Mountains, Risk And Liability: A Brief Legal Approach

Ezeizabarrena, Xabier

"Orhiko txoria, Orhin laket".

(in memory of Demetrio Loperena)

Foreword

From the summits of the Basque Country we would be able to watch it: valleys, lands and villages within the usual timing. But, even though the view would be the same, below, at the valleys things are now different. Indeed, something has changed since we celebrate together the last fair of Aezkoa valley. Right now he is not with us since 2013: the great friend and professor Demetrio Loperena.

I met him in 1994 at San Sebastian Faculty of Law. The man from Garralda was in fact our Professor of Administrative Law. I was a young student in that moment.

Once I finished my studies there, we became colleagues. Firstly, I was a research fellow and, afterwards, Demetrio was my PHd thesis director[1]. Finally, we taught together during the following years at the University of the Basque Country and in many other places worldwide.

Demetrio and his soon, Iñigo; Ana his wife and family, Silvia and all their fellows from Garralda we were all great friends. Therefore, when he is gone from us, we feel pain and absence all together. This is only a tribute to him. We will try to recover his works, projects and happy and open soul. We have a painful hole but his chain will continue with us…

1. The Chairman of the aforementioned PHd thesis was Doctor Ramon Martin Mateo. These words are also a tribute to the great master and pioneer of Environmental Law.

1. Introduction

Risky activities at mountain areas and along different natural spaces are becoming more relevant during the last decades in our societies. Therefore, the legal framework in general, domestic case-law and comparative law have developed certain legal "corpus" to regulate this matter whereat risk has different scales whether for professionals or voluntary people. So to say for third parties which are not familiar with these sort of activities.

This subject is not limited to walking, trekking or mountaineering because it is extended to a wide open series of activities developed in open and natural spaces. The complexities of these places would recommend a more detailed regulation within the scope of implementation of new case-law.

In addition, it is important to underline that our legal orders in general may analyse the issue within different contexts and interlinkages. Civil Law[2], Criminal Law and Administrative Law may become directly applicable in different situations and facts, even becoming complementary. Moreover for the different insurance regimes to overcome the obvious risks involved in certain activities.

Another aspect to consider with direct legal implications would be determined by the voluntary[3], sport and/or professional anture of the activities to study and, in particular, the professional liability of those persons which assume the task of professional guides or trainers of third parties in one of these activities[4]. Obviously, in these cases the level and requirements of diligence and liability are higher and more relevant in all the cases[5].

Another additional and complex category in this matter is the peculiar nature of mountain or nature rescue teams. In this case, there is as well a double approach:

a) The case of professional rescue teams coordinated by public administrations or by police or army corps.
b) The case of rescue by volunteers or mountain associations in which there is no professional skill to act under certain risky conditions.

In the aforementioned both cases there might be situations to incur in one of the liabilities previously mentioned. Criminal Law, for the extreme case of an eventual lack of diligence; Civil Law arising from Criminal Law with a liability to be determined; or even under Administrative Law for the case of the public adminis-

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2. See J. M. NASARRE, "Responsabilidad civil en actividades de montaña y actividades en la naturaleza", Ed. Desnivel, 2013.

3. For the case of those persons who may guide as volunteers others without a professional relationship, they are known as "Voluntary leaders".

4. See UIAA (Union Internationale des Associations D Alpinisme) Standards for Voluntary Leaders and Instructors, "Guidance notes for Member Associations training and assessment schemes", UIAA, Bern, 2007. http://www.theuiaa.org

5. In this regard, within the EU, see the Judgment of the CJEU (16-5-2002, matter C-142/01), on the recognition of the professional skills of ski trainer and mountain guide.

tration liability within the management or coordination during a rescue operation for instance[6].

It is necessary to add a brief comment on the physical aspects of nature wherat these activities are to be developed. Therefore, mountains, nature in general, rivers and waterfalls, canyons, even forests, the ocean and its waves, etc, are indeed risky places for persons either individually considered or in groups.

Moreover, and regardless of our training, knowledge or physical condition, both nature and weather conditions are also relevant issues to take into consideration when we analyse the course of these activities. In fact, a proper knowledge of the place, the weather forecast during the development of one of these activities could become important terms in order to graduate the level of liability, diligence or duty of care of a person or a guide acting before a risky situation arising from mountaineering or other activities.

6. See Judgment of the Spanish Supreme Court 2995/2007, (sala de lo contencioso-administrativo), 16-4-2007, concerning a rescue operation at "Orhi" summit in the Pyrenees of Navarre. On 24-8-2014, a helicopter from the Spanish Civil Police suffered an accident during a mountain rescue operation at "La Polinosa" summit (2160 m, León). Three members of the rescue team died during the accident.

2. Mountains and risk

The relationship between mountains and risk is very old due to various different circumstances[7]. Nevertheless, there are different reasons, specially during the last decades, to explain why there is a need to make a legal approach to mountaineering and climbing in a wider sense. This is also a need for the rest of activities developed within nature. This process is complex if we consider that early expeditions assumed risk as an ordinary situation linked with non profesional explorers.

