

Mountain sports law in multiple changed adventure tourism – consumer desire and global warming

Dominik Kocholl

Abstract

Mountain sports law could become a new legal field next to the well-established ski & snow sports law. Summer sports should help the tourist industry to cushion possible diminutions in Alpine winter tourism. From the commercialisation of climbing, mountaineering and hiking new legal issues emerge. How to assure both essential freedom and necessary safety tourists are seeking for in mountain environments? How does global warming influence natural hazards? Consumer desires have changed for climatic and job situation reasons. Compensation claims for civil liabilities increase, but what norms do lawyers apply in the various outdoor sports?

Keywords: freedom, information, law, mountaineering, safety, tourism

1 Introduction

Permafrost thaw and glaciers retreat lead to increased natural hazards and consequently influence tourism, local adventurism and the recreation business. Within a short time, Alpine hazards jeopardise historically safe routes, paths and trails. Century old refuge-huts turn obsolete. The reconstruction and the maintenance of exposed routes entail high expenses and steadily increased legal risks. The owners of land, public authorities and providers of routes often take high risks themselves possibly being exposed to criminal charges or compensation claims for civil liabilities (cf. Fuchs et al. 2006, OGH 2004). Nowadays Alpine and mountaineering associations can hardly bear the involved costs. Under these circumstances who wants to take care of publicly used property (e.g. paths and trails in the role of a keeper), so many admirers of nature are taking profit of? Increasing commercialisation (cf. Kocholl 2008b) and the will to gain return on investment out of every touristy incentive enhance the tendency to sue and the ability to gain money out of liability claims.

2 Multiple changes

2.1 Environmental changes

These days, global warming, changing weather patterns and retreating Alpine glaciers are publicly discussed. Escalating natural hazards, falling rock (cf. AG 2004, Röckrath 2005, Kocholl 2006a: 22) and ice endanger mountaineers (Meyer 2007).

Mountains are often regarded as hostile and economically nonviable regions but have attracted major economic investments not only for tourism. Changing climatic patterns are likely to exacerbate the potential for legal disputes as conflicting interests (e.g. economic stimulation vs. nature conservation) prevail in Alpine regions. For every 1°C increase in temperature, the snowline rises by about 150 m. Snow resources are therefore highly vulnerable to climate change. Below 1,200 m asl there will be no longer a continuous winter snow cover. A warmer climate will lead to glacier retreat and thawing permafrost to increased rock and mudslides (IPCC 2001: 661). The risk of avalanches is likely to increase due to warmer temperatures and coherent changes in precipitation.

2.2 Changing consumer needs in tourism

Tourism is one of the largest industries in the global economy. In most Alpine regions people live from tourism. Without doubt, the implications from climate change will affect tourism. In addition, changing demographic patterns – particularly an aging, wealthy population – may increase winter and shoulder season tourism. Health tourism to spas and mountains is increasing steadily. Outdoor recreational spending is likely to expand, as cities become undesirable locations during every hot summer. Alpine zones are used extensively for recreation and are the main sites of the European winter sports industry (IPCC 2001: 672). Artificial snow-making capabilities and alternatives to outdoor skiing should bolster winter tourism, whereas tourist experts try to expand outdoor activities in summer. Until now winter sports were regarded as the main market. The transitional periods of the current shoulder months (spring and autumn) can be used more easily for summer activities that are independent from snow. Ample outdoor adventure packages make consumers' adrenalin rush. Since several years, via ferratas, hiking, mountaineering, climbing, and trekking are booming. Many holidays are planned last minute and are shorter than two decades ago. In this short time, people look for self-empowerment and want to feel their bodies by exerting outdoor adventure sports (in a way of acting more like a consumer than like sportsmen) during the day and wellness offers in the evening.

2.3 Changing law?

When societies change, public policies and the law have to change too. Law changes to reflect society. But how does law change? In continental Europe, parliaments have to be mentioned first when discussing the process of law-making. The legislative process is backed up with case law where judges support the development of law by composing convincing precedents. Jurisprudence has a significant indirect influence on law making and implementation. Nevertheless, in a democratic country law has to follow public opinion, as the acceptance of law is important for the functioning of the whole legal system. During the past decades lots of answers have been found in the field of ski & snow law. Nowadays the expanding summer-orientated outdoor sports ask for more and sometimes different answers. Today's boom of indoor free-climbing on artificial rock will lead to huge usufructuary judicial conflicts once these

climbers want to get grip on real rock (OGH 2006b, 2004, Zeinhofer 2007, Gloß 2008, Hinteregger 2000). Mountain rescue work is continuously improving – but is also getting more expensive. Who is going to pay for rescues? When will one be charged for putting others at risk (Kass 2005, Maurer 2001)?

