured by a falling tree. The case illustrates generally that land managers can be held legally liable for recreational accidents on their land in some circumstances.

Randel v Brisbane City Council (1989) ATR 180-284 - Supreme Court of Queensland (Williams J)

Land manager not liable for reserve

Two teenage boys were struck by rockfall in 1977 while climbing a small cliff on their way home from school. Their action against the council failed because the latter had no statutory responsibility for the reserve in question and was not otherwise an occupier of the reserve either. Although it was foreseeable that boys might climb the cliff, expert evidence showed the risk of rockfall was not so great as to call for warning signs to be placed even if the council had been responsible. It was also found unlikely that warning signs would have deterred the boys from climbing there. The case does not illustrate any legal principle likely to be useful in determining liability in recreational climbing situations, apart from the fact a land manager which has no statutory responsibility for land and is not otherwise an occupier will not be liable for accidents taking place on the land (unless it assumes responsibility). The judge did emphasise, however, that in determining liability in negligence it was the capacity of the land manager to care for and control the land (not the exercise of actual control) which is the source of the duty of care.

Glasheen v Waverley Council (1990) ATR 181-016 - Supreme Court of NSW (Sharpe J)

Assuming responsibility for an activity

This case illustrates that a land manager will not be liable for recreational accidents merely because the public uses the land in question as a matter of right. A young girl swimming between the flags at Bondi Beach was hit by a surfboard and became a quadriplegic. Control and management of the beach was vested in the council by statute. It exercised that control by

ordinance and patrols by inspectors (who were responsible for beach safety). At the time of the accident, one inspector was out to lunch and the other had wandered 40m up the beach for some reason. The issue of proximity was not settled by the simple fact the council had statutory `control and management' of Bondi Beach. It was the circumstance that the council had taken `positive steps' and `assumed the responsibility' for preserving beach safety which supported the finding of negligence against the inspectors on duty (and hence the council). This is illustrative of the principle that a land manager will not be liable for recreational accidents (including climbing accidents) unless it takes responsibility for the activity, either by promoting it or becoming actively involved in some way. The judge also noted that exercise of the power to assume responsibility for beach safety was a decision `within the operational area' and hence judicially reviewable. Had the decision been a planning decision, it would not have been reviewable by the court.

Haines v Bendall (1990) ATR 181-005 - NSW Court of Appeal

Assuming responsibility for an area

In 1979 Dennis Bendall slipped while swinging on a rope attached to a tree above Blue Pool on Glenbrook Creek in the Blue Mountains. He fell awkwardly, hit his head on a submerged rock and suffered incomplete quadriplegia. He sued NPWS for negligence. Although NPWS had 'care, control and management' of the national park, both the arc of the rope and the tree were just outside the park boundary - a legal loophole? Evidence showed, however, that NPWS officers exercised actual control over adjacent land (including the pool). They actively promoted it via signposting and brochures. The court found that 'members of the public were encouraged, invited and permitted and allowed to enter the Park and use the pool and surrounding area'. NPWS officers knew of the danger, were aware of accidents there, had cut down ropes before, and even had legal advice recommending that warning signs be installed (ignored). It was held that government (through the NPWS) owed a general duty of care to visitors and that Bendall's injury was reasonably foreseeable. Damages of $750,000 were awarded. The case illustrates that assumption of responsibility by a land manager for a particular area is sufficient to create the degree of proximity necessary to attract liability if the other elements of negligence are satisfied.

Stone v Clarence Municipality (1993) 79 LGERA 392 - Supreme Court of Tasmania (Wright J)
Allurement of children

An 11 year old boy tried to climb a disused quarry face for which the municipality was the legal occupier and was injured. The court held the municipality should have foreseen that children gaining access to the quarry might try to climb one of the faces and suffer injury as a result. Despite the remote location, the likelihood of this kind of accident happening could not be disregarded as `far-fetched or fanciful' (according to the test in *Wyong Shire Council v Shirt).* Failure to property fence the abandoned quarry was in breach of the duty of care owed by the municipality to children of the area. However, because the boy should have been aware of the risks involved in attempting to climb the quarry face, damages were reduced by one third. This case appears to have little application to ordinary recreational climbing accidents but some interesting comments were made by Wright J in the course of his reasons. He suggested (at 406) that, because rock instability should have been an `obvious risk' (even to an 11 year old), damages should be reduced. An inference might be drawn from these comments that, if had an adult climber been injured, obviousness of the danger would have been a potent factor in excluding liability.

Nagle v Rottnest Island Authority (1993) 112 ALR 393 - High Court

Active promotion of a recreational activity

In this case, the High Court found a land manager liable to a man who became a quadriplegic after diving head-first onto a submerged rock ledge into shallow water at a popular WA reserve. No sign warned visitors of the hidden danger. The land manager had a statutory duty to manage the reserve for the benefit of the public. As an occupier, it came under a general duty of care at common law to take reasonable care to avoid foreseeable risk of injury to lawful visitors. By promoting the reserve for swimming and providing special facilities for that specific purpose, the land manager brought itself into proximity with those visitors. The High Court said (at 397) -

`... the basis for holding that the board came under a duty of care may be simply stated: the board, by encouraging the public to swim in the Basin, brought itself under a duty of care to those members of the public who swam in the Basin. As occupier under the statutory duty ... the board, by encouraging persons to engage in an activity, came under a duty to take reasonable care to avoid injury to them and the discharge of that duty would naturally require that they be warned of foreseeable risks of injury associated with the activity so encouraged'.

