Case No: TLQ/12/0282

Neutral Citation Number: [2012] EWHC 2745 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 15th March 2012

BEFORE:

HIS HONOUR JUDGE CURRAN QC
Sitting as a Judge of the High Court

BETWEEN:

PINCHBECK

Claimant

- and -

CRAGGY ISLAND LIMITED

Defendant

MS CATHERINE FOSTER (instructed by Colemans) appeared on behalf of the Claimant
MR SIMON KING (instructed by Razer & Co) appeared on behalf of the Defendant

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Approved Judgment

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JUDGE CURRAN QC:

Introduction

1. This is an action for damages brought by the Claimant, Mrs Louise Pinchbeck, in respect of personal injuries suffered by her on 26th March 2008, when she was aged 41, at an indoor climbing centre owned and operated by the Defendant Company in Cobbett Park, Guildford. Mrs Pinchbeck suffered a serious injury to her ankle. The trial has involved consideration only of the issue of liability.

2. The Defendant company operates the indoor climbing centre as a commercial concern offering members of the public the experience of scaling artificial rock climbing surfaces which they have installed at the premises. The Defendant company employs instructors who are trained to give advice and supervision to users of the premises who may be members of pre-booked parties or casual callers who pay at the door.

3. At the time of her accident the Claimant was employed by a High Street Bank. The bank had made arrangements with the Defendant company for the Claimant and some six other members of their staff to attend the climbing centre as part of a 'team-building' exercise. The idea seems to have been that dealing with the challenge of working together as a team in confronting a very different form of task from that which they were required to deal with at work might improve their effectiveness as a team within the bank.

The undisputed facts

4. The Claimant's unchallenged evidence was that everyone in the group had met at her house in the morning for a team meeting. She seemed to me to have been keen to take part in this exercise, but none of the members of the bank staff attending, including the Claimant, had any previous experience of rock climbing, whether in real or artificial conditions. The bank therefore, paid the Defendant Company for instruction and supervision of the team during a two-hour session. The greater part of the two hours spent on the exercise, by far, involved the Claimant and her colleagues climbing on a very high wall ('the competition wall') wearing safety harness and ropes. It was common ground that the final ten minutes or so involved a different form of exercise, without any safety harness, on a lower wall called the "bouldering wall."

5. None of the following relevant facts was in issue. First, on arrival at the premises operated by the Defendant Company each member of the team from the bank was required to fill out and sign a form described as a 'Course Acceptance Form.' This was a form specifically designed for those customers who were taking part in activities involving organised private instruction by members of the Defendant's staff, as the Claimant was. The form included what has been described during the course of the case as a 'general disclaimer,' which was to the effect that the Claimant declared that she was aware of and accepted the risks inherent in climbing and mountaineering activities. It also included a specific recommendation, as it was termed, in respect of the bouldering wall, which was that descent from it should be made by climbing down:

"*As jumping or an uncontrolled fall can result in serious injury*."

The Claimant's accident, it is important to note, occurred when she was descending from the bouldering wall, not by climbing down, but by jumping.

6. Secondly, counsel for the Claimant accepted that the majority of the activity undertaken by the bank team that day was the subject of careful and conscientious training and supervision by staff employed by the Defendants. The Claimant herself and witnesses called by her gave evidence in consistent terms as to the thoroughness and care taken by the staff employed by the Defendant Company in ensuring that the bank team undertook the rope climbing part of the exercise safely. They were provided with appropriate safety equipment, including harnesses and ropes, and they were given appropriate instruction in its use.

7. Thirdly, by far the greatest proportion of time spent by the Claimant and her group that day was in fact devoted to the rope climbing, which involved their making their way up the high competition wall, under close supervision and guidance. The instructors employed by the Defendant advised them then as to matters such as routes up and footholds. It is also common ground that all the climbing involved in this part of the afternoon on the competition wall was in a generally upward direction, although this may from time to time have involved lateral traverse movement. In particular, when participants reached the top of the wall they did not descend by climbing down. Instead, the instructors lowered them to the floor by means of the ropes attached to their harnesses, and thus no instruction was given during this part of the afternoon as to any method to be adopted in descent other than for participants to allow themselves to be lowered down by rope.

8. Next, there is no dispute that at a point when there was no more than ten minutes or so left of the two hour session paid for by the bank, one of the staff employed by the Defendant, Mr David Oxford, told the group that anyone who wished to do so could spend the time remaining on the bouldering wall.

The bouldering wall

9. The bouldering wall differed from the competition wall in a number of respects. It was a significantly lower wall than the competition wall. The parties did not reach an agreement between themselves as to its precise height, but estimates of about four to four and a half metres or 12 to 15 feet were accepted by both sides. Unlike the competition wall, which had a hard floor surface at its foot, the floor surface next to the bouldering wall was covered with heavy duty matting well over a foot thick (400mm was a figure given in evidence) which was referred to by some witnesses as 'crash matting.' It was plainly designed to be, and must have been installed as, a safety feature.

