

**THE HIGH COURT****[2013 No. 8723 P]****BETWEEN****LEANNE MCCARTHY****PLAINTIFF****AND****CANAL COMMUNITY TRAINING PROGRAMME TURAS LIMITED****DEFENDANTS****JUDGEMENT of Mr. Justice Bernard J. Barton delivered the 23rd June 2015**

1. This is an action brought by the plaintiff against the defendant for damages for personal injuries and loss arising as a result of an accident which occurred on the 23rd May, 2012 whilst she was participating in rock climbing organised by the defendant at Dalkey Quarry, Co.Dublin.

2. The plaintiff was one of a group of young adults involved in this activity. She and other members of the group had some rock climbing experience and would have climbed more challenging rock faces than the one involved on the occasion in question. The group were under the instruction and supervision of Mr. Colin Walshe, and Miss Elizabeth Doherty who were fully qualified rock climbers. They were assisted by a CE student, Miss Louise O'Neill.

3. The main object or purpose of the activity planned for the day was to abseil down the rock face of the quarry. The climbs which may be undertaken on the quarry face are identified in schematic form in a book entitled "Dalkey Quarry". One of these, numbered as 143, is particularly suitable for abseiling and, accordingly, was chosen for that day's activity.

4. The floor of Dalkey quarry is home to established fauna as well as flora and through which a number of paths run, including those which lead to different places at the foot of the quarry rock face. The group used one of these to gain access to the assembly point located at the base of the climb.

5. That the plaintiff fell is not in issue; her case simply put is that having assembled at the start place she was then instructed or permitted to climb up to a narrow ledge on the rock face without being attached to a safety rope and that having joined other members of the group who had done likewise and who were also standing on the ledge, she lost her footing and fell suffering the injuries and loss in respect of which she brings these proceedings.

6. The defendant's case is equally simple, namely that the plaintiff was standing with the other members of the group at the designated assembly point when she fell and that neither she nor any other member of the group had been instructed to nor were they standing on the ledge.

7. Whilst a defence had been delivered which put the plaintiff on full proof of her claim, the court was advised at the commencement of the hearing that the parties had reached agreement in relation all issues between them save as to the issue of liability. On this issue it was agreed that the outcome depended upon findings to be made by the court as to the place from where and in what circumstances the plaintiff fell, it being accepted that a determination as to the place and in the circumstances contended for by the plaintiff would render the defendant liable for the accident but not otherwise.

8. With regard to that question the parties agreed to the admission of the photographs which had been taken by their respective engineers. Although quantum had also been agreed, the medical reports were admitted for the purposes of showing, for what it was worth, that the plaintiff had sustained injuries which were consistent with a fall from a height. The significance of that from the plaintiff's perspective was that she had always given a broadly similar account to all of the physicians who had treated and/or examined her and that her injuries would have been less severe or would not have occurred at all if she had fallen at the place in the quarry identified by the defendant.

**Background.**

9. The plaintiff was born on the 4th March, 1977 and resides at 8 Rossfield Park, Brookfield, Tallaght, Dublin 24. She has had a number of social and personal problems which had previously blighted her life and with which she has had to grapple. I think it only fair to observe at the outset that her response to these was to seek help and to be pro-active in dealing with them by engaging in a well structured programme of rehabilitation. As part of that programme she developed a love of certain outdoor pursuits including kayaking and rock climbing and in which, over 3 years or so, she became proficient.

10. It was common case that on the day of this accident that each member of the group had been supplied with and was wearing a safety harness. The rock climbing activity ordinarily required each member of the group in turn having their safety harness attached to a safety rope before climbing on the rock face. On the day in question one of Ms O'Neill's tasks as a supervisor was to ensure that this was done before any climbing activity commenced.

11. The safety and abseiling ropes were brought to the top of the quarry by the defendant's instructor and group leader Mr. Walshe . He was accompanied by Miss Doherty, the defendant's outdoor pursuit's supervisor. The ropes, separated by a short distance, were dropped from the top of the quarry. The activity for that day did not involve a group climb; instead, and whilst supervised, each member of the group climbed up and abseiled individually on the rock face.

