Case No: HQ/15P01239

Neutral Citation Number: [2016] EWHC 2798 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 November 2016

Before:

MR JUSTICE JEREMY BAKER

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Between:

Mr Asif Ahmed	**Claimant**
- and -	
Mr Leon MacLean	**Defendant**

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Mr Frank Burton QC and Mr Bruce Silvester (instructed by **Philip Ross Solicitors**) for the **Claimant**
Mr Timothy Horlock QC (instructed by **DWF LLP (Leeds)**) for the **Defendant**

Hearing dates: 11-14 October 2016 with written submissions on 24 October 2016

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Judgment

Mr Justice Jeremy Baker:

1. On 25th March 2012 Asif Ahmed ("the claimant") took part in a beginners' mountain bike tuition course which he booked over the internet at a website known as, www.mountainbikeskillscourses.co.uk, which operated a franchise system for the delivery of mountain biking training courses in the UK. The franchise holder for the south-east of England was Leon MacLean, ("the defendant").

2. The website stated that the beginners' skills course was,

> "…ideal for the complete novice or those wishing to progress their riding. Our aims are to enable the participant, to ride more technically demanding terrain in a safer/controlled manner."

The website also stated that,

> "…the courses are instruction orientated where techniques are demonstrated and explained in detail; all participants will then attempt and re-attempt the techniques to optimise individual skill levels."

The skills which the website stated the participants would learn included,

> "….Riding position. Correct use of gears. Braking (efficiently and safely)…..Descending techniques. Single track riding techniques. Small drop offs. Small front wheel lifts."

The "Terms and conditions", included a clause purporting to exclude liability for injury or damage, and also stated that,

> "It is the responsibility of the participant to ride within their limits. If you do not wish to ride any part of the course, you always have the option to walk."

Although the booking form which the claimant completed has not been retained, the defendant believed that the claimant had ticked the box indicating that prior to attending the course, he had had no off-road riding experience.

3. The course which the claimant had booked to attend, took place on 25th March 2012, and cost £79.00. It was due to last for a period of 6 hours, commencing at 10am and finishing at 4pm, and the meeting point was at the car park outside the Royal Oak public house in Holmbury St. Mary, in Surrey. Three others had booked to attend the course. However, although two of those, Kerry Turnock and Aiden Nixon, arrived on time, as did the claimant and the defendant, the fourth member of the group didn't, and so the group's departure from the car park was delayed by about 15 minutes. At the end of this period, the defendant decided to commence the course, and the group set off and ascended to the top of Holmbury Hill. Once at the top of the hill, the defendant left the group in order to cycle back down to the car park to see if the fourth member had arrived. However, he hadn't and the defendant cycled back up to rejoin the group at the top of the hill.

4. After the defendant had returned, the group set off on a relatively level section, prior to travelling downhill towards a bisecting highway known as Radnor Road. It was from this point that a section of the route known as "Barry knows best" ("BKB"), commences. This is another downhill section, and within a few hundred metres of its commencement, a point is reached whereby a steep downward slope is encountered. It was whilst the claimant was cycling down this slope that he went over the top of the handlebars, and landed in a manner whereby he suffered extremely serious personal injuries, as a result of which he has been rendered paraplegic.

5. The claimant has commenced an action against the defendant, alleging that his personal injuries were caused by the negligence and/or breach of contract of the defendant, by having failed to take reasonable care of his safety on the course. The action has been defended. Originally, the defendant sought to rely upon the contractual exclusion clause, and the *Volenti* principle. Although it is submitted that the considerations which they involve are of relevance to the nature and extent of the parties' respective duties of care, ultimately neither has been relied upon as such. However, negligence and breach of contract is denied, and it is alleged that the accident was caused, either wholly or in part by the negligence of the claimant.

6. The parties having agreed that the claim should proceed by way of a split trial. I heard the witness evidence relating to liability between 11th – 13th October 2016, and conducted a view of the locus on 14th October 2016. Closing submissions took place on 24th October 2016.

Witness evidence

Asif Ahmed

7. The claimant, is 47 years of age (dob 26.9.69). Originally an engineer, he retrained as a lawyer, which was his profession in 2012 when he decided to extend his recreational interest in cycling, and take up a course in mountain biking. Prior to this he was a reasonably fit individual attending the gym about 3 or 4 times a week, and played cricket at the weekends. He had owned a mountain bike for a period of around 12 years, and, although he normally used this on the ordinary roads, he had ridden off-road, mostly on bridleways in areas such as the Cotswolds and the New Forest. On these occasions he had encountered pot holes and tree roots, but hadn't ridden any "drop-offs" or berms. However, although he had experience of applying his brakes in order to control his speed when descending hills, he hadn't ridden along any mountain bike specific trails, and had never had any previous mountain bike skills tuition.

8. On 25th March 2012 the claimant was the first of those attending the course to arrive at the pub car park. He stated that the defendant checked his bike over and made some minor adjustment to the handlebars, before getting him to sign a, "pre-ride safety check list", which the defendant had completed. The claimant said that he didn't read the document, and didn't notice that it not only included a clause purporting to exclude liability for injuries sustained on the course, but recommended to participants that if they had any doubts they should walk. Moreover, the claimant said that at no stage did he recall the defendant making this recommendation. He agreed that the defendant appeared to be an approachable type of person, quietly spoken and calm. Moreover, that although, as a novice, he

expected to follow the defendant's instructions, he would not have followed them if he thought that to do so would be dangerous. However, his anticipation was that the defendant would be teaching them in a manner which was compatible with his safety.

9. The claimant said that after ascending Holmbury Hill, they came to a halt, and it was there that the defendant taught the group how to ride over small obstacles, such as small sticks and stones, by placing one's weight over the rear of the bike, and using the bike's momentum, as opposed to its brakes, to ride over the obstacle. He said that this was what he understood by the term, "bunny hop". He agreed that the defendant had explained and demonstrated this skill to them, before getting each of them to repeat it on a couple of occasions.

10. However, although he recalls the defendant talking about their use of gears and brakes, he didn't recall the defendant either demonstrating any other skills to the group, nor getting the group to perform any other skills. He said that his recollection of what the defendant said about braking, was to emphasise the benefit of using the bike's momentum to ride over obstacles, rather than braking for them. He did not recall the defendant saying that the front and rear brakes should be applied equally, nor did he recall the defendant saying that the pedals should be kept level with each other when riding downhill. However, although he did recall the defendant saying that they should not look directly in front of them, his understanding was that they should look at a point about 2 metres ahead.

11. The claimant said that after setting off from the top of Holmbury Hill, they rode along a track prior to descending the fire road, and he agreed that this would involve braking from time to time. He also agreed that the defendant altered his position in the group, and may well have been observing their progress along the fire road.

12. It was at the bottom of the fire road, that they reached Radnor Road. The claimant agreed that he had been able to cope with riding the route that they had covered up until then, and that about an hour had passed since they had set off from the pub car park. It was after they had crossed Radnor Road that BKB commenced, and he agreed that this was a single track which descended through wooded terrain. After a short period, they reached the top of the slope where the accident took place, and the defendant brought them to a halt. The claimant said that the defendant pointed out that there were two routes which could be used to descend the slope, one to the right, and the main one straight ahead. He said that the defendant then demonstrated how to ride down the main route, using his brakes to slow him down, and his body balanced towards the rear of the bike. However, apart from this latter instruction, the claimant didn't recall the defendant saying anything else to them, save that they shouldn't brake at the top of the slope, as it would cause them to lose their balance and fall over.