10. So far as activities on the bouldering wall were concerned, there were also differences from those previously undertaken by the Claimant and her group. They were instructed to remove their safety harnesses, as the climbing on the bouldering wall was to be done un-roped. As a consequence participants had not only to make their way up and across the bouldering wall, but also had to manage their descent for themselves.

Issues of Fact

11. What happened when the Claimant and a few others indicated that they were willing

to spend the last ten minutes of the session on the bouldering wall is the first main issue of primary fact. That dispute centres on whether any warning or instruction about how to descend the bouldering wall was given before work actually began on it, but there are a number of subsidiary points which are also in issue. First, whether any formal briefing was given. If so, by whom was it given and what information did it contain? If not, was any informal warning given that no one should jump down? Next, what, if any, practical instruction in how to go up and down was given? What supervision took place of the Claimant when she first went up and down? How did the Claimant get down on her first or second attempt, before the ascent which ended in the accident?

12. The second main issue of primary fact is whether or not during the few minutes after her fall before the ambulance arrived, the Claimant, after apologising to one or more of the staff employed by the Defendant company for being the cause of all the fuss, actually made an admission to the effect that she knew that she had been instructed to climb down and that she should not have jumped down.

The Evidence

13. The Claimant's evidence was as follows: first, in her witness statement, which stood as her evidence in-chief, she spoke in detail of the very high standard of instruction and supervision on the competition wall. She said:

> "*... the instructors were literally standing right next to us telling us what holds to look for*."

She went on to say this at paragraph 13:

> "*The instructor who was supervising my team offered those of us that had completed the competition wall the chance to try the bouldering wall. He said that if we wanted to climb the wall we should remove our harnesses. The only other instruction the instructor gave us, which I specifically remember, was that only two people at a time could climb the bouldering wall as there had been an accident the previous week. There was no further instruction.*"

In cross-examination she was asked:

> *Q. "What steps did you take to climb down?" A. "It was not on my radar to climb down. I had not been told to. I had no experience. I had always been lowered down during the previous climbing. I had no harness or rope and there was no close supervision, and that led me to believe it was safe. I may have taken one or two steps down to get a settled position, but I made no deliberate attempt to climb down. With hindsight I could have climbed down. I had jumped off the wall previously.*"

By that she meant she had gone up the wall on about two occasions previously, not as high as on the last occasion and jumped off just before the last occasion. Cross-examining Counsel then said:

> *"There is no mention of this, is there, in your witness statement?"*

(He was referring to the previous occasions when she had jumped off the wall.) The

Claimant replied:

> *"I agree that is not in my witness statement that I had jumped off before, but I did say I had made several attempts to climb." Q. "Is that because you had in fact climbed down on those previous occasions?" A. "No. I jumped. I thought the risk was reduced by the mat being there. There are risks in climbing at all, I accept. I thought it was a reasonable risk. I didn't think there was any risk involved in the bouldering wall. My whole perception was of reduced risk. This was a cool down exercise." Q. "The instructors told you, did they not, before you went on the bouldering wall that you should not climb down?" A. "Absolutely not. I had no vested interest or reason not to follow instructions. I was given no such instruction. …. I know my statement was made a year after the accident, but it was a monumental day in my life. I have a very clear recollection of what happened. I had made two or three minimal attempts previously to get up the wall and then jumped off."*

As to the making of the admission while waiting for the ambulance, in effect that she had been the author of her own misfortune by disobeying an instruction, which she knew she had been given, the Claimant said when Mr Simon King, counsel for the Defendant company, put the matter to her in clear terms:

> *"Absolutely not. I entirely I accept I said sorry about causing the fuss,"*

and she said that she was indeed sorry, and she was in fact very embarrassed. She had not acknowledged any form of instruction, still less disobeying any such instruction, as no such instruction had been given.

14. The next witness, Mr James Parsons, in his witness statement, which was also adopted as his evidence in chief, said, and this is page 124 of the trial bundle:

> "*Our instructor advised we could go and use the bouldering wall if we wanted. I recall him saying that only 2 people were allowed on the wall at any time due to a recent accident involving a young girl. No further advice was given. I considered the wall posed no danger, as a large deep crash mat was positioned right up to the face of the wall boulder."*

In view of that he, too, said that he considered it safe to jump off the wall and to land feet-first on the mat. In cross-examination he said,

> *"I didn't think there was any danger in climbing the bouldering wall, because of the crash mat. I accept if you fall from any height you can sustain injury, but the crash mat made me think that the risk was minimal. I had seen the Claimant go up the wall and drop off it, as I did. The reference to the female who had had an accident the previous week was, I thought, in the context that only one person was to be at the crash mat at a time. I do not believe the instructor was close by when we were on the bouldering wall. I don't accept we were told to climb down, not jump. I jumped off the wall happily in the belief that the crash mat would remove the risk of injury."*

15. Another member of the group, Matthew Davis (whose witness statement is at page

118), said in chief that he recalled no instruction being given on how to climb the bouldering wall. He said that he had attempted to climb the same section of it as the Claimant did just beforehand. He had not made it to the top and he had jumped off. He said that he had received no instruction to climb down.

