

## INTERVENTION

# Risk and Lifestyle Sports: The Case of Bouldering

Paul Gilchrist<sup>1</sup> and Guy Osborn<sup>2</sup>

<sup>1</sup> University of Brighton, GB

<sup>2</sup> University of Westminster, GB

Corresponding author: Guy Osborn ([G.Osborn@westminster.ac.uk](mailto:G.Osborn@westminster.ac.uk))

The recent case of *Maylin v Dacorum Sports Trust* [2017] EWHC 378 (QB) is the latest example of a claim being made for damages suffered whilst participating in bouldering, a form of low-level climbing. Whilst interesting in its own right in terms of how the courts apply legal principles to the area, it also sheds light on approaches to lifestyle sports more generally and the place of risk within play. This Intervention is essentially a case note of *Maylin*, but viewed, in part, through the lens of recent interdisciplinary work the authors have undertaken into parkour.

**Keywords:** risk; liability; bouldering; lifestyle sports; climbing; negligence

### Context and Background of Bouldering

The popularity of climbing is growing rapidly; both at elite and grass-roots levels, with 25 million people participating regularly worldwide (Gronhaug & Norberg, 2016). There are many variants of climbing activity, and bouldering is particularly popular, being an activity that is based on low-level climbing that foregrounds the athletic abilities of the climber and which eschews ropes, harnesses and even partners. As Tejada-Flores (2000, 19) notes:

It is complex by definition since it has more rules than any other climbing game, rules which prohibit nearly everything – ropes, pitons and belayers. All that is left is the individual standing in front of a rock problem.

Bouldering takes place at lower heights than traditional climbing, and consists of bouldering routes or problems that need to be solved (Beal, 2011). The practice has been used by climbers training for roped climbs, but has also evolved into a discipline in its own right and with its own ethos and approach. Like parkour, it encourages reflection and self-negotiation for the practitioner, an evaluation of individual capability and iterative learning. There are prominent outdoor bouldering areas, but it is also practiced, indoors and outdoors, at artificial climbing walls, sometimes in private climbing gyms or facilities. Climbers attempt short sections of rock, generally 2.5–5 m high, and the problems generated by the boulder can take a long time to solve, particularly for sections rated with a high difficulty level. Through repetitive movements performed on a boulder, the climber gains confidence and knowledge of how to overcome bouldering problems. A typical safety measure is the use of a specialised portable pad in order to reduce the prevalence and extent of injuries from falls, which is placed underneath the area the climber is working in. Occasionally, a spotter is used who stands below the climber with arms at the ready to redirect the climber if they fall onto the mat, a technique that helps to prevent direct blows to the climber's head or back, thus maximising the chances of (though not necessarily guaranteeing) a safe landing (Josephsen et al, 2007). It is an accident that occurred whilst bouldering at an activity centre that is the focal point of *Maylin*, but before discussing the case itself we turn to some remarks about risk and lifestyle sport more generally.

### Risk and Lifestyle Sport

Activities such as bouldering are, of course, not without their dangers (Josephsen et al, 2007; Woolings et al, 2015). From a legal perspective, the courts have previously considered whether those who put themselves deliberately at risk should be able to seek compensation. Generally this has been answered in the negative – see for example the case of *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] All ER (D) 150, similarly a case that involved bouldering, where it was noted that:

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 they are injured.