13. The claimant said that following the demonstration, it was their turn to ride down the slope, during which the defendant stayed at the bottom of the slope. The claimant was the first to attempt to ride down the slope, and he commenced near to the top of the slope, and went slowly down the main slope, past a V shaped tree to his left. He said that towards the bottom of the slope he began to fall over, but was able to put one of his feet onto the ground in order to save himself from falling over. The claimant said that the defendant had told him that, although his ride down

the slope was OK, when he did it again, he should start from further back in order to give himself more speed when riding down the slope. However, the defendant didn't tell him that he had descended down the wrong part of the slope on this occasion.

14. Once the other two had completed their descents down the slope, the three of them walked back to the top of the slope, in order to ride down again, whilst the defendant remained at the bottom of the slope. As a result of the advice which he had been given by the defendant, the claimant said that he walked back up the track in order to be able to gain more speed prior to riding down the slope. He said that he walked back past the first turn before the slope, and was therefore unable to see the top of the slope from where he commenced his second ride down it. He said that he pedalled along the track towards the top of the slope, and neither recalled braking, nor turning left, prior to descending over the crest of the slope. He said that he didn't brake as he went down the slope and the next thing he was aware of was his front wheel jamming in what appeared to be a grassy mound, going over the top of the bike's handle bars and landing on the ground at the bottom of the slope. It was clear to everyone, including the claimant, that he had suffered a serious injury. The claimant realised that this was likely to be a spinal injury and ensured that he wasn't moved until the paramedics arrived. He was then placed on a stretcher, air lifted out, and taken to King's College Hospital. It was only whilst they were awaiting the arrival of the paramedics, that the claimant recalled the defendant telling him that he had ridden down the wrong part of the slope.

Leon MacLean

15. Originally, the defendant was a primary school teacher by profession. He has always been a keen cyclist, and became an experienced mountain biker. In 2010, he undertook the MIAS mountain bike instructor level 2 course, and, having successfully completed the course in September 2010, he ceased being a primary school teacher, and became a full-time mountain bike instructor. As a result of his previous primary school teaching, the defendant was experienced in completing risk assessments for school trips, and on 24th June 2011 he produced a written risk assessment for one of the areas in which he intended to provide his training, namely an area known as the Surrey Hills.

16. He said that at the beginning of each course, he would check the bikes which the participants had brought with them, and there is no reason to believe that he didn't do this on the course which the claimant had attended in March 2012. Moreover, he specifically highlighted the advice contained in the written check list, that if any of the participants had any doubts about riding their bikes on the course, that they should walk. He said that before they set off, he would explain to the course participants that they were going to cover about 15 miles during the day, and that he would demonstrate the various skills which they were to learn at various points along the way. He said that the claimant's accident occurred after the group had been riding for over an hour, and by then he had demonstrated and discussed the basic principles of gear choice, body positions for ascending and descending, keeping the pedals level, controlled braking and the need for the rider to keep his chin up in order to focus on the trail ahead of him. He denied having instructed the claimant to focus his sight about 2 metres in front of his bike, as this would be insufficiently far ahead in order to enable him to avoid obstacles along the trail.

However, he conceded that he hadn't taught the group to perform emergency braking, as this was something which he intended to teach them at a later stage of the course.

17. The defendant said that as he was ascending Holmbury Hill he would look back at the group to observe them, and he also instructed them how to negotiate channels crossing the track. At the top of the hill they all stopped, and he told them that they should normally be in the middle gear, and about the need to brake smoothly to avoid locking the wheels. He told them that they shouldn't be afraid of using the front brakes, and that they should adopt a position with their weight towards the back of their bikes. He told them that this would also assist them when lifting the handle bars in order to negotiate obstacles on the tracks, which was a precursor to the "bunny hop" technique. He told them that there would be protruding tree roots on the track down from the summit of the hill, and that they should approach them with caution, positioning their feet evenly on the pedals.

18. The defendant stated that after a reasonably flat section, the track then starts to descend, parts of it quite steeply; although in the main, it was reasonably wide due to it being a fire road, there were parts which were single track. He said that prior to commencing on this section, he would reiterate the instruction which he had provided about body positioning, braking and the field of vision. He would look back towards the group from time to time, and at the bottom at Radnor Road, he asked them how they were coping and nobody indicated that they were having any problems.

19. The defendant said that after Radnor Road, they crossed over, and commenced the descent, down BKB towards the slope where the accident occurred. When they arrived at the top of the slope they dismounted, and he indicated that there were two routes down. He said that the route on the right was slightly less steep, but that he had demonstrated how to descend down the main slope, at a slow and controlled speed, using his brakes, and with his weight towards the rear of his bike. He agreed that whilst they were at the top of the slope, other mountain bike riders arrived and rode down the main slope at greater speed. His instruction to the group had been that they shouldn't slam their brakes on and thereby risk locking the bike's wheels.

20. The defendant agreed that the right hand route was slightly easier to traverse than the main route. He agreed that he delegated the choice of which route would be used to descend the slope to the participants, and that they chose the main slope. He said that at the time he was content with this choice as, having seen them ride down the fire road, he believed that the group could cope with the main track; albeit he agreed that in hindsight, he doesn't know if their individual safety was uppermost in his mind at that point.

21. The defendant said that Kerry Turnock and Aiden Nixon rode down the main slope first of all, and they did so exactly as he had demonstrated to them. However, when the claimant approached the top of the slope, he suddenly turned sharply left and rode down part of the slope situated towards the left of the main route. He said that the route had debris on it and ends abruptly, so it is not a route one would choose to traverse. However, the claimant managed to ride down the slope, albeit his feet appeared to slip off the pedals at the bottom of the slope, and he fell over. He said that the claimant was able to get up and appeared to be uninjured. When he asked him if he was alright, the claimant replied that he was fine. He then told the

claimant that he had ridden the wrong way down the slope, and that he should start the approach to the top of the slope from a further distance from it, in order that he could go faster down the slope and thus achieve more stability.

22. The defendant said that he didn't know why the claimant hadn't ridden down the main route. He didn't know if the claimant was nervous about it, because unlike children in a classroom situation where you can see their eyes, the claimant was wearing shaded cycling glasses.

23. The defendant said that when the claimant descended the slope for the second time, he once again turned left just before the top of the slope and rode down the part of the slope to the left of the main track. He agreed that the claimant was riding faster on this occasion, but didn't consider that the claimant was riding at an excessive speed, such that he believed that the claimant must have used his brakes during the descent. Unfortunately, on this occasion, when the claimant reached the bottom of the slope, his bike came to a sudden halt, and he was thrown over the top of the handlebars and landed on the ground.

24. He accepted that some of the events of 25th March 2012 were not clearly embedded in his memory, and, that in so far as his tuition that day was concerned, he was reliant on what he normally did. He said that he could see no reason why it should have been any different that day; albeit he agreed that due to the non-arrival of one of the participants, the group had set off about 15 minutes late from the car park, and delayed by a further 15 minutes when he returned to the car park from the top of Holmbury Hill. He also agreed that he had made no contemporaneous record of what had occurred.