16. Mr Davis's evidence was to some extent confirmed in the cross-examination of one of the members of staff employed by the Defendant Company, Mr Squire, who said:

> *"Other climbers had descended by climbing down, some had jumped, but from a much lower height. They just stepped off, not jumping from a great height. I did not see anyone jumping from the height the Claimant did."*

(I will deal with Mr Squire's evidence in more detail at a later stage.)

17. In cross-examination Mr Davis said:

> *"I had exited the crash mat area and I had a full view of the bouldering wall. The Claimant was facing away from the wall when she landed. I would say she turned as she jumped. I saw her at the top and at the bottom, so I did see her fall. I agree with the position described by Mr Parsons at page 125."*

(That description was that the Claimant was lying on her back and with her head nearest the wall and her legs and body stretched away from the wall.) Mr Davis then said:

> *"No advice or instruction had been given at the foot of the bouldering wall. Immediately after the accident I was very aware that I had been given no briefing about the safety of this wall and the two instructors had agreed between themselves that only one of them would be present. There was an instructor there with the group who were using the bouldering wall, but I was not aware of where he was standing. I had followed him there. My recollection is that the Claimant took a step down and I think her feet, when she did that, were about four to six feet above floor level."*

In answer to a question I asked him he said he had seen the Claimant climbing vertically up the wall, but he had not seen her come down. He knows her well, and knew her well at the time. She is a fairly competitive person.

18. A senior manager from the bank, Mr Martin Foulds, was one of those who was taking part. He said in his witness statement at page 121 that he too thought that the initial instructions given before the group went on the competition wall were:

> *"Clear, concise and encouraging."*

Thereafter, he said at all times the group were properly guided, supervised and instructed. The level of supervision was very good he thought. Then, with ten minutes to go, the instructor had given them the opportunity of climbing the bouldering wall.

As to that he said:

> *"Our instructor said we ought to work sideways along the wall, but other than that gave very little guidance, which I thought was at odds with the*

experience throughout the rest of the session."

He remembered a limit of two people being mentioned, but, he said:

> *"No instruction was given as to getting off the wall after the activity that was either generic or specific."*

He remembered a reference to an accident on the bouldering wall a few weeks previously,

> *"But the depth of the mat appeared to provide real safety and I was at a loss to understand how this could occur and presumed that this was a freak accident. I assumed that the presence of the safety mat was the reason the instructor appeared unconcerned about the team participating in the activity unsupervised. The mood around this part of the session felt very relaxed. …. The whole feeling was of a warm down."*

19. In cross-examination he said that there was no formal briefing before the bouldering wall. He said he was terrified of heights. He had been very impressed with the instruction at the very beginning of the whole session, so that what followed was indeed a contrast. He said he was chatting to one of the instructors whilst the others were on the bouldering wall and they were 15 feet away. He accepted there had been the reference to an accident previously, but he said that had not been a briefing, it had been more of a chat.

20. The evidence of another member of the group, Mr Russell Caston, did not seem to assist on any of the material issues of fact. He did not try the bouldering wall, and although he witnessed the accident he could not add to the evidence already given.

21. On the principal issues of fact the Defendant Company relied on the evidence of Mr Gareth Squire and of Mr David Oxford. Mr Squire, in a handwritten statement made on the day of the accident and adopted as part of his evidence in-chief, page 268 in the bundle, said this:

> *"I was instructing on the bouldering … section with 2 members of the group on the mat whilst the remainder stayed at the edge of the boulder mat. …. I was speaking to one of the two people climbing. In my peripheral vision I saw Louise* [he was referring to the Claimant] *climbing down the right-hand section of the wall. As she stepped/jumped down from about 1.5 m I saw her land awkwardly on her ankle and it gave way. I immediately went to her assistance and continued to help look after her until the ambulance arrived….. All of the group had been briefed on the usage of the bouldering wall and were all told to climb down rather than jump."*

And it is with those words that the statement made on the day of the accident by Mr Squire concludes. No reference is made to any further conversation with the Claimant.

22. In a statement at page 90, which he made on 8th July 2008, he said:

> *"There were only two at a time and under supervision. The first two went on*

the bouldering wall and before they went on we advised them of the techniques required and this was a relatively easy section of the bouldering. We emphasised that they should not jump down onto the safety matting, but should climb down the wall as well as climb up it."

In a further, much lengthier, statement made two-and-a-half years after the accident, on 7th October 2010, which is to be found at pages 346ff in the trial bundle, he said this:

"Prior to going onto the bouldering section the two groups as a whole were gathered together at a safe spot on the main climbing floor and myself and David Oxford explained the nature of bouldering in that it was low-level climbing without the use of protective equipment such as ropes and harnesses and as such it was a much more free form of climbing. I then explained that the safety implications of bouldering were that you had to recognise that the crash matting under the bouldering wall was there to reduce the risk of injury and as such did not guarantee the participants' safety. As such the most important rule was that no one was to jump off from the wall as a means of getting down -- everyone was to climb down to the matting at all times. I was absolutely clear on this point as it was fresh in my mind that there had recently been an injury sustained by a climber who had not climbed down. David Oxford reiterated the instruction to climb down as it was vitally important to their safety, citing the example of what had happened recently ..."