There are however some significant examples that appear to show a more claimant friendly approach, where some form of 'assumed duty' can be established, essentially where some form of instruction has been provided (*Wilson v Haden (T/A Clyne Farm Centre* [2013] EWHC 229)) and more broadly there have been strong arguments that the social utility of the activity in question needs to be factored into any evaluation of liability – something that has taken statutory form via the *Compensation Act 2006* (s1). This provision, and also the *Social Action, Responsibility and Heroism Act 2015* (s2), have attempted, and arguably not very successfully, to encourage the courts to consider the public benefit or social utility of allegedly negligent acts when assessing liability. Recent work into lifestyle sports has considered whether the social value or benefit of sport should accord some extra protection for people engaging in such activities. Gilchrist and Osborn (2017a) have explored this in relation to parkour, examining in part a more nuanced understanding of this specific lifestyle sport, where there is a need to privilege *benefit* as well as risk, and to appreciate the possibilities of law to protect rather than proscribe such activities. Further to this, a wider argument has persisted that risk is something that is beneficial within play and should be encouraged not restricted, particularly in terms of learning how to manage or navigate risk (Ball and Ball-King, 2011; Brussoni, 2017). *Maylin* allows us to further consider some of these issues.

### Context

The case involved a claim for damage suffered whilst bouldering. Miss Maylin, a novice who had never tried the sport before, attended a rock-climbing centre with a friend who had previously completed a beginners climbing course at the centre. Before embarking on the bouldering session, Maylin paid by debit card for the session and signed a disclaimer form which included the following statement:

The British Mountain Council [BMC] recognises that climbing and mountaineering are activities with a danger of personal injury or death. Participants in these activities should be aware of and accept these risks and be responsible for their own actions.

The form went on to require Yes or No answers to a series of questions:

- Do you understand that failure to exercise due care could result in your injury or death?
- Do you have any questions regarding the application and Conditions of Use or Rules?
- Do you agree to abide by the Rules of the climbing centre?

Miss Maylin answered yes to the first and third of these questions and no to the second. On the reverse of the document were Climbing General Rules and Terms and Conditions, which included the following statement: 'Always climb within your capabilities and descend by down climbing.' The BMC provides a general participation statement, but, as we note below, the Association of British Climbing Walls states that whilst a good starting point, this may need to be tailored and added to for the specificities of the individual facility. It appears that the centre in question based their own statement on this. Members of the public were in addition not allowed admission unless they had either passed a 'rope test' or were accompanied by a 'buddy' who had passed this.

Miss Maylin attempted the yellow route, which she had been informed was the easiest one to climb. Whilst attempting the route her foot slipped and she fell to the floor suffering a serious back injury, specifically an unstable fracture to the T12 disc in the middle section of the spine. Following this she attempted to sue the defendants, the Dacorum Sports Trust, trading as XC Sportspace, for compensation for the damage suffered.

During the proceedings, the Participation Statement/disclaimer above was considered, and Miss Maylin agreed she had completed this and at least 'skim read' the Terms and Conditions. Whilst she accepted that no one was going to train her, she noted the presence of staff members in the vicinity of the climbing wall and presumed that some support or supervision would be available if needed but did not rely upon this. As she was accompanied by someone who had passed the rope test, there was no need for her to have passed the rope test herself.

Miss Maylin also noted she had not seen any signage in the area. As we have noted elsewhere, signs may fulfil a variety of purposes; legal and cultural, prescriptive and proscriptive, but that in a legal sense are not a panacea for controlling risk and must be seen as part of a broader contextual understanding (Gilchrist and Osborn, 2017b). At the activity centre in question, a sign, on A3 or A4 laminated paper, located on a wall to the right of the bouldering wall and headed 'Good Practice For Bouldering' included the following:

*'Falling off-*

- *Avoid uncontrolled falls, they are likely to result in injuries to yourself or those around you.*
- *Descend either by down climbing or a controlled fall.*
- *THE SOFT MATS DO NOT MAKE IT ANY SAFER, BROKEN OR SPRAINED LIMBS ARE COMMON.'*

### Decision and Impact

The essence of Miss Maylin's claim was that the risks involved in the activity were not sufficiently drawn to her attention and basic safety information was not provided to ensure she was reasonably safe in all the circumstances. However, previous case law such as *Tomlinson v Congleton BC* [2003] UK HL 47, and in particular *Poppleton*, provided a significant

obstacle to her claim. In *Poppleton* it was found that where risks were inherent and obvious there is no requirement to train, supervise or warn and the claim would fail on this ground. In addition, even if there were a duty to do this, such duty would, the judge argued, have been discharged by the defendant taking adequate steps to draw attention to these inherent risks and dangers via the participation statement and warning signs.