12. On arrival at the quarry, Mr. Walshe and Miss Doherty went to the top of the top of the rock face to drop the ropes and position themselves for the first climb. Mr Walshe was in charge of the abseil rope and Miss Doherty the climbing safety rope. Having dropped that rope, Miss Doherty's function was to keep an eye on each individual member of the group as and when they started to climb up the rock face and to gather in the rope as the climber ascended. Once the climber reached the top she would uncouple the rope and

drop it down to Miss. O'Neill. Mr. Walshe, who was positioned nearby, was tasked with supervising the climber as he or she abseiled down the rock face. Miss O'Neill's duty was to supervise the group at the foot of the rock face, to retrieve the safety climbing rope when dropped back down and to ensure that it was attached to the safety harness of each climber before the start of that person's ascent of the rock face. As the climbing activity on the day involved individual ascents only a single safety rope was deployed.

#### **Summary of the plaintiff's evidence.**

13. The plaintiff's evidence was that she and a number of other members of the group having reached the foot of the rock face started to ascend to what she described as a small ledge located on the rock face in or about the vicinity of a small bush as shown in photographs 3, 6, 7, 9 and 10 taken by Mr. Alan Conlon, engineer retained on behalf of the plaintiff and also visible in photographs 5, 9, 11, 12 and 13 of the photographs taken by Mr. Stephen Mooney, engineer retained on behalf of the defendant. The plaintiff's recollection was that the ledge was very narrow and that the number of the group standing on it (5 including herself) was such that they ended up huddled together waiting for the safety rope to be dropped down to them. On the plaintiff's case one member of the group, identified as Niall, was in the process of ascending the rock face when the accident occurred.

14. By way of explanation as to why the group, including Miss O'Neill, were standing on the ledge it was the evidence of the plaintiff that that was necessary if they were to get the safety rope. In relation to the occurrence of the accident, the plaintiff recalled standing at what she described as the edge of the ledge when she felt her feet slipping and that she then fell backwards down the rock face tumbling over and landing at a point which she thought was in the vicinity of a tree. Initially she did not think that she had sustained any significant injuries but was aware of abrasions over her hands and legs and of a pain in her lower back. While she did hit her head she didn't sustain any facial injuries, probably due to her safety helmet, though she did have some headache for a time after the accident.

15. Given the significance which the plaintiff attaches to the nature and causation of the injuries she sustained as being consistent with a fall from the ledge, it is appropriate that her injuries be summarised.

#### **Summary of the Plaintiff's injuries.**

16. The plaintiff was taken to Tallaght hospital in a van where she was seen in the emergency room complaining of pain in her back radiating into both legs as well as of some headache. X-rays did not show any fractures. The plaintiff was discharged and referred to the care of her GP Dr. Keogh who reviewed her on the 5th June, 2012 recording complaints of on going back pain with radiation. On clinical examination the plaintiff had restricted range of movements of her back and was given pain relief and also a local gel for application. She again consulted Dr. Keogh on the 13th June, 2012 complaining of ongoing back pain and was again given appropriate medication as well as night sedation. Examination disclosed that mobility of the lumbar spine was diminished, painful and there was tenderness in the upper lumbar spine. He referred the plaintiff for physiotherapy.

17. Thereafter plaintiff was referred to and seen by Mr. Hemant Thakore, consultant orthopaedic surgeon. He prepared a number of reports for the assistance of the court, the most recent of which is dated the 12th of December, 2014. His opinion of the plaintiff's injuries is that she suffered a contusion and sprain of her lower back resulting in soft tissue injury manifesting itself as chronic low back pain with right sciatic neuralgia; prognosis for the plaintiff was uncertain. He suggested certain assessments and treatments as well as recommending counselling. Marie-Elaine Grant, chartered physiotherapist also prepared a report for the assistance of the court dated the 26th February, 2015. Her prognosis was quite positive: provided that the plaintiff complied with recommendations in relation to physiotherapy and rehabilitation she thought that the plaintiff would make a good recovery in due course; the recommended programme would take a period of between six and nine months.