He added that he had seen the Clamant climb up to the top and back down to the mat on at least one occasion before she climbed up and jumped off. At page 350, in this October 2010 statement, he said:

"Whilst waiting for the ambulance Louise (referring to the Claimant) admitted that she had been instructed not to jump from the wall and apologised repeatedly for having done so."

23. In cross-examination he said his first statement had been made just after the ambulance left:

"At the time I made this statement the relevance of the fact that she had been doing something she shouldn't, jumping down, was not so clear to me. Q. "After the session on the main wall the group dispersed into a more informal setting?" A. "No. I don't agree that the bouldering wall was offered in a causal fashion. It is right they were told only two should be climbing at any one time. They were given a briefing instruction by myself, it was additional information, a safety brief. Q. Did Mr Oxford ask if he could go and do something else?" A. "He did. I had an assumption that he remained with the people who chose not to go to the bouldering wall, he did not stay with me. The other climbers had all descended by climbing down." [This is on the bouldering wall.] *"Some had jumped, but from a much lower height."*

As I have already mentioned, he said:

"I did not see anyone jumping from the height the Claimant did. I had guided people as to how to climb the high walls and also did on the bouldering wall. I suggested techniques."

He did not agree that his lengthy statement in October 2010, at page 346ff, was a textbook account of what *should* have happened, given hindsight, as counsel suggested to him. He said it was a textbook account of what *did* happen. The briefing was given to the group as a whole.

24. Mr David Oxford, in a statement at page 269, which was made that day and which was adopted in his evidence in chief said, after referring to senior management to obtain permission from a senior member of staff for the group to be allowed on the bouldering wall:

> "*I was told a maximum of two being instructed at the time. So I informed the clients that it was okay, two at a time, and that due to recent incidents they must climb down to the mat!"* (The exclamation mark is in the original statement.)
>
> "*Gareth Squire was supervising the two bouldering whilst I finished lowering a climber from the comp*[etition] *wall."*

25. Then, in his handwritten statement made on the day of the accident, he referred to accounts he had heard from other witnesses as to what happened. He referred to another member of staff calling the ambulance and said,

> *"Gareth Squire, being first on the scene, comforted the casualty … with the other client James. A blanket was fetched and I asked her if I could cover her with it. The ambulance arrived after about ten minutes and the paramedics took over from there."*

With those words that statement made on the day of the accident concludes.

26. In a further statement, which was also made part of his evidence in chief, at page 88 on 2nd July 2008 he said:

> *"I was told"* [by senior management] "*it would be in order, provided that no more than two people were allowed onto the wall at any time and that the group were fully briefed on the need to climb down as opposed to jumping off. Specifically we were to instruct the group that they should not rely on the safety mat to provide a safe landing as there had been a number of incidents where injury had been sustained to climbers who had not followed instruction."*

27. On 7th October 2010 he too made a very much more detailed account, which is at page 337 of the trial bundle,. In the course of that account he made, amongst others, the following points. First, that he was instructed by a senior staff member that the group were to be fully briefed on the need to climb down as opposed to jumping off the bouldering wall. Secondly, and specifically,

> *"We were to instruct the group not to rely on the safety matting,"*

because there had been previous incidents. Thirdly, that he had informed Mr Gareth

Squire of the above, and, fourthly,

> *"… we both then addressed the group and said they could use the bouldering wall, providing they complied with the safety brief, which we then proceeded to outline, stressing …"* [that there should be] *" … no jumping."*

28. In cross-examination there was a moment when I noted that he appeared to be hesitant and uncertain. He said:

> *"A very detailed briefing was given before they went bouldering. I think they all finished together before bouldering. It was not very informal and most of them were not interested. They were given the same brief everyone is."*

Then he added, in what seemed to me to be a rather nervous way,

> *"The Claimant did say something relevant before she left in the ambulance, she said she was sorry and that she knew she should have climbed down, she knew she had been told she should climb down."*

He had in fact first mentioned that in his lengthy statement at page 339, paragraph 12 on 7th October 2010, over two years after the accident:

> *"Whilst waiting for the ambulance to arrive I heard Louise Pinchbeck say that she was sorry about all the fuss that had been caused. That she knew she had been instructed to climb down rather than jump and that she had been fully briefed on the dangers of jumping from the wall."*

29. I asked him whether he had given any demonstration at the bouldering wall, and what he had said to the group. He said he had given no demonstration. Gareth Squire might have done, but he said he had explained that:

> *"What you need to do is to make sure you climb back down."*

He said:

> *"It would be my practice to watch someone go up and down and check they did it correctly. If I saw someone go up and jump I would tell them not to and not let them back on it."*

Assessment of the witnesses

30. Before making specific findings of fact I should mention my assessment of the respective witnesses as sources of reliable testimony, and my reasons for these assessments. I found the Claimant a clear, careful and articulate witness. She listened with evident concentration to the questions which she was asked and she answered them straightforwardly and fully. She did not use the witness box as a platform to argue her case. When she was asked about matters which she must have known were not going to be of particular assistance to her, for example, whether she had taken care to read the terms and conditions on the forms supplied by the

Defendant company, she did not shrink from frankly admitting that she had not. She accepted without any real reservation that she had realised that there was some risk in jumping down. Her admission in this respect indeed is significantly prayed in aid by the Defendant Company in support at least of a finding of contributory negligence. I found the Claimant to be entirely truthful.

