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Climbing Wall Association

# Lines: The CWA Newsletter

**Vol. 2, No. 2**

**May 26, 2006**

## Welcome

Dear Colleagues,

Welcome to the latest edition of Lines! In this issue you will find information about the results of the CWA board election, the formation of the CWA engineering standards committee, and an interesting article on primary assumption of risk doctrine by one of our new board members Bob Angell.

Please consider submitting articles to Lines. You can submit feature articles, short articles, news briefs, notices, and reviews. Submit your articles or your suggestions for articles to:  
[bill@climbingwallindustry.org](mailto:bill@climbingwallindustry.org)

Remember, forward this link and help the CWA grow! One can subscribe to Lines on the CWA web site.

Thanks for your support!

Regards,

Bill Zimmermann,  
Executive Director

## **CWA Board of Directors Election Election Results**

The Climbing Wall Association (CWA) Board of Directors announced a call for nominations over the winter. A number of highly qualified candidates submitted applications for membership on the CWA board this election cycle. We would like to welcome: Robert Angell, an attorney from the Columbus, Ohio area; Rich Cook, General Manager of Eldorado Wall Company; and Eric Meade, A.I.A, President of Entre Prises USA onto the CWA board!

Collectively, our board members have considerable knowledge and experience in governance, management, finance, government affairs, law, architecture, and engineering. Contact information for our new board members is below and a roster of current board members is posted on the CWA web site.

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## Engineering Standards Committee

### CWA Engineering Standards Committee Charter Approved, Nominees Sought

The Board of Directors approved a charter for a new "Engineering Standards Committee" at its last meeting. The CWA is seeking nominations or applications for membership. Nominations must be made with the nominee's knowledge and consent. The committee will consist of up to nine members initially appointed by the CWA Board of Directors for staggered terms of up to three years. Thereafter, the committee will manage its own nomination/application process. The committee will be responsible for developing, reviewing, maintaining, and revising the CWA standards for the design and engineering of artificial climbing structures.

Applications for committee membership must be made in writing to the CWA office in Boulder, Colorado. Knowledge of the CWIG or CEN standards for the design and engineering of artificial climbing structures or practical design and construction experience are assets and will be considered in the selection process. Roughly two-thirds of the positions on the committee will be reserved for individuals representing various industry sectors.

Consideration will be given to candidates with expertise in various related disciplines such as architecture, engineering, construction, and climbing sports. Consideration will also be given to members of the general public that would like to participate.

Criteria For Selection Include:

- 1) Current CWA membership is not required but certainly preferred;
- 2) Sufficient knowledge and professional experience to be an active and productive contributor to a national standards effort;
- 3) An identified area of expertise in a field or discipline related to climbing;
- 4) Working knowledge of the current design and engineering practices of the climbing industry;
- 5) Ability to work constructively as a member of an association committee;
- 6) Organizational/Institutional support for your participation;
- 7) Ability to attend periodic meetings of the committee;
- 8) Ability to volunteer the time needed to complete committee assignments on time;
- 9) Willingness to abide by CWA's bylaws, policies and procedures;
- 10) Ability to represent CWA and the industry with integrity and professionalism.

Please contact Bill Zimmermann for more information about the committee.

## Legal Matters - Primary Assumption of Risk Doctrine Co-Participant Liability in Recreational Settings

Protecting your climbing facility against legal liability involves (in addition to a good liability insurance policy) two legal considerations: primary assumption of the risk, which is a doctrine of tort law, and an express written release of liability/assumption of risk, which is in essence a contract between the facility and the climber. These issues arise both in cases where a participant seeks to hold a facility liable and in co-participant liability cases where, for example, a climber seeks to hold a belayer liable for injuries.

Courts are in general agreement that climbing, as a recreational activity, is subject to the primary assumption of risk doctrine. The risk of falling is an “inherent risk” of the sport of climbing, and as such is not subject to legal principles governing simple negligence. Facilities and co-participants do not owe a legal duty to protect climbers against the inherent risks of the sport, and a showing of intentional or reckless conduct is generally required to establish liability. Two cases will illustrate the point.

