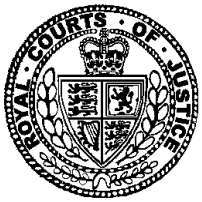


Neutral Citation Number: [2020] EWHC 1265 (QB)

Case No: E90WC036

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
WINCHESTER DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2020

Before :

Michael Bowes QC sitting as Deputy Judge of the High Court

- -

Between :

CHRISTOPHER ANDREW WELLS	**Claimant**
- and –	
(1) FULL MOON EVENTS LTD t/a DAVE THORPE HONDA OFF-ROAD CENTRE **(2) DAVE THORPE HONDA OFF-ROAD CENTRE LIMITED**	**Defendants**

- -

Benjamin Browne QC and Anastasia Karseras (instructed by **Novum Law**) for the **Claimant**
Graham Eklund QC and Stephen Innes (instructed by **Weightmans LPP**) for the **Defendants**

Hearing dates: 25th – 28th February 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be Tuesday 19th May 2020 on 10am . A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's clerk at QBJudgesListingOffice@justice.gov.uk

Michael Bowes QC:

Introduction

1. On 26th September 2015 the Claimant, Mr Christopher Wells, took part in an off-road motorcycle event at the Bull MX Centre in Llanwonno, South Wales which was operated by the second Defendant, Dave Thorpe Honda Off-Road Centre Limited ("the Centre").

2. The event was called an Enduro Day and involved riding for approximately 20 miles over varying terrain, including narrow tracks, open grassland, trails through forests and byways which were open to all traffic.

3. During the afternoon, while riding back to the Centre along a byway which was open to all traffic, the Claimant had a motorcycle accident in consequence of which he suffered catastrophic injuries which have caused him tetraplegia.

4. The Claimant rode through a section of the byway which contained muddy water and it is his case that the front wheel of his motorcycle struck an object concealed within the water which caused the handlebars to jerk violently out of his hands, causing him to lose control of his motorcycle before he had any time to react. The Claimant came into collision with a tree standing beside the track, in consequence of which he suffered his severe injuries.

The Pleadings

5. The Claimant's case is that the accident was caused by the negligence of the Second Defendant and that the Second Defendant acted in breach of an implied term of the agreement with the Claimant that it would organise the Enduro Day with due regard to the safety of the Claimant and other participants.

6. The Claimant accepts that the Enduro Day was operated by the Second Defendant only and the claim has proceeded against the Second Defendant alone ("the Defendant").

7. The Particulars of Negligence and of the breach of the implied term of the agreement are as follows:

> "(1) It and/or they failed, by its employees, servants or other agents, including Mr Owen, to carry out a detailed examination and risk assessment of the track before using the same.
>
> The nature of the case hereunder is that upon such an examination and risk assessment the First and/or Second Defendant would have ascertained that there were rocks concealed under the surface of the muddy water standing in the ruts. Riders would be unaware of the rocks which would be liable to cause substantial difficulties to riders such as the Claimant.

> Consequently, the First and/or Second Defendant should either have rejected the track as a route back to its premises or at the very least have warned riders to avoid the water-filled sections of the ruts since they were likely to contain concealed obstacles.
>
> (2) By its and/or their employee, servant, or agent, Mr Owen, led the Claimant's group down the track despite the dangers concealed below the muddy water in the ruts and across large areas of the track.
>
> (3) It and/or they failed to warn the Claimant and the rest of his group of such dangers.
>
> (4) It and/or they failed to instruct the Claimant and the rest of his group to avoid the water filled sections of the ruts.
>
> (5) It and/or they failed to provide an experienced instructor such as Stephen Sword.
>
> The nature of the case hereunder is that the use of this track without any warnings and instructions as to the dangers indicates that Mr Owen was not an experienced instructor.
>
> (6) It and /or they failed in the premises to arrange the Enduro Day with adequate regard to the safety of the Claimant."

8. The Defendant has admitted the implied term in the agreement pleaded by the Claimant, that it would organise the Enduro Day with due regard to the safety of the Claimant and other participants, but denies that the accident causing those injuries was due to any negligence or breach of contract on its part.

9. The Defendant's case is that:

> " By reason of the Signing on Form and the Declaration and Indemnity signed by the Claimant, the Claimant confirmed that he was aware:
>
> (1) Motorsport, including Motocross/Enduro/Trials was and is dangerous and hazardous and participation might result in injuries and/or fatalities.
>
> (2) That he was attending a physically demanding hazardous and dangerous Event."

10. The Defendant does not admit the circumstances of the accident alleged by the Claimant. Its case is that even if the Claimant is able to prove that he struck a concealed object in the water, there was no duty owed to the Claimant in relation to

the risk posed by the possible presence of concealed objects in the water, because it was an obvious risk to an adult that muddy water may conceal objects.

11. A split trial of all liability issues arising out of the Claimant's motorcycle accident took place before me in February 2020 and I reserved judgment. Both primary liability and contributory negligence are in issue.

12. I am grateful to both legal teams for their helpful oral and written submissions and for the provision of a joint agreed note of the evidence in the trial.

The evidence: general

13. On behalf of the Claimant I heard evidence from the Claimant himself, Mr Jamie Wells, the Claimant's brother who also took part in the Enduro Day and a Consulting Forensic Engineer, Mr Christopher Anderson.

14. On behalf of the Defendant I heard evidence from Mr David Thorpe, the Director of the Defendant, Mr Stephen Sword, the chief instructor on 26th September 2015, Mr Mark Owen, an instructor employed by the Defendant who led the Claimant's motorcycle group during the Enduro Day, Mr Kevin Wolstenholme, another motorcycle participant in the Claimant's group and Mr Brian Higgins, an expert in relation to off-road motorcycle events. In addition, I have read the statement of Julian Boland, who was also a participant in the Claimant's group.

15. I found all the witnesses called by the parties to be truthful and doing their best to assist the court.

16. In particular, I found Mr Christopher Wells, the Claimant, to be an impressive witness who gave his evidence very fairly and conducted himself with great dignity in such difficult circumstances.

The operation of the Bull MX Centre

17. The Defendant's operation was run out of the Bull MX Centre, Llanwonno and was authorised by the IOPD (International Organisation of Professional Drivers). It was set up around the summer of 2013 by Mr Thorpe and predominantly offered an off-road experience (the Enduro Day). By the time of the Claimant's accident, the Enduro Days had been running for more than two years.