3 The Austrian legal system as an example

Several specialised statutes cannot hide the fact that Mountain Sports Law issues are mainly dealt with by adapting general laws. Like in all Alpine nations civil law (e.g. claims for financial compensation) is separated from criminal law (e.g. punishment after prosecution). Austrian law is primarily statutory law and the jurisprudence of the three supreme courts acts as an important guideline for the application of the law. The Civil Code's system of liability in tort and contract is essentially based on the defendant's fault. Negligence or intent is a major reason why someone should bear the loss of another. The general liability clause set down in § 1295 ABGB (Allgemeines Bürgerliches Gesetzbuch, Austrian Civil Code) requires fault of the person harming another one wrongfully. The ABGB's standard of fault is subjective and therefore based on the personal abilities of the parties.

“A person is considered to be at fault if he was able to act voluntarily, if he should have acted differently, and if he himself – and not the ideal person in his situation – could have acted differently. An objective standard is, however, applied with regard to the degree of the tortfeasor's attention and diligence (§§ 1294 and 1297). The standard is also objective with regard to experts (§ 1299)” (Hausmaniger 2006: 276).

A very clear duty of care exists between a qualified mountain guide or climbing instructor and those they are professionally leading or teaching (Beulke 1994, Kocholl 2005a). Fault liability is limited in a tort action case, were the keeper of a public way (including ski slopes and via ferratas) must keep the way in good condition, yet the path keepers liability is limited to gross negligence (art. 1319a introduced in 1975, OGH 2006a, 1987, Bydlinski 1998). In Austria, the climbing or hiking associations (e.g. OEAV) are often responsible for the maintenance of trails endangered by environmental changes. In criminal law, in most Alpine countries a simple test of negligence and therefore the same standard as for compensation cases is sufficient to be found guilty. Derived from the Roman law principle “*nulla poena sine lege*” there is, of course, a different standard of proof.

4 Developing Mountain Sports Law

Winter mountain sports include skiing, ski mountaineering, back country skiing, ice and mixed climbing. Summer sports include rock climbing, climbing on artificial objects, bouldering, bigwall and aid climbing, Alpine climbing, hiking, classic mountaineering, mountain biking, climbing via ferratas, canyoning (BGE 1999), trekking and expeditions. Against popular views, these sports do not stand above the law (cf.

Kocholl 2005a). Since a specific or well-investigated body of Mountain Sports Law is missing, activity-hindering uncertainties exist to what extent risks are acceptable. The evolution of case law can be influenced by the way the cases are dealt with: Experienced lawyers who are mountaineers themselves need to contest cases to establish a favourable judicial climate in which liability is not extended and the benefits and hazards of the sport are understood (UIAA 2002: 8).

5 “Verkehrsnormen” and FIS-Rules

One of the difficulties sports people in mountains face is the missing body of rules to refer to for most activities. As there are few statutory guidelines on how mountaineers should act, lawyers use “Verkehrsnormen” (judicial standards/standards of legal value) derived from general good practice and court decisions. To find out, what standards should be regarded as “Verkehrsnormen” it makes sense to consult training manuals, recognised Alpine literature, regulations for the conduct of an examination on what techniques should be expected and the general good practice of the group of people to be judged (Verkehrskreis des “Täters”) on what can reasonably be expected. To some degree this test is similar to the one of customary law. “Verkehrsnormen” are a kind of soft law putting indeterminate duties of care in a more concrete form (Burgstaller 2001: § 6 Rz 46f). To discuss existing and potential standards and legally more concrete “Verkehrsnormen” is one of the noteworthy tasks of mountain sports law scholars. Examples are Pichler & Holzer’s (1987), Stiffler’s (2002) and Sprung & König’s (1977) analysis of ski law and the author’s analysis of sport-climbing/free-climbing (Kocholl 2006c: 152, 2006e, 2006a: 18) and ski-mountaineering (Murschetz and Tangl 2002, Unterberger 2007, Kocholl 2007: 36ff). In Austria, France, Germany, Italy, and Switzerland, the FIS-Rules (FIS 2002, Kocholl 2008c) are used similar to “Verkehrsnormen”. These rules represent the result of case law experience in Alpine countries. The doctrine in Austria is that they are not customary law (OGH 2005a). As in any discussion about techniques we should bear in mind that a mountaineer should be able to choose the level of her/his acceptable risk and the techniques used (Kocholl 2005a). There should also be room to develop new techniques and new products.