18. Returning to the accident circumstances, Dr. Peter Keogh records the plaintiff telling him that she and other members of the group were told *"to climb onto a ledge perhaps eight feet above the ground. The ledge was slippery at one end from water dripping down the quarry face and unfortunately she slipped and fell."*

Mr. Thakore recorded that the plaintiff was wearing a helmet and a harness but had been instructed *"by the course management not to clip their harnesses onto the ropes"*

Ms. Marie-Elaine Grant records the plaintiff advising her that

*"She reports that on the 3rd of May, 2012 she was with a group from her course at Dalkey quarry and was undertaking some rock climbing. She reports that normally a rope was attached at the outset of the training session but on this particular day the group were advised to start to do some climbing and they were then to be attached to a rope before ascending further."*

19. The defendant's case, which was put to the plaintiff and to Ms. Rebecca Kinsella, one of the group, was that the plaintiff fell from a point near the rock face but well below and to the left of the ledge seen in photographs 8 and 9 taken by Mr. Conlon and indicated by a yellow arrow in photographs 8, 9 taken by Mr. Mooney. It was in this area that the defendant suggested that the plaintiff and other members of the group were standing, that this was the position to which the ascent safety rope was dropped by Miss Doherty and retrieved by Miss O'Neill for attachment to the safety harness of each climber.

20. It was also suggested that neither the plaintiff nor any other member of the group were instructed, permitted to go to or were otherwise present at any time on the ledge identified by the red arrow in photographs 8 and 9 taken by Mr. Mooney and that if the plaintiff or anybody else had been seen on the ledge that that would have been an unauthorised activity which would have resulted in a cessation of climbing. It was also put that none of the group members were seen there at any time that day by either Mr Walshe or Miss Doherty.

21. The plaintiff rejected the defendant's case when put to her and rejected the suggestion that she was mistaken in her belief that she and the other members of the group had been standing on the ledge and that it was from there that she had fallen.

22. A member of the group, Ms. Rebecca Kinsella broadly corroborated the plaintiff's account of both the circumstances in which the accident occurred and the place from where on the rock face the plaintiff fell; she too rejected the defence case. When invited to recall the names of the individuals who were standing on the ledge she did not mention Ms.O'Neill but subsequently did so when pressed. As far as this witness was concerned one member of the group, identified as "Niall", had gone up the rock face attached to the safety rope and that the reason that they were all standing on the ledge was because they were waiting for the safety rope to be dropped back down to them.

23. As to how she got to the ledge Miss Kinsella's recollection was that she had climbed up the right hand side of the rock on her hands and knees. She believed that she and other members of the group had been assisted up onto the ledge by Miss O'Neill. While

she saw the plaintiff fall she did not know why the plaintiff had fallen but she was certain that it was from the ledge, moreover, she believed that the plaintiff ended up in a position to the right, beyond and out of sight of the area shown in the defendant's photograph number 13.

24. Both the plaintiff and Miss Kinsella accepted that in general Miss Doherty and Mr. Walshe were very safety conscious individuals; however, on this occasion their evidence was that they instructed or permitted the group to climb up to the ledge.

#### **Summary of the Defence evidence.**

25. Mr. Walshe and Ms. Doherty gave evidence on behalf of the defence. Mr Walshe described the plaintiff as being one of the better climbers in the group. He also gave evidence as to his own experience and qualifications and in relation to the safety procedures and precautions which are taken before any climbing activity is permitted to commence. By reference to the schema in the book " Dalkey Quarry" he identified the climb involved on the day as Climb Number 143. He also identified the place on the schema in the book, highlighted by a yellow arrow on photograph 9 of the photographs taken by Mr. Mooney, from where each climber would commence the climb of the rock face and where the safety rope would be attached to the climber's safety harness by Ms O'Neill.

26. Both Mr Walshe and Miss Doherty gave evidence that climbers would generally assemble in the area identified by a red arrow on photograph number 13 of the photographs taken by Mr. Mooney and that they would then come up one by one to the point identified by the yellow arrow on photographs 8 and 9 taken by Mr Mooney in order to commence the climb. Both of this witness identified that area as the place where the climb would commence and to where the safety climbing rope would be dropped by being allowed to fall from the top of the quarry. Miss Doherty said that if the group were standing on the ledge as identified by the plaintiff and Ms Kinsella that that would have necessitated the climbing safety rope having to be thrown from the top of the quarry, in a manner which she demonstrated to the court, in order to get it over to the ledge; something which she said did not happen.

27. Moreover, as far as they were concerned neither of them would have permitted or instructed any member of the group to climb onto the ledge on the rock face without a safety rope. That would require them to go against their own training and experience as well as everything that they themselves taught to others for whom they were responsible. It was Miss Doherty's evidence that the climbers were partly obscured from her view by a bush or small tree seen in Mr Mooney's photograph 11 but below which she knew they were standing and to which she simply dropped the rope from the top of the quarry; she had no difficulty getting the rope around the small tree. From her position there would have been no necessity to throw the rope at all, it would simply follow the fall to the group waiting below.

