Climbing accidents – the duty and standard of care

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The decision of the High Court in MacIntyre v. Ministry of Defence [2011] EWHC 1690 (QB) is reviewed by Matthew White, junior counsel for the Defendant and an amateur climber.

Introduction

The Claimant ("C") was an officer serving in the Army. He was on an adventurous training expedition in the Bavarian Alps when he was seriously injured by falling rocks. The court considered the duty and standard of care with regard to climbing accidents.

The facts

The accident happened on the Alpspitze mountain, a popular mountain with a tourist path, a kletterstieg/via ferrata (literally an "iron way" - a wire running up the mountain which can be followed by people more adventurous than walkers but not so adventurous as climbers), and climbing routes. The summit is at 2628m (about twice the height of Ben Nevis (1344m), and well over twice the height of Snowdon (1085m)).

C was *climbing* in a group of four, two novices and two experienced climbers. The experienced climbers would "lead" climb, i.e. they would climb first, each trailing a rope behind them, fixing protection equipment to the rock as they went and allowing the rope to run through that protection equipment (the idea being that if a leader fell, (s)he would only fall as far past the last piece of protection as (s)he had climbed above it). The lead climbers were "belayed" by the

novices – each novice held the rope that a leader was trailing in a friction device such that it would be held taut if the leader fell. After each pitch of the climb had been completed by the leader, the leader would tie him/herself onto the mountain using protection equipment. The relevant novice would then tie on to the other end of the rope and climb up, the leader holding the rope in a friction device and pulling the rope up as the novice went (so that if the novice fell the rope would be held taut and the novice would not fall far). This is normal climbing procedure.

The day before the accident the group of 4 had successfully climbed the lower tier of the mountain, arriving at an area known as the Herzl Terrace (which took its name from a permanent snow field on the terrace in the shape of a heart). They finished climbing for the day, but a plan was agreed to attempt to "top out" the following day by climbing the lower tier, crossing the Herzl Terrace, and then climbing the upper tier of the mountain.

On the day of the accident the group climbed the lower tier without incident and was attempting to cross the Herzl Terrace (although by the point of the accident they wrongly thought that they were on the upper tier). On the Herzl Terrace the mountain was not as steep as on the proper climbing routes, but that meant that a much greater quantity of loose rock collected on it. The leaders climbed the Herzl Terrace side by side, each trailing a rope as above. When the leaders got to the full length of their ropes, they needed to tie onto the mountain to bring the seconds up behind them. During that process a rock fall was triggered, probably by movement of one or other of the ropes. The rock fall struck the Claimant on the head and he was seriously injured by it despite wearing a helmet.

The allegations

The accident happened outside of the UK, therefore domestic Regulations did not apply and the claim was advanced in negligence only.

C served expert evidence that made wide ranging allegations. The main allegations were:-

- The leaders were not adequately qualified to cross the Herzl Terrace.
- The risks of crossing the Herzl Terrace had not been properly assessed.
- The Herzl Terrace ought to have been avoided.
- The leaders climbing side by side and to the full 50m length of their ropes significantly increased the risk of rock fall.

The Claimant relied on the fact that the leaders did not know where they were at the time of the accident as suggestive of incompetence.

The MoD's position was that there was no breach of duty, rather the injury was the result of a tragic accident of the sort which can happen when undertaking adventurous sports such as climbing.

There's nothing wrong with instructors being at the edge of their competence

On analysis of the military qualification requirements Spencer J found that the leaders were adequately qualified. The only point of general interest in relation to this finding appears at paragraph 61 of the judgment:-

> "*although [the leaders] were operating at the upper end of the limitations of their qualifications, this should in no way be*

regarded as undesirable. On the contrary, it is a positive and desirable feature of a training exercise that the leaders as well as the novices are stretched."

It is possible to see that observation being useful in other circumstances:- the trampolining coach who helps a novice with an ambitious move; the ski instructor who takes students off piste for the first time, etc. The mere fact that an instructor is at the edge of his/her competence does not mean that there is a breach of duty; how else would instructors ever progress?

Duty and standard of care

Spencer J re-stated the law that lead climbers/instructors owe a duty to take all reasonable steps to minimise danger of injury/death to those for whom they are responsible. At first blush that looks like a tough test:- "all reasonable care". Read it a different way, however, and it starts to look more manageable for defendants:- "all reasonable care". The judge emphasised that the requirement duty was to "*take all reasonable steps to minimise the danger to the claimant from rock fall*" (original emphasis, judgment para 66).