18. On an Enduro Day, riders would come to the centre and use an off-road motorcycle plus all the necessary safety clothing and protection and ride the bike in a group away from the Centre on land in the vicinity of the centre. Such days were non-competitive.

19. The Centre had both a small learner loop and an intermediate circuit, which was used for assessing every participant before being allowed to leave the Centre off-road.

The Enduro Day

20. Participants could sign online to join an Enduro Day. The online facility allowed riders to assess their own ability in one of four categories, in order to give an indication of their ability. The categories were as follows: "I'm an off-road legend",

"I know my way around", "only ridden on the road" and "never ridden off-road before".

21. Mr Thorpe gave evidence that irrespective of a rider's indication of his ability online, all riders were assessed by the Chief Instructor before leaving the Centre for the Enduro Day and had to ride the learner loop. Once assessed, the riders would then be split into groups dependent upon their ability.

22. The route to be ridden on an Enduro Day was not the same every time or chosen in advance of the day. The route would be chosen following the assessment of the riders in the group. The leader of the group would decide the route after making an assessment of the group's ability.

23. The routes which were ridden were extensive. In one day, a group could ride between 20 and 30 miles, across various types of terrain, along trails, across open country, on and around tips, through the forests, on land and trails with rocks, encountering and riding on natural terrain. This included byways which were open to the public to use, whether by foot, bicycle, motorcycle or vehicle.

24. The conditions of the terrain would vary considerably from day to day and ride to ride. They varied according to the seasons, the amount of rain which fell and the amount of traffic which had been on them. The trails were often muddy or had puddles of water on them.

The Claimant's experience as a motorcyclist

25. The Claimant is now 50 years old. Prior to his accident he was a roadside technician with the AA. As a result of his accident and his injuries he is no longer able to work.

26. The Claimant gave evidence that he considered himself to be an experienced motorcyclist, both on and off-road. As teenagers, he and his brother Jamie had spent most of their free time on motorcycles, learning how to ride on various terrains. He had started to ride regularly off-road in his early teens.

27. He said that over the years he had fallen off road bikes, trials bikes and motocross bikes but that, generally speaking, he fell infrequently because he had, over the years, gained much experience to anticipate potential hazards and to either be able to avoid those or to adjust his riding style to negotiate them as safely as possible.

28. In his witness statement, the Claimant summarised his experience as follows:

> "As I had many years' experience of riding sports bike, trials bikes and motocross bikes, I considered myself to possess the skills to describe myself as experienced and competent – a good all-rounder."

29. The Claimant had booked online for the Enduro Day and in respect of the tick box section which asked him to indicate his level of experience, he and his brother had ticked the box with the description "off-road legend". He said this was very much tongue in cheek. I have already referred to Mr Thorpe's evidence that he relied on his own assessment of a rider's ability based on his performance on a bike before placing

him in a group and not on any online description. In my judgment, the description box ticked by the Claimant adds nothing to his own evidence that he was "experienced and competent – a good all-rounder".

The Enduro Day: declaration and assessment

30. On 26th September 2015, the Claimant was driven to the Centre and remembered specifically thinking that the conditions were going to be wet and boggy.

The Defendant's signing on form & declaration

31. On 26th September 2015, the Claimant signed the Defendant's signing on form. The form stated (in part):

> "MOTORSPORTS ARE HAZARDOUS AND PARTICIPATION MAY RESULT IN INJURIES AND/OR FATALITIES.
>
> 'By signing the declaration below you are providing full, factual and honest information. You have understood and accept the terms and conditions below. Please note that this document creates a legally binding agreement between you and THE DAVE THORPE HONDA OFF-ROAD CENTRE (the 'Organiser') in relation to your participation…
>
> 1. I acknowledge that I shall be attending a physically demanding hazardous and dangerous Event and that I am aware of the associated medical and physical risks involved in as a result of my attendance at the Event.
>
> 2. I voluntarily assume the risks resulting from my attendance at the Event…".

On 26th September 2015, the Claimant signed the Defendant's Declaration and Indemnity. The Declaration and Indemnity stated (in part):

> "I am aware that motorsport is dangerous and may involve serious injury or death."

The Itinerary

32. The itinerary for the day stated that:

> "…EXPERT riders are in for a treat. Using the wealth of skill and experience of our team, we will put the most experienced riders to the test. Options are virtually unlimited and while always safe, we will provide you with a tough but memorable and challenging adventure"

33. The Claimant placed emphasis on the words "while always safe" in relation to the extent of the Defendant's duty of care.

34. No issue of *volenti non fit injuria* was raised by the Defendant in relation to the terms and conditions of participation in the Enduro Day signed by the Claimant.

35. In cross-examination by Mr Eklund QC the Claimant acknowledged he knew that off-road riding carried the risk of serious injury and that if he made a mistake there was a risk inherent in what he was doing that he may fall off and injure himself.

Q: You accepted that risk off-road?

A: I accept there are risks that may cause you to fall.

36. Stephen Sword was the chief instructor on the day. He conducted a safety briefing with all the riders and gave an outline of the day. This included advice to follow the 'leader', keep a safe distance between themselves and the rider in front and raise any issues with their 'leader' when they re-grouped. Mr Sword and the two other instructors present (Mark Owen and Luke Hawkins) saw all the participants ride and then graded them into three groups based on their ability. As was usual, the most experienced group was taken out by Mark Owen. This group included the Claimant and his brother.

37. Although the Centre's promotional material had referred to the group receiving expert tuition from Stephen Sword, a British Moto-Cross champion, the Claimant said he was happy to go in a group led by Mark Owen.

The Enduro Day before the Claimant's accident

38. The Claimant said that the terrain was generally challenging because of the wet conditions and the nature of off-roading. The trails were undulating with a series of steep inclines. They were muddy and rough with water; some Welsh slate and areas with coal slag heaps. In the morning, the off-road trail was what he would ordinarily expect when off-roading. As the terrain was something that both he and his brother were used to, they were able to deal with this competently and safely.

39. Mr Owen said that the group could all ride well and were one of the most experienced groups he had taken out in his time working at the Centre. In respect of the Claimant, he said "…it was clear that handling one of the centre's motorcycles was well within his ability. He rode quite safely for over 20 miles when the 2 rides are taken together before he sustained his accident."