Reasons for decision

Promoting swimming in Nagle v Rottnest Island Authority created a duty of care (which included a requirement to warn of the hidden danger), or it required the land manager's duty as an occupier to extend to giving that same warning. It was only by encouraging swimming in various ways that failure to erect warning signs was found in breach of any duty of care owed. Had the land manager not actively promoted this part of the reserve for swimming, it would not have been found liable in negligence. Discharge of the duty in this case required that visitors be warned of foreseeable risks of injury associated with the activity encouraged. The risk of injury from diving in the circumstances was foreseeable and failure to warn effectively caused the accident. Evidence showed Nagle would have been deterred from diving, even though he had some local knowledge of the coastline and its characteristics. On one view of the case, land managers would first need to actively regulate or promote climbing before any serious doubts over liability for climbing accidents would arise. Installation of belay anchors by a land manager, for example, would appear to establish the necessary proximity in the event of later bolt failure causing an accident.

Nagle creates anxiety

This case more than any other has caused concern about the liability position of public authorities. Professor Trindale wrote-'... the law now appears to be that public authorities as occupiers of land will owe a duty of care to those who come upon it and be liable for injury suffered if the risk of that injury is reasonably foreseeable and the risk will be regarded as a foreseeable risk even though it is unlikely to occur provided that it is not far-fetched or fanciful ... Is it any wonder that public authorities and their insurers are concerned about the possible escalation in their liabilities?' Trindale later concedes that `existence of the duty of care does not of course mean that the public authority will be liable in every case' because the authority need only take those measures in response which a reasonable person would take. In Nagle v Rottnest Island Authority, it was the proximity created by promoting swimming which made it a reasonable response to warn the public of hidden rock ledge danger. In the climbing situation, it would seem that no duty to warn would arise at least until the land manager had actively promoted or regulated recreational climbing in some tangible manner. Trindale also accepts that appropriate planning decisions may confer immunity from suit in some cases. If a land manager decided at a policy level for economic and aesthetic reasons not to erect warning signs and that decision was reflected in management plans, there are good arguments for the decision being

non-reviewable. This is an issue which will be considered directly by the High Court in Romeo v Conservation Commission.

Wilmot v South Australia (1993) ATR 181-259 - Supreme Court of South Australia (Full Court)
Passive acquiescence by land managers

A girl suffered abdominal and spinal injuries when she rode a trailbike off a small cliff on Crown land at Redbanks, north-east of Adelaide. The Department of Lands occupied the area but had no obligation to manage it for public benefit. It did no more than passively acquiesce in trailbiker use of the land and did nothing to positively attract the public. The appeal court held that, even though risk of injury was foreseeable (as being neither far-fetched nor fanciful), there was insufficient proximity to create any duty of care between the Department and the rider. The risks involved were also self-evident and could have been avoided by ordinary common sense. A decision taken at senior levels not to exclude trail bikers by fencing the land was further held to be a non-reviewable planning decision. There was evidence that trail bikers would have forced access anyway (making the whole exercise futile in any case). No duty was owed by the department to spend money on signs which stated the obvious, said the court.

Special leave refused

This case is important because it reinforces the fact that policy decisions properly made at the appropriate level are generally not reviewable by the courts. There is also a strong suggestion by the court that obviousness of the danger would have relieved any obligation to signpost the area even if proximity had been established. Special leave to appeal was refused by the High Court on the basis that the result was `not attended by sufficient doubt'. Technically speaking, such a pronouncement is not to be taken as an indication that the decision below is correct in all respects. Comments by Dawson J during the application, however, do suggest that the High Court saw this as a vastly different case to Nagle v Rottnest Island Authority on the basis that the land manager had done nothing to encourage trail bikers at all. To fence off the land could only have been achieved at great expense to the taxpayer. Erecting warning signs would also have given the `imprimatur of approval' to trail bikers (something which was in contradiction of earlier policy). While, not too much can be drawn from the approach of the High Court on the special leave application, there are indications that passive acquiescence is a factor against a duty to act.

Manly Municipal Council v Boylan (1995) unreported - NSW Court of Appeal

Nagle applied to similar facts

A young man became a quadriplegic after diving into a submerged rock in Manly Dam. The council had encouraged swimming there for decades and even imported sand to make the foreshore like a beach. Damages of $1.9m were awarded. Before diving in, the man veered around a rock, zig-zagged, and only dived when the water was thigh deep. The appeal court agreed the case was indistinguishable on the facts from Nagle v Rottnest Island Authority - the land manager had actively encouraged the very activity which led to the injury but failed to warn of the hidden danger involved or remove the rocks altogether. Although the man knew it was dangerous to dive into shallow murky water with concealed rocks and was reasonably familiar with the area, it was found justifiable for the trial judge to conclude that wading out until the water was thigh deep involved no contributory negligence on his part. The council argued that

the older test of Dixon J in Aiken v Kingborough Corporation (1939) 62 CLR 179 which places more emphasis on exercise of ordinary care by the public should be applied. This was rejected as inconsistent with Nagle v Rottnest Island Authority and other developments in negligence law. If the earlier test is to be revived, it must be done by the High Court itself. This issue arises in Romeo v Conservation Commission.

Western Australia v Dale (1996) 90 LGERA 307 - Supreme Court of WA (Full Court)

Black Diamond Swimming Hole

The people of Collie in WA had used an abandoned open-cut mine containing water of varying depths as their swimming hole for decades. Other people dived safely from a point called `the mound' before Dale took his turn. The water around this point was a dark blue indicating an appearance of depth. When Dale dived, be struck a rock and became a quadriplegic. The State created the mine and defended the right of people to later use it for swimming. It neither erected warning signs nor depth indicators. The State argued Dale should have known of the danger which was obvious. The trial judge held the State liable as an occupier of the swimming hole and rejected the argument that Dale was contributorily negligence. His actions were regarded as those of a prudent and reasonable man and the danger was not obvious. A similar result had been reached in *Inverell Municipal Council v Pennington* (1993) ATR 181-234.