Signs are in fact artefacts that may fulfil a number of functions and can be read as texts that inform us about culture and practice (Gilchrist and Osborn, 2017b). In terms of a specific role of putting users on notice of potential danger, or attempting to exclude or limit liability, the ultimate criterion is its effectiveness. This can be gauged by examining whether: (i) the sign gains *attention*; (ii) the *nature* of hazard is highlighted; (iii) there is a *statement of consequences*; and (iv) whether there are *specific instructions* for action. Whilst the judge in *Maylin* primarily based his decision on the basis of the inherent risk in the activity, he further argued that the warning signs, in conjunction with other action that had been taken, was sufficient. Compared to the signage we analysed as part of our longitudinal study into the juridification of parkour (Gilchrist and Osborn, 2017a; Gilchrist and Osborn 2017b), the sign in this case appears to be fairly simplistic. The case does not reproduce the warning in full, but the judge does not mention any specific attempt on the signs to limit or exclude liability or invoke the defence of *volenti*.

Interestingly, since the incident, there is now a requirement for novice climbers to undertake an induction (see <http://www.thexc.co.uk/bouldering/>) and a safety briefing is given on arrival. In addition, noting the specific potential of injury being occasioned by minors, Pieber et al (2012) illustrate that younger climbers seem more prone to injury. This has resulted in XC Sportspace limiting the activity to those over 18, although other activities can be undertaken by younger climbers if a parent or guardian has completed the disclaimer (see <http://www.thexc.co.uk/climbing/first-time-visitors/>).

There is in fact a Code of Practice (<https://www.abcwalls.co.uk/about/code-of-practice/>) for the climbing wall industry, emanating from the Association of British Climbing Walls, and it would appear that adherence to their 10 principles will be strong evidence of good practice and a likely useful shield for operators of such activities. These principles include the statement that walls must be fit for purpose and should comply with European standards, and that these walls must be maintained and regularly inspected. In terms of users, Principle 3 notes that whilst the BMC Participation Statement, such as that used in *Maylin*, is a useful starting point, '**in many cases the user will require more specific information**' and Principle 5 that all users should be **competent** and that this should be **documented** (our emphasis). Both of these appear to have been bolstered at XC Sportspace post this incident. This also raises the issue of what the law requires facilities providers to do, and what the role of sporting governing bodies in terms of providing guidance is. This is especially pertinent for lifestyle sports as the tension seen when something that emerges as countercultural begins to become bureaucratised and professionalised (Gilchrist and Osborn, 2017a and 2017b). This perhaps reaches its apotheosis where risk becomes commodified (McCarthy, 2017). In *Maylin*, the court was clear that as the activity undertaken was one with obvious and inherent risk, there was no requirement, following *Poppleton*, to train, supervise or warn. So what then is the status of the guidance provided by bodies like the BMC and its implementation by providers? It appears that by providing instruction or supervision, and following good practice provided by the BMC, the provider shifts from the obvious and inherent risk category towards the 'assumed duty' category represented by cases such as *Wilson*. This then means that any training or supervision must be competent or risk possible legal intervention (Pugh, 2013). More broadly, it raises questions about the bureaucratisation of lifestyle sports. For now, *Maylin* stands as further confirmation of the courts' approach to inherently risky sports, although as we have previously argued, the benefit of the activity and its social utility should not be overlooked.

### Competing Interests

The authors have no competing interests to declare.

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**How to cite this article:** Gilchrist, P and Osborn, G 2017 Risk and Lifestyle Sports: The Case of Bouldering. *Entertainment and Sports Law Journal*, 15: 5, pp.1–4, DOI: <https://doi.org/10.16997/eslj.211>

**Submitted:** 19 September 2017      **Accepted:** 18 October 2017      **Published:** 27 December 2017

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