28. Miss Doherty accepted that whilst the plaintiff fell she did not actually witness the accident, most likely because her view of the plaintiff and other members of the group would have been partly obscured by the small tree just above them. Whilst both she and Mr. Walshe accepted that a member of the group (possibly the person identified by the plaintiff as "Niall") was climbing up the rock face at the time when the accident occurred it was their evidence that he had started from the place where the group were standing and identified by the yellow arrow in Mr Mooney's photographs 8 and 9.

29. As to the suggestion put to Mr. Walshe that the plaintiff's injuries were not consistent with somebody who had fallen at the place indicated by the yellow arrow in photograph 8 and 9, all he could say was that the plaintiff was never on the ledge and did not fall from the ledge. Whilst Miss Doherty accepted that her concentration would principally be directed at the person climbing up the rock face she would, nevertheless, have had a clear view of anybody clambering out onto the ledge or standing on the ledge; such did not happen and if it had she would have stopped that activity immediately.

#### **Decision.**

30. Although the court is familiar with the accident locus, the photographs taken by the engineers are of particular assistance to the court on the issue of liability. Miss. Doherty, an experienced climber, preferred to adopt the terminology of walking rather than clambering when describing the approach to the climb assembly point at the foot of the rock face, however, it is apparent from viewing the photographs taken by Mr. Mooney that as one approaches some ascent from the floor of the quarry is required to reach the climb assembly point. The initial access path running through the vegetation on the floor of the quarry up to the first natural step up seen in Mr Mooney's photograph 4 can be seen in his photograph 2.

31.. A useful commentary is given by Mr. Mooney in relation to each photograph and in this regard photograph number 4 is said to show the end of the first section of the trail adjacent to the climb where at that point there was an 80 cm high natural step, with a secure footing available at 50 cm up to the rise. In his view no difficulty arises in connection with negotiation of that natural step. Photograph number 5 is said to show a closer view of the natural step shown in photograph 4. He says that the trail continues uphill and to the right for three paces. A second 20 cm step is then shown in photograph number 6, with the path continuing up until the area shown in photograph number 7 where another natural step measuring 60 cm is encountered; again no difficulty arises in connection with negotiating these natural steps. It is clear from these photographs and the engineers description of the heights involved as one progresses that there is an ascent involved from the floor of the quarry to the climb assembly point.

33. The area indicated in photograph number 9 by the yellow arrow as being the place where climbers assemble and where, on the defendant's evidence, the plaintiff was standing, is comparatively flat. However, from the edge of that area and as is illustrated by photographs 7, 8, 10 and 13 taken by Mr. Mooney there appears to be what is a significant fall away from that area which is also confirmed in photographs 4 and 5 taken by Mr. Conlon.

34. A view looking down from the position shown by the yellow arrow in Mr. Mooney's photograph 9 is shown in photograph 10. The gorse bush seen in the centre left of photograph 10 is also clearly evident in his photographs 7 and 8. Miss Kinsella thought that the plaintiff fell beyond and out of sight of what is shown in photograph 13.

35. The significance of all of this, in my view, is that if the plaintiff fell, for whatever reason, from the edge of the position shown by the yellow arrow in Mr. Mooney's photographs 8 and 9 she would not have fallen on flat ground. On the contrary, and as is apparent from the photographs to which I have just made reference, she would have fallen from a height onto terrain sufficient to cause the soft tissue injuries which have already been summarised and which she undoubtedly sustained.

36. Whilst it is clear that a fall from the position where she says she was standing would also have resulted in such injuries, the topographical evidence does not sustain the case made on behalf of the plaintiff that the injuries which she sustained were inconsistent with falling from the place where the defendant says that she was standing. Whether the plaintiff slipped and fell backwards from either place, it is clear from the photographic evidence that she would have fallen from a height and not onto flat ground.