In *Mankoski v. Mieras*, 1999 WL 33453871, a Michigan appeals court affirmed the dismissal of a negligence action by a climber against his belayer. The plaintiff had signed an agreement including a release of liability in favor of the climbing gym and an express acknowledgement and assumption of the inherent risks of the activity. The court found that the plaintiff’s acknowledgement and assumption of inherent risks included the risk that his belayer would act negligently: “[T]he concept that a participant assumes the risk of a co-participant’s negligence logically comes from that line of cases which forgive simple negligence (but not recklessness or intentional wrongs) in a co-participant sporting context. The rationale is the encouragement of free and uninhibited play normally engaged in between co-participants in a sport.”

In *Holbrook v. McCracken*, 2004 Ohio 3291, another belayer-negligence case with facts virtually identical to those in *Mankoski*, an Ohio appellate court applied the primary assumption of risk doctrine to bar the plaintiff’s claim: “In order to gain the thrill associated with rock climbing, the appellant voluntarily assumed the primary and ‘inherent risk’ of the activity, viz., falling. [T]he risk of falling inherent to the activity of rock climbing can be ‘reduced [but] cannot be eliminated.’ This is especially true when the injury results from simple human error.”

The aspect of “free and uninhibited play between co-participants” is an important factor setting recreational climbing apart from simple amusement activities. It is clear even from a couple of cases that the doctrine of primary assumption of risk, applicable to sport and recreational activities, is a crucially important legal doctrine for the climbing industry. For these reasons, the Association strives to keep recreational climbing gyms separate from amusement rides and venues in government regulatory schemes.

None of this is meant to suggest that climbing gym operators can become complacent on the assumption that climbers and belayers will always lose in court. Far from it! Every facility should protect

itself with (1) adequate liability insurance, (2) a participation agreement in which the climber releases the gym from liability (including liability for the negligence of co-participants) and expressly assumes the risks of the activity, (3) a comprehensive employee handbook and operations manual, and (4) well-trained instructors and staff in sufficient numbers to ensure adequate supervision of climbers. In my next column, I will highlight cases in which breakdowns in these crucial areas defeated the primary-assumption-of-risk doctrine and resulted in operator liability.

Please feel free to contact me or the Association if you have any questions about these important matters. To your success!

Robert Angell, Esq.,  
CWA Board Member

*Definitions:*

**Negligence:** Negligence is “failure to exercise the degree of care considered reasonable under the circumstances, resulting in an unintended injury to another party.” It implies a duty of reasonable care owed to another party, a breach of that duty, and an injury proximately caused by that breach.

**Assumption of Risk Doctrine:** By participating in an activity, the participant assumes all risks of injury which are “inherent” to that activity (i.e., the risk of falling in rock climbing). There are 2 types: primary and secondary (or implied) assumption of risk.

In primary assumption of risk, the participant assumes all inherent risks, even those of which he is not aware. It is essentially a doctrine of no duty or no negligence, and will defeat a claim of negligence as a matter of law.

Secondary or implied assumption of risk requires a showing that the participant has consented to or acquiesced in an appreciated or known risk. In other words, there is a knowledge-of-risk component that is not relevant in the primary-assumption-of-risk context.

***Disclaimer:*** The information provided above is offered for the general guidance of members of the Association and is not intended, and should not be construed, as the provision of legal advice in any pending or anticipated matter. Please consult your legal counsel for advice regarding any such matters.

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## Risk Management 101

### Four Fundamental Risk Management Strategies

There is a lot of discussion of “risk” and “risk management” in the climbing industry. However, when professionals are pressed to define what they mean by these terms, you’re likely to get a bewildering array of definitions. I’ll attempt to provide you with some relatively straightforward definitions and help you understand some of the fundamental strategies used to deal with risk in a recreational setting.

First, what do professional risk managers mean by the term “risk”? The word simply means the “possibility of loss or injury; the probability of such loss; or someone or something that creates or suggests a hazard.” If risk can be equated with loss, injury or the potential of loss or injury; then what are the types of things we value that we have the potential to lose?

The risks that we are concerned about in the operation of our types of businesses are: loss of income, loss of property, damage to property, damage to reputation, injury, and death. If risk is defined using terms such as “possibility” or “probability” is it reasonable to assume that we can evaluate, measure, or quantify risks? The answer is yes, insurance company actuaries do this kind of work all the time.