A good example of this idea is clearly seen in the foreword of Lucien Devies to the book "Annapurna" by Maurice HERZOG on his mighty climb during 1950[8]. All along this text, always wihin certain mystic perfume on Himalayism, we can see a direct assumption of risk which clearly overflows any juridical reflection. It is indeed very far away from nowadays society of risk. Early climbers at the Himalayas assumed a personal concept on their relationship with mountains, risk and with nature as a whole.

This aspect is visible also within the contrast of views on the reasons for exploring the planet in the biography on Captain Scott by R. FIENNES[9]. In front of the visión made by Scott who did not have interest in polar expeditions, FIENNES states that his aim is profesional and that it was not easily understood by sponsors or by the media. Presumely, they may rather prefer an answer like the one made by Mallory: we explore... "because it is there".

Nowadays, this conception of explores like SCOTT, HERZOG or MALLORY has shifted due to various reasons, in most of the cases out of juridical circumstances.

Firtsly, because activities in mountains and nature have become a social issue in our free time both for ordinary enjoyment and also in order to organise climbs and expeditions which are not necessarily profesional but with its own complexities. Secondly, if we consider that elite mountaineering has become profesional as suggested by FIENNES. This implies direct consecquences in the assumption of the derived risk from any point of view. Thirdly, due to the professionalisation, at least partially, of the activity of mountain guides or leaders and of other activities in nature. This requires in fact a higher level of diligence and knowledge in those persons who asume the profesional leadership of these activities. Even more, as quoted by NASARRE, when there are minors involved in those activities[10].

In addition, there is actually a growing general and comparative trend towards sctrict liability in different activities. Together with this criteria, the general case-law tends to limit the requirements of "dolo" or negligence to decide on the existance of civil liability. In many cases, we see that there is only the need to

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7. See V. SEIGNEUR, "The Problems of the Defining the Risk: The Case of Mountaineering", Forum Qualitative Sozialforschung / Forum: Qualitative Social Research, 7(1), Art. 14, 2006.

http://nbn-resolving.de/urn:nbn:de:0114-fqs0601148

8. See M. HERZOG, "Annapurna".

9. R. FIENNES, "Capitán Scott".

10. See J. M. NASARRE, "Responsabilidad civil en actividades de montaña y actividades en la naturaleza", Ed. Desnivel, 2013, page. 13.

prove the relation between the action or inaction and the damage. Therefore, there is also a growing importance of insurance.

Within the following pages, we will analyse some brief examples taken from case-law in different Spanish jurisdictions together with a brief final comparative approach.

3. Civil liability

Likewise in someter issues, the basic regulation of non-contractual liability in Spain is based on the Civil Code, article 1902:

> el que por acción u omisión causa daño a otro, interviniendo culpa o negligencia, está obligado a reparar el daño causado. (The person who, as a result of an action or omission, causes damage to another by his fault or negligence shall by obliged to repair the damaged caused).

This article need to be complemented with article 1101 of the Civil Code which regulates, in general, civil contractual liability: *"quedan sujetos a la indemnización de los daños y perjuicios causados los que en el cumplimiento de sus obligaciones incurrieren en dolo, negligencia o morosidad, y los que de cualquier modo contravinieren el tenor de aquellas"*[11]. (*Persons who, in the performance or their obligations, may incur in wilful misconduct, negligence or default, and those who in any way should contravene the content of the obligation shall be subject to compensation of any damages caused*).

In both cases, as stated by NASARRE, it is indeed very doubtful to accept the use of waivers to avoid liability for the organising party, for example. Whenever you are going to sign a contract with a company to climb, ride horses or make paragliding and you see a waiver whereat the company refuses any eventual liability, the clause seems to be void in most of the cases. In fact, there is always the possibility to claim for compensation at the corresponding court[12].

A first important judgment on Spanish civil liability is the Judgment of the "Tribunal Superior de Justicia de Navarra" (High Court of Navarre) 13/1997 (Civil & Criminal branch), of 10 June. Actually, it is an important case if we consider the facts. A mountaineer felt down in a deep fissure suffering important damages during the rescue operation organised by a local mountaineering club in order to find another colleague[13]. This Judgment in 1997 decided that there was civil liability due and underlines the relationship between non-contractual liability of the Span-

11. This would be therefore the general framework of liability of mountains guides or of those persons who, professionaly, may asume the contractual responsability arisen from these activities.

12. J. M. NASARRE, "Responsabilidad civil en actividades de montaña y actividades en la naturaleza", Ed. Desnivel, 2013, page 14.