Appeal dismissed

The fact that the State had control of the area meant there was sufficient proximity to create a duty of care. The State had allowed a hazardous situation to develop but did not restrict public access - there was every indication the public were welcome. The risk that someone might be injured was foreseeable on the basis it was not far-fetched or fanciful. Arguments that the local council was also liable were rejected. Although the appeal court found against a submission that State action in relation to the swimming hole was a non-reviewable policy matter, it was accepted (at 320) that this argument `would be of considerable significance in relation to reserves which had been left in their pristine state'. Although the appeal court made no mention of Nagle v Rottnest Island Authority, the result is fully consistent with that case. This point was made by the trial judge. She also indicated that Wilmot v South Australia raised different issues, quoting that an occupier who does nothing to make attract visitors or make the land unsafe should not have to warn people seeking a recreational activity having known inherent dangers. The trial judge also agreed with Heenan QC (counsel for WA) that it was obviously impractical and impossible to warn visitors to foreseeable hazards on vacant Crown land, such as friable rocky cliffs and the like.

Northern Territory v Shoesmith (1996) ATR 181-385 - *Northern Territory Court of Appeal*
Adopting a natural feature

An army corporal sustained severe injuries after slipping from a log which projected over a waterhole maintained by a local council. Both the NT and the council were occupiers of the site. The council had a program to develop and beautify the waterhole. It provided better public access, cleared rubbish and debris, and built a rock terrace just below the surface at one point. In 1983 a storm caused a paperbark tree to fall across the waterhole. The council pruned the tree and left it in position as an enticing platform from which to dive. No signs warned of any danger of slipping or the nearness of the constructed rock ledge. Shoesmith had been to the waterhole before. On the day of the accident, he was sitting on the paperbark when army friends approached. Shoesmith thought they intended to drag him in and tried to escape. In doing so, he slipped and hit the rock ledge suffering spinal dislocation in the process. An appeal

court found the risk of injury was reasonably foreseeable, and that proximity was established by the encouragement of public use. This case went beyond passive acquiescence and Wilmot v South Australia was not followed for this reason. By adopting the fallen paperbark tree and completing the other works of construction, responsibility for safety was assumed.

Public encouragement factor

The appeal court found that the response to the issue of public safety fell short of what a reasonable occupier would have done given the simple and inexpensive nature of providing a warning sign. In these circumstances, even if the risk is regarded as minimal, failure to take the step usually constitutes negligence - Turner v South Australia (1982) 56 ALJR 839 (at 840). The NT argued that, consistent with Romeo v Conservation Commission, no action at all was called for by the land manager. Mildren J said that, absent the factor of public encouragement to use the waterhole (including the fallen paperbark), and the risk being an obvious one, there was `much to be said for this submission'. These comments suggest an emphasis on promoting the activity leading to the injury being important to establish proximity, consistent with Nagle v Rottnest Island Authority.

Romeo v Conservation Commission (1994) 104 NTR 1 - Supreme Court of the NT (Angel J), (1995) 123 FLR 84 - NT Court of Appeal, Special leave granted by the High Court - 4 November 1996

Over the edge

In this case, a partially intoxicated young woman fell 6%Zm from a small cliff in a Darwin reserve after dark and became a paraplegic. She had been to the reserve before and was aware of the cliff (which was self-evident in any case). The commission had control of the reserve and was obliged to manage it for public benefit. It established a car park, erected a fence and maintained vegetation at the cliff top. The trial judge held the commission owed a duty of care to the girl, but said the danger involved here was inherent and obvious. Nagle v Rottnest Island Authority was not followed in these circumstances on the basis that case involved a hidden danger (not an inherent and self-evident one, as here). As nothing the commission did created or increased the risk of injury, no positive action was called for in the circumstances. The trial judge said (at 11) -'No reasonable expectations were falsified. The danger of the cliffs could have been avoided by the exercise, by the plaintiff, of ordinary care which she did not exercise on the night in question. Any risk of injury was foreseeable to the plaintiff, the defendant and the public alike. It follows from this that the defendant was not in breach of the duty of care it owed to the plaintiff.

Policy questions etc

Whether a bigger fence, lighting or a warning sign should have been installed was 'a policy question for the defendant, not a matter for dictation by a court', said the trial judge - Sutherland Shire Council v Heyman (1985) 157 CLR 424 (at 468). There were aesthetic and environmental reasons why these structures would be inappropriate. Additionally, there was no basis for identifying this particular spot as a particular hazard, and whether this particular section of coastline ought to have special safety facilities installed was a non-reviewable policy question. It was also found that, even if there had there been warning signs, bigger fences or more illumination, the girl would probably have ignored them anyway - cf Randel v Brisbane City Council. The view of the trial judge appears to have been that the accident was essentially the girl's own fault. In reaching his conclusion, however, he may have relied too heavily on older cases which place more emphasis on exercise of ordinary care by members the public - cf Manly Municipal Council v Boylan. It is this feature of the case which apparently led the girl concerned to mount an appeal.