40. Mr Owen said they had ridden for approximately 17-18 miles in the morning and had returned to the Centre for lunch.

The Enduro Day: the accident

41. The Claimant said that after the group had finished their lunch they all re-grouped and Mr Owen offered the group the two options of riding the motocross circuit or going back out off-road. He asked for a show of hands for each and the Claimant had the casting vote for the group to head back out off-road.

42. Mr Owen said that in the afternoon, the route was somewhat shorter. It was more circular. It left the Centre and went northwards towards Tylorstown, returning

(southwards) towards Wattstown, before joining the byway on which the Claimant had his accident.

43. Mr Owen was leading the group which rode in single file. The Claimant was riding second (i.e. behind him) and was followed by his brother. The accident occurred almost at the end of the day (the accident report gave a time of 2.45pm). They had "effectively completed the Enduro experience" and were heading back to the Centre. They were going down a public byway in the forest to re-join the main road and were within minutes of getting back to the Centre. They had stopped at a cattle grid, with approximately 250m to go along the track to the road which would lead them back to the Centre. At the cattle grid he had said to the group that "…basically we had finished and we were heading back down the track to the centre". He said it had been a dry day although it had rained earlier in the week so there were puddles on various parts of the route which they had taken.

44. He said the accident sustained by the Claimant occurred on a byway open to traffic - i.e., on a track which was open to the public and over which anybody using a vehicle, motorcycle, cycle or horse could have access. Mr Owen said he was familiar with the track, because he used it regularly to get to the Centre and it was used regularly also as part of the rides he would lead, because it led back towards the Centre.

45. He said they headed off in line from the grid down the track back to the main road. The track was quite level and relatively wide. It could accommodate four-wheel-drive vehicles. There were puddles along the track, but nothing of any great significance. The condition of the track was quite normal following a wet period.

46. He said he almost certainly rode down the byway that morning on the way to the Centre. On a ride with customers he would be riding at "…no more than 10-15 mph".

47. He said he rode through the puddle near where the Claimant was found after his accident (the right-hand side of the puddle), although it was not necessary to go through the puddle as it was possible to go around it. The centre of the track was dry.

48. He waited for the group at the end of the track. One of the group then came around the bend and told him that someone had been involved in an accident and his help was needed. He immediately returned to the scene and went straight over to help the Claimant.

<u>The Claimant's account of the accident</u>

49. The Claimant said that on the route back to the Centre he was travelling directly behind Mr Owen at a safe distance and with him in his line of vision, with his brother Jamie travelling behind him. He said they travelled back at a lower speed, around 15 – 20mph.

50. As he came around a sweeping corner, he saw an area of standing water extending across the track. He could tell this filled two wide and deep ruts because there was evidence of a central non-submerged small section at both ends of the standing water.

51. He said he made a split-second decision as to whether to ride through the left-hand or the right-hand side. Mr Owens had travelled round a bend and was therefore out of

his sight at the point where he entered the standing water. This meant, therefore, that he did not see which route he took through that standing water. Mr Owen had not provided any prior instruction or warning about this section of standing water or whether there were any areas or sections to avoid.

52. He said that whilst there was evidence of a non-submerged middle section, he would not ordinarily ride the central or middle section because that was likely to be uneven and the rider would run the risk of then slipping into the water, which could be a potential fall hazard. It was for this reason that he did not ride around the edge of the standing water or ruts, which, in any event, were lined with large rocks and trees.

53. He believed he would have been stood up on his foot pegs when he proceeded through the standing water. At the time his fitness levels were good and he was usually a "peg rider".

54. He proceeded through the standing water and towards the latter end he specifically recalled the feeling that his front wheel had struck something hard and before he had time to react the handlebars were flicked forcibly out of his hands. The flick was aggressive enough for him not to be able to regain control of the bike and to cause him and the bike to start to fall to the right. The fact that the handlebars were flicked out of his hands led him to believe there was an object which was obscured or hidden in the standing water.

55. He said it all happened in a matter of seconds and recalled that it was a hard landing very close to a tree, with his head at the base of the tree. He did not think he was knocked unconscious but he could not be sure. It did not take him long to realise that he had suffered a serious injury because he could not feel anything.

56. In cross-examination the Claimant accepted that because he was not in a position to see Mr Owen pass through the water he had to make his own assessment as he approached the puddle. He accepted that he could see rocks on the path and there was the possibility that the rocks could extend into the water:

> "Q And I think you would accept if there are rocks which extend to the right under the water that would be a hazard?"
>
> A Potentially rocks that I can't see and would take into account whether that might become a hazard."

57. The Claimant accepted that with his experience he knew there may be something concealed under the muddy water and that he did not need a warning about that:

> "Q With all your experience and puddle after puddle would know might be something concealed?
>
> A There may be something concealed.
>
> Q Don't need warning?
>
> A I don't need a warning about that."

58. The Claimant was referred to the expert's report prepared on his behalf by Mr Anderson which included a suggestion (paragraph 4.19) that what could have happened is that "The rocks which projected into the rut, hidden by the muddy water, could turn the front wheel to one side (to the left), precipitating a fall of the motorcycle and rider towards the right."

59. The relevant questions and answers on this point were as follows:

> "Q And Mr Anderson suggests what might have happened is - para 4.19 at [D18] [read out] "The rocks which projected…"
>
> A Could have projected into the water
>
> Q "…could front wheel…" - agree?
>
> A Could cause wheel to be turned right or left
>
> Q "…precipitating a fall" - agree?
>
> A I agree with that
>
> Q Agree with Anderson that may have happened because riding and came into contact with [rocks] extending in under the water from the right-hand side and struck one of those rocks?
>
> A That's correct
>
> Q I think you agree the possibility of those rocks was obvious because abutted each other?
>
> A Possibility that rocks may extend into water
>
> Q And have to take account of?
>
> A I'd try to take account of."

60. It was suggested to the Claimant that he had made a mistake and ridden too close to the visible rocks on the right-hand side. The Claimant did not accept this suggestion and replied:

> "I don't think I made a mistake. Likelihood is that there was something more significant that I didn't anticipate that caused me to strike [it] and knock the handlebars out of my hands."

61. The Claimant accepted that he could have chosen an alternative route to avoid riding through the puddle, by riding over the rocks on the right-hand side of the puddle or riding over the tree roots to the left of the puddle.