13. It is interesting to compare this judgemnt of 1997 with the Judgment 2995/2007 of the Supreme Court, 16-4-2007. In the first case, the rescue was organised by voluntaries of a local club, whereas in the second one the rescue operation ir organised by the public rescue services. Curiously, both cases happened in Navarre.

ish Civil Code with the same concepts in force in the so called "Fuero Nuevo" or Civil Code of Navarre. The Judgment states concerning non-contractual liability in the Civil Code of Navarre that is based on article 482.2 and this requires negligence. Moreover, the court assumes, that, meanwhile, authors and the case-law of the Supreme Spanish Court refers normally to the interpretation and aplication of articles 1902 and 1903 of the Spanish Civil Code and there is an evolution thereon, with a tendency towards strict liability as a consecquence of the risk created by anyone[14].

This trend is repeated, inter alia, in Judgments like the followings by the Spanish Supreme Court: 10 july 1943 (RJ 1943\856), 5 february 1991 (RJ 1991\991), 11 february 1992 (RJ 1992\1209), 25 may 1993, 20 june 1994 (RJ 1994\6026), 14 july 1995 (RJ 1995\6008) and 9 february 1996 (RJ 1996\953). Regarding the concept of the lack of duty or negligence, it is also stated by the Spanish Supreme Court, in Judgment of 8 November *1990 (RJ 1990\8534),* that we are nowadays in front of a wider concept in comparison with the classic approach.

In Judgment 13/1997, the Court agrees that there was an official coordination of the rescue, but the members of the club of the person who disappeared decided to become part of the rescue under the oficial coordination team. But the Court also states that 16 days after the disappearence, the same club decided, on its own, to organise new rescue operations through "Aralar" range (at "Tuturre" mountain and "Irumugarrieta") whereat there are risky breaches. There is a fall in one of those places, and, in that sense, this non-official rescue team was declared in lack of the due care. It was indeed organised without maps or guides with very bad weather conditions[15].

Another important judgment was issued by the "Audiencia Provincial of Bizkaia" 193/1999 (Section 5), of 15 march. In this case, the interest is due to the friendship relationship of somebody who is teaching climbing techniques to a person who had never climbed before that moment. In this Judgment, there was a declaration of civil liability for the person who assumed the direction and therefore, the responsibility of a risky activity.

In this sense, the Judgment declares that there was a situation of negligence to declare civil liability. Even though the victim was not a minor and climbing is a risky sport, he trusted on the experience and professional knowledge of his friend[16].

Another interesting Judgment was issued by the "Audiencia Provincial of Madrid" (Section 12) 545/2010, 14 September, with very different facts and con-

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14. We quoted some paragraphs before this tendency towards strict liability due to the criteria of liability based on the creation of risk.

15. There is therefore, a contrast in the due diligence required during both rescue activities according to the Judgment of the "Tribunal Superior de Justicia" of Navarra.

16. The Judgment declares that during the way down he did not apply an adequate technique without any security measures provided, and without consideration of the weight of the victim and his lack of experience. The Court declares that we are not in front of two persons with the same conditions. One is an expert while the other is not. So the victim could not questioned or doubt on the technique decided by the expert or minimise the risk.

text. The Court declares the existance of non-contractual civil liability during an accident suffered by a minor who walks in a non risky path. The main reason therefore is that the organisation of the walk did not take all the due diligence required to organise the activity properly. Moreover, the minor was not advised on the required shoes to walk through the path and he did it with football boots. He felt down and hit one eye with the stick he brought with him. The accident produce the whole loose of one eye of the kid. This Judgment actually underlines the trend towards strict liability by means of the theory of the creation of the risk. The coordinators of the walk were unable to prove that they did enforce their due diligence avoiding the kid to wear forball boots. At the end, that was the cause of the accident.

Therefore, we observe in this case-law that the main issue to decide on civil liability is based on the concept of the "due diligence" of those who asume the responsibility of organising each of the activities[17].

We will analyse in the following pages some cases and answers from Criminal Law.

4. Criminal Law

In this area of Law in Spain, case-law is less usual and more complex, mainly due to the special nature of the criminal jurisdiction. In the view of the Spanish autor, NASARRE, *"it is difficult to find judgments declaring criminal liability arising from mountain accidents in Spain"*[18].

One of the famous cases within the Spanish jurisdiction happened in Sierra Nevada (Granada) during 2004 with the participation of a foreign tourism guide. NASARRE quotes that the guide was leading a group of people during the 5-5-2004 in a trekking from "Trevelez" to "Poqueira" shelter. They did not have the adecquate equipment for the weather, with very adverse conditions, and after having a conversation with the guardian of the shelter who advised the guide to avoid the trekking in those conditions. The group arrived to the area of "El Chorrillo" with high winds and very low temperature. They stopped for a time and continued towards the shelter. Along this final trail, three persons died of hypothermia[19].