37. The plaintiff and Miss. Kinsella both accept that Mr. Walshe and Miss Doherty were generally very safety conscious. Given that

the main purpose of the day's activity was to abseil down the rock face, and about which there is no dispute between the parties, it seems improbable that the organisers would want the group to assemble on the ledge identified by Miss Kinsella and the plaintiff. Apart altogether from the danger of assembling and standing there, climbing up to that place without a safety rope would also be dangerous. Positioned on the top of the rock face Ms Doherty would have had an unobstructed view of any such activity. It seems highly improbable that in addition to taking no action to prevent the group from climbing up the rock face to the ledge without a safety rope that she would also have permitted those waiting their turn to stand there untethered.

38. Furthermore, on the plaintiffs case if the next member of the group was to have the benefit of a safety climbing rope Miss Doherty would have had to throw the rope over to the group on the ledge instead of just dropping it over the edge to Ms O'Neill who, on the defence case, was standing directly below to retrieve it. Although Miss O'Neill did not give evidence there was no dispute between the concerning her function at the bottom of the rock face which was supervisory, was to receive the climbing safety rope and ensure that this was attached to the harness of the person next in turn to climb.

34. Both the plaintiff and Miss Kinsella say that Miss O'Neill was standing with the group on the ledge. If that is correct then it follows that Ms. O'Neill participated in what would have been a dangerous manoeuvre namely climbing up to the ledge and carrying out her function there without a safety rope. Whilst I accept the evidence that Miss O'Neill was standing with the group I do not accept that she was positioned on the ledge when doing so.

35. Given the acknowledged safety consciousness of Mr. Walshe and Ms. Doherty in general it is ,in my view ,highly unlikely that they, together with Ms. O'Neill, would have permitted ,never mind instructed, any member of the group to engage in a task which was manifestly dangerous to all ; none were novices. On the contrary the plaintiff and Ms. Kinsella were experienced rock climbers and possessed experience from climbing in more dangerous situations.

36. With regard to the record in the first report of Mr. Thakore to the effect that the plaintiff had been instructed " *by the course management not to clip their harness onto the ropes.*" I am, satisfied that not only would such an instruction have been contrary to the personal interests of Mr. Walshe and Miss. Doherty but would also have been contrary to the undisputed evidence as to the safety consciousness of both

37. Both Mr. Walshe and Ms. Kinsella accepted that in general climbers would gather at the point shown by the red arrow in Mr. Mooney's photograph 13 and would then proceed one by one to the place shown by the yellow arrow in Mr. Mooney's photograph 9. If all of the group clambered up one after another and gathered around Miss. O'Neill that would be entirely consistent with the evidence of both the plaintiff and Miss. Kinsella of a group huddled together which included Ms. O'Neill, the only difference being that they were standing at the place identified by the defendant rather than out on the ledge as suggested by the plaintiff.

#### **Conclusion.**

38. The court has been tasked by the parties with determining the place on the rock face from which, on the balance of probabilities, the plaintiff fell. I have had the opportunity of observing the demeanour of all of the witnesses who have given evidence in this case. Whilst I am quite satisfied that each did their best to tell the truth as they recalled it and that the plaintiff and Miss Kinsella are convinced as to the correctness of their evidence, I have come to the conclusion and find that the plaintiff and Ms Kinsella are mistaken as to the place from which the plaintiff fell and that the evidence given in that regard by Mr Walshe and Miss Doherty, which I accept, is more reliable and more likely reflects the probability of the matter.

39. The court also accepts the evidence of Mr. Walshe and Miss. Doherty that they would neither have permitted nor instructed the plaintiff and the other members of the group to go and stand on the ledge and particularly so in the absence of utilising a safety climbing rope. The court finds that doing so would have been contrary both to their own interests and to their reputation for safety consciousness and safety adherence fairly acknowledged by the plaintiff and Miss. Kinsella.

40. Moreover, given that the main object and purpose of the climbing activity organised for the group was abseiling I think it much more likely that the positioning of the climbers and the safety climbing rope as indicated as suggested by the evidence of the defendant is correct. Accordingly, I am satisfied that, on the balance of probabilities, the plaintiff was neither standing nor fell from the ledge on the rock face.

41. Both parties having agreed that a finding to the contrary would be necessary to found a liability on the part of the defendant, the court having thus concluded as it has will make a finding that the defendant was not guilty of negligence or breach of duty and will make an order dismissing the plaintiff's claim.

42. It is the earnest hope of the court, recognising the undoubted disappointment that will be felt by the plaintiff as a result of the outcome of these proceedings that she will not permit that to interfere with her desire or to deflect her from her decision and determination to rehabilitate herself and for which she is to be commended.