62. The Claimant's brother, Jamie Wells, was riding behind him as they came towards the byway and his recollection was that they were travelling back at a lower speed, about

15-20 mph. His brother disappeared from his sight as they travelled round the sweeping bend to the right. He did not see his brother ride into the puddle and so did not see how the accident occurred. By the time he reached the puddle, his brother was already lying on the ground to the right of the puddle. He appreciated quickly that his brother was seriously hurt and remained with him while help was summoned. The Claimant was initially taken to a road ambulance and then to a hospital in Cardiff by air ambulance.

63. No-one witnessed the Claimant's accident and no-one photographed the puddle he had ridden through or examined it at the time for the presence of rocks or other concealed objects. This is not in any sense a criticism of anyone involved, all of those at the scene were rightly concerned with attending to the Claimant who was obviously very seriously injured.

64. On 19th December 2017, Jamie Wells attended the location of the accident with the Claimant's solicitor. His solicitor took a photograph which showed Jamie Wells standing adjacent to the muddy standing water that his brother rode through immediately prior to his accident (HLC2). He said that to the best of his recollection, the extent of the standing water at the time of this visit was representative of the extent of the standing water at the time of his brother's accident.

65. This photograph is important as the expert instructed on behalf of the Claimant, Mr Anderson, stated that it suggested the extent of the water was similar to that seen at his inspection on 23rd April 2018, when he had measured the depth of the water at various different points.

66. Further, the expert instructed on behalf of the Defendant, Mr Brian Higgins, stated that when he visited the site on 6th August 2019 in order carry out certain demonstrations which were video recorded, the conditions were similar to those shown in the photographs provided to him by the Claimant's solicitors.

67. It follows that the best evidence available of the depth of the water at the time of the Claimant's accident on 26th September 2015 is derived from the measurements taken by Mr Anderson on 23rd April 2018.

Expert evidence on behalf of the Claimant: Mr Christopher Anderson

68. Mr Anderson is a Chartered Engineer and was instructed on behalf of the Claimant to attend the site of the accident with a view to providing a detailed description of the accident location and to opine upon the likely mechanism of the accident. He was asked specifically to consider the significance of the nearby large stones and trees. Very fairly, he made it clear in his report that he is not an expert in the design, inspection and maintenance of motocross type courses, the good practice or the proper training and instruction relating to such sport.

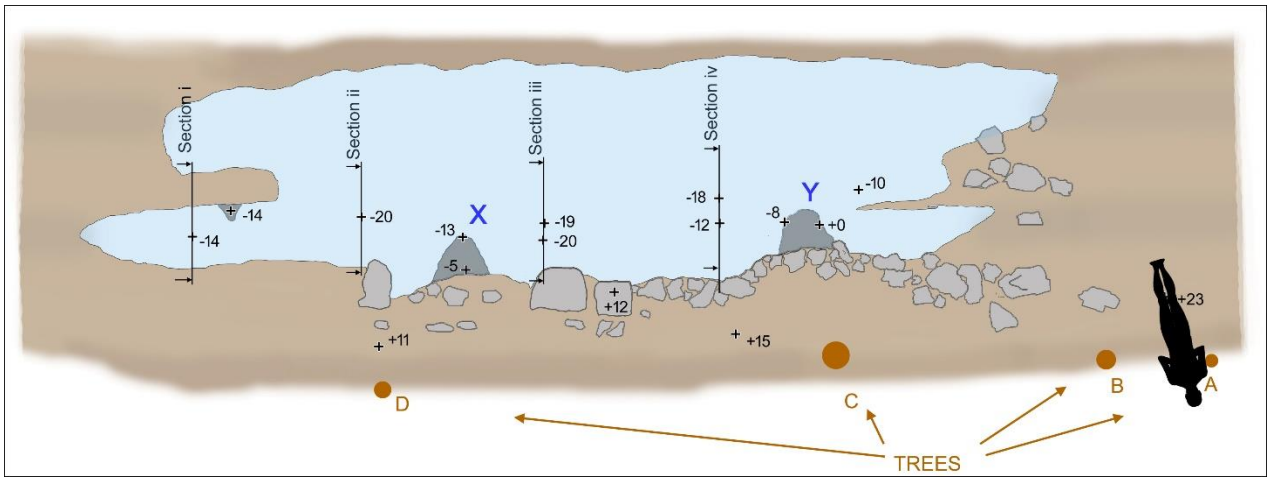
69. Mr Anderson inspected the site on 23rd April 2018. The details of the standing water and ruts were represented by a plan helpfully produced by him (Appendix D) and copied below.

70. Mr Anderson stated that as the accident happened about 2½ years prior to his inspection, it may be that the passage of traffic on the track had changed the shape of

the ruts and the resulting standing water. He had no knowledge of the state of the site at the time of the accident.

71. As I have set out above, this plan represents the best available evidence of the depth of the water on 26th September 2015. It does not, of course, purport to be a representation of what rocks (if any) were present in the water at the time of the accident. In particular, it cannot prove whether the rocks marked at X and Y on the plan were present at the time of the accident.

South **Claimant's direction of travel ➡** **North**



72. For ease of reference, a larger version of this plan shows that the darker coloured rocks indicate rocks below water and the lighter coloured rocks indicate rocks above ground. The figures with a minus sign indicate the water depth in centimetres and the figures with a plus sign indicate the ground levels above water in centimetres. The water depth at rock X was 13cm (5 inches) and at rock Y 8cm (3 inches). Moving left to right across the plan is moving from south to north.

73. Jamie Wells took a photograph of the scene of the accident on 26th September 2015 when his brother was being attended by paramedics (B13). The photograph shows two trees, but not any of the water. Mr Anderson concluded that on the basis the Claimant had not been moved significantly after his fall, he fell between trees A and B on the plan.

74. Mr Anderson said correctly that there is no basis for offering expert evidence regarding the speed at which the Claimant had been riding at the time of his accident. Mr Anderson observed that both Christopher and Jamie Wells estimated their speed was in the range 10-15 mph and Mr Owen estimated his speed as being 10-15 mph. However, evidence given by Mr Higgins (the expert instructed on behalf of the Defendant) clarified that none of the motorcycles had a speedometer and so any estimates of speed given by the witnesses are subject to that significant limitation.