25. The defendant agreed that mountain biking is a potentially hazardous pursuit, so that the instructor's paramount focus was to ensure the minimisation of risk. He agreed that it was essential for instructors to know the level of individual expertise which each of the participants possessed prior to the commencement of the course, and for this to be monitored throughout the course. In so far as prior knowledge was concerned, he would have obtained this information from the booking form, and wouldn't ask any of them about their individual experience in the car park before setting off. The defendant said that in so far as monitoring their progress was concerned, he did this by observing those attending on his courses, and that if he observes that they can perform a particular skill, and they don't say that they are having any difficulty, then he assumes that they possess that skill. He agreed that it is not uncommon for individuals in a group to be embarrassed to admit that they are not keeping up with the others, and that it is therefore necessary to cater for the least able in the group. He said that so far as he was concerned, when he was at the top of the slope where the accident occurred, he believed that all three of the participants had shown equal riding ability prior to them attempting to ride down the slope for the first time. It was for this reason that he had treated the three participants equally that day, and had not provided any of them with any additional instruction or tuition.

The defendant's blogs

26. Since becoming a mountain bike instructor, the defendant has maintained a blog relating to his mountain biking activities, and he provided entries from this over a two-year period between 2010 – 2012. It includes still and moving images of some

of the courses which he had taught during this period, together with commentary on those images from the defendant, and observations from some of those who had taken part in the courses. It is correct to note that these latter observations were clearly supportive of the defendant's tuition.

27. The defendant agreed that on occasions he had introduced those who had attended for the beginners' course, to intermediate level skills. Initially he said that this was when he was teaching on a one-to-one basis, but later conceded that this sometimes took place when groups were involved; albeit he would only do so, after he had assured himself that those participating had reached a sufficient skill level to be able to cope safely with the more advanced skills. He admitted that on occasions when he was instructing on these courses, including beginners' ones, he did push participants to the edge of their comfort zone. However, he said that he did not believe that he did so to the extent that any danger arose; albeit he agreed that on occasions this had resulted in the participants falling off their bikes.

Kerry Turnock

28. Prior to attending the defendant's course in 2012, Kerry Turnock was a proficient road cyclist, but had only taken up mountain biking in 2011. She had been to a couple of manmade mountain bike centres, including one in Snowdonia, which had scared her, as the terrain was much more difficult than that where the accident took place, so she decided that she would attend a beginner's course in order to learn how to cycle in safety.

29. When she got to the pub car park on 25th March 2012, although she recalled that the defendant checked her bike, and provided her with a form to sign, she was unable to recall whether any further explanation was provided to her by the defendant. The first mention by her of the provision of any training was after the group had reached the top of Holmbury Hill. It was there that the defendant demonstrated some "basic stuff", and watched them perform these skills, providing feedback to them. After this Kerry Turnock described how they set off down towards Radnor Road, with the defendant riding at the rear in order to observe them. She described the track at this point as being mainly single track, and "wasn't steep or anything, and there were no drop-offs." She believed that everyone was coping well up to that point.

30. Kerry Turnock said that, after they had crossed over Radnor Road, and reached the top of the slope where the accident occurred, they dismounted from their bikes and walked to the top of the slope in order to view it. She said that there were two routes down the slope, the main one which had a drop-off at its crest, and one to the right which looked easier to ride down because it had a shallower gradient and didn't have a drop-off; both of which were used by other bikers whilst they were standing near the top of the slope. She said that the defendant then demonstrated how to ride down the main slope, telling them to keep their weight to the back of the bike, and to keep their heads up.

31. Kerry Turnock said that following this demonstration, Aiden Nixon was the first of the group to go down the main slope, followed by herself. She could not recall if the choice of which route to ride down the slope was theirs, or whether the defendant had chosen it. However, she did recall that the defendant had stayed at the bottom of the slope as they rode down it. She said that because of the drop-off, going over the crest of the main slope was a "confidence moment", but she was able to ride

down to the bottom without mishap. However, when the claimant reached the top of the main slope, "he chickened out", and she saw him wobble and then fall to the side. She said that he didn't fall over completely because he put his foot out, and somehow went down the main route, and reached the bottom of the slope.

32. After this first traverse of the slope, the defendant had asked them if they wanted to ride down the slope again, and they all agreed to do so. On this occasion it was the claimant who attempted to ride down the slope first. She said that she couldn't recall whether he rode faster on this occasion. However, when he got to the crest of the main slope he did the same thing as before, namely he slowed down, lost his nerve, and wobbled. On this occasion, instead of going down the main route, he rode down the slope to the left of the main route, and she saw his back wheel flip up and he was thrown off his bike.

Aiden Nixon

33. Aiden Nixon has been riding mountain bikes for a number of years, and in 2012 wanted to become a mountain bike coach. As a result, although he intended to enrol on an intermediate mountain bike skills course, it was suggested that he should first attend a beginners' course, and so he enrolled on the defendant's course which was to take place on 25th March 2012.

34. When he arrived at the car park, he recalled the defendant carrying out a safety checklist on his bike, which he signed, but doesn't recall if the defendant provided any further explanation about the course. However, he did recall that as the course progressed the group would come to a halt at certain points, and the defendant would demonstrate a particular skill. He recalled that this included instruction upon when to brake and when not to do so.

35. Aiden Nixon recalled that during the course of the ride, leading up to the slope where the accident occurred, they traversed a couple of slopes which were similar to, but not as steep as the one where the accident occurred. When they reached the top of this latter slope, they dismounted and saw that it had two different routes, a main one, and one to the right of it which provided an easier descent. He recalled that the defendant did a "static demonstration" of one's body position on the bike, explaining where the rider should look, the entry speed for the slope, and recommended keeping one's fingers on the brakes. He recalled the defendant saying that if any of the group felt unconfident, then they could ride down the right hand route.

36. Aiden Nixon was unable to recall who rode down the slope first, but recalled that when the claimant rode down the slope he looked unsteady, and he believed that he went down the right hand slope, which he described as the "chicken line." He recalled that the fall in which the claimant was badly injured took place on his third ride down the slope, albeit he cannot recall which part of the slope he rode down on this occasion, and recalled that on the previous occasion the claimant had ridden down the main route and again looked unsteady and lacking in confidence.

37. Overall Aiden Nixon considered the defendant to have been a good instructor. He said that although he considered that the slope where the accident occurred was not particularly challenging, he considered that it may have been a bit intimidating if you hadn't ridden down anything like it before. He said that although he believed that, prior to reaching the top of the slope where the accident occurred, the claimant

had been coping alright, he hadn't been concentrating on the other two riders' abilities. Moreover, he did recall that at some point the claimant had said that he had never ridden on this type of terrain before. He also agreed, as had Kerry Turnock, that he had attended a subsequent beginners' course with the defendant, and that it was possible that part of his memory of what had been taught on the course had emanated from this latter course, rather than the one during which the claimant had been injured.

David Lees

38. David Lees is a trustee of the "Friends of Hurtwood", a charity established by the owners of the land upon which the accident took place, for the purpose of maintaining the public's access to the area. In furtherance of this, volunteers maintain the various mountain bike trails which have been established in the area, including BKB. He said that the only maintenance work which the volunteers had completed on the slope in question was at the bottom of it, in order to enhance its drainage. He said that over time the passage of the mountain bikes causes soil erosion, and so some of the trails become more defined, such that they may form gullies. He looked at the films taken of the slope at various times, and noted that the trail had altered over time. However, he considered that the main route was always that situated towards the right of the V shaped tree.

