

Climbing Wall Accidents and Litigation

Context

The first purpose built indoor climbing walls appeared approximately 50 years ago. The early structures were typically constructed from brick or stone and were crude affairs. However climbers quickly came to appreciate their value as a training facility and they enabled a significant increase in standards of difficulty. The Leeds University wall in England became famous as its protagonists took the climbing world by storm across Britain and abroad.

The demand for such facilities increased dramatically but users also started to demand facilities that had a greater similarity with “proper” climbs. More imaginative design and new construction materials played a part and modern walls have little in common with their early predecessors. Alongside this evolution there were other developments, notably the advent of “sports” climbing and bouldering. Those activities have influenced the development and use of climbing walls which in turn have facilitated a continuing increase in climbing standards and the number of participants. In that process indoor walls have become a recreational facility as well as a training facility.

The ever increasing number and accessibility of indoor walls, the development of facilities for novices and the commercial instincts of wall operators has resulted in a dramatic increase in user numbers. No longer are walls the sole province of experienced climbers: they are now widely used by non-climbers and novices. Operators have found that they can increase profits by renting out their facilities for children’s birthday parties or work team bonding sessions. Equipment hire and provision of instruction to such users are additional revenue streams. With the increased number of walls and users there has been a significant increase in the number of accidents and consequent personal injury litigation.

Few statistics are available and the majority of claims have been brought in the lower courts which are not reported. A few have made headlines in one jurisdiction or another and federations sometimes receive reports. If this article has a bias towards the English experience, that reflects the writer’s personal knowledge. However the report also draws on information provided to the Legal Experts Working Group by representatives of other federations, notably Renee Hopster who prepared two papers during the period that she was chair of that group. As with all such documents it should be regarded as a work in progress, rather than a finished product.

Claims

The volume of case law demonstrates a wide spectrum of grounds that have been relied on to bring a claim. The following list of different types of claim recorded is not definitive:-

1. Liability of the occupier (the climbing wall operator) for the safety of the facility. Strict liability applies.
2. In the United Kingdom the operator is also required to comply with health and safety legislation relating both to design, maintenance and operation of the wall.

3. The majority of jurisdictions in mainland Europe have a codified system of civil law and accidents resulting in claims of the nature listed may also give rise to a claim for breach of one or more provisions of that Civil Code.
4. Negligence of the operator in managing the wall. For example:-
 - a. Inadequate design;
 - b. Failure to maintain;
 - c. Failure to establish the experience and skill of the user; coupled with
 - d. Failure to provide instruction or adequate instruction;
 - e. Failure to supervise users adequately or at all;
 - f. Failure to manage effectively (e.g. number of users); availability of ancillary equipment (mats, belay weights, etc.).
5. Breach of contract by operator: implied terms as to safety of environment, suitability of equipment, adequacy of training, etc.
6. Operator's liability under food safety legislation applicable to food and drink sold in the café.
7. Liability of operator or retail concessionaire as to quality and suitability of equipment sold or rented.
8. Negligence of instructor as regards adequacy of instruction. Note that the operator will have vicarious liability for instructors employed by the operator and a club or association providing/engaging its own instructor may have vicarious liability.
9. A club or association renting the facility and providing a training programme (as distinct from the individual activities of members of the club) may have liability in negligence and contract regarding the delivery of that structured programme.
10. One user acting recklessly or negligently and causing injury to another user will have liability and negligence to that other user, just as in any other walk of life.

Risk Management

It is apparent that the climbing wall operator has the greatest exposure to the risk of a claim in the event of an accident. The operator is in any event the one individual or organisation that can and should manage all activity on the site. However accidents will happen no matter how good the management. Operators, encouraged by their insurers, have developed methods of managing their own facility in a manner intended to reduce risk and demonstrate that an accident is not caused by the negligence, action or omission of the operator. Operators have learnt from experience and have, in many cases, shared that experience with other operators with the result that systems of best practice have evolved.