31. Mrs Pinchbeck gave me the clear impression that not only is she intelligent and energetic, but also that she is someone who, when given a task to perform, approaches it with determination and keenness to do it as well as it can be done. I accept entirely her evidence that she focused carefully on such safety instructions as she was given and she took care to follow them. Whilst she did indeed give the appearance of being someone who was competitive in the context of a team building exercise, that seemed to me to be an entirely appropriate quality, in the circumstances, with no hint of foolhardiness to it.

32. Mr Parsons and Mr Davis were witnesses whose clarity of recollection seemed to me to vary slightly in terms of detail. But again, I found each of them a truthful witness. On essential matters they also seemed to me to be reliable. For example, each was clear in registering the contrast between the very careful initial instruction and supervision before and during the session on the competition wall, with what followed before the session on the bouldering wall. Each witness also spoke of his own recollection of doing what the Claimant said she had done, namely trying to ascend the bouldering wall by climbing up a little way and then jumping off. I have no doubt that these were entirely truthful recollections and I find as a fact that the Claimant and each of these witnesses did jump from the wall onto the mat before the Claimant fell and injured herself.

33. Mr Foulds was by some measure the senior member of the group. In his understated way he was an impressive witness. It may be of some significance that Mr King relied upon part of Mr Foulds's evidence in support of the Defendant's case that a warning of some kind was given before the party began any activity on the bouldering wall.

34. I found Mr Squire and Mr Oxford less satisfactory as witnesses. I make allowance for the fact that in the unfamiliar exercise of giving evidence they would not be as familiar with articulating abstract concepts as people who work as bank staff may be. I bear in mind that this accident occurred at the very end of an intensive two-hour session in which each of them had worked hard, and well, in supervising the group from the bank. It seems obvious to me that they, as much as the Claimant and her colleagues, regarded the short spell on the bouldering wall as a warming-down session and they treated it with a significantly more relaxed attitude. In addition, Mr Squire alone was going to deal with the bouldering wall group and Mr Oxford had to continue dealing with someone who was still on the competition wall. In particular, however, the very late appearance of the first mention by them of the alleged admission by the Claimant of disobedience to instructions was very unsatisfactory.

Findings of Fact

35. I am satisfied that some reference was made, either by Mr Squire or Mr Oxford or possibly by both in conversation with one or more members of the bank group when they went to the bouldering wall or about to go to it, about an accident which had previously occurred there, probably to a girl or a young woman. Mr Foulds, for example, heard the reference, but which of the other members of the group were

present when that was said is not clear to me. I am also satisfied on the balance of probabilities that it was not said in anything like the formal and definite terms in which Mr Squire and Mr Oxford recalled in their final versions of events. I do not accept that there was any more than, as Mr Foulds put it, an informal chat. Even from that he found it difficult to see from what had been said and from his observation at the scene, how the girl who was injured could have had anything other than a freak accident. The reference to that accident was understood by at least one other member of the group to have been made in the context of the instruction that there was to be a maximum of two climbers allowed on the wall at once. The very words used by Mr Oxford in his statement made the same day are:

> *"I was told a maximum of two being instructed at a time, so I informed the clients that it was okay, two at a time."*

The words which immediately follow that in the statement

> *"And that due to recent incidents they must climb down to the mat."*

Something like this may have indeed have been said by him, but whether it was actually said to one or more members of the group, or only possibly to Mr Squire to pass onto the group, I am satisfied on the balance of probabilities that they were not said as a clear instruction in a formal briefing, as Mr Squire asserted. In particular, I am satisfied that no words were said to the Claimant or to anyone else which clearly explained any prohibition of jumping down. It is common ground that no demonstration or practical guidance as to climbing down was given. I have already said that I have found that the Claimant and Messrs Parsons and Davis had jumped from the wall before the Claimant was injured.

36. I also accept on the second main issue of primary fact that the Claimant is entirely truthful and accurate in saying that whilst in her embarrassment she apologised for being the cause of a fuss, she certainly did not make any admission that she knew she had disobeyed an instruction not to jump down.

37. My reasons for these findings of fact are as follows. In general I found the Claimant and the witnesses called by her to be significantly more reliable in their testimony than the witnesses called for the Defendant. One of the contrasts between them was that Mr Oxford, and to a lesser extent Mr Squire, were not convincing in matters of detail as to the laborious lengths they went to in giving instructions before letting the group go on the bouldering wall. This had, in my view, every indication of being the product of afterthought.