Ian Major

39. Ian Major is a forensic engineer, and carried out a survey of the slope where the accident occurred on 1st October 2015. As a result, he was able to extract sections through the slope in order to measure its profile and gradient. This was displayed on a DVD presentation, and he explained that the mean gradient of the various ways down the slope were 17 degrees for the main route, 19 degrees for the right one and 22 degrees for the left. As these are mean gradients, each of the ways encompassed variations. However, the middle one was the only one which had a drop off at its commencement, which was considered to be about 45 degrees. It also had a section further down where the slope was about 40 degrees.

Tom MacDonald

40. Tom MacDonald is a mountain bike trail designer. He visited the Holmbury Hill area on 12th September 2013 and filmed the area around the slope where the accident took place, which included experienced mountain bikers descending the various ways down the slope. He also carried out research on YouTube, and was able to download films of other mountain bike riders descending the slope at different dates, both before and after the date of the accident. He noted that over time, due to soil erosion caused by attrition from the wheels of mountain bikes, the topography of the slope had altered. In particular, whereas in 2011 the left way down the slope appeared to be a more obviously available route, by 2013 its entrance had become covered with loose stones and therefore less obvious.

Daniel Browne

41. Daniel Browne had been asked to research the internet for any observations which may have been posted concerning the mountain bike trails in the vicinity of Holmbury Hill, and in particular BKB. He had been able to locate a forum which

appeared to be discussing the slope where the accident occurred, which included comments, by fellow mountain bike riders, that it may be unsuitable for novice riders.

Expert evidence

42. It was apparent that the experts' reports had been written in response to the pleadings in the case, rather than what might be considered to be the more normal approach of the pleadings reflecting the reports. Although by no means critical, it was not as straightforward to discern the expert's overall views, as it might otherwise have been, prior to them having given evidence at trial. Fortunately, the views which they expressed at trial provided more clarity.

William MacKay

43. William MacKay provided a report dated 20th April 2016, and contributed to the joint report with Mr Martin dated 30th June 2016. He has experience in a number of different types of hazardous sporting activities, including mountain biking, for which he holds a level 3 MIAS mountain bike instructor's qualification. He has been a member of their steering group, and has been involved in mountain bike training for over 30 years.

44. Mr MacKay said that just as ski trails are graded in terms of the skills required to complete them, so too are mountain bike trails, and that in 2012 BKB was apparently designated as a green trail. He said that, although there is no one official designator of such grading, Trailforks, which is a recognised body, currently rates BKB as being a blue trail. He conceded that although trails, through soil erosion and the like, can alter over time, such that the skills required to complete them may alter accordingly, when he rode BKB in 2016, he too considered the trail to be a blue one, such that it was not the ideal type of trail upon which to take novice mountain bikers, which he deemed to be those who, whilst they may have ridden mountain bikes on the roads, had not been taught any of the specialist skills required to traverse difficult terrain in safety. However, he agreed that provided sufficient prior instruction and training had been given to a novice mountain biker, BKB could be traversed in safety.

45. Mr MacKay said that in relation to the question as to the sufficiency of instruction and training was concerned, when leading a beginners' course, it was important to ensure that the participants are taught the skills which are required to safely traverse the particular piece of terrain, before it is ridden. In these circumstances, it would be inappropriate to commence teaching these skills on the terrain for which the skill is required, rather the skill should be taught on terrain which does not present the potential danger which the skill is designed to protect against.

46. Mr MacKay was of the opinion that the defendant had not provided the claimant with sufficient instruction and training prior to reaching the top of the slope where the accident occurred, so as to enable him to ride down the slope in safety.

47. In this regard, he considered that it was necessary, prior to the commencement of the course, for the defendant to investigate the level of skill which the claimant actually possessed, by setting tasks and assessing his ability to complete them. It was only in this way that the claimant's, and, for that matter, the other participants' abilities could be properly ascertained. Once the defendant had this base level of

knowledge, the defendant would then know the skills which were required to be taught, and the likely level of instruction which would be required for them to be mastered, as it was necessary for the tuition to be tailored to suit the least able.

48. Mr MacKay also considered that if, as the claimant said, he possessed no mountain bike specific skills prior to the commencement of the course, then the hour or so which preceded the claimant's descent down the slope where the accident occurred, would have been insufficient to have enabled him to have sufficiently mastered the skills required to negotiate the slope in safety.

49. In his opinion, it was necessary for the defendant to have selected another slope, not as challenging as the slope in question, and one which was more isolated, away from the business of the BKB, where the claimant and the others could have repeatedly practiced the required skills until they were sufficiently mastered, so as to enable the claimant to negotiate the slope in question in safety. He considered that this would have been likely to have taken a considerably longer period of time, than the hour or so which the defendant had devoted to instructing the group up to the time when the accident occurred. He said that if these various steps had been taken, and the claimant had mastered the necessary skills, then it may be that by the end of the beginners' course the claimant could have safely negotiated the slope where the accident occurred. However, these steps had not been taken, and the progress of the course proceeded too rapidly to enable the claimant to ride down the slope in safety.

50. Mr MacKay considered that the only skill which the defendant may have taught appropriately, was that of wheel lifting, which he had undertaken with the group at the top of Holmbury Hill, as not only did there appear to have been adequate instruction in a safe environment, but the defendant had both demonstrated the technique, and then observed the participants performing it on more than one occasion. He said that the remainder of the training which the defendant had provided, for example in relation to braking techniques, had been more akin to coaching an individual who already possessed the skill, in that there did not appear to have been adequate instruction or demonstration, only observation whilst negotiating the trail itself. He said that other skills which were important for a rider to possess in order to be able to safely negotiate the slope in question, included track standing, whereby a rider is able to keep his balance whilst standing on the pedals, and it did not appear that the group had been taught this skill. Nor had the defendant taught the techniques involved in emergency braking. Moreover, simply requiring riders to keep their chins up, is insufficient instruction upon the need to keep one's vision focused ahead, whilst ensuring that peripheral vision is still maintained. He said that focusing on the ground a couple of metres ahead of the bike was too close to permit potential obstacles ahead to be avoided.

51. Mr MacKay said that so far as he was concerned, having seen the film footage of the slope in question, both from 2012 and more recently, he considered that although some riders would brake prior to descending down the left hand side of the main route, others would not have needed to do so. He said that if the claimant had ridden down the main route on the first occasion, then it may not have been reasonably foreseeable that the claimant would have descended down the left of this route on the second occasion. However, Mr MacKay considered that regardless of which route the claimant had taken on the first occasion, there were observable signs arising from his first descent, that the claimant had not mastered the required

skills, such that the defendant should not have allowed him to try and descend the slope on the second occasion without further instruction and training. In this regard the other participants considered that the claimant had variously appeared to "chicken out", wobble, looked unsteady, and fallen. Moreover, he considered that although increased speed can assist stability for those who already possess the required skills, this is not the situation for those who haven't yet mastered them, as it is likely to enhance rather than reduce the risks arising from the rider's lack of skill.

Richard Martin

52. Richard Martin provided a report dated 21st April 2016, and contributed to the joint report with Mr MacKay dated 30th June 2016. He has worked in the outdoor industry for over 23 years, and is now a technical leader in the field of mountain bike coaching. He provides training to the advanced MTB level 3 programme, and is a British Cycling Centre Inspector.

