

Legal Issues in Search & Rescue

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Introduction

What follows is a compendium of information on various legal aspects that are relevant to the delivery of ground SAR in Canada. It includes a brief survey of the legal jurisdiction and authorities for GSAR, an overview of the evolution of GSAR and the law, salient points about standards and insurance requirements and a review of legal liability as it pertains to GSAR providers, particularly volunteers, and ground SAR organizations. It is by no means an exhaustive review, but should highlight some of the more significant issues that warrant the consideration of GSAR authorities.

Authorities for Ground Search and Rescue

A.. Jurisdiction

The legal basis of SAR is multifaceted and very complex because most legal structures that concern "SAR-like" activities do not have the words "search" and "rescue" incorporated into them. The consequence of this situation is that it is not possible to provide a definitive survey of SAR responsibilities and these responsibilities must be determined on a case-by-case basis for issues where there is some dispute or doubt (Nowack 1991).

It should be noted that on a very general level it can be said that SAR is the responsibility of the provinces, except where federal legislation specifically addresses it. Specifically, more than one level of government has the power to make legislation concerning SAR if it is connected with some other subject matter that has been assigned to that level of government (ie. shipping is a federal responsibility. It does not necessarily mean that because one level of government has the power to legislate concerning SAR the other does not; SAR may be connected to subject matters having both federal and provincial aspects (Nowack 1991).

Responsibility for ground search and rescue resides with the provinces except in cases where there is federal interest established pursuant to legislation (Trotman 1989). Because SAR may be connected to subject matters having both federal and provincial aspects, there is no clear or easy answer to the question, Awho is responsible ...≡ (Nowack 1991). Given the tendency towards multi-agency delivery of SAR, Memoranda of Understanding between the agencies involved serve to establish decision making authorities, roles and responsibilities, call out procedures, insurance provisions, and cost reimbursement procedures. These protocols when clearly defined delineate the legal responsibility of the agencies involved.

B. Existing Legislation

Because there is no legislation that refers specifically to search and rescue, the province has legal jurisdiction by default. Sections 91 and 92 of the British North America Act establish the basic distribution of law making powers between the federal Parliament and the provincial legislatures respectively. These powers grant legislative authority over matters falling within various wide-ranging classes of subjects. The process for determining what matters are included in the various classes usually arises when a particular law or provision within a law is challenged in court as not being a valid federal or provincial law. The court then has to assess whether it falls within the realm of the federal or provincial classes of matters. One way to determine the jurisdiction of the matter is to determine the most important feature of a law and this

feature then is considered to be a law in relation to the class concerned with that feature although it may necessarily affect other classes of legislative power (Nowack 1990).

Section 92(16) of the BNA Act describes a catch-all class as being generally all matters of a merely local or private nature in the province. Failing that, the federal government is granted residual power to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the Provinces, as well as power to make laws where issues respect two or more provinces. Having said this, the authority (not an obligation) to make laws or particular provisions of them dealing with activities involved in SAR could be found in the more general classes of subject matter in sections 91 and 92 as well as in the general authorities in the opening to section 91 and in subsection 92(16). SAR provisions would likely be found in both federal and provincial laws (Nowack 1990).

C Case Law and Precedents (or the Evolution of SAR and the Law)

Historically, the common law countries, most notably the United Kingdom, the United States and Canada, were unwilling to compensate a rescuer for injuries he may have suffered in attempting a rescue. (Quinton 1989). The courts relied on the maxims *voluntary assumption of risk* and *a new intervening action* to deny the rescuer compensation. These maxims allowed the courts to rule against the rescuer in actions for compensation for they said that the rescuer willingly assumed the risk associated with the rescue and/or that the rescuer's attempts were a new action and not part of the chain of causation. Today however, the rescuer is more favourably looked upon in cases of compensation.

Over the years, Canadian law has continued to broaden the category of situation in which the rescuer would be allowed to recover damages. The following case, *Haigh vs. Grand Trunk Pacific Railway Co.*, clearly demonstrates that the right of the rescuer to recover is not dependent on there being any duty owed to the imperiled victim. Rather, their right to recover is dependent upon the belief in a real or perceived danger coupled with a reasonable rescue attempt in the circumstances and not a specific duty owed by the wrongdoers in the rescued party (Quinton 1989). In the decision it was held that

A person is justified in intervening to save from apparent probable death or serious injury a third person independently of any contractual or natural relationship between the person in danger and the intervener, unless his intervention was unnecessary, rash or reckless under the circumstances.

Later, in 1943, there was question as to whether the rescuer could seek to recover damages against someone who had negligently imperiled him or herself. In *Dupuis vs. New Regina Trading Co. Ltd.*, a rescuer was killed trying to rescue a woman in the workplace and the rescuer's estate filed action against the woman's employer. The court found that the woman had endangered herself through her own negligence and that the defendant company should not be liable to the deceased rescuer as there was no negligence on the party of the company towards the rescued. Under the maxim of *voluntary assumption of risk*, the requirement for immediate aid or action must be caused by the defendant's wrongful conduct in order for the rescuer to have a claim against the defendant. In *Dupuis*, there was no wrongful conduct on the part of the defendant employer towards the rescued party; and as such, there could be no separate and independent wrongful conduct towards the rescuer (Quinton 1989).