38. There were also a number of other matters which I regarded as significant, of which the following are examples. First, had any formal briefing actually taken place I am satisfied that the Claimant and the other members of the group would have listened intently, and that they would have followed the instructions they had been given in it. Each of them is and was at the time a mature responsible adult who had, as the Claimant put it, 'no vested interest' or reason not to obey instructions. Secondly, I am equally satisfied that they would now remember such a briefing and would have admitted that it had taken place when they gave evidence, if it had. Thirdly, to the Claimant in particular this was a uniquely memorable day in her life and the other members of the group have a particular reason to remember the events of that day as standing out from their day-to-day lives. By contrast, to Mr Squire and Mr Oxford, this was simply another day at work. Accidents did occur from time to time and, as

they made clear, this was by no means the worse one they had known.

39. Next, it is quite clear that the Claimant did say something about being sorry for being the cause of all the fuss. For her to have said that would, in my view, have been entirely in character, but I am satisfied that that was all she said. It is perhaps understandable that, to a listener such as Mr Squire, that could be construed as an admission that she had caused the accident by her own foolishness, when in reality it was simply an expression of embarrassment. That is particularly so where the listener is somebody of whom criticism may have been perceived. It is clear to me that both Mr Squire and Mr Oxford may indeed have perceived that they would be subject to criticism.

40. As time passed, and as it became clear that the litigation involved such potential or actual criticism of Mr Oxford and Mr Squire, it seems to me it was only too human a reaction on their part for them to assume that they had done and said more than in fact they actually remembered doing or saying, and the Claimant's simple apology for causing the fuss may have become, in their minds, an explanation for all that had happened, and *may* have been assumed by them to amount to an admission of fault by the Claimant.

The relevant law and the parties' submissions

41. It is common ground that the provisions of the Unfair Contract Terms Act 1977 prevent the Defendants from avoiding liability simply by reliance upon the written terms of the form in which first the Claimant declares she was aware of and accepted the risks inherent in climbing and mountaineering activities and secondly, in which she acknowledged the specific recommendation that descent from the bouldering wall should be made by climbing down not jumping. It is also common ground that these terms were not specifically drawn to her attention by the Defendant's staff. They are relevant only in respect of such risks as are inevitable in taking part in any hazardous recreational activity and not risks which can be avoided or minimised by careful instruction and supervision.

42. It is also accepted by both sides that this is a case where liability does not arise from the condition of the premises as distinct from the activities carried on in them, thus the terms of the Occupier's Liability Act 1957 are not engaged here. It is accepted by the Defendant company that it owed a duty to the Claimant to provide her with appropriate instruction and supervision in her use of the premises, including the bouldering wall, and that included making it clear to her that she should not descend from the bouldering wall by jumping or dropping of it. The evidence called on behalf of the Defendants is that that is precisely what their staff did. I have found to the contrary.

43. Reliance is placed by the Defendants upon the case of Trustees of the Portsmouth Youth Activities Committee (A Charity) v. Poppleton [2009] PIQR P1, which also involved an accident on a bouldering wall at a climbing centre. The Claimant in that case, Mr Poppleton, is described as a fit young man. He had visited the premises before the day of his accident on a number of occasions. On that day he attended with some companions. Whilst he was not asked to sign any disclaimer, there were rules displayed which the Claimant did not read, but which included a prohibition of jumping from the walls and climbing onto girders which were above the wall at the level of the top of the wall. The wall was a maximum of 16 feet high and the floor covered from wall to wall with shock-absorbent matting at least 12 inches thick.

The Claimant in that case was not given any form of instruction or explanation of the risks involved and whilst using the premises he saw others jumping from the walls, in particular he saw one of his companions leap from the back wall to grab hold of an overhead girder and then drop onto the floor. Mr Poppleton tried to do a similar leap from the back wall to grab hold of a projecting buttress or the top rope bar on the opposite wall. He did not manage to complete this leap successfully, but lost his grip. He then somersaulted in the air and fell to the matting below landing on his head. He was very badly injured and rendered tetraplegic.

44. The judge at first instance considered the nature and extent of any common law duty of care owed to those of full capacity who chose to make use of a facility when the activity allowed is potentially dangerous to its participants. Whilst he said that a duty could arise if a participant was offered training or supervision, the evidence was that the Defendants offered neither of these and Mr Poppleton did not ask for them either. The judge said that he was satisfied that the Defendants were under no duty to a participant to assess his competence or to ensure he had any necessary training nor to see that he had a more experienced friend to help him. To impose such duties would be an extension of established duties of care which would not be fair, just or reasonable where the Defendants had not relevantly assumed responsibility. He made reference to dicta of Millett LJ in Files v. Bedfordshire County Council [1995] PIQR P38 at P389 to the effect that where the only connection between the acts of the Claimant and the Defendant is the fact that the Defendant made it possible for the Claimant to harm himself, the Claimant's acts are taken to be the sole cause of the harm. If these were the only issues the judge would have dismissed the claim.