In Great Britain the Association of British Climbing Walls has been created. The majority of climbing wall operators in Britain are members. The Association has been encouraged and assisted by British Mountaineering Council. BMC advice and guidance has been developed in consultation with the Health and Safety Executive, a Government body. BMC produces a Climbing Wall User Guide and has provided advice and comment to insurance companies who insure climbing wall operators. Systems have been developed to identify and record the experience and needs of users, to provide suitable equipment and guidance on its use. Registration forms are commonly used by operators in which the user sets out information regarding experience and competence, discloses relevant medical conditions and endorses the BMC participation statement (which is similar to that of UIAA). Conditions of use have been developed which set out regulation of different types of activity which are reinforced by

appropriate notices displayed at strategic points in particular centres. Monitoring activity within the facility and providing supervision where appropriate is essential. In the Netherlands NKBV has set up an organisation jointly with climbing wall operators to certify systems, practice and procedures.

In the USA and Canada users are routinely required to sign a waiver (otherwise called a release) by which the user accepts responsibility for his own safety and waives any claim against the operator. These will be effective in avoiding liability save where the accident is caused by the reckless act of the operator. Waivers have little or no effect in Europe, but the doctrine of informed consent has become established. It is a refinement of the basic principle of voluntary acceptance of risk (*volenti non fit injuria*) by which it is necessary for the operator to demonstrate that the user was aware of and understood the risk. If a participant in a risk activity claims to be experienced and then suffers an accident the threshold which must be overcome to assert a claim for negligence against the operator will be significantly higher than otherwise. It would, for example, normally result in a claim based upon a failure to train or supervise being unsuccessful. Even where such a claim did succeed it is likely that the doctrine of contributory negligence would be applied to apportion liability between the user and the operator, thereby proportionately reducing the amount of compensation payable by the operator. Whilst these or similar concepts exist in many jurisdictions, they are not universal. None of them are applicable in Japan.

Criminal

Of course operators can insure against the risk of a civil claim, so long as insurers are willing to provide cover. However risk management assumes greater importance once it is recognised that operators and others may have exposure to criminal prosecution. There have been fatal accidents in a number of jurisdictions which have given rise to a criminal prosecution for manslaughter. Less serious outcomes (for the victim) may give rise to a criminal prosecution on other charges, including a breach of the criminal code in European jurisdictions and of health and safety legislation in Great Britain. The risk of a criminal prosecution is not limited to the operator, but extends to all involved, as it does in every other walk of life.

Jurisprudence

Belgium

- 1) A civil claim brought against a climbing wall operator by a user who suffered injuries in a fall was successful. The court considered that the operator had been negligent by failing to manage the facility properly and allowing an excessive number of people onto the wall which was part of the causation of the accident.
- 2) Two friends went to a wall together and the more experienced of them led a climb. He thought the other would lower him off but the second thought that the leader had belayed at the top of the wall and took him off belay. The leader fell, was injured and brought a claim against the second who defended it asserting that the leader was more experienced and “in charge”. The court considered that they were equally at fault and allowed the claim with 50% contributory negligence on the part of the claimant.

- 3) In 2009 a court in Brussels considered a claim brought against the climbing wall operator, the Scout Organisation and a seventeen year old novice who failed to adequately belay another scout who was killed in a fall. The belayer was considered not to have been negligent because he was a novice under instruction and neither was the Scout Organisation who had arranged the activity at an appropriate venue with trained instructors. The claim against the climbing wall owner succeeded because it was found not to have taken adequate safety measures.

France

- 1) A claim in negligence on similar facts to the last one brought by an injured participant against a club/association which organised an open day at a climbing wall succeeded at the first hearing but that decision was reversed on appeal. The injured claimants were not members of the club/association but took part because it was an open day and the appeal court considered that the club/association did not owe a duty of care to non members.
- 2) In another similar, but more recent case, members of a club/association were using a climbing wall during a club event. Participants all asserted that they were experienced and not in need of instruction but when the leader wanted to be lowered from the top of the wall the second failed to belay properly and control the descent. The leader suffered serious injuries and brought a claim against the club which failed on the ground that the claimant had asserted that he was experienced. On appeal to the Court de Cassation it was said that there was still a duty of care (obligation securite) and it was referred back to the court of appeal for further consideration. The court of appeal must now determine whether there were any actions that the club/association should have taken and failed to do. The outcome is awaited and is a cause of concern because it may affect how club activities are conducted in the future and the availability and cost of insurance.

