

Falling in line with the law

Should adults who are injured after deliberately putting themselves at risk expect to be compensated?

Kris Lines and Jon Heshka reports

IN BRIEF

- People must take responsibility for possible accidents if they voluntarily take part in a dangerous sport.
- The climbing cases of *Poppleton* in the UK and the US' *Holbrook v McCracken* are compared.
- To what extent is supervision of dangerous sports activities necessary where it is not asked for?
- The law has a delicate balancing act to perform between allowing individuals the autonomy to express and challenge themselves, and taking a more paternalistic view.

“Adults who choose to engage in physical activities which obviously give rise to a degree of unavoidable risk may find that they have no means of recompense if the risk materialises so that they are injured” (see *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646, [1] (May LJ), [2008] All ER (D) 150 (Jun)). With these opening lines, the Court of Appeal reasserted a return to commonsense and traditional legal principles and dispelled the modern myth of a compensation culture in sport. Indeed, such a stance is particularly welcome in activities where the claimant has intentionally sought a risk and which eventuates with ultimately tragic consequences.

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In Gary Poppleton's case, these consequences were tetraplegia caused through his participation in bouldering – a form of low-to-the-ground free climbing performed without the aid of ropes. On 12 February 2002, he was part of a group bouldering at

an indoor climbing centre in Portsmouth. However, an hour into the climbing session, he attempted to copy the actions of one of his more experienced friends in leaping from one of the walls to grab hold of a metal cross-beam running across the centre of the room, before dropping from this beam onto the floor. Unfortunately, while attempting this manoeuvre, Mr Poppleton lost his footing and missed the beam, somersaulting in the air, before falling head-first onto the shock-absorbent matting below.

Mr Poppleton later sued the activity centre in negligence for failing to supervise him and/or warn him of the risks of the activity. Although much of the claimant's case was struck out, his claim did partially succeed in the High Court, with the finding that the defendant owed a duty to warn the claimant of the “hidden” dangers inherent in the activity. This is significant, as these hidden dangers did not comprise harmful objects, but rather paradoxically, the provision of wall-to-wall, 12-inch thick safety matting underneath the climbing walls which the court held had the effect of emboldening patrons of the centre into needlessly dangerous situations! This finding notwithstanding, the claimant was held 75% contributory negligent for his own injuries for attempting such a dangerous manoeuvre.

Unsurprisingly, both sides appealed against this award and it was left to the Court of Appeal to decide whether the climbing centre was under a duty either to train or supervise any adults admitted to use the climbing wall, or merely to warn these climbers that there was a risk of injury notwithstanding the presence of entirely suitable matting.

DUTY TO SUPERVISE OR TRAIN

While it has already been established that climbing guides owe a duty to supervise

students in their care (*Pope v Cuthbertson* (1995) 21 December (unreported)), what *Poppleton* has now clarified, is the extent to which a similar duty is owed to supervise or instruct patrons who do not want it. This is important because in *Poppleton*, the claimant and his friends effectively self-certified themselves that they were competent to use the facilities unaided. Although comparisons can be drawn with the similarly relaxed supervisory environment in *Fowles v Bedfordshire CC* [1996 PIQR P380] where the defendant was found liable for the claimant's injuries, liability in *Fowles* came not from the centre allowing unrestricted access to the gymnastics apparatus, but rather from an instructor assisting a student to learn a forward somersault and thereby assuming responsibility for his safety. By contrast, in *Poppleton*, once a climber had signed both a “disclaimer form” and registered at reception, they were free to use the climbing walls without any further guidance or supervision from any of the centre staff. Given these lack of restrictions, it is difficult in the absence of any assumption of responsibility (direct instruction, or system of regulatory control) to see on what basis any duty of care could exist, and therefore the Court of Appeal rightly rejected this notion. It is noteworthy in *Poppleton* that it made no difference whether the claimant paid a fee to use the facility or whether the centre was in breach of established industry practices including failure to conduct proper risk assessments. At the core, what is important is that if the facility is provided as an unsupervised centre, no duty will then arise to check the competence of participants or provide instruction, unless a participant specifically requests this, or a centre wishes to offer such as service.

DUTY TO WARN

It is also material in this case that *Poppleton* was both an adult of full capacity, (a duty could be owed to children, or mentally impaired participants using the same facility) and his choice to climb, and method of doing so, was a genuinely free and informed choice. This is important as while a duty could be owed to participants under a compulsion to take part in a sporting activity, for example school children in physical education, or employees as part of an employment setting (*Dawson v West Yorkshire Police Authority* [1995] (P&MIL, October 1995), it is well established that no duty exists to protect

against obvious or self-inflicted harm where there is a free and informed choice (*Tomlinson v Congleton Borough Council* [2004] 1 AC 46, [27] (Lord Hoffmann)).