45. However, in respect of an allegation that the Defendants were in breach of duty in failing to warn Mr Poppleton that thick safety matting did not make a climbing wall safe, but might induce or encourage an unfounded belief that it did, the judge found for the Claimant. Expert evidence supported this allegation, and it was asserted therefore, that appropriate supervision was vitally important. One of the experts said that matting did not significantly reduce the likelihood of injury, but usually reduced its severity. Mr Poppleton's evidence was that he would not have attempted to make his disastrous leap if he had been climbing outside without the security of the safety matting. The judge held that the Defendants had a duty to warn of dangers which were not obvious and that this was such a danger. He accepted that they had no duty to supervise his climbing, but they did have a duty to warn him of this latent danger, as he regarded it. He was satisfied that if Mr Poppleton had been made aware that matting did not render falls entirely safe he would not have attempted the dangerous and risky leap, which as he knew, was well beyond his capabilities.

46. As to contributory negligence, the judge was satisfied that Mr Poppeleton's disastrous manoeuvre was foolhardy, especially for a climber of his very limited experience. The majority of the blame for the accident must rest with him. The judge assessed this as 75 per cent. The Defendants appealed against the finding of primary liability and the Claimant cross-appealed against the finding of contributory negligence. In the Court of Appeal, the President of the Queen's Bench Division, May LJ, with whom Richards LJ and Sir Paul Kennedy agreed, said that the heart of the matter was whether the Defendants were under a duty to train or supervise adults whom they admitted to use the climbing wall. That comprised: "The kernel of the various aspects of the wider duty of care," for which counsel for the Claimant contended. Secondly, there was the issue of whether the judge was correct to hold that the Defendants had a duty to warn Mr Poppleton that there was a risk of injury, notwithstanding the presence of entirely suitable matting.

47. May LJ then considered the case of Tomlinson v. Congleton Borough Council [2004] 1AC 46. Whilst that was a decision mainly about the application of the Occupier's Liability Act 1984, and the liability of occupiers to trespassers, the speech of Lord Hoffmann, in particular, had *dicta* relevant to policy considerations underlying the scope of duties which may be owed in cases such as this. Lord Hoffmann had said at paragraph 27 that,

> "Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had an inherent risk."

Lord Hoffman repeated at paragraph 44 under the heading "Free will" that Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk. If people want to climb mountains, go hang-gliding or swim or "dive into ponds or the like" (which was the particular form of activity involved in that case) that is their affair. The landowner may take a paternalistic view and prefer people not to undertake risky activities on his land, but the law does not require him to impose conditions.

48. May LJ said that a duty may also exist where the Defendant has in some relevant way assumed responsibility for the Claimant's safety as in Files v. Bedfordshire County Council [1995] PIQR P380. The same may be said of Perrett v Collins [1998] 2 Lloyd's Rep. 255, and Watson v. The British Boxing Board of Control [2001] PIQR P16, in each of which the relevant Defendant was exercising a degree of regulatory control. Absent any duty to instruct or supervise, the question was whether the risk was inherent and obvious. The risk of falling from the wall was plainly obvious. The judge held in effect that the risk that the matting might not in every case protect a climber who fell from serious injury, was not obvious, but May LJ held that that finding was not sustainable. He observed that,

> "Evidence apart, it is to my mind quite obvious that no amount of matting will avoid absolutely the risk of possibly severe injury from an awkward fall and that the possibility of an awkward fall is an obvious and inherent risk of this kind, climbing. Mr Poppleton's evidence was that he did not think it was that risky, indicating that he knew that there was a risk."

Mr King relies particularly on this observation.

49. There being inherent and obvious risks in the activity which Mr Poppleton was voluntarily undertaking, the Court of Appeal held that the law did not require the Appellants to prevent him from undertaking it nor to train him or supervise him while he did it or see that others did so. If the law required training or supervision in such a case it would equally be required for a multitude of other commonplace leisure activities, which nevertheless carry with them a degree of obvious inherent risk such as sea-bathing.

50. Mr King for the Defendants accepts that a distinction between Poppleton and the instant case is that the Defendant Company assumed the responsibility both of instruction and supervision. Nevertheless, as I have just mentioned, he submits the observations of May LJ at paragraph 18 to the effect that no amount of matting will avoid the risk of injury to an adult falling from a height under the force of gravity applies with equal force in this case.

51. In my view, Mr King was right to accept that the distinction he referred to may be made between this case and Poppleton. Indeed, not merely did the Defendant staff assume responsibilities for instruction and supervision, on the evidence it is common ground that they discharged those duties faultlessly in respect of the competition wall. It was the evidence of Messrs Squire and Oxford that they also discharged their duties in respect of the bouldering wall. However, I have rejected that evidence.

52. Ms Foster for the Claimant submits that whilst in Poppleton there was no assumption of duty, here the bank had paid for its staff to be trained and supervised by the Defendants, which amounts to express agreement to assume a duty. A further very clear distinction she submits is that the Claimant in that case was not truly using the wall for the experience of learning to climb, but essentially for fooling around. The "inherent and obvious" risk to which May LJ was referring was not the kind of deliberately controlled dropping off the wall undertaken by Mrs Pinchbeck in this case. Thus the two Claimants are in no way comparable, still less identical in what they were doing and the risks they were running. The Court of Appeal's decision in that case is thus very fact-specific and the learned President made it clear in paragraph 17 of his judgment that in circumstances such as those in the present case: "A duty may exist where the Defendant has in some relevant way assumed responsibility" for the safety of the Claimant.