75. The Claimant entered the water from the south and said he rode through the rut on the right-hand side. Coincidentally, this was the same route that Mr Owen had taken a

very short time earlier, although the Claimant did not see it as Mr Owen was out of his sight.

76. In relation to the location of the Claimant's fall, Mr Anderson stated as follows (report, 4.15-4.16):

> "The question whether Christopher collided with tree 'A' or tree 'B' cannot be determined. The speed at which he collided with the tree is not known and the extent of any interaction with the ground and the motorcycle during his movement from the incipient stages of the fall to his rest position, cannot be determined. This makes it impossible to perform a calculation to determine exactly where the fall process began.
>
> However, if he had been standing on the pegs of the motorcycle, as he says, such that his fall height had been around 1½ metres, he would likely have taken at least ½ second to fall to the ground. Thus, supposing that he had not fallen to the ground much before striking the tree, he likely would have begun to fall at least 2½ - 4½ metres from the tree. That would be more consistent with a fall beginning close to the rocks at 'Y'. It would be less consistent with a fall beginning near the rock at 'X'."

77. In relation to the mechanism of the Claimant's fall, Mr Anderson concluded that at the time of his inspection there were several features which could precipitate a fall if the rider was not able to accommodate them. He stated that these included:

> "4.19 The rocks which projected into the rut, hidden by the muddy water, could turn the front wheel to one side (to the left), precipitating a fall of the motorcycle and rider towards the right.
>
> 4.21 Untoward engagement with the rocks on the eastern shore might have unbalanced the machine and rider, leading to fall."

78. In cross-examination Mr Anderson was asked in particular about his opinions in paragraphs 4.19 and 4.21 of his report. He agreed he could not say that rocks X or Y were present at the time of the accident and agreed that if rock X was not there, the Claimant could have entered the water from the left, passed over the area at X on the plan and carried on towards the slight curve shown in the rockface leading to position Y.

79. He was then asked:

> "Q And it would have been possible for him if he had done that and then struck the rocks in that curve rock face that would give rise to the mechanism at 4.19?
>
> A That's a possibility yes"

80. In answer to a question from me, Mr Anderson said that in order for the Claimant to end up at tree A on the proposition put forward by Mr Eklund QC, he could have

struck the rocks in the curve anywhere between positions X and Y, but it was more likely to be nearer Y than X.

81. In answer to Mr Eklund QC, Mr Anderson said that the possible explanation for the accident set out in paragraph 4.21 of his report, "untoward engagement with the rocks on the eastern shore", was the same as the proposition being advanced on behalf of the Defendant, striking the rocks in the curve between X and Y.

The conduct of the Enduro Day and Mark Owen's competence as an instructor

David Thorpe

82. Mr Thorpe has ridden motorcycles in motocross and off-road circuits over many years. He won the Motocross World Championship 500cc in 1985, 1986 and 1989 and was the Veterans World Champion in 2007. In 2013 he was one of the ACU's (Auto-Cycle Union) assessors of instructors.

83. Mr Thorpe stated that he assessed Mr Owen's ability to ride a motorcycle and his potential as an instructor before offering him employment. He said Mr Owen was an experienced leader and instructor. At the time of the Claimant's accident, he had been working for the Defendant for approximately two years and had successfully led many groups of riders in and out of the trails and forests and across varying terrain near the Centre. He had probably led in the order of a thousand riders or so.

84. He said the route to be ridden on an experience day is not the same every time or chosen in advance of the day. The route would be chosen following the assessment of the riders in the group. The leader of the group (Mr Owen for the Claimant's group) would decide that after the assessment of the ability of the group. The instructor would lead the group out. He is the leader. He goes first.

85. He said the conditions of the terrain would vary considerably from day to day and ride to ride. They varied according to the seasons, the amount of rain which fell and the amount of traffic which had been on them. The trails were often muddy or had puddles of water on them. Negotiating through or around the mud or water was part and parcel of the Enduro experience.

86. In cross-examination by Mr Browne QC he agreed that the leader should be carrying out a constant dynamic risk assessment when riding, but he did not accept there was any need to instruct or warn the Claimant (or the riders generally) to avoid the water filled sections of the ruts.

87. In respect of the allegations of negligence in the Particulars of Claim, a summary of his evidence is as follows:

    1. Carrying out a detailed examination and risk assessment would be impracticable and unnecessary.

    2. The track where the accident occurred was a public byway in its natural condition which had been ridden down countless times by other groups in all sorts of conditions without problems. He had ridden down that

track himself on many occasions in all sorts of conditions without ever thinking there was danger. He would have been very content to lead the riders down the track.

3. There was no need to instruct or warn the Claimant (or the riders generally) to avoid the water filled sections of the ruts. It was up to the riders as to whether they rode in the ruts and as to the route they took through the water or around it. The ruts were frequently ridden through; it was safe to ride through them while retaining control, as had been done on countless occasions in their experience. If a rider was not comfortable about riding through muddy water which might conceal objects beneath the surface, an alternative route could just as easily be ridden. Part of the Enduro experience was that the riders would have to make judgements for themselves as to the particular route which he or she would take at any particular location of the trail or track.

Kevin Wolstenholme

88. Kevin Wolstenholme was riding in the same group as the Claimant, whom he did not know. He said he found Mr Owen to be a competent and reliable leader. As a participant in the event, he did not expect Mr Owen or any other member of the staff to investigate every puddle and rut in the woods to see if there were stones or rocks beneath the water. It was part of the Enduro experience that they would ride through puddles and over rough terrain.

89. As regards the Enduro Day, he saw no reason to criticise the organisers or instructors in any way. He said the opposite was true and that he was particularly impressed with how they ran the event. He did not think the route down the track where the Claimant had his accident was unsafe.

Julian Boland

90. Julian Boland (who did not give evidence at the trial) was also riding in the same group as the Claimant. He said that the section where the Claimant had his accident was far from challenging and was "way easier" than other sections the group had undertaken. He thought the instructor (Mr Owen) was good.

Mark Owen

91. Mr Owen said that in 2015 he lived close to the forests and tracks which were used on the day of the Claimant's accident. He had been riding motorcycles for approximately 30 years. He rode through those forests and tracks regularly and knew them very well.

92. I have dealt with Mr Owen's description of the Enduro Day up to and including the Claimant's accident in paragraphs 42-48 above.