While in this case the plaintiff was not able to recover from the defendant, the law was unclear as to whether "careless conduct for one's own safety should not involve liability towards a rescuer who seeks to mitigate the harm likely to result from such carelessness." (Quinton 1989). It was not until 1958, following the case of *Baker vs. Hopkins*, that the Canadian courts had the judicial authority to impose liability on a person who negligently imperiled himself. In that case, it was held that

Although no one owes a duty to anyone else to preserve his own safety; yet if, by his own carelessness, a man puts himself into a position of peril of a kind that invites rescue, he

would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid (Quinton 1989).

The maxim of *voluntary assumption of risk* was rejected in 1970 in *Seymour vs. Winnipeg Electric Railway* when the judge reasoned that a rescuer could recover from a negligent wrongdoer. The judge ruled that

the trend of modern legal thought is towards holding that those who risk their safety in attempting to rescue others [and] who are put in peril by the negligence of a third person are entitled to claim such compensation, from such third persons for injuries they receive in such attempts.

It was also stated that:

To save human life is a lawful act and a man is doing a lawful and proper act in endeavoring to rescue the person so threatened. His conduct in placing himself in danger in order to effect rescue, unless he is needlessly reckless in exposing himself to injury, is not negligent and does not absolve the third party of responsibility for their negligence.

The case of *Horsley vs. McLaren*, is considered to be a milestone in search and rescue law. In this case, a passenger on a motorboat, for no apparent reason, fell overboard and the operator (McLaren) failed in his attempt to rescue mainly because he didn't follow the recommended rescue procedure. A second passenger attempted to rescue the first and was killed himself. The Supreme Court of Canada held that there was no negligence on the part of McLaren and that while there was an exigency caused by the first person falling overboard, it could not be attributed to McLaren. Therefore there was no negligence that induced the second passenger from attempting to effect a rescue and no grounds for recovery.

The outcome of this case vastly improved the position of the rescuer vis-à-vis negligence and liability. As a result it is now widely accepted that as long as your efforts (as a rescuer) do not leave the person whose rescue you are attempting to effect in a worse position than when you took over, discontinuing your rescue will not lead to liability (Quinton 1989). However, as demonstrated in *Cleary vs. Hansen*, simply being a rescuer does not preclude the exercising of reasonable care in effecting a rescue. Here the court held that

Even during an attempt to assist someone in an emergency, the law expects reasonable care to be exercised, even though the standard is reduced to a certain extent. The court does not expect perfection, but rescuers must be sensible. They like, anyone else, must weigh the advantages and the risks of their conduct. Their conduct, too, however, laudable must measure up to the standard of the reasonable person in similar circumstances.

Consequently, there is now legislation that permits courts to apportion responsibility for a foolhardy rescuer attempt, thereby awarding the rescuer for heroism without condoning the careless conduct of the rescue attempt. Precedent demonstrates that the courts are willing to reward rescuers even if their conduct resulted in contributory negligence, albeit at a reduced amount.

This case law reflects the rescue doctrine and does not necessarily hold true for professional rescuers. In these cases, the courts will hold that the presence of a duty to rescue rebuts the voluntary assumption of risk defence. This duty to rescue arises when certain relationships involving an element of control or economic benefit exist, and will be discussed later.

Standards and Ground Search and Rescue

Decisions over liability in SAR usually involve interpretation and are based largely on case law and precedent. Standards that are recognized by the courts protect the individual and the group from liable. Moreover, standards protect against the misinterpretation of case law in certain situations.

In order for the courts to determine whether an action constitutes negligence, they must first determine whether the incident giving rise to the action was foreseeable to any extent, and whether or not the plaintiff took reasonable measures to minimize and reduce the potential risk. Precedent reveals that rather than emphasizing the plaintiff's own conduct which has either wholly or in part contributed towards the circumstances giving rise to the incident, the courts have instead tended to direct their attention towards the level of response and standard of care provided by SAR organizations {SAR Strategic Plan Working Group, 1995:1.2-1.3}. Therefore, those accused of negligent behaviour can defend themselves by establishing that their actions were in accordance with either policy or well established and generally accepted legitimate practice (SAR Strategic Plan Working Group 1995).

In Australia, the existence of the National Search and Rescue Manual, although not legally sanctioned, may be taken to describe appropriately legal duties and obligations (Guzman 1991). It serves as the standard reference document to be used by all SAR authorities and is endorsed by the involved federal authorities. It can also be used to answer questions of proximity (ie., cause and effect) and standard of care. At the time of writing, the National Ground SAR Manual had only just been published. It provides a common minimum standard, which SAR providers and organizations are to follow to ensure not only that Canadians receive consistent and adequate SAR services across jurisdictions, but to guard against situations that may lead to accusations of negligence (National Search and Rescue Secretariat 1997).