Netherlands

- 1) In this case the claimant was participating in an event organised by NKBV who had engaged an unpaid voluntary instructor. She fell and suffered injury because she had not tied onto the rope properly. Her claim against the instructor failed because she had claimed to be experienced and not in need of instruction and a claim against NKBV failed because they had not employed the instructor. The fact that the course was for experienced climbers and the woman was experienced was considered significant.
- 2) Criminal charges were considered by a court in Heerlen in 2003 when an experienced climber belaying another experienced climber was distracted by other people and unclipped the belay. His friend fell and was killed. The belayer was convicted of manslaughter and given a six month suspended prison sentence.
- 3) In 2008 a criminal court in Amsterdam considered manslaughter charges brought on similar facts. A climber was belaying his friend on one climb whilst his girlfriend was belayed by somebody else whilst she climbed another route. When she descended and untied from her rope the defendant also untied although his leader was still high on the wall. He fell and died. The defendant was convicted of manslaughter

but did not receive a prison sentence. The judgment was appealed and the belayer was found to be not guilty on the curious ground that he had untied himself from the rope in a series of automatic actions.

Spain

- 1) A climber, who was injured when his climbing partner failed to belay properly successfully brought a claim before a court in Castellon in 2000 because the belayer was negligent.
- 2) In 2005 a court in Oviedo considered a claim against a climbing wall operator and found in favour of the claimant because the equipment had been installed incorrectly.

United Kingdom

- 1) In *Hardy –v- Blackpool Borough Council* (2001) the claimant brought an action against the climbing wall operator when he suffered injury in consequence of a fall from a bouldering wall. He had completed a registration form in which he claimed to be a competent and experienced climber who had used several other climbing walls and asserted that he did not require any training or supervision. The court considered that the doctrines of *volenti non fit injuria* and informed acceptance of risk were applicable and dismissed the claim.
- 2) In *Davy –v- High Performance Sports Limited* (2003) the claimant completed a registration form in which she stated that she was an experienced climber. However she did not tie the rope into her harness but simply threaded it and on discovering that, when she was high up the wall, she panicked and did not respond to instructions. A supervisor unsuccessfully attempted a rescue and the claimant fell and suffered serious injury. She asserted that the method of rescue was inappropriate, the employee was negligent and the climbing wall operator was vicariously liable. The court considered that the employee had done his best in difficult circumstances and with limited time available. The court also had regard to the principles of *volenti non fit injuria* and informed acceptance of risk and concluded that the claimant was wholly responsible for not tying into the rope.
- 3) In *Poppleton –v- Portsmouth Youth Activity Centre* (2008) the claimant was a novice using the bouldering wall for the first time. He observed another participant jumping for a hold, attempted to copy that, fell and suffered head injuries. The claimant alleged negligence and breach of statutory duty on the grounds that the operator did not provide adequate training, regulation, guidance or supervision. The court considered that the risk was self evident even to a novice and, applied the doctrine of *volenti non fit injuria* and dismissed the claim.
- 4) In determining the case of *Pinchbeck –v- Craggy Island Limited* (2012) the court came to a different conclusion. The claimant was a novice attending the wall with work colleagues on a team building exercise. The group had an hours instruction on a top roping wall before using a bouldering wall. The claimant suffered leg injuries when she jumped off and brought a claim against the wall operator asserting that they were vicariously liable for the instructor’s actions or omissions and that he failed to provide a proper briefing or to advise against jumping off, which assertions were

contested. The court considered but disregarded the Court of Appeal decision in Poppleton, decided that there was an absence of proper instruction and therefore did not apply the *volenti non fit injuria* principle, although it did find the claimant one third contributory negligent. The decision is considered to be controversial.

- 5) Another accident resulted in injury to one of a group of novice students who were being trained by an instructor. Two or three students were supposedly managing the rope and performing the belay operation collectively whilst the claimant first climbed up and was then lowered off the wall, but the lower off was not under control. A successful prosecution was brought by the Health & Safety Executive for dangerous work practices. Although the instructor was on the spot he was found not to have provided adequate supervision.