6 Safety or freedom? Where is the optimum?

Society has become increasingly risk averse and freedom is under attack. As society re-evaluates acceptable risks, the assumption that somebody (else) is to blame when an accident occurs becomes prevailing. The culture of “an accident equals blame then claim” is completely contrary to the alpinist’s ethos of personal responsibility and self-reliance that would seem to be normal characteristics of a healthy society (Macnae 2001). Because of the real law of gravity, climbing, hill walking and mountaineering are readily identifiable dangerous activities (BayObLG 1998). The freedom to face, assess and manage this risk (Alpine risk management) is one of the

factors that attract people to the sport. All of us should recognise that total safety can never be achieved and should not be strived for (v. Cube 1990). Only those who know and (e)value(ate) risks can expect to get home in safety. Those consciously handling risk will hesitate to compensate mobile phones, comprehensive insurances, rescue helicopters by even riskier behaviour. The concept of “optimised risk” which includes significant freedom of choice is very valuable because, in reality, people do not seek too much of security and safety but also sensations and risks (cf. Kocholl 2005a).

6.1 Taking responsibility

Today's society tends to relieve individuals from the responsibility for any risk they might be exposed to. Technical and legal measures are regularly applied. Mountain environments allow alpinists to live with more responsibility towards themselves, third parties, and towards the environment. For example, in order to survive, the members of a rope party should trust their peers. Based on the fundamental idea of self-responsibility (art. 1311 ABGB), the concept of contributory negligence by the injured party (art. 1304 ABGB) reduces the liability of the tortfeasor. One example would be the evidence that an alpinist would have remained uninjured if he had worn a helmet. The Tyrol Declaration states:

“Individual Responsibility: Mountaineers and climbers practice their sport in situations where there is risk of accidents and outside help may not be available. With this in mind, they pursue this activity at their own responsibility and are accountable for their own safety. The individual's actions should not endanger those around them nor the environment” (Tyrol 2002: art. 1).

A prominent topic of Alpine Mountain Sports Law deals with avalanche accidents either happening during ski-mountaineering or off-pistes' free-riding (BGE 1992, 1965; OLG 2002). Major issues are the foreseeability of avalanches and the strategic risk management tools like the reduction method of Munter (2003), the snowcard or Stop or Go. Their norms are recommendations and not legally binding as long as they cannot be regarded as “Verkehrsnormen” (Kocholl 2007: 39, 2008a).

Commercially organised fun outdoor sports events and activities enlarge the zone of zero tolerance for accidents. When “shit happens” the results are often legal claims. With the magnitude of claims a small change of the borderline takes place between the mountaineering-ethos and becoming a victim of wrongdoing usually ending in demand for damages to be paid. More and more cases concerning Mountain Sports Law are filed with the courts. The smaller the residual self-responsibility of the tourist adventurer, the more and more risk management duties are put in the charge of professionals or honorary club leaders (cf. Michalek 1990, Galli 1995). The concern of liability risks for those acting people rises proportionally to their charges.

6.2 To bolt or not to be?

The term “bolt” generally refers to any form of metal placement that requires a hole to be created into solid rock. First, bolts make climbing safer and more popular. Bolts are part of the definition for sport climbing (free climbing), which is different from Alpine or clean climbing. Second, for most climbers the use of bolts in a given wall is an ethical question in the heart of the concepts for the sport. Debates between mountaineers and climbers about the ethics on the use of protection techniques continue, e.g. the debates between “plaisir” climbers and “purists”. Purists climb clean and only use removable anchors. Third, “the line” and something like the “copyright” of the first ascent, which should not be altered by redevelopment/retrobolting of the route, has to be considered (UIAA 2000). The right to place bolts and bolt failure have become important legal issues (Hinteregger 2000, OGH 2004, 2006b, Gloß 2008). Either bolts are not fixed properly and in the right place or they are fixed in dangerous rocks. Deterioration (corrosion/rust) of bolts must not be neglected. The most popular bolts are the expansion bolts and the glue-in bolts. “Glue” includes all forms of chemical resins, adhesives and cements. Mountaineering associations offer installation guidelines to assist in good practice. This published advice is for installers and for users of bolts, as the users should be able to judge their trustworthiness. Further, bolts are not only used for protection but also for waymarking and orientation. A surplus of fixed gear would result in a superficial and deceiving safety, as a new generation of inexperienced climbers would be encouraged onto the mountains. They would not know how to protect themselves using their own clean climbing gear. One solution to these questions is that every mountain range has to find its own way of handling these issues and to define mountains, areas and walls where bolts are prohibited. With the augmentation of bolts the risk of litigation rises in case that any anchor fails.