Special leave granted

The plaintiff argued for special leave before the High Court that the trial judge had applied the wrong legal test of liability, and because of this she had never had a trial according to law. Her case for special leave was that both the trial judge and the appeal court had applied tests concerning concealed danger which had been swept away in 1987 by Australian Safeway Stores Pty Ltd v Zaluzna. McHugh J commented that 'category of danger' was not the test to be applied these days - the question is whether there was a foreseeable risk of injury. Kirby J in similar vein referred to the categories of danger tests as `1930s stuff. He also pointed out Echo Point at Katoomba is fenced ... `If people go there then, unfortunately, aesthetics have to take second place to its safety'. Special leave was then granted by the High Court (4 November 1996). This does not necessarily mean the High Court disagrees with the result below and will allow the appeal. The basic requirement for having special leave granted is that the case involves some issue of public importance. Since the decision in Nagle v Rottnest Island Authority, there has been a degree of uncertainty as to how the law operates in relation to land managers. It is reasonable to assume a major reason for granting special leave was to allow the law to be clarified. Senior judges have observed that the law in this area is not working very well - cf *Bardsley v Batemans Bay Bowling Club (1997)* unreported. Comments made by certain High Court judges hearing the special leave application give the impression they would be sympathetic to allowing the appeal.

At the hearing

The case was eventually argued before the High Court commencing 30 September *1997.* The ordinary practice is for five judges to sit on appeals of this nature. However, the unusual step of sitting all seven judges was taken. This was apparently due to a written submission made by the commission that the court should reconsider the correctness of its earlier decision in *Nagle v Rottnest Island Authority.* Argument lasted for a day and a half with counsel on both sides subjected to rigorous questioning by various members of bench. Counsel for Romeo argued that the existence of a duty of care by virtue of a statutory responsibility for the area, coupled with foreseeability of injury, made the defendant liable. It was also alleged that photographs showed the girl had been deceived by what looked like a track leading toward the edge of the cliff. The fact that this could have been fenced relatively easily was also said to support liability. Tom Pauling QC for the commission said more was needed or all the cliffs around Australia would need to be fenced. He pointed out that the decision not to fence, signpost or illuminate the area, as a policy decision, was `non justiciable' (that is, could not be considered by a court). There was also, said Pauling QC, a finding of fact by the trial judge that even if the commission had taken steps like those mentioned to reduce the risk, the girl would have ignored the precautions anyway.

Crystal ball

The case of *Romeo v Conservation Commission is* the most important case affecting land managers for decades. Whatever the High Court has to say will affect how public land in Australia is managed until well into the 21 st century. What is the High Court likely to do? Partly because the High Court has the function of making the common law, predicting the outcome of individual cases is notoriously difficult (even by gauging the reactions of individual judges as they hear a case) - get out the crystal ball. The most that can be said is that McHugh J appeared to support the plaintiff, with Brennan CJ (who dissented in *Nagle v Rottnest Island Authority)* seemingly in favour of the defendant commission. Many people will take the view that everyone should be totally responsible for their own actions on public land (especially when pursuing their chosen recreation activity). For this reason, they seek to make land managers

immune from liability. This is not a realistic expectation of the High Court, nor is the view that land managers must signpost and fence every danger on the land they manage. The most likely outcome is that the High Court will steer some middle course between these two extremes. But where the balance will be struck is anyone's guess. However, it is unlikely the High Court will retreat from basic reforms to negligence law achieved over the past decade or so. Recreational users of public land will be hoping the High Court will place greater stress on the obligation of people to take greater care for their own safety as a factor to be weighed in determining liability. Confirmation that policy decisions of land managers are non-reviewable would also assist them to manage public land less defensively.

Implications for climbers

Under the present law, the vast majority of climbing accidents will result from the inherent risks of climbing (for which no-one is legally liable). Where an accident is caused by the negligence of a climber, that person may be held responsible. The mere fact that the incident takes place on public land will not make the land manager liable. Land managers generally attract liability by assuming some responsibility for climbing or doing something which increases the risks involved. Simply because a land manager has care and control of the land, and an accident is foreseeable, does not require the manager to signpost or fence the cliffs. It should also be remembered that what is required depends on what the reasonable land manager would do in all the circumstances. These include the fact that all cliffs are inherently dangerous to everyone, and that the climbers themselves will have actively chosen to engage in an activity on those cliffs which is inherently dangerous, known to be so and undertaken partly for that reason. While it is wrong to regard these particular factors as constituting formal legal tests for determining liability, the weight given to them in practice will ordinarily ensure that land managers are not held liable. The position of ordinary recreational climbers freely pursuing their chosen activity on public land is vastly different from that of a young woman partially intoxicated walking over an urban cliff at night.

Walking over a cliff

During the hearing of Romeo v *Conservation* Commission, the attention of Pauling QC was drawn to an unreported English case decided on facts comparable in some respects with the matter being argued before the High Court. In Cotton v *Derbyshire* Dales County Council (1994), a group of people were walking on council land above a climbing area called High Tor. They gained height on a path then tried to take a short cut down. They couldn't see the cliff in front of them, but the path fizzled out and the terrain got steadily steeper and steeper. Only Cotton (who had been drinking) kept going, eventually falling over a 20m cliff. It was held the council owed him a duty of care under section 2(2) of the *Occupiers Liability* Act 9957 but that the content of that duty did not require warning signs to be posted on the land. Under prevailing English law, the danger was obvious and any reasonable person would have retraced their steps to safety. The court said -1f he had decided to descend at that point, whether he knew there was a steep drop or not, it would have been an act of sheer folly ...' On land open to the public as a matter of right, the duty owed does `not include an obligation of protection against dangers which are themselves obvious' - *Glasgow* Corporation v *Taylor* [1922] 1 AC 44 (at 60). Pauling QC argued that Cotton v *Derbyshire* Dales County Council was an important case because it showed that obviousness of the danger was important even after the old category tests under occupiers law had been swept away (as done under the 1957 legislation in England and by the High Court at common law in 1987 for those Australian jurisdictions which had not already legislated along English lines).