93. In respect of the track where the Claimant had his accident, he said there was nothing out of the ordinary. He had ridden that track on countless occasions in all sorts of conditions and there was nothing to indicate any danger. Over the years, he had also led a substantial number of different groups down that track towards the end of the day heading to the Dave Thorpe centre. There had been no prior accident on the track of which he was aware and so nothing to suggest a need for any special care to be taken.

94. In cross-examination, Mr Owen said that he had been through the rut on the right-hand side seconds before the Claimant and there had been no rocks in it. It was not suggested to him that his estimated speed of 10-15 mph was excessive.

Expert evidence on behalf of the Defendant: Mr Brian Higgins

95. Mr Higgins was called as an expert witness on behalf of the Defendant. He started riding off-road motorcycle events at the age of fifteen and proceeded through to International Level, which included representing Great Britain twice in the International Six Days Enduro. He had been an ACU Motocross Track Inspector since 2002. From approximately 2008 to December 2016 he conducted inspections at various National Level circuits throughout the UK. He stated that within the discipline of Enduro, the ACU does not operate a Track Certification policy and therefore there are no "Inspectors" appointed for that particular discipline.

96. In his opinion, the puddle which the Claimant had to negotiate was an ordinary part of an Enduro course. It may have presented difficulties and possibly a hazard, but that is the nature of such courses.

97. In his opinion, a detailed examination and risk assessment of the track before each ride was impracticable and would completely take away any enjoyment for the riders on the day. An Enduro or Trail ride included coming across circumstances where the rider has to take account of the possible hazards and ride or act in response to those hazards.

98. In his opinion, there was no reason why Mr Owen should not have led the group down the track where the accident happened. This part of the track had been used on many occasions before without difficulty. There were similar puddles on other earlier parts of the track which Mr Owen led the Claimant and others through without incident.

99. In a video recorded exercise, he demonstrated four ways of getting to the other side of the puddle which could have been used by the Claimant, riding a motorcycle very similar to that ridden by the Claimant. In his opinion, riding through the ruts at a low speed was the best option for a rider less experienced than himself.

100. In his opinion, the Claimant did not require a warning that a puddle may conceal something beneath the water. A rider of the Claimant's apparent level of experience would not require any instruction as to how to negotiate the puddle safely.

101. On the basis that Mr Anderson's measurements of the puddle on 23rd April 2018 constituted the best evidence of the depth of the puddle on the day of the Claimant's accident, Mr Higgins was asked to consider what effect a rock with a height of 8cm (3

inches) would have had on the motorcycle. He said that the suspension travel on the motorcycle was 25cm to 30cm and that the suspension would soak up the impact. It would traverse over the rock and carry on again.

102. In summary, Mr Higgins concluded as follows:

> 1. The whole off-road day was organised to a high standard.
>
> 2. The accident location was not unusual as a typical part of an Enduro or Trail course. Mr Owen had sufficient experience of riding this course to lead the Claimant and others in the group of reasonably experienced riders on 26th September 2015.
>
> 3. The Claimant's accident was caused purely by rider error.

103. In cross-examination he did not accept that a rider would simply follow the leader without making his own assessment of how to negotiate the water. He said that as regards speed, each rider should make his own judgement as to what feels comfortable going through that water.

104. In relation to speed through the puddle, Mr Higgins stated in his report that his first demonstration was to ride through the right-hand puddle on a very similar motorcycle at a speed he estimated to be 10-15 mph (report, paragraph 59a).

105. Using Mr Higgins' video footage and working on a measurement of 11m for the length of the water in the right-hand rut, Mr Anderson was able to calculate the time taken to negotiate the water and so Mr Higgins' speed. In relation to the demonstration where Mr Higgins estimated his speed to be 10-15 mph, Mr Anderson calculated his speed to be just above 5 mph.

106. Using these calculations, it was suggested to Mr Higgins that if his 'safe speed' was in fact only 5mph, Mr Owen had been going too fast if he did in fact ride through the puddle at 10-15mph. Mr Higgins' response was that without a speedometer, an estimate of speed was no more than a perception and may be inaccurate. He did not accept that if Mr Owen had ridden through the puddle at 10-15mph it would have been too fast.

Has the Claimant proved that he struck a concealed object in the water?

107. The Claimant's pleaded case is that his motorcycle struck an object concealed within the water which caused the handlebars to jerk violently out of his hands, causing him to lose control of his motorcycle before he had any time to react.

108. In written submissions and in the course of the trial, it was made plain that the Claimant was alleging he had hit a large rock concealed by the water in the puddle.

109. It is common ground that the Claimant must prove on the balance of probabilities that he struck a rock in the rut, concealed by water and it is submitted by the Defendant that the Claimant has not discharged that burden.

110. It is submitted on behalf of the Claimant that the evidence taken as a whole does prove he hit a concealed object which was large enough to cause him to lose control and fall off. In particular, it is argued that although the bike's suspension would have

coped with small embedded rocks without difficulty, because the collision caused the Claimant to fall off, the object he struck is likely to have been large.

111. The Defendant's submissions on this issue in summary are as follows:

i) Mr Owen rode safely through the same rut just seconds before the Claimant attempted to go through.

ii) Mr Owen had ridden safely through the puddle on many occasions as had probably hundreds of other riders.

iii) Mr Owen had never seen any rocks other than those which were embedded and with which the motorcycle's suspension could easily cope.

iv) The best evidence (which came largely from Mr Anderson, the expert instructed by the Claimant) is that the water level at the location where the accident was probably precipitated was in the order of 8cm, possibly extending to 12cm. A motorcycle with suspension of around 30cm on its front forks would easily have coped with that size of obstruction.

v) If any rock was in the rut in the relevant position, either it would have been around that size or less than the depth of the water (in order to be concealed), in which case the bike would have easily coped with it, or if it was larger such that it would cause a problem to the motorcycle, it would have been visible above the surface and could have been noticed and avoided.

vi) Mr Anderson's evidence was that the rocks which projected into the rut, hidden by the muddy water, could turn the front wheel to one side (to the left), precipitating a fall of the motorcycle and rider towards the right (report, 4.19) or untoward engagement with the rocks on the eastern shore might have unbalanced the machine and rider, leading to fall. He agreed this could happen if there were no rocks present in the water at the time of the accident, but the Claimant took a line which resulted in him striking the rocks in the curve shown between positions X and Y on his plan.

vii) In cross-examination the Claimant agreed with Mr Anderson's report (4.19) that the accident may have happened because he had come into contact with rocks extending in under the water from the right-hand side.

viii) The probability is that the Claimant did not strike a large concealed object with which the motorcycle's suspension was unable to cope, but struck the rocks on the eastern side of the puddle, due to his own error.