53. He considered that in general terms, the terrain chosen by the defendant for the provision of a beginners' course was suitable, as the trails were "…user friendly and offered very little by way of technical features." However, he acknowledged that due to attrition and erosion, the trails will have altered since the date of the accident, and contemporaneous film footage may provide the best evidence of its features at that time.

54. Mr Martin considered that because of the claimant's previous experience of riding his mountain bike on bridleways, he ought not to be considered as a completely novice mountain biker. He accepted that braking techniques were an essential feature of any beginners' course, and, that on the basis of the defendant's evidence, he considered that the defendant had provided adequate instruction and training in regard to this skill. In this regard, he considered that the route which was taken from the car park to the slope where the accident occurred, encompassed terrain which would have allowed the defendant to assess the claimant's braking proficiency. Moreover, he did not consider that it was necessary for the defendant to have taught the claimant how to brake in emergencies prior to riding down the slope where the accident occurred.

55. Mr Martin was critical of the general approach to mountain bike tuition which elevated the need to master a particular skill before an element of faster speed was introduced. He considered that accidents may occur at a slower speed, in circumstances where riding at a faster speed would have been likely to have avoided them, as lower speeds can cause hesitation and loss of balance, which faster speeds may avoid. Therefore, a UK coach may often refer to speed being the rider's friend. In this context he considered that whilst speeds less than walking pace may contribute to accidents, speeds at walking pace would be more likely to avoid them. He accepted that with experienced riders, the need to master a new skill may precede the introduction of pace, and that this was likely to be why the NICA guidance recommended, "Skill first, speed later."

56. Mr Martin was of the opinion that the defendant had taken sufficient steps to ensure that the claimant was appropriately prepared to ride the slope in question in safety. It was apparent that Mr Martin had visited the course venue, and had ridden down the trail from the car park to the slope where the accident occurred. Although he

had not made mention of this in his original report, in his evidence at trial he said that one section of the fire road above Radnor Road comprised a gradient that was steeper and therefore likely to be faster than the slope where the accident took place. He said that as a result, this would have provided the defendant with the opportunity for assessing the claimant's ability to cope with riding down the slope where the accident occurred. Although, he accepted that, unlike the other parts of the trail, the crest of the slope in question presented something of a leap of faith, due to the fact that, because of the acute gradient at that point, the trail immediately below could not be viewed, he considered that in reality the slope was easier to negotiate than it looked. He accepted that if the slope had been more challenging, then the defendant should have walked down the slope with the group prior to riding down it, but the slope in question didn't necessitate it.

57. Mr Martin also considered that, if the claimant had ridden down the main route first, then it would not have been reasonably foreseeable that the claimant would have ridden down the slope to the left of the main route on the second occasion. He said that, in any event, it had been appropriate for the defendant to allow the claimant to ride down the slope for a second time. As Mr Martin observed, "nothing grows in your own comfort zone." He also considered that it was appropriate for the defendant to have instructed the claimant to start the ride towards the summit of the slope from further back, in order to be able to ride at a faster speed down the slope, as "speed is your friend." Mr Martin said that he had had the impression that on the first descent the claimant had ridden at less than walking speed, whereas he would have ideally wanted him to descend at walking pace.

Professional guidance

58. The parties provided written guidance from two different professional associations, namely, the National Interscholastic Cycling Association ("NICA"), and the Mountain Bike Instructors Award Scheme ("MIAS"). The former being provided by those representing the claimant, whilst the latter by those representing the defendant. There was some dispute as to which of these two guides was more apposite to the course which was provided by the defendant. In this regard, Mr Martin asserted that the NICA was more suited to the interests of more technically proficient mountain bikers. However, to my mind there is insufficient evidence of this, and it seems to me that both provide useful insight and guidance which is of assistance to those teaching mountain bikers of all abilities.

59. The NICA guidance included within it, a recommendation that those participating on mountain bike courses should not be pushed too hard, as this can lead to an inability by them to ride properly, which may result in injury. In particular, the section on promoting safety through skills instruction, included within it the following recommendations.

> "Don't ride overly steep or technical trails……
>
> Make sure riders have the skills and instincts to handle their bikes in the terrain you will encounter. This includes knowing what to do if they lose control. If the skills are not up to the terrain requirements, either change terrain or have riders walk the section……

> If a rider can't visualise a move, s/he should not try it. Do not cultivate a culture of 'Go for it: I'll be fine.'……
>
> Start slow. Learn great skills. The speed will come naturally……..."

60. The MIAS guidance pointed out that in relation to descents,

> "….Some rough terrain may actually be easier and safer to do at a higher speed, as it will provide the much-needed momentum. Whereas otherwise, at slow speed, your bike may come to an unexpected halt as it gets stuck on the terrain."

In relation to maximum deceleration it is pointed out that the most effective measure is to apply the front brake, albeit with the arms braced. It points out that this is a skill which requires to be learnt, otherwise,

> "This can cause the classic 'over-the-bars' crash….."

Moreover, in relation to descents the "Technical Tips" provides,

> "Get your bike into a low gear, 3rd, 4th or 5th gear depending on your speed. Ride at a very slow speed. Approach the descent in a straight line. As you go down the descent, position yourself to the rear of the cycle in order to maintain a gravity line. Keep your pedals on the horizontal. Feather your brakes to suit descent. Keep looking ahead. If the rear wheel of the cycle tries to overtake the front wheel, disengage brakes, straighten up and re-apply. A slope of no more than 30 degrees should be tackled."

Film and still images

61. The various film images of BKB which have been provided by the parties, ranged between those taken in 2008, through to 2015. At the earlier date, the impression which is gained is that as the rider approaches the top of the slope in question, he is presented with a choice of two ways down the slope, with, if anything, the way to the left hand side of the V shaped tree, being more obvious than the way straight ahead. However, by the time that the 2015 film was taken, there appears to be one main route, namely that going straight ahead, whilst the area to the left hand side of the V shaped tree is covered in small loose rocks, and forest debris. One can also discern a route to the right of the middle route.

62. The film which is perhaps the most helpful, so far as the assessment of the terrain at the time of the claimant's accident, is that taken on 5th March 2012. At this time, although the middle route appears to be significantly more prominent than the earlier film, and the way to the left of the V shaped tree has some loose stones on its surface, the left hand way still presents as an optional way down the slope.

63. These contrasting impressions are also to be found on the still images taken on 2nd May 2011 and 21st April 2013.

View

64. At the instigation of those representing the defendant, a view of the locus was carried out on 14th October 2016. Unfortunately, as a result of mobility difficulties the claimant was unable to attend. In these circumstances, it was considered inappropriate for the defendant to attend. However, both experts attended, accompanied by the parties' legal representatives. Having parked just off Radnor Road, we were able first of all to walk down BKB to the slope where the accident took place. After returning to Radnor Road, we were able to walk a significant distance up, what has been described as the fire road, in the direction of Holmbury Hill.

65. The impression gained of BKB was that it comprised a single-track trail, which curved and descended, relatively gently, until reaching the crest of the slope in question. At this point the trail divided, with what appeared to be two more obvious ways down the slope. The most obvious one, being gullied, was straight ahead, whilst the other was to the right. It was apparent that there was a way down to the left of the main route and the V shaped tree, but this was less obvious and didn't appear, at the date of the visit, to have had anything like the same amount of wear as either of the other two ways down.