The court accepted the proposition (judgment para 70) that "*[i]t is not sufficient to show that a different decision [by the climbing leaders] might have been better. Rather the test is whether no reasonable climbing leader would have done what they did.*"

The court accepted the further proposition, based on the under-reported decision in Whippey v. Jones [2009] EWCA Civ 452, that *even to do what no reasonable climbing leader would do is not sufficient to prove negligence*.

In Whippey, Aikens LJ put it like this:-

> "*The question of whether a person has acted negligently is not answered simply by analysing what he did or did not do in the circumstances that prevailed at the time in question and then testing it against an objective standard of "reasonable behaviour". Before holding that a person's standard of care has fallen below the objective standard expected and so finding that he acted negligently, the court must be satisfied that a reasonable person in the position of the defendant (i.e. the person who caused the incident) would contemplate that injury is likely to follow from his acts or omissions. Nor is the remote possibility of injury enough; there must be a sufficient probability of injury to lead a reasonable person (in the position of the defendant) to anticipate it.*"

Whippey has not, in my experience, been relied upon a great deal by defendants, perhaps because of a wrong belief that it applies to the limited circumstances of the case (a dog buffeting case). MacIntyre makes clear that the principle applies more broadly. In Whippey itself foreseeability of the *possibility* of injury when letting a big dog off the lead in a park was insufficient to establish breach of duty when the dog was not known to jump up at people. In MacIntyre the proposition was held to encompass climbing leaders such that the mere fact that they acted in a way in which no reasonable climbing leader would act would not establish negligence, unless they ought also to foresee that injury was likely to follow from their acts/omissions. As it is, on the facts, the climbing leaders acted entirely properly in any event.

Another part of the Defendant's case (accepted by the court) was that when assessing what *reasonable care* means, the purpose of the training had to be borne firmly in mind. The training was to challenge,

stretch and develop personnel. It was recognised that that was done through activities (such as climbing) that involved real risk. Spencer J relied upon the now well-known speech of Lord Hoffmann in Tomlinson v. Congleton Borough Council [2004] 1 AC 46 at paragraph 34 where he said:-

> "*... the question of what amounts to 'such care as in all the circumstances of the case is reasonable' depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other.*"

So here we have an example of the court accepting the 'social utility' argument of Tomlinson, but applying it to an activity which is deliberately risky. It will be remembered that the occupier in Tomlinson had erected "no swimming" signs at a disused quarry, but had not physically prevented people getting into the water. The House of Lords held that the fact that many people enjoyed using the beaches weighed in the balance against requiring destruction of the beaches for the safety of the few. MacIntyre takes an obvious step, saying that social utility has to be weighed in the balance when a defendant deliberately exposes a claimant to risk. Note too that a balancing of social utility against risk/seriousness of injury is required in employer/employee negligence claims in just the same was as in occupiers' claims.

The evidence

There were some modest disputes of fact. The real dispute in the case was between the parties' climbing experts.

As an aside, I have observed a trend in adventure sports cases:- there is a tendency for claimant experts to throw as much mud (or confusion) as they can, in the hope that some of it sticks. That can be a good strategy. A defendant who does not think about it too hard might well be worried by the sheer volume of allegations made against them. There is, however, a risk with this approach:- if a defendant can convincingly knock out some of the "easier" allegations, it can expose the relevant expert to criticism.

The outcome

Applying the law to the allegations, the court found against C on all of them. One finding that merits particular mention relates to risk assessment. It was held that the risks had been properly assessed. That finding was made in the absence of paper records of risk assessments, it being said (judgment para 82) that "*[r]isk assessment is a process not a document*". The court was satisfied that risks had been assessed as the party progressed (albeit that they were not written down).

Points to take from this case

(1) It can be used to support the proposition that to prove negligence against a sports/training leader, a claimant must prove not only that the leader acted in a way which no reasonable leader would have done, but also that the leader

ought to have foreseen injury as a likely consequence of their action (not just a possibility).

(2) Balancing risks against social benefits (per Tomlinson) applies just as much to (a) situations where the defendant deliberately exposes the claimant to risk as to situations when the exposure to risk is not deliberate; and (b) employer/employee relationships as to occupier/visitor relationships.

(3) Care is needed with regard to expert evidence. Claimants ought to take care to try to avoid a barrage of allegations, some of which are likely to be shown to be wrong. Defendants, rather than being scared off by such a barrage, ought to look at them as an opportunity to discredit a claimant's expert.

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