Ground Search and Rescue Liabilities

A. Introduction

Liability is based upon the unreasonable (subject to interpretation) interference with the interest of others. There are three types of liability: 1. intentional acts to harm, 2. unintentional acts with harm or negligence, and 3. strict liability or liability without proof of fault (van der Smissen 1990). Liability falls under the scope of tort law.

Factors which impact on whether and to what extent volunteers are liable for their actions include foreseeability (how predictable the injury was), remoteness (how closely connected the injury was to the wrong done) and duty of care, and negligence {Austin, 1989}. When deficiencies in the quantity and quality of the SAR service are deemed to have affected the victim's chance for survival or full recovery, potential for a liability claim exists (Hanna 1994).

Generally, tort law, whether based on negligence or strict liability, ordinarily requires that only those individuals who alter the status quo to the detriment of others must compensate their victims and restore them to their position prior to the commission of the wrongdoer's act. It is a system of corrective and not distributive justice {Klar, 1996:151}; the purpose of which is to encourage rescue efforts by reducing the risk of liability for failing at such (Hanna 1991).

SAR providers and organizations should be reminded that they are not only liable in cases brought forward by SAR clients, but may also be sued by other SAR personnel and dependents of the SAR client. In fact, the risk of being sued by other SAR personnel is substantially increased by the fact that the rate of injuries to personnel is magnitudes greater than the rate of injuries to victims (SAR Strategic Plan Working Group 1995). SAR agencies can also be found liable for operational decisions or the operational implementation of policy decisions but not for policy decisions themselves, therefore employees should be careful to follow

policy (ie., management directives) and if they are not, documentation should be maintained explaining why they are consciously not being followed (Hanna 1994).

B. Duty to Rescue

Unlike many European countries, there is no affirmative duty to effect a rescue anywhere in Canada other than Quebec. However, the affirmative duty to rescue arises when certain relationships exist. For instance, if an individual, through their own negligent behaviour causes danger of injury to the person or property of another individual, there exists a duty to rescue (*Heaven vs. Pender*) (Quinton 1989). Furthermore, the duty to rescue is extended to those situations where the rescuer, under no duty to so undertakes to effect a rescue. In other words, a duty to rescue is imposed when the conduct has gone forward to such a point that discontinuing it would not only result in withholding a benefit but would actually inflict an injury (Quinton 1989). The law in Canada has tended to expand the situation in which a positive duty of care is required. It appears that

There is a growing group of special relationships which import an obligation to engage in positive conduct for the benefit of another. Normally, there is some element of control or some economic benefit inuring to the person as a result of the relation, which justifies the creation of the duty.

In 1987 the Law Reform Commission (LRC) recommended that Canada take a much firmer stance with regard to requiring rescue. Building on the principles recognized in the Quebec *Charter of Human Rights and Freedoms*, the implementation of Clause 10(2), *Failure to Rescue*, of Report 31, (Recodifying Criminal Law) would in fact create a new crime, and bring Canadian law into line with ordinary notions of morality and the laws of other countries, including Belgium, France, Germany, Greece, Italy, Poland and some US states. Under the recommended clause

Everyone commits a crime who, perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him.

The clause however, would allow for an exception in that it would not apply in situations where

the person cannot take reasonable steps to assist without risk or death or serious harm to himself or another person or where he has some other valid reason for not doing so.

Considerable debate ensued over the implications of imposing a duty to rescue on Canadians. On one hand it was believed that prescribing a duty to rescue contravenes an individual's personal freedoms in that it obligates them to the assistance of another, thereby making them a slave. Conversely, any duty advocated through legal means would seldomly be invoked and when it was, it would only require action which would not expose the rescuer to danger. Therefore the extent to which freedom would be threatened would not be great (McInnes 1990). In fact, the lines of contention were drawn over the issue of interfering with the rights of others and failing to allocate goods and services to others. Because there is a difference between them, the law says "do not harm others - do not worsen their lot in life, but refrains from adding "and do good to others - go and improve their lot."

These recommendations made by the LRC to date have not been adopted into criminal law. There remains however, the possibility of these recommendations being considered in a judge's ruling provided that the judge is aware of them, thereby establishing precedence regarding the duty to rescue. It has been suggested through discussions with officials at the LRC, that jurisdiction may have played a significant role in why no modifications based on the recommendations were made. It is felt that in many circumstances a duty to rescue is best addressed through provincial statutes and was beyond the mandate of the federal commission.