112. I have considered carefully all the evidence in relation to the circumstances of the Claimant's accident and all the submissions made on behalf of the Claimant and the Defendant and I have concluded that the Claimant has failed to discharge the burden on him to prove that he struck an object concealed in the water which was large enough to precipitate his fall. Although there is no burden of proof on the Defendant, I find that it is more probable that the Claimant's fall was precipitated by him striking the rocks on the eastern side of the puddle, due to making an error in the manner in which he negotiated the puddle.

113. Although I have found that the Claimant has failed to prove the cause of the loss of control as pleaded, I will consider the issues which would arise if I were satisfied on the balance of probabilities that his loss of control was due to encountering a concealed object beneath the muddy water.

Discussion on the legal principles

114. It is common ground that the Defendant owed the Claimant a duty of care to organise the Enduro Day with due regard to the safety of the Claimant. The key issue between the parties is the extent of the duty of care.

115. On behalf of the Claimant it is submitted that the Defendant should have carried out a risk assessment in relation to the byway and/or that Mr Owen should have given guidance to the riders beforehand as to how they should negotiate the track ahead of them and/or warned them of the possible presence of concealed obstacles in the puddle.

116. On behalf of the Defendant it is submitted that none of these measures was necessary. It is submitted by the Defendant that there are three legal principles particularly relevant to the duty to take reasonable care for the Claimant's safety:

> 1. There is no duty to warn of or protect against risks that are inherent in the nature of the activity, to which the participant may be considered to have consented.
>
> 2. There is no duty to warn of or protect against risks that are obvious.
>
> 3. In determining whether there was a breach of duty, the court has to weigh the risk of injury against the social benefit of the activity.

117. In relation to all three principles, the Defendant relies in particular on Lord Hoffman's observations in the case of *Tomlinson v Congleton BC* [2004] 1 AC 46, (at paragraphs 45, 46 & 34):

> "[45] I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely chose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair."
>
> " [46] I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ, ante, p 62 para 45, that it is "only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability". A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger

> (*Herrington v British Railways Board* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves: *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360 ."

> "[34] …the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other."

118. *Tomlinson* was a case of someone who broke his neck swimming in a disused quarry in disregard of prominent notices warning that the water was dangerous, and that swimming was not permitted by the local authority. The Claimant seeks to distinguish *Tomlinson* on the basis that the defendant council had not participated in the activity being undertaken by the claimant, unlike the present case. Reliance is placed on the discussion by May LJ in *Poppleton v Trustees of Portsmouth Youth Activities Committee* [2009] PIQR, where it was acknowledged that a duty may exist where a defendant "…*has in some relevant way assumed responsibility for the claimant's safety*…". This is correct, but it is important to read this part of May LJ's judgment as a whole. After citing Lord Hoffman's observations in *Tomlinson* (paragraphs 45 & 46), May LJ continued (paragraph 17):

> "I add that a duty may also exist where the defendant has in some relevant way assumed responsibility for the claimant's safety, as in Fowles v Bedfordshire 'CC — see especially Millett L.J. at [20]–[24]. The same may be said of *Perrett v Collins and Watson v British Board of Control* [2001] P.I.Q.R. P16, in each of which the relevant defendant was exercising a degree of regulatory control. By contrast, in *Evans v Kosmar Village Holidays* [2007] EWCA Civ 1003, it was held, following the approach in Tomlinson, that the defendants' duty of care did not extend to a duty to guard the claimant against the risk of diving into the pool and injuring himself. That was an obvious risk of which he was well aware."

119. In *Evans v Kosmar Villa Holidays Limited* [2008] 1 WLR 297, the Court of Appeal held that the claimant, who was seriously injured when he dived into the shallow end of a swimming pool, did not need to be warned against the dangers of diving into a swimming pool when he did not know the depth of water he was diving into. The risk was obvious. It was held that Lord Hoffman's reasoning in *Tomlinson* also applied to persons to whom there is owed a duty of care under a contract (Richards L.J., paragraph 39):

> "But the core of the reasoning in Tomlinson's case [2004] 1 AC 46, as in earlier cases such as Ratcliff v McConnell [1999] 1

> WLR 670 , was that people should accept responsibility for the risks they choose to run and that there should be no duty to protect them against obvious risks, subject to Lord Hoffmann's qualification as to cases where there is no genuine and informed choice or there is some lack of capacity. That reasoning was held to apply in relation not only to trespassers but also to lawful visitors to whom there is owed the common duty of care under section 2(2) of the Occupiers' Liability Act 1957 —a duty which, by section 5 of the 1957 Act, can be owed to contractual as well as to noncontractual visitors. I do not see why the reasoning should not also apply to persons to whom there is owed a duty of care in similar terms under a contract of the kind that existed in this case."

120. In *Grimes v Hawkins* [2011] EWHC 2004 (QB); [2011] 8 WLUK 43 (relied on by the Defendant) Thirlwall J. applied *Tomlinson* in dismissing a claim where an 18 year old woman dived into a swimming pool and suffered catastrophic injuries when she struck the bottom of the pool. Thirlwall J held (paragraph 96):

> "The claimant was an adult. She did something which carried an obvious risk. She chose, voluntarily, to dive when, how and where she did, knowing the risks involved, as she acknowledged on the first day of the trial."

121. The Defendant also relied on the decision in *Clarke v Kerwin t/a Dirtbikeaction* [2018] 4 WLUK 497 (HHJ Peter Hughes QC sitting as a Deputy Judge of the High Court). The Claimant was riding a motorcycle in an off-road event which took place over two laps of a circuit of public roads and forestry tracks in a forest owned by the Forestry Commission. The event was not a race. Within minutes of the start the Claimant had fallen from his bike on a bend into a ditch, propelling him over the handlebars. He landed heavily and sustained serious injuries to his spine and wrist. He brought proceedings on the basis that the Defendant had failed to carry out a proper inspection and risk assessment of the course, contrary to the Management of Health and Safety at Work Regulations 1999 reg.3. The Claimant contended that the Defendant should have foreseen that riders from one group were likely to overtake slower riders and that their forward visibility would be affected by the dust thrown up by the bikes ahead. The claim was dismissed. It was held (following Lord Hoffmann's dicta in Tomlinson) that if the cause of the accident was inherent in the intrinsic risks that the Claimant had accepted in taking part in the event, then he had no claim.