Bolt failure accidents - no bombproof answers yet

Factual example

David Jones (a Victorian climber) had just flashed *Snake Flake* 26 on Taipan Wall in the Grampians. At the top, he came across two brand new ring-bolts in a belay installed by Malcolm Matheson. Jones clipped into one of them with a quickdraw and untied from the rope (the recommended procedure for descending sport routes is to clip into both). He then threaded the rope through both bolt-rings prior to re-tying. Jones had only just re-tied the rope into his harness when the bolt he was clipped to came out. Closer inspection revealed it had sheered off just below the surface. All that stood between Jones and probable death was that few millimetres of the shank between the sheer point and the rock surface. Had David Jones actually fallen, who might have been legally liable? The bolts were rated to take the load. Matheson had tested them extensively on his backyard jig at Natimuk and followed manufacturer instructions to the letter. The bolts themselves were almost new with minimal wear and tear. Climatic conditions were not a factor.

Who is responsible?

The bolts in question were an industrial screw-in type which cuts its own thread. A number of them have now failed in various climbing situations and the manufacturer has now recommended, first, that they not be used for climbing and, second, that any that have been are removed immediately - Van (1997) 31 Rock 11. An issue here is whether bolt failure is to be regarded as an inherent risk of climbing or whether someone might be legally liable in the case of an accident. If the latter is correct, could a negligent installer of bolts be found liable, or perhaps the manufacturer of the bolts if they are defective? Another possibility is that a land manager simply knowing they are there might be liable in some limited situations. This issue has never been tested before a court of law but (with the timebomb count increasing) it seems only a matter of time before it is. In fact, after this paper was presented, the issue became a live one at Gibraltar Peak in the ACT (part of Tidbinbilla Nature Reserve). A climber apparently identified some suspect bolts and notified rangers. They took legal advice and (at time of writing) there is a proposal that climbing be banned outright as a result - (10/97) Argus 23. The ANU Mountaineering Club is thought to be taking the matter up with the land manager concerned. The official club view is that, as bolts are placed by climbers for climbers, land managers are not responsible. This message will appear in the coming new edition of the local guidebook - Churchill & Peck ACT Granite. If climbing is banned at Gibraltar Peak, the same outcome could easily follow at nearby Booroomba Rocks (part of Namadgi National Park). Liability for bolts is an issue of major importance for climbers and land managers worldwide. What the High Court has to say in Romeo v Conservation Commission may have a direct impact on the final outcome so far as bolting in Australia is concerned.

Enter - The Economist

The importance of the bolting issue might be gauged from an article in The Economist of 11 March 1995 where it was asked directly - `who is responsible for a bolt in a cliff? The bolter? The cliff owner? The climber?' The possibility that fixed protection may fail is surely a routine (if exhilarating) risk in climbing. Reliance on fixed pro could well be an inherent risk of climbing, at least where there was no negligence involved in its installation and no deterioration over time for which some other party is responsible. This should require that the answer to the question be - 'the climber'. One problem with this view is that, if the reason for placing bolts changes, legal outcomes may become less predictable. Once upon a time, fixed gear was placed solely to protect the person swinging the hammer. New routes these days are equipped with at least one

eye on facilitating later ascents by unknown others. First ascensionists weigh carefully the safety needs of those who will follow. It is a fact of life that later climbers do rely on the skill and judgment of bolters. It is equally true that new routers are well aware of this prospective reliance on their skill and judgment.

Reasons for bolting

With more demand for safer routes, the view is growing that those who bolt new routes bear some responsibility to those who follow. Whether this is simply a moral directive is uncertain. What is clearer is that general acceptance of this view increases the risk the law will impose liability for injury in appropriate cases. This follows because it would then be easier to show the necessary responsibility and reliance to satisfy proximity requirements. The answer in this case to The Economist question would be - `the bolter'. New routers (and retrobolters) could be brought into sufficient proximity with victims by assuming a responsibility and fostering reliance. The resulting duty of care would be breached by careless bolt placement, perhaps through installing backyard gear (like carrots) or bolts of the wrong type, or failing to follow manufacturer instructions. These issues are raised directly in the September 1997 issue of Argus (at 12) - `Would the person who placed the bolt ... be held liable if serious injury resulted [from] incorrect placement? If safety guidelines were not followed?' The answer is that there is no legal or other reason why a negligent bolter might not be liable in appropriate circumstances. However, different outcomes may be possible depending on whether the failed bolt is located on an urban sports crag (like Berowra near Sydney), or in an area set aside by agreement with land managers for more traditional modes of ascent (like the *Adventure Climbing Zone* which now surrounds Albany in WA).

Land managers at risk

It has been suggested (elliptically) in *Rock* magazine that national park authorities are strictly liable for *any* dangerous bolts placed by climbers on the property they manage. This may have been the bottom line of the advice thought to have been given to the park authority responsible for Gibraltar Peak near Canberra. If correct, this view has very serious implications for climbing access. Legal advice to the British Mountaineering Council in 1994 from solicitors *Rich & Debney* states -

'The tort of negligence will undoubtedly affect those who choose to place bolts. If a bolt is placed negligently, with a result that a later climber trusts it and it fails, then the placer of the bolt could be liable for the resulting injuries, but it could go further. If the bolt was placed and there was no system of maintenance or inspection and it corroded in a way that was not clearly visible it would not be negligent of a later climber to use the bolt. If it then failed and he hurt himself he might have a claim against either (or both) the landowner for failing to warn him of a hidden trap and against the original placer of the bolt for failing to maintain or remove it, thus creating a trap'.