The guide was absolved by a Judgment of the Audiencia Provincial of Granada dated 16-3-2005. According to NASARRE the decision was taken mainly because the walkers who survived confirmed that they were prevented in their country on the convenience of bringing adecquate clothes and equipment for mountains; they assumed that the decision to continue to the shelter was adopted unanimously and not by the guide. This argument is relevant because it recognises the value of the will of the group. That indicates that the guide did not pro-

17. Vid. inter alia, Judgments of the Spanish Supreme Court (STS, Civil) 30-10-1992, STS 543/97 (Civil) 19-6-1997, STS 247/1998 (Civil) 17-3-1998, STS 931/2001 (Civil) 17-10-2001.

18. J. M. NASARRE, "Responsabilidad civil en actividades de montaña y actividades en la naturaleza", Ed. Desnivel, 2013, page 43.

19. Ibid. pages 43 and 44.

ceed like a mountain guide. Due to her own lack of experience, she decided to leave the decision in hands of the group[20].

Following the view of NASARRE, criminal liability may arise from a negligent organisation of the activity. That was the case in Judgment of the Audiencia Provincial de Málaga, 6-2-1996, in which the Court decided to declare the criminal responsibility of two members of a local sport council who choosed a risky place for a trekking. An accident happened with the result of a minor who die[21]. The aforementioned Judgment underlined that the election for the walk of the so called "Caminito del Rey", at the Gaitanes pass, in very bad conditions of maintenance was, indeed, a negligent decisión due to the extraordinary risk of the place, even for adults. So to say for a 12 years old girl whose reactions are unexpected and unpredictable.

More recently, a mountainneer found death at Sierra de Gredos (Ávila), 29-3-2013 due to hypothermia and extreme fatigue. The issue was researched at the "Juzgado de Primera Instancia e Instrucción num. 1", Piedrahita, who decided initially to prosecute the person who guided the trekking due to the lack of help and lack of duty towards the victim[22].

Once again, the level of diligence developed by those who organise the activity is a determining criteria for the existance or not of criminal liability in the cases analysed[23].

5. Administrative Law

Within the scope of eventual liability of the different public administrations in Spain we would be under Administrative Law as quoted by article 106.2 of the Spanish Constitution together with articles 139 et seq. of the Act 30/1992 and the Real Decreto 429/1993, whenever there might be a damage arising from the development of a public service. Therefore, this possibility is relevant in those cases whereat the activity or eventually a part of it is directly organised by a public administration, or whenever a public signal or advise for trekking, security or emergency is not in good maintenance or use. If the damage is a consequence of the management of that public service, we would be in a case of liability for the public administration. So to say for the cases of public rescue services in nature or mountains for example.

That is precisely the case in the Judgment of the "Tribunal Supremo 2995/2007, contencioso-administrativo", 16-4-2007, concerning a rescue of a climber in "Orhi" mountain at the Pyrenees of Navarre[24]. The peculiar nature of the case regards with the plaintiff s position who was a member of the rescue team

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20. Ibid. page. 44.

21. Ibid. page. 45.

22. Vid., O. GOGORZA, "¿Quién me lleva a la montaña?", El País, 7-4-2013. http://deportes.elpais.com/deportes/2013/04/07/actualidad/1365351524_723971.html

23. It is posible as well to extract Civil liability arising from Crminal Law.

24. Orhi mountain is 2017 meters high and it is the first summit higher than 2000m in the Pyrenees coming from the West end of the range.

who helped the climber, in very difficult weather conditions, with the colaboration of two helicopters[25]. The aforementioned member of the rescue team suffered serious injuries during the rescue operation. Both the first judgment and the one issued by the Supreme Court rejected any liability of the Public Administration involved in the rescue operation.

In the case of the first legal consideration of the appeal before the Supreme Court, the Court refuses the argument towards any public administration liability stating that the ice towards the summit was very hard, and therefore there was a need to firmly assure the rescue team. Thereby, if the legal reason of the appeal was regarded to a different interpretation of the facts at the first instance court, the reason of the appeal fails. Therefore, this first consideration was directly rejected.

The second legal argument within the appeal was related to the correct or incorrect managment of the public service for the rescue. The Judgment states that the initial operation of the helicopter was correct, being as well the same mode of operation made by the French helicopter[26]. [...] During the flight towards Orhi moun-

25. Emergency services of Navarre and the French Gendarmerie.

26. According to the 6th legal ground of the Judment, it was clear that without the colaboration of the French helicopter both rescues were very difficult and risky. The facts of the case demonstrated the necessity to have a great cooordination between the rescue team in land and the helicopter team on board, well trained and working together with mutual trust and professional skills.

tain, "SOS Navarra" communicated to the Government of Navarra on the call due to a new accident within the area. In that moment there were 3 rescue operations: 2 at Orhi mountain and 1 at Lakartxela (…). In this context, the officer Imanol decided to proceed towards Orhi mountain to deal with the 2 rescues (…). His evaluation of the situation and the decisión made on the resources operated were correct (…). But the whole event became more complicated when the rescue team reached to Orhi mountain. According to the information given by the pilot of the helicopter (…) there was a very strong wind in the area, and that was the reason why he left the rescue team members in the mountain pass below the summit in order to let them go walking to the place were the injured was located[27].