66. In so far as the other characteristics of these ways were concerned, the main route had a relatively sharp drop at its crest, obscuring the area immediately below, whereas the way to the right lacked this feature, so allowing full view of the slope down to the bottom. Moreover, it seems to me that, because of the effects of erosion which has caused the main route to become noticeably more gullied, the drop-off effect at the top of the main route may have been more prominent at earlier stages of the trail's life than its present condition.

67. In so far as the left way was concerned, the lower part of the slope contained more forest debris than either of the other two ways. Furthermore, if one stood just before the first bend in the trail before the top of the slope, the view of the top of the slope was obscured.

68. In so far as the fire road above Radnor Road is concerned, initially this was a relatively broad track which would have allowed the passage of four-wheeled vehicles. However, as it rose up in the direction of Holmbury Hill, it narrowed and in places, due to overhanging vegetation and the like, reduced to a width which was little more than a single track. There were clearly differences in gradient in the section that was viewed, although none of it appeared to be any steeper than any of the gradients encountered along BKB. Moreover, none of the curves appeared to be any more acute than those seen along the section of BKB which was viewed.

Legal principles

69. By reason of *section 13* of *the Supply of Goods and Services Act 1982*, which provides that,

> "In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable skill and care.",

the contractual relationship between the parties mirrored that of the common law, namely that in providing mountain bike tuition, the defendant owed the claimant a duty to carry out the tuition with reasonable skill and care.

70. It is accepted on behalf of the defendant that mountain biking along these trails, and in particular the slope where the accident took place, did give rise to a foreseeable risk of serious injury. Moreover, as I have already noted, and as was confirmed in closing submissions, neither the contractual exclusion clause, nor the Volenti principle is relied upon as such. However, the latter, in particular, is submitted to have relevance to the nature and extent of the parties' respective duties of care.

71. Therefore, the matters to be determined are whether the claimant has established, on the balance of probabilities, that the accident was caused by the defendant having failed to exercise reasonable skill and care in providing him with tuition on the mountain bike beginners' course, or whether, as the defendant submits, the claimant was either wholly or in part responsible for the accident due to his own lack of care.

Discussion

72. My impression of all of the witnesses in the trial were that they were straightforward individuals, who, in the case of those providing evidence of events now some 4 years ago, were seeking to do so honestly and to the best of their recollections, whilst those providing expert evidence, did so conscientiously. However, as the other participants on the course acknowledged, due to the fact that they had subsequently gone on to repeat the beginners' course with the defendant, it may well be that part of their recollection as to the nature and extent of tuition which the defendant provided, may have emanated from one of these later courses, rather than from the earlier course in which the accident occurred.

73. Far from being a litigious individual, the claimant appeared to be relatively relaxed and easy-going. Moreover, his motivation for booking the defendant's mountain bike beginners' course didn't appear to be to seek a thrilling day out, rather his aim was to ensure that he could pursue this recreation in a safe and effective manner. Although it is clear that the claimant had been riding a mountain bike for a number of years, I accept that the vast majority of this period had been spent cycling on tarmacadam roads, and that such time which he had spent on bridleways in the Cotswolds and the New Forest, involved a significantly different experience from that which took place on the day of his accident; in that those bridleways were both broader and shallower in gradient. In these circumstances, whilst the claimant would no doubt have known how to operate the gears and braking system on his bike in general terms, I am quite satisfied that, prior to attending the defendant's course, he would not have known, either how to operate the braking system, or how to perform any of the other ancillary skills required to ensure his safety on some sections of the terrain which he was to encounter on the course. Therefore, he was, to all intent and purposes, as described by Mr MacKay, a novice mountain bike rider.

74. The defendant clearly has a passion for mountain biking, to the extent that he gave up his career as a primary school teacher, and, since 2010, has been a mountain bike instructor. Neither his demeanour in court, nor the evidence which I heard from those who attended on the course in March 2012, led me to believe that he was either a reckless or authoritarian individual. The impression which I gained was that

in 2012 he had an enthusiastic easy-going manner of teaching, albeit, he had a tendency to be overly optimistic as to the ability of some of those attending his courses to keep pace with the instruction and training which he provided. There is some evidence of this in a number of the entries which he posted on his blog, and it may explain why it was that, at the commencement of the course, instead of carefully ascertaining the individual abilities of each member, he appears to have set off from the car park without having made any such assessment.

75. In this regard I accept the evidence of Mr MacKay, that such an assessment was a necessary prerequisite, which should have been undertaken by the defendant, so that he was able to appropriately pitch and progress his instruction and training during the course. It seems to me that this was particularly important in the present case, due to the fact that this was a group course, and, as the defendant accepts, it is likely that he knew from the booking forms that the pre-course mountain biking skills possessed by the various participants was significantly different, in that whereas the claimant possessed little or no mountain biking skills, Aiden Nixon was significantly more proficient. It was therefore essential that the defendant tailored his tuition to ensure the safety of the least able of those attending his course; a matter which I consider that he ultimately failed to achieve.

76. Although one can of course be critical of the claimant, especially perhaps as a lawyer, for not having properly read either the terms and conditions on the website or the pre-ride safety check list, I note that none of the participants gave evidence that they had read the terms, nor that they expressly recalled the defendant pointing out to them that, if they had any doubts, they could get off their bikes and walk. In these circumstances, although this may well be something which the defendant normally says to those attending his courses, and certainly he would have been prompted to do so since the date of the accident, I accept the evidence from the claimant that the defendant did not make this clear to him at any stage of the course.

77. It may well be that the defendant was able to observe the progress of the group from time to time as they ascended Holmbury Hill. However, it appears to me that the first time which the defendant provided any form of skill tuition was at the top of the hill. Whilst it is evident, as the participants including the claimant said, that this would have included some instructions in relation to the operation of their gears and brakes, I accept the claimant's evidence that the only skill which the defendant taught them in accordance with the website's expectations of instruction, demonstration, explanation and repeated attempts by participants, was that of negotiating small obstacles, where the emphasis was on maintaining the bike's momentum, rather than using the braking system. In this regard, Kerry Turnock was unable to recall which aspects of the skill tuition were provided in this manner, save and except some "basic stuff", whilst although Aiden Nixon recalls the defendant demonstrating when to brake, he made no mention of the defendant making any assessment of the activity, by watching the participants repeatedly demonstrating their own ability to undertake that or any of the other skills.

78. I accept the evidence of Mr MacKay, as reflected in the defendant's website, that repeated individual assessment of the claimant's ability to perform each of the necessary skills was required, in order to ensure that he had mastered them to a sufficient extent that it was safe for him to continue along the trail. I also accept the evidence of Mr MacKay, that not only should the skills which the defendant had taught the claimant, prior to negotiating the slope in question, have included track

standing, in order to ensure his ability to balance at slower speeds, but also emergency braking, in order to maintain balance whilst avoiding collisions at faster speeds. Both of which are skills which would have been of benefit to the claimant in seeking to safely negotiate the slope in question.