An analogy of sorts

No judicial authority or other reasons are given by the solicitors for their conclusion. In any event, category of danger is no longer the determining factor in Australia after 1987. However, an older Australian case does tend to suggest that an occupier may not be liable where there is no particular reason to suspect that an accident using a device routinely used to climb rocks is subject to faulty deterioration - *Bylsma v Kitson* (1984) ATR T80-679. A young boy was climbing a granite outcrop near Albany in WA by means of a chain anchored around the base of a boulder above by loops of fencing wire. The chain had been used for the very purpose of climbing the outcrop over a 20 year period without incident. When the boy was a few metres

above the ground, the chain dislodged causing rockfall which severely damaged his foot. The appeal court found that the occupier was not liable on the basis that, on the evidence, it was open to find that the occupier was not aware or ought to have been aware that the chain or that the method of attachment constituted a concealed danger. There was no evidence that the rockfall was caused by any faulty deterioration in the chain or its method of attachment. As this case was decided before 1987, no firm conclusions may be drawn as to what result a court would necessarily reach today in the same circumstances or in a climbing situation. *Bylsma v Kitson is* of anecdotal interest only.

Factors in the calculus

It is not clear at all that the *Rich & Debney* opinion necessarily represents the law as it presently stands in Australia. The fact that land managers may know in some generalised sense that climbers have installed bolts would be only one of the factors to taken into account in Australia when deciding whether the land manager concerned had any positive duty to inspect or replace bolts in unknown locations which had become suspect due to wear and tear over the years. The fact that the bolts were installed by climbers for climbing and had been deliberately used by other climbers well aware of possible defects and deterioration over time would be circumstances pointing in the opposite direction. Another factor tending against any responsibility on the part of the land manager would be that the expense and effort involved in inspection and replacement of bolts may well be considered outside the scope of what the reasonable land manager could be expected to do in the situation. However, if the land manager became actively involved in the promotion or regulation of climbing activities, a higher standard of care could be imposed.

Brown v Nelson

Different considerations apply where land managers themselves are involved in the placing fixed protection or its active maintenance. The English case of *Brown v Nelson (1970) 69* LGR 20 serves as an illustration. Nelson was an Outward Bound instructor and occupier of certain recreational land. With help from the Quest Climbing Club, a 'flying-fox' cable arrangement was erected between two large trees. At the time, climbers left behind a second cable with Nelson, which he stored on the land. School groups used the facility on `confidence courses' run by Nelson personally. Brown was injured when the cable snapped and he fell 10m to the ground. An engineer gave evidence that the most likely cause of cable failure was rust. It transpired that Nelson had taken down the original cable because it was frayed. However, a person unknown (perhaps someone else from Outward Bound or a Quest Climbing Club member) had installed the second cable in the meantime. Nelson was held liable in negligence for the injuries to Brown.

Similarities and differences

Nield J said (at 24) -'The real case against [Nelson] is that knowing that the cable was not new when it arrived, knowing that its pair had frayed in a year, and not knowing who had erected it in his absence ... he had a duty, in view of the use to which it was to be put, to have the cable brought down and examined by an expert'. Some parallels exist between this case and the situation where a climber is injured after bolt failure on land occupied by someone else. One, the occupier is generally aware that climbers have placed bolts on the land. Two, the identity of those climbers is effectively unknown. Three, the occupier has reason enough to believe that reliability of the bolts in question will be subject to deterioration over time. Four, the occupier suspects that the true safety condition of bolts may not be apparent from ordinary physical inspection. Five, the occupier is aware that recreational climbers rely heavily on the bolts for

their personal safety while climbing. Several other factors, however, distinguish the climbing bolt failure situation from *Brown v Nelson.* Most importantly, Nelson himself used the 'flying-fox' apparatus in the conduct of courses for schoolchildren. He was using equipment (about which he had first-hand knowledge and experience) in running such a course at the time of the accident. This is materially different from where an occupier is only generally aware that unknown climbers may rely on bolts and other fixed protection (placed there by others from within the same recreational group) at unspecified times and without further reference to the occupier. *Brown v Nelson is* also an English single judge decision which has never been judicially referred to (let alone followed) either in Britain or Australia in 25 years. What the case does generally illustrate is that, if a land manager becomes involved in climbing in some way (perhaps by running climbing courses or installing fixed gear for use by climbers), a duty of care extending to maintaining bolts placed by climbers could arise.

Land managers go bolting

As Ken Wilson correctly observed once in *On* the *Edge* magazine - `any officially or semi-officially placed anchor implies some responsibility on the part of the placer'. Land managers in Australia who install abseil bolts for safety reasons do so at their legal peril. Assumption of risk in this way by the land manager would be actionable in cases of resulting climber injury where the bolt was carelessly placed (or inadequately checked and maintained). Contracting recreational climbers to do the work, or permitting the same under familiar `nod and wink' arrangements, would not shift legal liability from the land manager. Once a land manager makes an operational decision concerning climber safety, its duty of care is likely to be nondelegable. The duty here is not just to take reasonable care, but to ensure that reasonable care is taken. The `dangerous activity' test is satisfied, not because placing bolts is necessarily dangerous, but because any collateral negligence by those placing bolts creates danger for climbers later relying on them. Were a climber to be injured as a result of bolt failure in these circumstances, and negligence was shown, the land manager could be legally liable and damages awarded. The answer to *The Economist* question in this case would be - `the cliff owner'.