For this first Judgment we can resume that the rules to decide on an eventual liability of the Public Administration are very similar to the civil or ordinary ones. Nevertheless, the interpretative job of the court becomes more difficult at the time of deciding on the level about the duty of care developed by the public rescue teams. In this case, the approach was made from the viewpoint of the public service involved (including the operation of the helicopters), but also about the operation developed from the mountain itself by the rescue team members in very difficult weather conditions[28]. The Judgment underlines as well that the claimant is, in fact, a member of the aforementioned public rescue team.

Another Judgment of the Spanish Supreme Court 3411/1999 (Contencioso-Administrativo), 18-5-1999 deals with a different rescue operation at the Peña de la Hoz (Cantabria). It denied any public Administration liability, but the main argument was linked more clearly with the health assistance received than referred to the mountain rescue operation.

There are two other important judgments concerning the adecquate signing and marking of public paths in natural areas. Both are referred to National Parks with different decisions of the Audiencia Nacional on the existance of liability of the Public Administration. There is indeed a clear interest within these judgments due to the link of the subject with the public management of natural areas by Administrations. That is also relevant due to the growing acceptance and development of active tourism activities in nature.

The first of these Judgments was enacted by the Audiencia Nacional (Contencioso-Administrativo, 1st branch), 20-10-2004[29]. This Judgment deals with the signs, marks and advices of the natural area and its eventual risk. The Judgment

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27. Therefore, the Judgment of the Spanish Supreme Court concludes that there was no strange or bad operation of the public rescue service. The security measures were correct and the material was fine as well together with the human resources according to the different reports, so there was no Administrative liability in this case (7th legal ground).

28. For these cases, the requirements to obtain Administrative liability in Spain are usually as follows:

a) A person suffers an impact on his goods or rights with no obligation to assume it;

b) The damage is real, individualised and it can be economically evaluated;

c) The damage is caused by a public service managed by the Administration, and there is no "act of god" involved.

29. The accident happened during the summer in the National Park of Ordesa and Monte Perdido (Pyrenees) with the falling of a big piece of ice killing a kid and with serious injuries for his mother.

states that there was a correct advice at the begining of the path together with the information provided at the Center of Interpretation of the Natonal Park. Therefore, the trail was in good marking and signal conditions, including the general advice about the location of ice fields. The Judgment considered that the falling of a part of the ice field during the moment whereat a family was taking a picture was due to what is called an "act of god" or "force majeure"[30].

The second of the aforementioned Judgments was issued by the Audiencia Nacional (Contencioso-Administrativo, 1st branch), 17-10-2007[31]. In this case, the Judgment declared the existance of liability of the Public Administration, mainly due to the absence of any kind of advice on the risky situation within a public path. In contrast with the previous case, the Judgment underlines that the crevice was located in the middle of the path, within a trekking path clasified as "mínimum difficulties", whereas the accident with the ice field happened outside the public path of the National Park. Therefore, in this case, the Audiencia Nacional considered that there was no mark or sign on the path, failing to advice the risky situation of the path itself. In this sense, the walker trusted on the administrative nomination of the path as an easy one. Finally, the path became a difficult place to walk due to the lack of previous advice by the relevant public Administration[32].

Once again, we need to underline that the usual rules of Administrative liability should be adapted to technical requirements and to social reality, in particular in those cases whereat the role of the Administration might be linked with accidents. That is indeed an specific issue tu address within natural protected areas managed normally as public services.

Precisely regarding public rescues, we will analyse right now the open debate in force at the Basque Country on the particular public fee to cover searching, mountain rescue or sea rescue operations in risky conditions.

6. Rescues, liability and public fee in the Basque Country

The decisión following a new Law, and under several circumstances, on the payment of a fee to cover searching, mountain rescue or sea rescue operations in the Basque Country opened since 2012 an interesting debate on the role of Public Administrations and their universal public services, in front of the role and duties of every citizen[33], when developing risky activities and within a social context such as

30. "Fuerza mayor" in Spanish, or *"Act of God"* for the English case.

31. This case happened at the National Park of Picos de Europa (Asturias) when the walker introduced his leg within a crevice located in the path. This path was clasified as a trail of minimum difficulties by the National Park information.

32. In that sense, it seems that if the accident would have happened out of the path, the Judgment would have been different.

33. Navarra has a similar fee which is also in force with different criteria in Asturias, Castilla-León, Catalonia, Canary Islands and Cantabria. Vid. J. A. AUNION, "El monte ya no impone respeto", El País, 28-8-2014.

http://politica.elpais.com/politica/2014/08/27/actualidad/1409162633_450525.html

the Basque whereat the number of people practising mountaineering and trekking is, proportionaly, one of the highest rates in Europe[34].