122. It is submitted by the Claimant that the decisions in *Clarke and Grimes v Hawkins* can be distinguished on their facts as neither case related to what the Claimant argued was a "hidden hazard" in the water on the track.

123. It is also submitted by the Claimant that the concept of public utility is irrelevant, since this was a commercial activity engaged in by the Defendant for profit and further, that questions of public utility relate not to breach of a duty of care but to the existence of a duty.

Application of the legal principles to the facts

124. In applying the relevant legal principles to the facts as I find them, I adopt gratefully the reasoning applied by HHJ Peter Hughes QC in *Clarke* (paragraph 41):

> "In my view, this case turns, at the end of the day, on the evidence and on my findings as to how the accident happened and what caused it. If the cause was inherent in the intrinsic risks that the Claimant willingly accepted in taking part in the event then he can have no valid claim. If, though, it was caused in whole or part by some breach of the duty of care owed by the Defendant he is entitled to succeed subject to any finding of contributory negligence."

125. In reaching my conclusions, I have considered the totality of the evidence and the submissions made on behalf of the Claimant and the Defendant.

The Claimant's acceptance of risk

126. I am satisfied on the basis of the Claimant's own evidence, the signing on form and the Indemnity signed by the Claimant that he fully accepted there was an inherent risk in motorcycling off-road and that he was aware of those risks.

The obvious nature of a concealed hazard in the water

127. In cross-examination the Claimant accepted that with all his motorcycling experience he would know there might be something concealed beneath a muddy puddle and that he did not need a warning about that.

128. In my judgment it was an obvious risk to an adult (as accepted by the Claimant) that muddy water may conceal objects.

The Claimant's skill and experience

129. The Claimant's evidence was that he had many years' experience of riding sports bike, trials bikes and motocross bikes, he considered himself to possess the skills to describe himself as experienced and competent – a good all-rounder. His self-assessment of his skill and experience was supported by the evidence of Mr Owen and Mr Sword.

130. I am satisfied that the Claimant was sufficiently experienced and skilled to negotiate the track and accident site without any difficulty, on the factual basis I am now considering in the alternative, that the Claimant struck a concealed object beneath the muddy water.

131. It follows that I am satisfied on this alternative basis that the Claimant's accident was due to his own error in the manner in which he negotiated the puddle.

The Defendant's conduct of the Enduro Day

132. I am satisfied that the Centre was well run, with a high regard for the safety of the participants in the Enduro Day on 26th September 2015 and that Mr Owen was an entirely competent and highly experienced instructor.

133. In my judgment it was reasonable for Mr Owen to bring the group back to the Centre along the path where the Claimant had his accident. In reaching this conclusion, I have taken into account that the track was a public byway which had been used frequently by Mr Owen and very many Enduro Day riders without any history of accidents. It was not difficult to negotiate and was nothing out of the ordinary.

134. There is considerable uncertainty in relation to the speed at which Mr Owen rode through the water, given that none of the motorcycles was fitted with a speedometer. In any event, I find that Mr Owen's speed is largely irrelevant as the Claimant did not see Mr Owen go through the water or which route he took. I accept the Defendant's submission that the Claimant was not being led through the water and that it was for him to make his own decision as to how to negotiate the water, both in terms of route and speed. As part of the Enduro Day, it was for each participant to make decisions for himself as to how to negotiate the terrain ridden by Mr Owen.

135. The activity of off-roading involves wet and dry conditions. The Claimant accepted this was part of the activity and that he enjoyed succeeding in negotiating off-road obstacles.

136. I accept the Defendant's submission that undertaking detailed risk assessments, identifying all hazards, guarding against all hazards, instructing experienced riders on how to negotiate all sections of the course or expressly to avoid parts of the course which ordinarily would be regarded as part of the off-road experience would negate the experience of an Enduro Day and would not be a reasonable requirement to impose on the Defendant. In this regard, I have taken into account the social value of an Enduro Day as a reasonable sporting or recreational activity.

137. It was not necessary for the Defendant to carry out a risk assessment nor to give any warning in relation to the obvious risk that a water-filled muddy rut may contain a concealed object, as that risk was both inherent and obvious.

138. In my judgment, the wording in the Itinerary that "Options are virtually unlimited and while always safe, we will provide you with a tough but memorable and challenging adventure" does not add anything to the Defendant's admitted duty of care. I find that the Defendant did organise the Enduro Day with due regard to the safety of the Claimant.

139. As I have stated above, in my judgment the Claimant has failed to prove the cause of the loss of control as pleaded and his claim against the Defendant fails on that basis.

140. In the alternative I have considered the issues which would arise if I were satisfied on the balance of probabilities that his loss of control was due to encountering a concealed object beneath the muddy water.

Breach of duty

141. The Defendant had a duty of care to organise the Enduro Day with due regard to the safety of the Claimant. In my judgment that duty did not extend either to carrying out a risk assessment in relation to the path on which the Claimant had his accident or to warning him about an inherent and obvious risk of which he was already aware.

142. The extent of the Defendant's duty of care was to ensure that the Claimant was reasonably safe in relation to risks posed by the Defendant's activities which were not obvious. I accept the Defendant's submission that any assumption of responsibility by the Defendant, including any obligation on the leader to carry out a dynamic risk assessment, was limited to risks which were not obvious.

143. Even if the Defendant was under a duty to provide the warning and there was a failure to provide the warning, I accept the Defendant's submission that it would be of no assistance to the Claimant who was already aware of what he would have been warned of, and therefore there could be no breach.

Causation

144. In my judgment, even if there was a breach of duty, it did not cause the Claimant's accident. The Claimant's evidence was that as he approached the puddle, he was aware of the risks and made his own assessment on how to negotiate it.

Conclusion

145. In my judgment the principles set out by Lord Hoffman in the case of *Tomlinson* are applicable to the facts of this case. There was no duty on the Defendant to protect against the risk that the muddy water on the track may contain a concealed object as that risk was inherent and obvious to the Claimant in the Enduro Day activity which he had freely undertaken.

146. For these reasons this claim fails and there will be judgment for the Defendant.