79. Although I am not necessarily persuaded that the defendant expressly instructed the claimant to keep his vision focused at a distance of 2 metres ahead of his bike, not only do I accept that the claimant genuinely believed that he should do so, but I also accept Mr MacKay's opinion that an instruction to "keep your chin up", the phrase which was repeatedly put to the claimant in cross-examination as being the words used by the defendant, was not a sufficient instruction to make it clear to the claimant as to where to focus his vision in order to safely avoid obstacles along the trail. In these circumstances, I consider that any mistaken belief by the claimant as to where to focus his vision, was borne of a lack of adequate instruction by the defendant.

80. I am sure that, as the group descended from the top of Holmbury Hill, along the track and down the fire road towards Radnor Road, the defendant did observe the participants in order to seek to assess their progress in relation to their use of the gear and braking systems on their bikes. However, not only do I accept the evidence of Mr MacKay that this was more akin to a coaching session for those who already possessed these skills, but I also accept that the gradients and characteristics of this part of the trail did not reflect those of BKB, and in particular the slope where the accident occurred, such that it would not have afforded an adequate opportunity to the defendant to make a proper assessment of the claimant's ability to cope with the challenges of the slope where the accident took place. Although, the defendant's opinion that some of the earlier parts of the trail were as steep as that of the slope in question, was supported by Mr Martin in his evidence at trial, it was notable that there had been no mention of this in his earlier report, and no such sections were observed during the course of the view. Moreover, the evidence of both of the other participants, which I accept on this point, was that the earlier sections were not as steep as that of the slope where the accident occurred. Kerry Turnock's evidence being that the previous part of the trail "wasn't steep or anything…..", whilst Aiden Nixon's recollection was the previous part of the trail involved slopes which were similar to but not as steep as the one where the accident took place.

81. In these circumstances, I am disinclined to accept Mr Martin's opinion that the defendant's observations of the claimant, as he rode from the car park to the top of the slope in question, were sufficient to have allowed the defendant to adequately assess either the claimant's braking proficiency or any of the other skills, which were necessary to enable the claimant to safely descend the slope where the accident took place.

82. It is unclear to me as to whether the defendant's failure to provide sufficient instruction, demonstration and assessment of the participants' mountain biking skills, other than the negotiation of small obstacles, before reaching the slope where the accident took place, was borne out of the time deficit caused by the non-attendance of one the participants. However, whatever its cause, it resulted in what I am quite sure was unjustified optimism by the defendant as to the claimant's ability to ride down the slope in question in safety. In that his belief that, by the time the group reached the top of the slope, all three of the participants had shown equal riding ability, one mirrored to an extent by Kerry Turnock and Aiden Nixon, was

founded on terrain which was significantly less challenging than the slope where the accident took place.

83. Whatever had been the defendant's assessment of the claimant's capabilities prior to reaching the top of the slope where the accident took place, I am satisfied that the slope represented the most challenging part of the trail. In this regard it seems to me that the fact that Aiden Nixon didn't consider it particularly challenging, merely reflected his familiarity with mountain biking, and the skills which he possessed. Moreover, even he acknowledged that it would be a bit intimidating for those less experienced, and Kerry Turnock observed that the presence of the drop-off at the crest of the main route represented a "confidence moment." In any event, as I have concluded, the slope represented the steepest part of the trail which the group had thus far encountered.

84. Although I accept that, on occasions, it may be appropriate for those under instruction to be taken slightly out of their "comfort zone" in order to make progress, I accept the evidence of Mr MacKay that, especially bearing in mind the risk of serious injury which it is acknowledged this slope presented, the defendant should have selected an alternative and less challenging slope upon which to teach the participants the skills which were necessary to negotiate it in safety; essentially those of balance, observation and braking. Moreover, I also accept that the defendant should only have permitted the group to ride down the slope where the accident took place, once each of them had not only gained sufficient mastery of these skills so as to be able to negotiate the slope in safety, but also with the necessary degree of confidence to meet the challenges presented by it. In my judgment had the defendant taken these steps, then it is likely that the accident would not have occurred, in that the claimant would have had sufficient confidence and ability to negotiate the slope in safety.

85. Instead, the defendant took them straight to the slope where the accident took place, where they were met, in 2012, with, at the very least, two optional routes which could be taken down the slope, the main one which was in effect a straight continuation of the trail leading up to it, and the other route to the right of the main one. It seems to me that the challenging nature of the slope was not only caused by the steepness of the gradient, but in relation to the main route there was a sharp drop at the crest, which had the effect of obscuring the area immediately below. Therefore, although there was little to distinguish between these two routes in so far as gradient was concerned, the reason why the right route was deemed to be the easier one, was because it lacked the sharp drop at its crest, so allowing the rider to view the whole of the slope before riding down it.

86. There is some conflict in the evidence as to whether the defendant provided the group with a choice of which of the two routes to take down the slope. Originally the defendant said that he could not recall if the group traversed the right route, before attempting the main one. However, even if he gave them such a choice, he accepted in evidence that he had delegated the choice to them, and in any event had only demonstrated riding down the main route. The claimant made no mention of being provided with any choice, save that the two routes were pointed out by the defendant, who then demonstrated riding down the main one. Similarly, Kerry Turnock made no mention of being provided with any such choice, although Aiden Nixon did. In the event, I am unconvinced that the defendant did provide any real choice of route to the group that day. Although he may well have indicated that

there were two possible routes, the fact that he only demonstrated riding down the main route, provided them with a clear indication, at the very least, as to which route they should use to ride down the slope. Moreover, even if there remained some measure of choice, I consider that, as acknowledged by the defendant at trial, it was inappropriate for him to have delegated the decision to the participants. Not only did the main duty to assess whether the participants possessed an adequate level of skills to negotiate the slope in safety, lie with the defendant, but he ought to have appreciated that any apparent choice, by any individual member of the group, may well be tainted by the effects of peer pressure. In this regard it is significant that the right hand route was considered, at least by Aiden Nixon, to be the "chicken route."

87. I have already indicated that, in any event, it was inappropriate for the defendant to have selected the slope where the accident took place as the location for instructing the group concerning the skills required to safely negotiate it. However, even if it had been an appropriate choice of location, as it is universally acknowledged that the right hand route was the easier to negotiate, even if only by reason of the lack of drop-off at its crest and the consequent ability for the rider to view the whole of the descent, it seems to me that whatever the perceived ability of the group was, it would have been appropriate, not only for the defendant to have initially demonstrated his own descent down the right hand route, but to have expressly directed the group to use this route on at least the first few descents down the slope. In the event that they had all been able to show a sufficient degree of ability using this route, only then would it have been appropriate to allow them to attempt to descend the slope down the main route.

88. In the early stages of the trial, the question as to whether the claimant's first descent down the slope was via the main route, or to the left of the V shaped tree, assumed some significance. Particularly when *Volenti* as such was relied upon. However, as the trial proceeded the significance of this issue receded somewhat, as it became apparent that the risks associated with riding down the slope were not significantly affected by the choice between these routes, rather it was the claimant's ability to safely negotiate the slope in general. Therefore, it became clear that the real issue upon the question of liability, was whether the defendant had carried out his tuition with reasonable skill and care, so as to enable the claimant to ride down the slope in safety. However, as there clearly is a conflict of evidence upon this point, I consider that it is necessary to resolve it, if for no other reason, as those representing the defendant acknowledged in closing submissions, that if the claimant did descend down the left hand way on the first occasion, as claimed by the defendant, then this may have been a further negative indicator that the claimant lacked sufficient ability to negotiate the slope in safety.