The aforementioned fee due for searching, mountain rescue or sea rescue is in force in the Basque Country by means of the Act 5/2011, "Ley de modificación de la Ley de tasas y precios públicos de la Administración de la Comunidad Autónoma del País Vasco"[35]. The first issue to consider is a formal one: event though we are talking about an amendment Act, it intoduces "ex novo" a new fee within the general framework of public fees and public prices. The new regulation is included in Chapter V of the Act 5/2011, within articles 111 bis onwards.

In particular, article 111 bis includes the regulation of the fee itself for implementation in different situations and facts.

The first case in order to apply the fee is regulated by article 111 bis 1 a). Therefore, the fee is applicable when the searching or rescue happens during the development of sport or recreation activities determined as dangerous or risky for persons. The same article mentioned includes a list of the so called sport and recreation activities determined as dangerous or risky for persons:

> scuba-diving, long swimming, windsurfing, flysurf, water-skiing, wakeboard, wakesurf, skurfer, wáter-motorcycles, bodyboard, surf, rafting, hydrospeed, canoeing, rowing, canyon-descending, puenting, goming, kite buggy, quads, climbing, sport speleology, mountain byke withot helmett, motocross, motor vehicles in mountains, horse raid and trekking, ski, snowboard, ski-motorcycle, paraski, snowbike, mushing, skibike, aerostation, parachuting, base jump, ultralight flying, flying with and without engine, paragliding, hang-glider and parasailing[36].

The first situation whereat the fee is imposed is automatically applicable when the searching or rescue happens as a consecquence of practising one of these activities[37].

The second situation is regulated by article 111. bis. 1 b) of the Act 5/2011. In this case the fee is applicable whenever the serching or rescue happens within areas marked as risky or in those ones of restricted or forbidden access. In this case, there is no need for the situation to be included within the

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34. In Europe the situation in States with Alpine tradition is diverse. Switzerland, Germany, Austria and Italy do have particular regimes to claim the rescue operations in mountains with different criteria and proceedings. In France, the rescue operation is free but the french legal regime mantains the possibility to open a criminal procedure due to unjustified calls for rescue: abusive call for a rescue operation (Déclenchement abusif de secours).

35. BOPV (Basque Country Official Gazette) number 245, 28-12-2011. The Act/Ley 5/2011 was subject of an action of annulment at the "contencioso-administrativo" branch, registered by the Basque Mountaineering Federations before the Tribunal Superior de Justicia del País Vasco. The appeal was rejected by means of an Award of 7-1-2014. Within the Spanish system, any appeal against a Law is a restrictive competence of the Constitutional Court.

36. Trekking is not included within the list of risky or dangerous activities.

37. According to "El Diario Vasco", 29-7-2014, 164 rescues happened during 2013 in the Basque Country. Within 3 cases the fee was enforced: 2 of them in climbing and the other one with a horse activity.

http://www.diariovasco.com/sociedad/201407/29/ertzaintza-solo-cobro-tres-20140729002000-v.html

risky activities determined in paragraph a). Right now the criteria of the Act refers to specific risky or forbidden areas. Therefore, that means a direct call to Administrative Law in general together with an adecquate advice within all the aforementioned areas.

The third situation for the fee to become applicable is regulated under article 111 bis. 1 c). In this case, the fee becomes applicable when the searching or rescue happens during a public call to the people on orange or red alarms due to adverse weather conditions which may increase the risk to develop activities. This possibility requires a previous advice of orange or red alarm issued by the relevant public Administration[38].

Finally, the last situation refers to those situations whereby the searching or rescue is required without objective reasons[39], or whenever there is a simulation of the existance of danger or risk (art.111 bis 1 d) of the Act 5/2011).

Nevertheless, article 111 bis 2 includes a general exemption of the enforcement of the fee in the following terms: the fee is not applicable for searching or rescue which may happen during catastrophes or unforeseen accidents. It is neither applicable when the search or rescue is required due to general interest reasons nor whenever the rescue is required at sea by the relevant Laws and international agreements.

Article 111 ter is also important because it regulates the persons who may be charged with the aformentioned fee:

1. Pasive subjects of the fee are legal or natural persons and those entities mentioned by article 35.4 of the General Tax Act who may received the mentioned services.
2. Those persons who may organise the recreation or sport activities which may cause the application of the service are also pasive subjects of the fee[40]. In this case the persons mentioned in paragraph 1 of this artcile will be subsidiarily liable for the payment of the fee.
3. If the pasive subject has an insurance contract in force which may cover the expenses of the fee, the insurance company will become the substitute pasive subject. The sum of the fee will have the limit of the insurance contract in force, or otherwise, the limit established at the contract for the whole of the service[41].

Whenever there might be various pasive persons, article 111 quinquies 3 establishes that the fee will be divided among them. According to article 111 quater the fee will become due at the beginning of the service. In any case, the previously

38. This possibility assumes that the searching or rescue happens due to the lack of duty and attention of people to the public alarm. A different issue would be to know if the affected persons did knew about the aforementioned alarm or not.