The law relating to search and rescuer liability has achieved a precarious balance and caught amidst the historical common law position and the increasing trend of the courts to encourage altruism, are the rescue cases. Common law and legal literature make it quite clear that absent a special relationship, there is no duty to act for the benefits of others (Quinton 1989). However, in past years, the Canadian trend is imposing civil as well as criminal liability in an increasing number of situations where previously would have been hands off. Typically, the refusal to offer assistance is an omission which the law generally does not concern itself, unless there are the following conditions (McInnes 1990): 1) relationship of economic benefit; 2) relationship of control or supervision; 3) creation of danger; 4) gratuitous undertakings (combination of gratuitous undertakings and reliance can lead to a duty to action); and 5) statutory duties (legislation imposing a duty).

C. Standard of Care

An issue that arises from there being an established duty to rescue is the standard of care in effecting the rescue. The standard of care adopted by the negligence law is an objective standard, not a subjective one (Linden 1993). It is determined by written standards, unwritten standards, common law (*stare decisis*) and common sense/knowledge (Kitchen and Corbett 1995). The standard of care required in a given situation is related to the degree of risk as influenced by (a) the severity of the risk (or the potential seriousness of the resulting injury, damage, or loss), (b) the frequency of the risk (or the likelihood of the injury, damage or loss occurring), and (c) the imminence of the risk (or the immediacy of the danger).

Generally speaking, the standard of care of the reasonable man in the same or similar circumstances is applied, however the status of the rescuer is often taken into consideration when determining the standard of care. Those people with special knowledge or skills who are operating in their area of expertise, are always held to a higher standard of care than the ordinary person without such skills. As a general rule, professionals must meet the same level of competence as others in the same professions (Kitchen and Corbett 1995).

Case law shows that the standard of care required for SAR providers is quite low. Although volunteers may come under a legal liability if they worsen the position of the person they are seeking to help, the law is rather solicitous for the welfare of the volunteer (Gruzman 1991). This might be attributed to two factors:

As long as the rescuers conduct doesn't worsen the condition of the victim's position noticeably, the rescuer is under no legal obligation to significantly improve the status of the imperiled victim (Hanna 1994), and

It is in the interest of society that voluntary efforts directed towards promoting excellence and safety in any field of endeavour be encouraged. If the standard expected from a non-profit organization is put too high, such organization may depart the field (Quinton 1989).

D. Good Samaritan Legislation

Under the common law, emergency intervention is not encouraged. In recent years, legislators in most of the provinces and territories, have enacted Good Samaritan statutes to encourage more people, especially those with medical training, to provide assistance to individuals rendered ill, injured or unconscious by an accident or emergency. To date, six provinces and two territories have Good Samaritan Acts. All of these statutes, except Quebec's serve partially to relieve people from liability for injuries or death caused when they render emergency services or assistance to others, by relaxing the standard of care owed by individuals who are providing aid to victims of accidents or other emergencies (Austin 1989). Good Samaritan legislation does not however, protect any individual responding in a specific situation from gross negligence. The statutes in Canada are presented in the accompanying chart.

Table 2 Good Samaritan Acts by Province

Province	Act	Scope of Protection	Limitations/exceptions
NWT	<i>Emergency Medical Aid Act</i> , RSNWT 1988, c. E-4.	2(b) ... a person other than a medical practitioner or a registered nurse voluntarily renders emergency first aid assistance, ... is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on the part of the ... other person in rendering the medical services or first aid assistance.	2. ... unless it was established that the injuries or death were caused by gross negligence on the part of ... the other person.
Yukon	<i>Emergency Medical Aid Act</i> , RSY 1986, c. 52.	2(b) ... a person other than a medical practitioner voluntarily renders emergency first aid assistance, the ... other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his part in rendering the medical services of first aid assistance	2. ... unless it is established that the injuries or death were caused by gross negligence on his part.
BC	<i>Good Samaritan Act</i> , RSBC 1996, c. 172.	1. A person who renders emergency medical services or aid to an ill, injured or unconscious person, at the immediate scene of an accident or emergency that has caused the illness, injury or unconsciousness, is not liable for damages for injury to or death of that person caused by the person 's act or omission in rendering the medical services or first aid.	1. ... unless that person is grossly negligent. 2. Does not apply if the person rendering the medical services of aid (a) is employed for that purpose, or (b) does so with a view to gain.
Alberta	<i>Emergency Medical Aid Act</i> , RSA 1980, c. E-9	2(b) ... a person other than a person mentioned in clause (a) voluntarily renders emergency first aid assistance and that assistance is rendered at the immediate scene of the accident or emergency, the ... other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his part in rendering the medical services	2. ... unless it is established that the injuries or death were caused by gross negligence on his part.