Legislative responses - lessons from the United States

An alternative approach

At *Escalade* 97, I presented a paper called *Liability &* Access in which I argued that, rather than worrying over perceived uncertainties in the present law, land managers should consider using their official position to persuade parliaments they should legislate to give them a degree of statutory protection against recreational accidents in certain circumstances - Brysland (5/97) *Thrutch 9.* This would make their position more secure and allow them to manage the land they are responsible for less defensively and more in keeping with the purposes for which most public land is in fact dedicated - that is, conservation and recreation. Such an approach would provide substantial protection against possible changes to the common law effected by the High Court in cases like Romeo v *Conservation* Commission. It is widely assumed that land managers in America are virtual insurers against any and all recreational accidents on their land. In practice, precisely the opposite is the case. US land managers of different types are protected by special legislative provisions from liability in at least four different ways (some of which overlap in practice). There are good reasons to investigate whether similar approaches are now justified in Australia. Dick Smith took up my point in a recent editorial - (1997) 48 Australian Geographic 6. There are now also indications the NSW Legislative Council Standing Committee on Law & Justice may further investigate the matter under its terms of reference. This issue also needs to be considered seriously by NPWS in the context of its discussion paper, *Public* Access Strategy. What follows is a very brief summary of the different ways American land managers are protected from liability by special legislation.

Discretionary function exception

Special clauses within the Federal Tort Claims Act 1946 protect federal land managers from liability in negligence whenever they exercise a discretion having a policy element. The underlying rationale for the provisions is that the courts should not have jurisdiction to second-guess government policy. Some examples - in *Childers* v United States *(1993)* 841 F Supp 1001, a young boy was killed after he slipped from an icy lookout at Yellowstone National Park during winter. Rangers knew of the danger involved (which was obvious) but a deliberate decision had been taken not to signpost the danger. The court held that the decision not to warn was discretionary and a later appeal was dismissed. In *Kiehn v United* States *(1993)* 984 F 2d 1100, a guide suffered brain damage after a climbing fall at Dinosaur National Monument while taking a shortcut to visit petroglyphs. He sued the land manager (among other things) for failure to signpost rock instability. The court said the risks involved were `inherent and obvious'. Absence of signposts was also part of a definite policy to protect the national scenery. The case was dismissed as coming squarely within the discretionary function exception.

Recreational user provisions

Various provisions of this type in all but a few US jurisdictions now protect managers or owners unless (broadly speaking) they charge a fee or are otherwise guilty of `wilful or malicious failure to warn against a dangerous condition'. Most of these provisions are modelled on a draft 1965 code. Some examples - in Hamilton v United States (1974) 371 F Supp 230, a woman fell over a cliff in a federal park near the Potomac River. She had walked through a hole in the fence and followed a 55° descent path. It was found that she had not acted for her own safety and there was no malicious failure to warn of the danger. The result in this case might be compared with Cotton v Derbyshire Dales CC and what the High Court says in Romeo v Conservation Commission. In Herrington v Stone Mountain (1969) 171 SE 2d 521, a Miami woman was hiking a marked trail up a granite dome in a Georgia park when a sudden storm hit. She fell and was injured in the slippery conditions. No signs alerted the danger involved in walking over granite domes in wet conditions. The court held there was no obligation to warn and dismissed the case.

Unimproved condition provisions

Some American jurisdictions (like California) protect state land managers against liability in cases of accident arising from the unimproved condition of public land. The rationale here is to guarantee recreational access to certain land by relieving the state of particular legal burdens. Some examples - in McCauley v San Diego (1987) 235 Cal Rep 732, a man on his 21st birthday got very drunk and fell 60m into a canyon in a municipal park. A sign at the top warned `Caution - Slippery Trail'. An appeal court dismissed the claim on the basis that the land was unimproved and the danger was obvious to everyone. In Arroyo v California (1995) 40 Cal Rep 2d 627 (noted (1995) 42/1 Summit 16), a mountain lion mauled a child hiking in a state park. No signs warned of any danger. The court said wild animals were a natural part of the unimproved condition of the land and the state had done nothing to increase the risk involved. A hunting moratorium made no difference.

Inherent risk provisions

Many US jurisdictions have ski statutes protecting operators from liability for accidents arising from the inherent risks of skiing (whether or not a fee is charged). Some states (like Wyoming) go further and protect against the inherent risks of recreation generally. Some examples - in Nelson v Snowridge Inc (1993) 818 F Supp 80, a skier lost control on a `double black' run due to the presence of boilerplate ice and was severely injured. The statute said sports persons

accept inherent dangers so far as they are 'obvious and necessary'. The court held the ice to be an inherent risk of skiing and dismissed the case. In Johnson v United States (1991) 949 F 2d 332, relatives of a dead Tetons climber sued the NPS for failing to initiate an early rescue. The case was dismissed on discretionary function exception grounds but the judge also said that claims for accidents of this type are also barred under the general inherent risk provisions of Wyoming law. In other words, falling is an inherent risk in climbing for which the land manager was not to be made liable.

Concluding remarks

The general position

Climbers and land managers are subject to the ordinary law of negligence. Where a climbing accident results from a risk inherent in the activity itself (as will usually be the case), no-one is liable for the consequences. Inherent risks in this context at least include slipping, breaking a hold, `pumping out' and a range of other personal horrors depending on the circumstances.

Where a climbing accident results from the negligence of one of the climbers involved (not belaying properly or setting a defective anchor, for example), it will be the climber who is personally responsible. Although it may be conceded that there is a degree of uncertainty as to how negligence law applies to land managers in practice, the decided cases indicate in a generalised way that land managers will only expose themselves to liability where they become actively involved in the activity or otherwise increase the risks to climbers. It should also be kept in mind that there are no cases in Australia, the United States, Britain or New Zealand where a land manager has been held liable in negligence for an ordinary recreational climbing accident.