So, what questions would one need to ask to be able to evaluate a risk? How do we decide what risks are important? In analyzing or evaluating risks it is essential to ask three related questions: What is the probability that this risk will occur at all, with what frequency, and with what severity? Many professional risk managers plot risks associated with specific activities according to frequency/severity graphs. “Activities, policies, or personnel which produce frequent and severe losses should be halted, infrequent but severe losses indicate profound problems, frequent but not severe losses indicate problems but to a lesser degree.” (Gregg, 1998). Simply ask yourself what risks are likely to occur, how often, and what would be the consequences of those things happening to me or my business. Attention should probably be paid to risks or incidents that occur frequently or whose severity would be high.

O.K., so I know what a risk is, now what is risk management? Risk management is a discipline employed to deal with uncertainty. It has been referred to as “the systematic analysis of one’s operations for potential risk exposures” (van der Smissen, 1997). As a discipline it provides an overall framework and specific strategies to identify and confront virtually all reasonably foreseeable risks. Risk management involves these steps:

- Identifying the organizations mission, goals, and programmatic context;
- Identifying the reasonably foreseeable risks associated with the organization’s mission, goals, and operations (based upon past performance);
- Evaluating and prioritizing those risks (based upon frequency and severity);
- Mitigating the risks using general risk management strategies;
- Developing a risk management plan (often a written document or set of documents); and
- Monitoring and adapting your plan to changing conditions.

Analysis and management of risk is a proactive approach to preventing or reducing all types of incidents, injuries, or losses. Practically speaking, A risk management system can be thought of having three aspects: identification, mitigation, and monitoring.

Once risks have been identified, there are four basic strategies generally employed to address them: 1) elimination, 2) reduction, 3) transfer, and 4) retention (van der Smissen, 1990).

1. **Elimination.** Some risks can be eliminated by avoiding or discontinuing an activity altogether. Risks that are deemed to be too great or “unacceptable” should be eliminated. Avoiding risks involves identifying occurrences beforehand and modifying your activities accordingly. An example of this strategy might be discontinuing the use of certain techniques or equipment in a climbing gym (eg. the removal of automatic belay devices for those not comfortable with their use or managing their use).
2. **Reduction.** Many risks cannot be eliminated, some are unpredictable (e.g. lightning or “acts of God”) and some are inherent. Inherent risks are those that cannot be eliminated without changing the nature of the activity itself. Many risks attendant to adventure programming are inherent, they are obvious and unavoidable. Furthermore, the presence of inherent risk in some activities contributes to their value and, one could argue, should not be eliminated (Gregg, 1997). Risks that cannot be eliminated can be managed by minimizing the frequency and/or severity of occurrences. An example of this strategy might be making sure that the climbing facility has a sound belay training and testing protocol in place for clients.
3. **Transfer.** Transfer is a strategy that attempts to re-allocate financial or legal risk to another party by means of a contract or some form of “affiliation agreement” (van der Smissen, 1990). Examples include: purchasing appropriate types and levels of insurance and employing legal documents such as assumption of risk, releases, waivers, indemnity agreements, covenants, etc.
4. **Retention.** This strategy is “the keeping of risk, either *in toto* or in part” (van der Smissen). For example, one might understand the risks associated with an activity and continue to engage in it regardless of the risks. Presumably there is some compelling purpose, rationale, or justification for retaining risk. Retention is a strategy of acceptance, and in our industry of personal responsibility. As a business owner, you want to be clear with your clients regarding the nature of the risks they should be willing to assume. If they are not willing to assume the requisite risks, then they should not be your clients.

Practical risk management can be boiled down to a simple methodology that includes identification of the reasonably foreseeable risks and prevention, prevention, prevention. When we learn some very simple methods to identify and analyze risks, those risks become much easier to see, understand, and avoid.

**About the Climbing Wall Association, Inc. (CWA).** The CWA is a 501(c)(06), non-profit, trade association incorporated in May of 2003 for manufacturers of climbing wall equipment, builders of climbing walls, operators of climbing walls, and others involved in the climbing industry.

The CWA is the only trade association addressing the needs and interests of the climbing wall industry and climbing wall operators. The mission of the Climbing Wall Association is to support the growth, health and independence of the climbing wall industry, and to promote the sport of climbing.