or first aid assistance

Saskatchewan	<i>An Act respecting Emergency Medical Aid</i> , RSS 1978, c. E-8	2(b) ... a person other than a person mentioned in clause (a) voluntarily renders emergency first aid assistance and that assistance is rendered at the immediate scene of the accident or emergency, the ... other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his part in rendering the medical services or first aid assistance	2. ... unless it is established that the injuries or death were caused by gross negligence on his part.
Manitoba	The Manitoba Law Reform Commission concluded that legislation was not needed (<i>Report on the Advisability of a Good Samaritan Law in Manitoba</i> , Report 11 (1973), pp. 9-10).		
Ontario	The Ontario Law Reform Commission argued against the enactment of the legislation (<i>Fourth Annual Report (1970)</i> , p 13 and <i>Fifth Annual Report (1971)</i> p 13.) and Bill 98 <i>Good Samaritan Act</i> , was defeated after first reading in 1984.		
Quebec	<i>An Act respecting the protection of persons and property in the event of disaster</i> , RSQ 1979, c. 64	42(1) no person taking part in a rescue or in the implementation of emergency measures of a plan or program of disaster prevention and emergency measures may be held responsible for damage resulting from his participation if caused in good faith, to another person.	
Nova Scotia	<i>Volunteer Services Act</i> , RSNS 1989, c. 497.	3. ... a volunteer renders services or assistance at any place, the volunteer is not liable for damages for injuries to or the death of that person alleged to have been caused	3. ... unless it is established that the injuries or death were caused by gross negligence on the part of the volunteer ...

by an act of omission on the part of the volunteer while rendering services or assistance...

Newfoundland	<i>Emergency Medical Aid Act</i> , RSN 1990, c. E-9	3(b) ... a person other than a person mentioned in paragraph (a) voluntarily renders emergency first aid assistance, and that assistance is rendered at the immediate scene of the accident or emergency, the ... other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his or her part in rendering the medical services or first aid assistance ...	3. ... unless it is established that the injury or death was caused by gross negligence on his or her part.
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The Good Samaritan Act is intended to provide protection for passers-by who either happen to be at or stumble across the scene of an immediate accident or emergency. Its interpretation and application in previous tort actions has raised several issues. Does the act cover SAR volunteers not employed in the typical sense of the word in SAR response, but utilized for that purpose, and does the Act cover SAR groups providing SAR services as it is not clear whether these groups are considered "persons" for the purposes of the Act? (SAR Strategic Plan Working Group 1995). It is also unclear whether any individual acting in a supervisory capacity is protected from liable under the Act as their activities can not be considered to be providing the actual services or A .. being at the immediate scene of an incident and the interpretation of the Act in these circumstances is arbitrary (SAR Strategic Plan Working Group 1995).

Good Samaritan statutes grant a partial immunity from liability by typically providing that rescuers will only be held accountable for injuries or fatalities that they cause through their own gross negligence. The question arises as to whether they are necessary as the actual risk of liability faced by the rescuer under the common law is minimal.

Prior to the enactment of the first statute in Alberta in 1969, there was not a single reported decision involving a suit successfully brought against a rescuer. Since their enactment, there have only been three reported decisions where the statutes were given judicial consideration (Alberta (1983), Nova Scotia (1987), and British Columbia (1988)). The absence of cases brought against negligent rescuers could be a result of several concurrent factors, the most significant of which being that the standard of care expected of rescuers is low coupled with the doctrine of "sudden peril" which holds that a person confronted with an emergency will not be required to exhibit the level of prudence and competence that would be demanded in less stressful situations. This would suggest that perhaps statutes protecting the Samaritan are unnecessary (McInnes 1992).

The classes of rescuers that enjoy protection under the statutes vary by jurisdiction. The effect of such diversity of protection may be at odds with the aim of Good Samaritan legislation. While little can be done to achieve a uniform statutory scheme across the country, a patchwork of immunities may fail to assuage the fear that emergency intervention entails a risk of liability. Other differences in the various statutes include whether or not the assistance is undertaken with specific intent to, whether the individual is employed for the specific services rendered whether it is voluntary, where the assistance is given (ie., at the immediate scene of the incident) and the standard of care expected by the rescuer. These factors all contribute to the ambiguity and potential for injustice derived through the statutes (McInnes 1992).

Both the common law rules pertaining to emergencies and the realities of the litigation process significantly limit a victim's ability to recover damages for mishandled efforts. Therefore, if possible, it would be better simply to educate potential rescuers to the fact that intervention actually entails a negligible risk of liability. Arguably, good Samaritans in Canada will continue to face emergencies with little risk of prosecution but also little chance of compensation. But if Good Samaritan legislation is to be used in an attempt to promote rescue, it should be drafted carefully so that it will achieve its objective with a minimum of undesirable side effects. The following recommendations are made to that effect (McInnes 1992).

- (1) protection should generally be extended to all potential rescuers;
- (2) protection should not be denied only because assistance is not rendered at the immediate scene of an accident or emergency.
- (3) protection should be denied to all members of the medical community for services that are rendered at a hospital or other place having adequate medical facilities and equipment;
- (4) protection should not be denied only because one does not act gratuitously
- (5) protection should be denied to one who has an obligation to provide assistance
- (6) when applicable, Good Samaritan legislation should reduce a rescuer's standard of care such that liability will lie only for injuries that are caused by gross negligence.