39. This writing leaves a very wide margin of interpretation for the Administration.

40. In the Basque Country, they are mainly clubs, mountain associations, mountain federations and federations of other sport activities organised in nature.

41. This is a good reference of the growing importance of insurance in these activities.

provided data refers to a very limited real application of these provisions by the Basque Administration[42].

Concerning the fee itself, article 111 bis quinquies regulates the general criteria, together with certain specific criteria with regard to the required persons, teams and materials in order to organise the search or rescue. The fee has to be determined considering the number of persons involved within a team, the materials used, the equipment intervening, together with the real time involved therefore for each of the different services in order to develop the search or rescue[43].

Finally, article 111 sexies regulates some exemptions on situations in which the fee is not to be enforced. There is no fee applicable for those suffering any kind of illness, phisical alteration and people with an age younger that 16. There is no fee applicable for those person who die during the rescue once provided that the mentioned event was caused by the research or rescue operations.

The new legislation in force in the Basque Country tries to reach a delicate balance between the universal concept of public service in certian situations and the due liability care of citizens during the development of risky sports and activities in nature. As quoted before, the new Act is having a moderate application so far, but the debate is open and seems to recommend a balance as well between the economic impact in persons through insurance.

7. Brief note on Comparative Law: United Kingdom, United States and France

The general situation of liability and activities in nature is diverse and difficult to develop within a brief report. However, I will underline some general criteria on the situation according to Comparative Law.

In fact, as a general previous criteria, anglosaxon countries tend to analyse the legal approach to the subject through a case by case study in order to distinguish those cases with a formal contract from those ones without contractual relationship.

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42. As mentioned before, during 2013 in 3 cases the fee became enforced: 2 of them in climbing and the other one with a horse activity.

43. Art. 111 quinquies 2 of Ley 5/2011:

2.– The fee will be due according to the following criteria (euros/hour):

1.– human resources (for each person): 36.

Materials:

2.1.– For each vehicle: 38.

2.2.– For each helicopter: 2093.

2.3.– For each vessel.

– With length shorter than 18m: 383.

– With length longer tan 18m: 2017.

For the case of hour fractions, the fee will be divided proportionally. The maximun time limit will be of 4 hours to count the fee.

At the United Kingdom, for example, there is a relevant judgment enacted by the House of Lords with regard to the duties of landowners with third parties who enter into a lake and suffer an accident. According to this Judgment the advice and marks were adecquate and therefore there was no liability for the owner at all according to this Judgment[44].

Right on the apposite side of this analysis, marks and signals were clearly not enough to call for the risk of a person who decided to jump into the water and

44. House of Lords (2002), Tomlinson/Congleton BC, B3/2001/0788 [2002 EWCA Civil, 309].

suffered an accident in the waters of Folkestone within a civil trial at the Court of Appeal[45].

A different civil Judgment was issued by the High Court in 1996. In this case, the Court understood that the professional guide did fulfilled properly with his due care during a climbing session in Northumberland, including all preventive and security measures. Liability was excluded in the Judgment[46].

Another relevant reference from the UK, happened in Wales in this issue, wherat the Caernarfom Crown Court deals with a trekking accident with a death result of a minor. The criminal court excluded the liability of the guide considering mainly that the guide bahaved within the limits of his due care in order to get the trekking finished by the whole scout group[47].

In the case-law of the United States there are also some relevant judgments. Among them, once again, we can underline the issue of the risk arising from a non adecquate signal or advice, within the context of ski according to the Judgment issued by the Supreme Court of Utah[48].

With regard to the void nature of waivers to escape from liability, there is also a Judgment of the Supreme Court (1995) which gave priority to the specific regulation of this matter when an accident happened at Vermont Ski Station[49].

The Federal District Court of Ohio analysed in 2001 the due care level developed by an expedition to Tibet with the result of a died person due to altitude sickness. The court considered that the due care and preventive measures taken by the expedition were correct[50].

The most relevant case-law in France is diverse and tends to distinguish as well contractual and non contractual situations. In my view, it seems to be the most strict regime among the ones analysed so far.

A classic Judgment on this context is the Judgment of the "Cour de Cassation" in 1979 which ratified the previous Judgment of the "Cour d Appel de Chambery (Chambre Correctionnelle, 24-2-1977). In this case. The Judgment recognised the existance of a negligent manslaughter with the civil liability included due to the accident and death of three young persons which happened, according to the court, due to the lack of care of the guide in order to choose the proper climbing route for the level and experience of the young climbers. The court declared in particular that the guide did not considered the low technical level of the young climbers in this case, together with the very short training period organised previously in order to develop the whole climbing[51].

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45. Court of Appeal (2003), Donoghue v Folkestone Properties Ltd., B3/2002/1920 [2003 EWCA Civil, 231].