7 Commercialisation of summer sports

While commercialisation of winter sports tourism has a long tradition, it is quite new to summer sports (cf. Kocholl 2008b). As an example, mountain hut managers fully equip climbing routes with bolts to make their huts more popular. Regional organisations promoting tourism (Tourismusverbände) do the same when putting up new via ferratas and sport-climbing areas. As stated above, climbing routes meeting the “plaisir” criteria (using bolts as safety points making removable anchors (nuts, cams, pitons) unnecessary) attract the great mass of climbers who enjoy carefree sport-type outdoor climbing. All trail providers face a major legal problem: The more they invest in security and safety, and the more marketing instruments are involved in promoting their high-safety-standards (for reasons of increased summer tourism) the higher the justified expectations of the users will become. Especially in contractual relationships between the parties these justified expectations are getting increasingly important. As the area where contract law applies is enlarging for several reasons (e.g. culpa in contrahendo), the same is true for expectations. The duty of

care for outdoor sport providers further rises, because of the idea, that obligations should be reasonable and not overtask for the party involved; what is reasonable to some extent depends on their return of investment and their profit. As a result the legal duties and obligations grow with increasing commercialisation. In an expert's report for Ötztal Tourismus, the author stated that it is impossible to encourage climbers to visit the Ötztal valley providing good bolting-standards on crag routes, without facing increased risks to be held liable when accidents occur. In heavily commercialized contexts, the legal defence of full self-responsibility will become, to some degree, inadequate (cf. Kocholl 2008b).

8 Liability for misleading and false information

In Mountain Sports Laws the part of tortious and contractual liabilities as well as the responsibility for false information will become increasingly important (cf. Völkl 2006). As an example legal risks result not only from bad route conditions but also from insufficient/unclear trail signalisation. Liability for information given on signs, maps or in guidebooks is a fairly new topic. Sometimes the duty to inform is produced by collateral duties (*vertragliche Nebenpflichten*) aiming at the protection of the partner in contract, whereas more often providing information is a reasonable measure to boost self-responsibility and to establish informed consent.

9 Informed consent: assumption of risk

Establishing a well-informed consent or using the doctrine of “assumption of risk” is getting harder. “*Volenti non fit iniuria*” (i.e. a willing person cannot be injured in law) is a very old legal principle. If somebody has accepted a voluntarily assumed risk and was fully aware of the dangers involved in the chosen activity she/he could be in a bad position to sue. In this vein, two further topics should be considered: (1) Contractual waivers or releases (*Haftungsfreizeichnung*): Customers acknowledge that they are aware of and accept the risk inherent in the activity, participate voluntarily and agree not to bring any claim against the guide. Under Austria's Consumer Protection Act (*Konsumentenschutzgesetz*), terms of a consumer-contract excluding liability for personal injury are void by law (art. 6 (1) 9 KSchG, cf. Kocholl 2006b, 2005b). (2) Information duties for informed consent (*Aufklärungspflicht*): To act self-responsible and to make good judgement in a given situation, one has to know at least something about the situation (OGH 2005b, 2007). A guide, organizer or leader should inform the client or group about the risk inherent in an outdoor activity like climbing and the current danger level. If clients are suitably experienced they should even be involved in the decision-making process. Clients should be carefully briefed on the limits of support that guides and leaders can reasonably provide. However, an experienced mountaineer would find it hard to adduce evidence that she/he is unaware of the risks associated with outdoor recreation.

10 The doctrine of free access to nature and conservation

Discussing the doctrine of free access to nature, we should bear in mind that the question is not only of constitutional or administrative law but also a question of land law and the freehold interest of a proprietor (§ 33 ForstG (Forest Act), Malaniuk 2000, Reindl 2007, Obermeier 2007, Zeinhofer 2007, Weber & Schmid 2008). Additionally, the behaviour of land-owners and public authorities highly reflects their perception of risk from compensation claims. Any reduction in land-owners' liabilities enhances free access to nature as the restriction of access due to possible compensation claims is not needed. Future tasks are therefore the management of the tourist-streams, the legal engineering of guidelines and safety concepts, and the defence of natural heritage.