E. Group Liability

It is important to recognize that liability can be applied not only to individuals but also to groups or organizations. An organization or agency may be held responsible for the negligent conduct of its volunteers if the organization controls, or has the right to control, a volunteer's performance even though the organization is not directly at fault (SAR Strategic Plan Working Group 1995). This control is determined by three factors: the specific action of the volunteer and how much that action was directed by the agency; the hierarchical organization of the agency and corresponding right to control; and the level of contact between the agency and the volunteers before and after the incident (van der Smissen 1990).

Depending on whether an organization is incorporated or not, liability can be applied differently. An incorporated agency constitutes a corporate entity which can be sued as an individual would be sued. It also allows for the doctrine of respondeat superior (vicarious liability) where the negligence of an individual working on the behalf of the organization can be imputed to the corporate entity (van der Smissen 1990). Therefore, the decision by SAR agencies to incorporate to groups could impact on the degree of liability they could assume.

F. Limiting Liability

There are limitations to liability and it does not always follow that negligent actions result in liability for those actions. For instance, a case of proven contributory negligence by the plaintiff, a voluntary assumption of risk by the plaintiff, or a comprehensive insurance policy can all preclude the application of liability (Kitchen and Corbett 1995). Notwithstanding these examples, if liability is applicable to an individual or vicariously to a corporate entity, there are a number of preventive measures that can be used to mitigate the liability (see Lawson, Kitchen and Corbett, Austin).

First and foremost, if you say you can do it, the law assumes that you know how to do it. Therefore, it is critical that the organization should decide what its mission in life is to be, adopt a written mission statement, publicize that mission, train for that mission, equip itself for that mission, practice for that mission, and perform that mission. Developing a mission statement prevents misunderstanding, and forces the organization to think more clearly about what it does, what it is capable of doing, and what it wants to be recognized as being capable of. A mission serves as a guide for training, for equipment, for command and control, and for assessing how the organization fits into the response community.

It is easier to justify one's actions if you offer a valid reason for action. Therefore be prepared and know what you are doing. Ensure that a reporting system is used to keep track of training programs, equipment maintenance, incident reports, meetings. Be as thoroughly trained as possible for your position and if you accept a new one try to get the training for it before you take over the duties. This could involve keeping abreast of training updates and developments in the field and assembling a basic library of literature on rescue, search management, fire service, and related literature and training materials. Develop and maintain good working relations with co-agencies. This will help to clarify roles and responsibilities and increase familiarity with capabilities. If at all possible, sit down regularly with counterparts to discuss problems of mutual interest; conduct joint exercises to test existing protocols and adjust as necessary.

G. Negligence

In the event that something goes wrong during a rescue attempt, there is a small, but real possibility that SAR providers, or the organizations through which they operate, may be sued. This depends, in large part, on the interpretation of the terms negligence and misfeasance, by the presiding judge according to precedent and case law.

Negligence is defined as an unintentional breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred. Moreover, it is a matter of conduct, not intent and is measured by balancing the danger created by the defendant's conduct and the utility of the conduct (Linden 1993). Negligence implies recklessness or carelessness with respect to the manner in which one conducts their activities, with harm eventuating to another as a direct result of this carelessness" (Hanna, p 71) It occurs when each of the following conditions are present: (1) a duty of care is owed to someone; (2) the standard of care imposed by this duty is breached; (3) a harm or loss is suffered; and (4) the breach of the standard causes, or substantially contributes to, the harm or loss (Kitchen and Corbett 1995).

Nonfeasance is defined as a wrong committed when the individual is not directly involved. It results from passive inaction or acts of omission that causes a negative harm but seldom civil liability. In order for nonfeasance to result in liability a duty to take positive action must be established (van der Smissen 1990).

Misfeasance occurs when the rescuer's conduct worsens the condition of the victim's position noticeably. It is committed when an individual is directly and actively involved either by an action (acts of commission) or inaction (acts of omission) that positively harm the plaintiff and is actionable (van der Smissen 1990).

Gross Negligence occurs when the individual/group can not justify the cause for liable and there is never any protection. It suggests the reckless or wanton disregard of others (Hanna, p 73). While conceptually simple, the gross negligence has in practice proved to be somewhat difficult to apply uniformly and consistently (SAR Strategic Plan Working Group 1995).

To sue for negligence the following criteria must be met: (1) a duty to rescue exists; (2) one or more standards of care are breached; (3) actual injuries are suffered; (4) negligence is the proximate cause of the injuries; and (5) the plaintiff's position is not prejudiced (ie., assumption of risk, or contributory negligence) (Hanna 1994). The following are possible circumstances that may constitute negligence in the context of SAR (Gruzman 1991):

- 1) delay in initiating a search,
- 2) negligence in the conduct of the search (ie., an inadequate search, defective equipment),
- 3) ineffective use of resources to conduct search, and
- 4) negligent termination of the search.