53. Ms Foster submits that Poppleton thus involves no novel point of law which assists in deciding the present case. In Files Millett LJ at page 390 referred to the fact that the Defendants in that case had assumed the task of teaching the Claimant how to perform a forward somersault and they therefore assumed the duty of teaching him properly and also to make him aware of the dangers inevitably involved in doing, especially without supervision. They failed to do so. That, he said, appeared a sound basis for ascribing some degree of liability to them. He later added: "It matters not how obvious a danger may be, it should be pointed out."

54. Ms Foster relies upon the scope of the duty pleaded as an admission in paragraphs 2 and 4 of the defence, namely to provide appropriate supervision and instruction. She submits that once the Defendant decided to allow the use of the bouldering wall the Claimant should have been given as close supervision and as detailed instruction as she had been given for rope climbing, including the need to climb down and a prohibition upon jumping down.

55. I agree that, in all the circumstances, the Defendants were under a duty in this respect as they had indeed assumed responsibility for the safety of the Claimant and, what is more, they knew of the previous accident, or possibly accidents, of which she was unaware. Moreover, they knew that she had practised only going upward (and had been lowered down by others) in the greater part of the time she had spent at the premises and had been carefully monitored throughout the previous one and three-quarter hours. If she were then left to her own devices at the bouldering wall they knew or ought to have known that that might put her at a disadvantage. In the circumstances, on the facts as I have found them to be, they failed to discharge their duty.

Volenti

56. As to the question of the applicability of the maxim *volenti non fit injuria*, Mr King, in fairness, described it as his secondary case. He submitted that it arises

where any adult freely chooses to jump down from a height onto a floor, however well cushioned such a floor may be. It was a clear risk, he submitted, which the Claimant freely chose to take.

57. Ms Foster, in accepting that the maxim applies to risks voluntarily undertaken, nevertheless submits that it only applies to those which inevitably arise from the activity when all appropriate care has been taken by those supervising and instructing to explain safety procedures. I have found in the instant case that all appropriate care had not been taken by those supervising and instructing to explain safety procedures. Had they done so, the accident would probably not have occurred. If a participant has followed the appropriate instruction and training but nonetheless suffers a fall, say, which may happen even though appropriate precautions were taken, the maxim may apply. Here, the Claimant's employers having paid for her to be trained, the Claimant consented to such inevitably uncontrollable risks (or, putting it another way, unavoidable risks) as were involved, but not to risks which could or should have been eliminated or avoided by proper instruction and supervision. This risk was one such.

58. The Claimant, Ms Foster submitted, did not have to accept risks arising from deficiencies in instructional supervision, and insofar as the staff failed in those respects they were in breach of duty and she had in no way consented to that risk. The Claimant thought the bouldering wall relatively safe by comparison with what she was previously doing. She had no harness. The instructors seemed to be adopting a casual attitude. She was allowed to go up and down and jump off it, and there was a large crash mat, all in complete contrast with the conditions next to the competition wall. She did not consent to a risk which could have been eliminated.

59. In a case of alleged negligence such as this the maxim *volenti non fit injuria* has very limited applicability, since consideration of it at all presupposes a tortious act by the Defendant. The consent which is relevant is not consent to the risk of injury, but consent to the lack of reasonable care that may produce that risk, and that does not arise in the instant case. In my view the submissions which related to the risk which the Claimant acknowledged she took are better considered as matters relating to contributory negligence.

Contributory negligence

60. Turning therefore to that question, the fact that the Claimant has taken a risk does not amount to contributory negligence if the need to take the risk was created by the negligence or breach of statutory duty of the Defendant and a reasonably prudent person in the Claimant's position would have acted as she did. The burden of proving contributory negligence is on the Defendant. It is not for the Claimant to disprove it. If the Defendant's negligence or breach of duty is established as causing the accident the onus is on the Defendants to establish that the Claimant's own negligence made a material contribution to it. The amount of care which a Claimant may reasonably be expected to take necessarily varies with the circumstances.

61. I consider that the Defendant's staff, for whom they are vicariously liable, should bear a significantly greater share of the responsibility for the accident than the Claimant should herself. First, they were in breach of their own procedures and standards in failing to brief or warn her properly about jumping onto the crash mat. Secondly, they were aware that previous participants had sustained injury jumping down onto the mat. Thirdly, they either failed to observe or they ignored the

Claimant and the other witnesses actually jumping onto the mat before the accident, and, fourthly, they failed to go through any drill with the Claimant as to the appropriate way to climb down.

62. On the other hand, I do not think that the Claimant can escape some finding of liability for her own accident. She could, as she conceded fairly in evidence, have attempted to climb down, or she could have asked for help. Instead, she chose to jump from a height of over five feet. She also chose to twist or turn as she did so. To that extent she may be regarded as being to some degree as being at fault, however soft a landing she may have expected.

63. In my judgment, the appropriate proportion for contributory negligence is one-third.