USA

- 1) A novice was under instruction by a qualified instructor and after top roping a climb was lowered off. However the rope had been attached by the instructor into a gear loop on the claimant's harness and not the proper attachment point. The claim was brought against Petzl, (as manufacturer of the harness) against the climbing wall operator and the instructor variously alleging that the harness was not appropriate for use on a climbing wall (because the gear loop was an unnecessary distraction) and that safety instructions on the label were inadequate; the instructor was negligent; and the wall operator was vicariously liable. This claim was settled and did not go to trial.
- 2) In a case heard in the State of New York (*Linthwaite –v- Mount Sinai Union Free School District*) a student was injured when she fell from a wall which she claimed was dangerous and argued the school was negligent in not properly supervising its use. The Defendant argued that it was not negligent and that the student assumed the inherent risk of the activity and that it was not compulsory. The court confirmed that schools are under a duty to adequately supervise students and can be held liable if supervision is inadequate and a student is injured in consequence. The court also confirmed that (in New York State) the standard of care for a school is higher than that of a commercial organisation.
- 3) A case in the State of Michigan (*Lucas –v- Norton Pines Athletic Club Inc*) was brought by an experienced climber who fell from a wall because he had failed to clip into an auto-belay system used by the club. The club had a rule requiring that an employee must clip a climber into and out of the auto-belay system. That did not happen because the Claimant was a regular visitor and experienced and had developed a routine in which he would invite an employee to do a visual inspection from a distance. On this occasion the Claimant did not check with the employee but then alleged that the club was negligent in not enforcing the rules. The club successfully applied for the claim to be dismissed on the ground that the Claimant had signed a release (waiver) and that decision was upheld on appeal. If the Claimant had argued that the club's actions amounted to gross negligence and the Court had agreed the release would not have been effective.
- 4) In another case in Michigan (*Mankoski –v- Mieras*) the Claimant was lead climbing and fell and hit the floor because the Defendant failed to belay properly. They were both experienced climbers and friends who had gone to the wall together. The Defendant argued that the Claimant was aware of and accepted the inherent risks of injury in this activity and had signed a release (waiver) at the request of the wall

operator. The court accepted the Defendant's argument and the release signed by the Claimant was accepted as proof that the Plaintiff had accepted the risk.

Conclusions

There is a tendency among participants to think that their activity is special, distinct and separate from normal life. The law does not work in that way and is equally applicable to all areas of human activity. Injury caused to another by the negligent action or omission of one person is equally as culpable in climbing as in driving a car. Depending on the seriousness of the negligent act or omission it may have consequences in civil law alone or in both civil and criminal law. The central legal principles are common to most jurisdictions, although there are many variations on points of detail. Those details may nevertheless be very significant in individual cases.

Another constant is change: the law evolves in each jurisdiction, not necessarily as regards key principles, but in the way they are applied by the judges. Similar facts may give rise to different outcomes in different jurisdictions. Judicial thinking may be influenced by cultural changes. European society appears to be increasingly risk averse. The European Union is obsessed with protection of consumers, employees and the society at large. In France a tendency has been noted to a more sympathetic treatment of accident victims. The doctrine of informed acceptance of risk carries less weight in consequence and can no longer be relied upon by defendants to the same extent as before. An opposite trend has been apparent in England and Wales over the last ten years although there are occasional aberrations. A judge may be influenced by a pretty face, a paraplegic, a widow or an orphan and the availability of insurance.

As with life, nothing related to activity on climbing walls is certain. Too often those involved seem to think otherwise. Users may assume that they are in a safe environment despite all the information and notices to the contrary. The number of accidents and disparate experience of those involved appears to suggest that such thinking is common both to some novices or recreational users and some experienced climbers. Sometimes it may extend to supervisors and instructors. However much UIAA and National Federations preach the gospel of the individual taking responsibility for his own safety, it is right that the law should hold to account those who by their own negligence or recklessness cause injury to others.

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MartinWragg