The failure of a SAR action is not grounds for negligence....rather there should be in a particular case a failure to do (by act or omission) what a reasonable and prudent person, with the requisite knowledge and experience, would have done in the circumstances, or the performance of an act which a reasonable and prudent person, with the requisite knowledge and experience, would have performed in the circumstances (Gruzman 1991).

There are ways for an individual to protect against negligence. Although the legal status of volunteers in SAR remains unclear, it is assumed that most would be considered Crown servants under the Crown Liability Act when officially tasked by a provincial authority and operating with due care within the scope of their tasking. The Crown therefore would be held vicariously liable for their actions (Hanna 1994).

As indicated, a breach in the standard of care is one of the criteria for negligence. The standard of care expected of a person operating as a SAR professional is that degree of care which would be shown by the reasonably prudent professional operating in like circumstances (Hanna 1994). It is in the best interest of the SAR worker to remain current in their skills and procedures to reduce the risk of liability by maintaining an adequate standard of care. Established certification and performance standards can assist in this manner but must be established with care to ensure that they are achievable and don't open up opportunities for liability actions.

V. Workers Compensation for Ground Search and Rescue Workers

While some protection is available to SAR workers through their respective provincial workers compensation statutes, the coverage is not consistent across the country. Most provinces and territories have established "Volunteer Emergency Service Workers Agreements" between Emergency Preparedness Canada and the provincial Emergency Measures Organization, Workers Compensation coverage is provided to the volunteers, while they are responding to an emergency (search) or training to respond. This coverage begins when the volunteer commences to respond in either scenario until he/she has returned from it. The Emergency Measures Organisation is the employer and the Workers Compensation Board acts as the insurance adjuster for the process. The actual costs are split 75% federal and 25% provincial and no annual fee is paid to the WCB. The following table outlines the coverage available in each province.

Table 1 Workers' Compensation Acts by Province

Province	Act	Application to SAR Workers	Information
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NWT	<i>Workers Compensation Act</i> , RSNWT1988, c. W-6	1(1)(c) A "worker" includes a member of a fire brigade, an ambulance driver, and any other person engaged in rescue work on a part time basis, and whether working with or without remuneration, but only while so engaged.	Workers' Compensation Board Centre Square Mall, 3 rd floor Box 8888 Yellowknife, NT X1A 2R3 (403) 920-3809
Yukon	<i>Workers Compensation Act</i> , 1992	101(1) "worker" means ... (f) any person deemed by the board or by regulation to be a worker. 4(1) ... the board may, upon the application of an employer and subject to any conditions that it may establish, deem the following persons to be workers of that employer: ... (d) a volunteer.	Yukon Workers' Compensation Health and Safety Board 401 Strickland Street Whitehorse, YK Y1A 5N8 (403) 667-5645 (403) 668-2079 (fax) 1-800-661-0443 toll free
British Columbia	<i>Workers Compensation Act</i> , RSBC 1996, c. 492	2(5) where a person or group of persons carries on an undertaking that the board thinks is in the public interest, the board may, on the terms and conditions it directs, (a) deem the person or group of persons, whether or not any of them receive payment for their services, to be workers of for the purposes of this Act ...	Workers' Compensation Board Head Office 6951 Westminster Highway Richmond, BC V7C 1C6 (604) 273-2266 1-800-661-2112 (toll free in BC)
Alberta	<i>Workers Compensation Act</i> , RSA 1996, c. W-16	9(4) The board may, on application by an employer or prospective employer proposing to engage persons in any volunteer activity in which the remuneration, if any, is nominal, order that those persons are deemed to be workers to whom this Act applies.	Workers' Compensation Board 9925 107th Street Edmonton, AB T5K 2H9 (403) 498-4000 310-0000 (toll free in Alberta)

Saskatchewan	<p><i>Workers Compensation Act</i>, 1979, c. W-17.1</p> <p><i>Workers Compensation Act Exclusion Regulations</i>, 1979, c. W-17.1 reg 2.</p>	3(bb) "worker" includes voluntary workers, except those in mine rescue work, and members of the Emergency Measures Organization or a municipal fire brigade.	<p>Workers' Compensation Board</p> <p>Suite 200,</p> <p>1881 Scarth Street</p> <p>Regina, SK S4P 4L1</p> <p>(306) 787-4370</p>
Manitoba	<p><i>Workplace Safety and Health Act</i> , RSM c. W-210</p>	1. "worker" includes (a) any person who is employed by an employer to perform a service whether for gain or reward, or hope of gain or reward or not ...	<p>Workplace Safety and Health Branch</p> <p>200-401 York Avenue</p> <p>Winnipeg, MB R3C 0P8</p> <p>(204) 945-3446</p> <p>(204) 945-4556 (fax)</p>
Ontario	<p><i>Workers Compensation Act</i>, RSO 1990, c. W-11</p>	1. "worker" includes a person who has entered into or is employed under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes ... (e) a person who assists in any search and rescue operation at the request of any under the direction of a member of the Ontario Provincial Police Force.	<p>Workers' Compensation Board Head Office</p> <p>Simcoe Place</p> <p>200 Front Street West</p> <p>Toronto, ON M5V 3J1</p> <p>(416) 344-1000</p> <p>(416) 344-4684 (fax)</p> <p>1-800-387-0750 (toll free in ON)</p>
Quebec	<p><i>An Act respecting Industrial Accidents and Occupational Diseases</i>,</p> <p>RSQ, c. A-3.001</p> <p><i>Lou sur les accidents du travail et les</i></p>	12. A person is deemed to be a "worker" employed by the government if he gratuitously lends his assistance to implement emergency measures within the meaning of the Act respecting the protection of personal and property in the event of disaster (c. P-38-1).	<p>La Commission de la santé et de la sécurité du travail</p> <p>524, rue Bourdages</p> <p>Quebec, (Quebec) G1K 7E2</p> <p>(418) 643-5850</p> <p>cé: csst.communication@riq.qc.ca</p>