Given this, the next logical questions to address are what are the risks of climbing and to what extent are they obvious? Indeed, these questions have become especially important in this case, given the High Court ruling that the safety matting at the centre constituted a hidden risk. What makes this analysis even more problematic though, is that while the traditional negligence test judges a participant against the actions of a prudent and reasonable person (*Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781, [1843-60] All ER Rep 478), participants of extreme sports are often anything but prudent, preferring to consciously seek out hazardous situations and accepting this risk as an inherent part of the activity. The law therefore has a delicate balancing act to perform between allowing individuals the autonomy to express and challenge themselves, and taking a more paternalistic view and protecting participants from the consequences of their own actions.

In the Court of Appeal, Lord Justice May (delivering the only judgment) effectively sided with the former view, that participants undertaking a hazardous activity should be free to take risks, notwithstanding the potentially serious consequences should this risk occur. In rock-climbing, it is therefore foreseeable that climbers will fall from the wall, possibly suffering injury as a consequence. This situation is even more acute in bouldering, as the omission of any safety harnesses or ropes only serves to increase the reliance on the participant's own skill to prevent a fall from occurring. However, because this risk is obvious and inherent in the activity, a defendant will not be under any duty to warn participants of it, or prevent this risk from occurring.

A defendant will, however, be under a duty to warn a claimant if there are hidden risks to an activity, or if the premises itself was in a dangerous state. This was not the case at the climbing centre in question. The claimant had climbed at the centre four or five times before this incident and was aware of the type of matting present at the centre. Similarly, the layout of the mats was in accordance with industry best practice and indeed no criticism was made of either the design or suitability of the equipment. Instead, the claimant's case springs from

the fact that he would not have attempted such a dangerous leap in a natural situation outside because he would not have had a soft mat to land on, a view supported in the High Court by the British Mountaineering Council:

“Much of the perceived danger of climbing is absent for beginners when using an artificial wall. This can give novices a potentially dangerous false sense of security and even experienced climbers may relax their normal awareness when using climbing walls.” [50]

Again however, this view was rejected by Lord Justice May who held that it was obvious that no amount of matting will completely prevent the risk of a possibly severe injury from an awkward fall and that falling was an inherent feature of climbing. Given these conclusions, it was irrelevant that the claimant had not signed in at the reception himself, or that he had not been aware of the climbing wall rules displayed outside the bouldering room which specifically forbade climbing on top of the structures and jumping off the walls; he had engaged in an inherently dangerous activity, and the defendants were not under a duty to prevent, train or supervise him while he was participating. As such the High Court decision was overturned.

While views expressed by the Court of Appeal accord with that of Lord Hoffman and the House of Lords decision of *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, it is worth considering to what extent this line of authority unwittingly creates a dichotomy within the law between individual and team sports. Essentially following *Tomlinson, Evans v Kosmar Village Holidays* [2007] EWCA Civ 1003, [2007] All ER (D) 330 (Oct) and now *Poppleton*, individual participants are free to consent to potentially catastrophic personal injuries and death within the context of their sport, whereas for public policy reasons, participants playing team sports or against opponents cannot consent to deliberate acts or take risks that are intended to cause serious harm to others (*R v Brown* [1993] 2 WLR 556, [1993] 2 All ER 75).

THE AMERICAN EXPERIENCE

It is interesting that American courts have reached the same point as *Poppleton*, albeit via different logic pathways, in climbing

cases which have very similar facts. In *Holbrook v McCracken* 2004 WL 1402695 (Ohio App 8 Dist), the Court of Appeals of Ohio essentially held that in order to gain the thrill associated with rock climbing, the claimant climber voluntarily assumed the inherent risk of falling. Indeed, in an indoor climbing gym, although the risk of falling inherent to the activity of climbing could be reduced, it could not be eliminated. The issue of duty was not therefore deliberated and summary judgment to the defendant-appellee McCracken was granted.

“What are the risks of climbing and to what extent are they obvious?”

It is also worth considering *Delk v Go Vertical, Inc* 303 F Supp 2d 94, a 2004 case with an eerily similar fact pattern to *Poppleton*. In *Delk*, the claimant fell from a height of 16 feet while bouldering in a climbing gym, sustaining severe spinal injuries in the process. With echoes of *Poppleton*, Delk alleged, amongst a potpourri of complaints, a failure to adequately supervise or train her, a failure to warn patrons of risks, a failure to give her notice of dangerous and unsafe conditions and, importantly, alleged that the defendant negligently lulled her into a false sense of security and failed to exercise due care. The US District Court—District of Connecticut—granted Go Vertical's motion for summary judgment by strictly holding that the waiver and release of liability was valid and enforceable. Matters relating to matting, supervision, failure to warn, and the sundry other allegations were rendered irrelevant and not even contemplated by the court as the waiver acted as a complete bar to recovery.

The Court of Appeal's ruling is a devastating loss to Mr Poppleton, but by standing on the shoulders of *Tomlinson*, it is a reminder that the courts take a broader view and recognise the social utility of activities such as bouldering and climbing, particularly where the injury is an inherent risk of engaging in the activity. In the age of the nanny state and grey and dull safety regimes, it is a refreshing thought that autonomous risk-taking and personal responsibility can still be protected.

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