46. High Court (1996), Pope v. Cuthbertson, 1991P Number. 3484.

47. Caernarfon Crown Court (2001), R. v. Finlay.

48. Supreme Court of Utah (2007), Rothstein v. Snowbird Corporation, 2007 UT 96; 2007 Utah LEXIS 219.

49. Supreme Court (1995), Dalury v. S-K-I, Ltd, 164 Vt. 329; 670 A.2d 795; 1995 Vt. LEXIS 127.

50. Federal District Court of Ohio (2001), Wight, Admr., et al. v. Ohio State University. 112 Ohio Misc. 2d 13; 750 N.E.2d 659; 2001 Ohio Misc. LEXIS 9.

51. Cour de Cassation (1979), Bulletin Criminel Cour de Cassation, Chambre Criminelle, nº 259, page. 697.

Another relevant Judgment was issued by the "Cour de Cassation" in 2003, with regard to a rock fall after a climbing passing through and the subsequent accident suffered by the coming climber. There was no liability for this case and the accident was declared to be caused by the lack of experience of the actors[52].

In 2001, the "Cour d Appel de Chambery" analysed the criminal liability of a guide during the accident of two young climbers at the North face of Mont Blanc du Tacul in 1997. In this case the Court determined the criminal liability of the guide for a negligent manslaughter due to the different circumstances of the case. The Judgment considered that the died climbers were not properly monitored by the professional guide during their ascent through a glacier with very hard snow conditions, along a risky trekking and with a significative slope. Therefore, the lack of diligence brought to the young climbers to an innecessary risk. The Judgment confirmed the previous one made by the "Tribunal Correctionnel" of Bonneville, 15-9-2000[53].

A different situation, with certain previous objections, was analysed by the "Cour de Cassation" in 2006 concerning the death of a 18 years old climber due to an avalanche. Regardless of the previous general objections on the procedure, the Court assumed that the avalanche was a totally unforeseen event. Both guides did behave with the professional due diligence according with all the resources when the accident happened[54].

Within a general approach, we observe that the French case-law has a more active presence of the criminal jurisdiction in general and a more accurate or strict criteria in the requirements of the profesional due diligence of the guides.

8. Conclusions

This brief legal approach deals with risk and liability in montaineering and in other activities at nature. The initial viewpoint is a shifting paradigm in the perception of risk by historic climbers and explorers to our modern times with increasing professionalisation and spread social use of mountains and other activities in natural areas. This process requires as well new trends towards professionalisation of voluntary leaders and general stakeholders developing sport activities in mountains and nature.

From a general perspective, a first criteria to define the different legal regimes to apply on civil liability would be the distinction between contractual or non contractual relations within the scope of the developed activity. It is also relevant to consider the professional or voluntary nature of the guide or leader in order to define the different levels of liability to enforce. In this sense, training and insurance become very useful tools for an adecquate development of these activities.

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52. Cour de Cassation (2003), Sabry v. M. Morris, Bulletins des Arrêts de la Cour de Cassation.

53. Cour d Appel de Chambery (2001), Chambre des Appels Correctionnels, Audience Publique du 19-12-2001, nº de RG: 01/00350.

54. Cour de Cassation (2006), Chambre Civile 1, Audience Publique du 24-1-2006, Nº de pourvoi: 03-18045.

In both cases, the civil case-law tends to define the aforementioned due diligence levels by professional or voluntary leaders. As it is happening in many other activities, this due diligence levels are more strict when we are talking about professional guides. In this sense, the insurance usual tools and contracts are compulsory for professionals and convenient for the rest of the cases.

The analysed case-law on criminal law refers mainly to very relevant cases whereat we can see an important lack or failure of diligence with absence of preventive and security measures. The most significative and strict cases can be analysed in the French case-law.

Some claims before Public Administrations derived from accidents happening due to bad monitoring or failure in path marks, inter alia, and also due to rescue operations organised by Public bodies. In Spain, the usual framework therefore is the liability of Public Administrations in general. In this context, Public Administrations need to improve their policies and general maintenance activities in public paths, natural public areas and similar spaces.

In certain contexts, for example, in the Basque Country, there is an open debate in order to enforce a public tax towards citizens involved in serching or rescues according to different criteria and requirements, in general depending on the level of diligence developed by the person involved in the search or rescue. In the Basque Country the tax is inforce since 2011 but with very few cases of effective application. This new Act declares as risky or dangerous activities a wide range of sports and recreation activities in nature. Trekking is not included among them.

The analysed comparative case-law is not very extense but it is very diverse presenting technical aspects of great interest from the legal point of view. It is also remarkable to foster awareness of those who develop professional or voluntary activities at mountains and at nature in general.

If the main trend in general Civil Law advocates for strict liability in other risky activities, Mountaineering law and sport recreation law tends to assume also this idea towards strict liability sorrounding risky activities. Therefore, our main efforts should encourage all stakeholders to improve their levels of diligence, training, professionalisation and insurance for most of the cases.

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