Waiting for Romeo

That is not to say that in no circumstances could an Australian land manager ever be liable for a climbing accident. However, the mere fact that a land manager has statutory care and control of an area and climbing accidents are notionally foreseeable will not be enough in practice to incur liability in the face of a dangerous activity known to be dangerous and practiced at a site obviously dangerous by climbers freely accepting all inherent risks. It is hoped that the High Court in Romeo v *Conservation* Commission will clarify this area of the law so far as climbers and other recreational users of land are concerned. Whether it does so on the question of bolt failure accidents is another matter. This is potentially the biggest and most difficult issue affecting liability and access particularly given present directions of the sport towards more and more bolted routes. Just how the Gibraltar Peak situation is resolved should be of interest to climbers all around Australia. As a general proposition, it is arguable that in some cases the risk that a bolt may fail in the absence of negligence by anyone is an inherent risk of climbing. In others, a practice of land managers not to become involved in climbing may operate to protect them from liability. It is also possible that a greater proliferation of bolted routes will make it impossible in practice for a duty of care to be imposed which requires inspection and maintenance. There remains also the ability of land managers to avoid liability for bolts by entrenching appropriate policy decisions in management plans. If a greater degree of legal protection is desired, land managers should investigate prevailing US models. In the meantime, we are all just Waiting for Romeo.

Postscript

Waiting no more

On 2 February 1998, the High Court (by 5/2 majority) dismissed the appeal by Nadia Romeo and held the Conservation Commission not liable in negligence. The High Court has now

confirmed that a land manager will not be liable for recreational accidents on public land simply because a duty of care arises from statutory responsibilities and the accident was foreseeable. The High Court, however, refused to overrule its earlier decision in Nagle v Rottnest *Island* Authority. This shows that overly pessimistic interpretations of that decision by land managers and their legal advisers were unwarranted. As Kirby J stated in his judgment -

`... courts have both the authority and responsibility to introduce practical and sensible notions of reasonableness that will put a brake on the more extreme and unrealistic claims sometimes referred to by judicial and academic critics of this area of the law'.

This appears now to have been done. Romeo v Conservation Commission doesn't change the law, so much as emphasising an aspect of the law to some extent lost sight of. This is that it will be the *standard* of care in most land manager cases which determines the issue of liability.

Quotable quotes

Kirby J also said -'Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about the risk is neither reasonable nor just'. Brennan CJ made similar comments -'There is no statutory duty to take positive action to protect entrants against risks of their own making which the authority has done nothing to create or increase, even if the possibility of the entrant's careless conduct be foreseeable'. Toohey and Gummow JJ said `reasonable steps did not extend to fencing off or illuminating the edge of a cliff which was about two kilometres in length'. And as Hayne J pointed out - `The duty is a duty to take *reasonable* care, not a duty to prevent any and all foreseeable injuries'. It may be concluded that, in determining the standard of care a reasonable land manager must meet, obviousness of risk and the fact that the injured party freely participated in the activity will mean land managers will be seldom if ever liable for ordinary recreational accidents on the land they manage. Unless a land manager creates or increases the risk involved, or otherwise takes responsibility for the activity in question, it will not be liable for failing to fence, signpost or illuminate sites which are obviously dangerous.

Practical effects

In confirming rejection of the literalistic equation `duty of care + foreseeability = liability', the High Court has underlined the fact that people who choose to recreate on public land need to take more care for their own personal safety. This is something which seems to accord more generally with prevailing community attitudes. It also sends a strong message reinforcing the need for greater personal responsibility when entering national parks. As I wrote before the decision was handed down -'Simply because a land manager has care and control of the land, and an accident is foreseeable, does not require the manager to signpost or fence the cliffs'. Although the Australian law of negligence no longer relies on strict categories of danger as an indicator of the particular standard a land manager must meet, the outcome in *Romeo v Conservation Commission is* analogous in practical respects with English cases holding that, on land open to the public as a matter of right, the duty owed does `not include an obligation of protection against dangers which are themselves obvious' - *Glasgow Corporation v Taylor* [1922] 1 AC 44 (at 60), *Cotton v Derbyshire Dales County Council* (1994). Victims of accidents on public land are now less likely to succeed in obtaining compensation for their injuries unless they are personally insured, or the land manager created or increased the danger.

Management and access

Romeo v Conservation Commission, however, is good news for both land managers and recreational users. So far as land managers are concerned, the High Court decision should

result in the discontinuation of many negligence claims against them, settlement of others on more favourable terms and the prospect of fewer actions in the future. In other words, *Romeo v Conservation Commission* should take some of the pressure from land managers concerned about liability. This may enable them to manage the land entrusted to them less defensively and more in keeping with the reasons it was dedicated to public use in the first place. The decision will make it more difficult in practice for land managers to justify access restrictions on the mere basis of perceived liability fears. The High Court has shown those fears to be `jumping at shadows' to a significant degree. Present restrictions on recreational access for liability reasons should be reviewed in light of the case. In particular, the policy basis for the current ban on climbing in NSW national parks without ranger consent should be closely scrutinised.

Final comments

The decision in *Romeo v Conservation Commission* takes away from the urgency to investigate if the liability position of land managers should be restricted by statute (along American lines, as I have argued in the past). The NSW Legislative Council Standing Committee on Law & Justice accordingly has decided against terms of reference in this regard at the present time. However, liability for bolts placed by climbers remains potentially the most important legal issue affecting climbing access to public land in Australia and elsewhere. Nothing in *Romeo v Conservation Commission* gives any real clue as to how that issue might be resolved if litigated. It now looks like the bolt liability issue has subsided at Gibraltar Peak in the ACT, but it may reappear in Queensland in relation to national parks, state forests and recreation reserves. In the United States, it was recently reported that an environmental group has taken legal action to force the Forest Service to remove all fixed protection placed by climbers in a wilderness area.