Federated Mountain Clubs of NZ (Inc)

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CRIMINAL NUISANCE PROSECUTIONS & OTHER NASTIES:

SOME IDEAS ON PREVENTION & CURE.

Several clubs have approached FMC for advice on the various pitfalls around legal liability for accidents. This document was originally written in light of the prosecution of the organiser of the Le Race cycling event, and has been updated in 2008 as a resource for clubs.

The following general points can be made, but please note that every club's situation is different, and our advice is neither prescriptive nor a "fix-all solution". Also note that this memo is not a legal opinion.

Anderson case

Astrid Anderson was prosecuted for criminal nuisance following the death of a competitor in a commercial cycling race. After the first version of this article was written, she successfully appealed the conviction. The poiytrs made remain valid.

What did the judge actually say?

It's important to note that the judge in the Anderson case was quite emphatic that while the circumstances of that case meant that a conviction was inevitable, suggestions that the verdict would substantially alter the sporting culture of New Zealand were unfounded. This is what he said at sentencing:

"As I have indicated, since the verdict, there have been a number of wild pronouncements in the media and by sporting organisations and event organisers that the verdict on the criminal nuisance charge against you is the death knell of the sporting culture of this country as we know it. That is utter nonsense. Nothing could be further from the truth. While, as I suggest later, this case may prompt a rational reconsideration of the degree of negligence which is required for a criminal nuisance charge to be proved, there is no reason whatever to suggest that people who are involved in organising sporting or other events have any justified cause for alarm as a result of the verdict in this case."

He went on to quote from a letter to The Press written by a competitor (and Crown witness), which he said encapsulated the crucial issue.

"There is a point at which participants in inherently risky activities must assume responsibility for their own safety. However, this point can only be defined by the participants' understanding of the likely risks involved, based on the information available to them."

Having said that, the judge has no control over future decisions. The verdict rested upon the impression that the defendant gave the competitors that the road would be closed. Similarly, statements that, for example, a river is safe to cross could also be taken as an assurance of safety. It is to be hoped that the Police, or the judge if such a case came to court, would, as appears to happen now in the case of bush and mountain fatalities, recognise that going into the hills will always involve a small and voluntarily assumed risk.

Prevention is the key

As noted by the judge, one critical element is participants' understanding of the risks. It is vital that clubs ensure that their safety procedures are rigorous, applied regularly, and can be justified. Most, if not all, clubs probably do this. These procedures need to be re-examined regularly to ensure that they are relevant and reflect current best practice. It is also important that they are looked at following an incident or near miss (near hit?).
Your safety procedures probably need to address:

- How does your club assess the suitability of a member/prospective member for a trip?
- Is it absolutely clear who is responsible for what and when from the organisation of trips right through to when participants arrive back home?
- Do all participants understand the boundaries of responsibility of all others?
- Do you insist that unknown people start with an easy trip before attempting something more difficult?
- Would you turn someone away from a trip because of inadequate gear?
- Would someone on a hard trip who it turned out was only suited to an easy trip be dragged along, or would the party turn back?
- Is the leader a suitable leader just because they've been around forever?
- Do you have leaders who are obsessed with objectives, regardless of risks?

The list of questions to answer is endless, but one of the strengths of a club system is the ability to pool collective wisdom and deal with these issues.

You also need to be aware that the judge considered Astrid Anderson's culpability arose primarily because she made subsequent changes to the previously agreed and peer-reviewed race safety plan – a change that the race safety officer had no knowledge of and in evidence said he would not have allowed.

It would also seem that an error of judgement by, say, a leader of a climbing party would not necessarily equate to the leader being considered negligent, though this would need to be tested in court. That there have been no climbing accidents from which prosecutions have arisen, at least that FMC is aware of, indicates that this distinction is currently made.

Paradoxically, these procedures may be more important on easy trips than on hard ones. The more demanding the trip (assuming the nature of the trip is known), the clearer it will be to participants that there are risks, known and unknown, which they freely assume. Easier trips, with novices and where it could be assumed that there is little risk, may well be the areas where more care is needed. If clubs have good procedures for describing a trip to participants, and for establishing the suitability of leaders, this should go a long way towards satisfying the authorities that appropriate risk minimisation has occurred. Human error in a moment of crisis is less to be blamed than avoidable misrepresentations earlier on.

Disclaimers

Some clubs have been considering using signed disclaimers or changing their constitutions in the hope that it will get them off the hook in the event of an accident. This is of dubious value. Firstly, criminal nuisance and manslaughter are criminal charges, and any decision to prosecute is made by the Police and the Crown Prosecutor. Secondly, the issue is going to be the negligent act or omission that led to the injury, and a signed disclaimer is not going to alter the events. Thirdly, it can offer a false sense of security, leading to laxness in safety procedures.

Nevertheless, it might be wise, as a matter of club philosophy, to remind members that certain risks exist, and that trip leaders and club officers are human like everyone else, and that members are ultimately responsible for their own safety. At the very least, such a statement can do no harm.

Negligence & OSH

Many people worry unduly about prosecution by the arm of the Department of Labour previously known as Occupational Safety and Health under the Health and Safety in Employment Act. As this relates to places of employment, unless a club is an employer it is of little concern. Clubs that are employers should acquaint themselves with the Act and discuss the possibility of cover with their insurer or broker. Clubs that use professional instructors for courses should satisfy themselves as to the nature of the relationship – is the instructor employed by the club, or is he a contractor with the attendant control and responsibility. (Or put another way, do you pay his wages, or pay on an invoice for services?).

Another oft-mentioned concern is about being sued for injury. Under the Accident Compensation system it is not generally possible to sue or be sued for personal injury in this country. While some people argue about the adequacy of the amounts paid by ACC, the fact that medical, earnings and rehabilitation costs can be met without proving negligence or quantum is usually seen as a major plus.

The one major exception to the prohibition on litigation is for exemplary damages. These are awarded by the court when it is satisfied that the liable party has acted in such a callous or high-handed manner as to warrant being made an example of. Awards are very rare. One example was in the Gisborne cervical cancer affair, when the first complainant was not awarded exemplary damages against the doctor. This illustrates the high threshold that needed to be crossed.

Insurance

It is possible to get insurance against legal defence costs. FMC looked into a group scheme, but there was insufficient demand.

However, when considering insurance, consider also all the other risks you don't insure – both as a club, and as individuals. Many clubs don't have public liability insurance. Is the risk of a fire greater, than that of a fatality-related prosecution? If so, why do you want cover for the lesser risk? Do you insure against legal defence costs as an individual? What happens if you open a car door in front of a cyclist? The message here is that there are no right answers in striking the balance between protection and risk – everyone's needs and attitude to risk is different. Maybe you need more insurance, but you may also need less.

It is worth noting that public liability policies, which primarily cover accidental damage to the property of others, usually cover liability for bodily injury for the very rare situations where it is not covered by ACC. They can often be extended (at a cost) to cover exemplary damages. Talk to your insurer or broker.

More information

This paper was prepared by FMC Executive Member David Barnes.

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