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New Brunswick	<i>Workers Compensation Act, c. W-13.</i>	1. "worker" includes any emergency services worker within the meaning of any agreement made under the Emergency Measures Act between the Government of Canada and the Government of New Brunswick in which provision is made for compensation with respect to the injury or death of such worker.	Workplace Health, Safety and Compensation Commission Fredericton office: (506) 453-2467 1-800-442-9776 (toll free) Saint John office: (506) 738-4021 1-800-222-9775 (toll free)
Nova Scotia	<i>Workers Compensation Act, 1991-95, c. 10</i>	2(ae)(ix) "worker" is any other person deemed to be a worker, and includes: Y where a person who is not a worker within the scope of this Part, performs work for the benefit of another person, the board may deem that the first person to be a worker, and the second person to the Employer of the first person within the meaning of this Part (s. 9(a)).	Workers' Compensation Board 5668 South Street PO Box 1150 Halifax, NS B3J 2Y2 (902) 424-8339
PEI	<i>Workers Compensation Act, RSPEI 1994, cap. 67</i>	1(z)(iv) "worker" includes in respect of any industry, a person while he or she is actually engaged in rescuing or protecting or attempting to rescue or protect life or property.	Workers' Compensation Board 14 Weymouth Street Charlottetown, PE C1A 7L7 (902) 368-5680
Newfoundland	<i>An Act Respecting</i>	40(1) The Lieutenant-Governor in Council may by regulations	Workers' Compensation Commission of Newfoundland and

<p><i>Compensation to Workers for Injuries Suffered in the Course of their Employment,</i> RSN 1995,</p> <p>Chapter W-11</p>	<p>in relation to ... (f) volunteers engaged in work or measures under the <i>Emergency Measures Act</i>, provide that the provisions of this Act may apply ...</p>	<p>Labrador</p> <p>146-148 Forest Road</p> <p>PO Box 9000</p> <p>St John' s NF A1A 3B8</p> <p>(709) 778-1000</p> <p>(709) 778-1714 (fax)</p>
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Workers Compensation does not cover volunteer SAR activities unless they are tasked through a provincial/police authority. Once they are officially tasked, these volunteers are considered to be an employee of the province and entitled to full coverage.

Insurance for Ground Search and Rescue

In Canada, there are no nationally recognized standards for ground search and rescue training. Currently, both NASAR and ERI standards (both American) are followed in different regions in Canada. Moreover, there is no national organization with the mandate for maintaining and enforcing GSAR standards through accreditation programs. As a result, insurance companies will not recognize search and rescue organizations as professional organizations, and therefore, they cannot qualify for professional liability coverage.

Notwithstanding the requirement for standards, an organization should also be registered and hold a federal or provincial charter, maintain an ongoing education component, and have some form of regulatory process within the organization. These features will provide the necessary structure against which the insurance company justifies their coverage for the organization, thereby improving the organization's insurability.

An ideal scenario would involve a national umbrella policy being written for a national volunteer GSAR association, that would be SAR specific. It would outline the worst case scenario for any SAR group, and individual SAR groups would be covered according to their groups capabilities and requirements. For instance, there are search only, rescue only and search and rescue capabilities within any given organization. It is very important that the purpose and functions of the SAR organization and the associated level of risk be carefully documented.

A national organization would serve as the regulatory body for the local SAR units and ensure that the specific capabilities, roles and responsibilities of each group is up to date. The benefits of a national policy include SAR groups and individuals being covered regardless of where in North America they conduct their activities (excluding Mexico). A national policy is also the most cost effective insurance alternative, and the rate varies according to the group's capabilities and membership levels.

Until such time that a national organization with the mandate for standards and accreditation is formed, interim steps are possible. It is conceivable that an insurance company offer a policy to SAR organizations by setting the standards for the SAR organizations. However, these standards would only allow the unit to qualify for coverage, it wouldn't necessarily qualify them as SAR volunteers.

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