10.1 Leaving mountains as high as they are: the ethical dimension

Nature conservation needs great efforts. Careful assessments are required to avoid exploitation of the wilderness. Sustainable mountaineering without the „benefits“ of high altitude streets and cable cars and thus consequently renewing the conquest of Alpine mountains by fair means could help the Alps to regain altitude and impression. In 1968, Reinhold Messner argued massively against the modern style of a bolt protected sport and the aid climbing on direct, vertical routes to the summit, the so-called “direttissimas” (Messner 1968). His argument, that rock impossible to freeclimb at the moment should be preserved for the next higher skilled generations and that the “impossible must not be killed” is still very popular and bolsters the clean climbing philosophy. Ecological awareness and the protection of fauna, flora and landscape is another important aspect that Mountain Sports Law along with environmental law cannot neglect. For nature protection, the channelling of visitors in the mountain areas has to be considered. Let's focus on another conflict of interests: Should new ski areas at higher elevations (glaciers) be built in ecological sensitive areas? Such projects would also present a host of environmental and safety issues. Nowadays considerable controversy exists between development companies and environmental organisations.

10.2 The Tyrol Declaration on Best Practice in Mountain Sports

Participants of a conference 2002 in Innsbruck passed the Tyrol Declaration on Best Practice in Mountain Sports. It contains a set of values and maxims that provide guidance by principles and standards on best practice in mountaineering (Tyrol 2002). The Declaration's values are human dignity, life, liberty and happiness, intactness of nature, solidarity, self-actualisation, truth, excellence, and adventure.

11 Conclusion and outlook

Climate change is increasingly recognised as a scientific certainty and is likely to create both winners and losers. Mountaineers affected by increased natural hazards will be among the losers. The needs of tourists will change not only due to climatic reasons but also due to changes in the society, on the labour market and nowadays in oil price. Multiple changes concerning the surroundings of the mountains take place in sport and in the human satisfaction of recreational needs. Law has to change accordingly and with the support of interdisciplinary research. The important economic factor of outdoor tourism in mountains should be given wings by better and quicker understanding the legal aspects of Mountain Sports Law and the development of the law.

So far the floodgates against the litigious trend mentioned, where risk awareness has turned into compensation awareness, are only leaking. On the one hand great efforts are made in spreading information and raising awareness, in educational work and public enlightenment. On the other hand national tourist organisations and other bodies invest in safety campaigns. Summarising one of the questions to be answered is: Does a highly organised and commercialised environment have space for self-responsibility? Self-empowerment towards increased self-responsibility has to become a guideline for alpinism and outdoor tourism in the 21st century. Therefore, in legal discussions on liability issues, the passive consumption of zero-accident adventure-offers should be separated from traditional mountaineering. The latter provides desirable experiences in mountains that should be preserved. Those experiences cannot be thought of without freedom. Freedom is necessarily connected with self-responsible actions and the consequent drawback of potential liability for acts and omissions. Freedom compared to security and safety should be seen as the more valuable good (Kocholl 2006b: 519f). The author believes that the basis for participation in mountain sports is knowledge and acceptance of the risks and hazards of participation. Negligible risks of human error should be included.

A particular focus has to be set on the harmonisation of Mountain Sports Law in Europe, starting from a comparative law approach and including non-European legal systems. Mountains are not confining; they offer visions and broaden perspectives. In society the opposite is true: we conform to rules, behavioural norms and guidelines. In the mountains we can feel free. On the other hand even the most remote mountains cannot be what some mountaineers would like them to be: extra legal space (cf. Kocholl 2005a: 162-164). Mountains are an area regulated by law as soon as human beings get there. Most mountaineers do a good job coping with the (natural) hazards of their sport. It will always be risky and injuries occur. The author believes that the prevention of accidents is a purpose of law (cf. Kocholl 2006f: 48-54). How is a reduced accident rate possible without seriously restricting the sport? Everyone should have the right to choose his own level of risk. Nevertheless everyone owes it to herself/himself and everyone else to make a conscious choice taking ecology, economy (e.g. tourism), and current climatic changes into account.

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Autor(en)/Author(s): Kocholl Dominik

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