89. Although the defendant in his evidence claimed a degree of certainty as to his recollection that the claimant's first descent was to the left of the V shaped tree, I do not consider that this is correct. In this regard I note that there is no contemporaneous note upon which the defendant is able to rely, but it would appear that his recollection was not reduced to writing until a significant period, some 4 years, had elapsed from the events. Although Aiden Nixon's recollection is far from clear, he has never suggested that, prior to the descent when the accident occurred, the claimant had descended down to the left hand side of the V shaped tree.

Moreover, both the claimant and Kerry Turnock gave clear and consistent evidence which I accept, that the claimant's first descent was down the main route.

90. In these circumstances, although there was nothing from the route itself taken by the claimant on his first descent to have caused the defendant any concern, this is not the end of the matter, as I agree with Mr MacKay that there were other significant indicators which ought to have positively caused the defendant to have appreciated that the claimant lacked the ability to negotiate this slope in safety at that point, all of which were observed by one or other of the participants, namely that as the claimant was attempting the descent, he appeared to "chicken out", wobble, look unsteady and fell over. It is clear that at least some of these matters were observed by the defendant, who not only permitted the claimant to make a second attempt at descending the slope using the same route, but chose to remedy the claimant's perceived difficulties, by advising him to do so at greater speed.

91. I have no doubt, as Mr Martin said, that cycling at too slow a speed can cause difficulties with balance, and that on some occasions it may be appropriate to advise an increase in speed; a matter which gains some support from the MIAS guidance. However, given the accepted risks which descending this slope entailed, I agree with Mr MacKay that this was not an appropriate occasion upon which to utilise this methodology. As the NICA guidance recommended, not only ought overly steep trails be avoided, and in this regard MIAS cautioned against slopes in excess of 30 degrees, but the NICA guidance recommended that it is prudent to, "Start slow. Learn great skills. The speed will come naturally."

92. Moreover, although Mr Martin gave evidence of the type of speed which he envisaged as being appropriate, namely walking speed, and in his original witness statement the defendant talked of such a speed, not only was it unclear from his statement whether this was expressed to the claimant, but, in the course of his evidence at trial, the defendant did not claim to have done so. Likewise, not only did the claimant not make any mention of having been informed that only a modest increase in speed, to that of a walking pace, was required, but nor did either of the other participants. In these circumstances, I am not satisfied that the defendant instructed the claimant that only a modest increase in speed was required, and that by advising the claimant to start his second descent from a position further back from the crest of the slope than before in order to gain more speed, and, given the clear instruction which the defendant had previously provided as to the need to maintain momentum whilst negotiating small obstacles, it was wholly foreseeable that the claimant would achieve a significantly greater speed than walking pace when he descended the slope, regardless of any nervous hesitation at its crest.

93. Indeed, I am satisfied that this is what the claimant proceeded to do on his second attempt at descending the slope in question. Undoubtedly, and probably through a combination of nerves, and the fact that, having started the run from beyond the first turn in the trail he initially lost sight of the entrance to the main route and became confused, he descended down the slope to the left of the V shaped tree. However, even if he did momentarily brake at the top of the slope, once having embarked on the descent, I consider that his speed was such that it became more rather than less likely that if, as he had done on the first occasion, he was to fall, then the consequences were likely to be more serious; as they in fact turned out to be in this case. In view of my previous findings, I also consider that, as he attempted to ride down the slope on the second occasion, he lacked sufficient ability

to know where to focus his vision to safely avoid obstacles ahead of him, brake and keep his balance. In this regard, it is to be noted that just as the MIAS guidance points out the risks of a rider not keeping their arms braced when emergency braking, so too does it appear that the claimant's accident involved him going over the handle bars of his mountain bike.

94. Although the issue as to whether it was reasonably foreseeable that the claimant would descend the slope to the left of the V shaped tree has, for the reasons I have explained, receded in significance, I have considered it. On this point, albeit with some hesitation, I part company with the two experts, a matter which, as is accepted on behalf of the parties I am entitled to do, as this is primarily an issue of foreseeability based on all the surrounding evidence, including that of the locus, and not a matter upon which expert evidence is of great assistance. It seems to me that whatever the situation more recently, looking at the more contemporaneous moving and still images of this part of BKB, the area to the left hand of the V shaped tree appears to have been considerably more open and available as a route down the slope at the time of the accident. Moreover, in 2012 the main route is also not as contrastingly obvious as the route of choice, as it is in the most recent images of the area. In these circumstances, and having instructed the claimant to commence his second attempt from an unspecified location further back along the trail, I do consider that it was reasonably foreseeable that a nervous novice rider, such as the claimant, might, descend the slope to the left hand side of the V shaped tree. A matter against which, at the very least, he should have been warned.

95. In so far as the claimant is concerned, I do not consider that, as he travelled along the trail towards the crest of the slope, he made any measured choice to descend the slope to the left of the V shaped tree, rather I consider it more likely that, in the heat of the moment, he mistakenly took the route; not having been warned otherwise. In any event, not only am I satisfied that the claimant travelled down the main route on the first occasion, but, as has become apparent, the risks associated with riding down the slope were not significantly affected by the choice between these routes. In all these circumstances, I do not consider that the claimant can be said to have been the author of his own misfortune, and liable for the accident on this basis.

96. Instead, for the reason I have sought to provide, I consider that the defendant is at least in part liable to the claimant for this accident, in that the accident was caused by his failure to carry out his tuition with reasonable skill and care, so as to enable the claimant to ride down the slope in safety. In summary, I consider that, having failed to carry out an adequate assessment of the claimantnt's individual skill level at the commencement of the course, he thereafter progressed the tuition which he provided to the group, without sufficient regard to the claimant's capabilities; in that he failed to make sufficient assessments of the claimant's ability to undertake the skills he was being taught, failed to teach the skills required to negotiate the slope where the accident took place in safety, and thereafter permitted the claimant to attempt to negotiate the descent of the slope down the main route, and, on his second descent, encouraged him to do so at a speed which was likely to enhance the risk of serious harm being caused to him.

Contributory negligence

97. I turn next to the issue of contributory negligence, as it is submitted on behalf of the defendant that, even if he bears some liability for the accident, the claimant is also

to blame for not having indicated to the defendant that he considered that it was beyond his capacity to ride down the slope in safety; such lack of capacity being a matter which, it is said, was best known to the claimant.

98. This is a matter which was considered, in a not dissimilar context, by Foskett J. in *Anderson v Lyotier (t/a Snowbizz) and Portejoie [2008] EWHC 2790 (QB).* In that case the claimant, who was taking part in a mixed ability skiing lesson run by the defendant, was seriously injured when the defendant took the group down an off-piste section without having properly ascertained that the claimant could traverse the slope in safety. Foskett J. found that, although the defendant was mostly to blame for the accident, the claimant also bore some responsibility on the basis that, either knowing that he lacked the ability to ski down the slope in safety, or at least feeling sufficiently concerned for his safety as to warrant notifying the defendant about it, he failed to notify the defendant about it.

99. In the course of his judgment at paragraph 142 Foskett J. said,

> "In my judgment, it would be wrong to hold that a skier, even in the case of a relatively inexperienced skier who is under the supervision of a ski instructor, abdicates all personal responsibility for deciding whether to do or not to do something the instructor suggests. The consensus of all the witnesses who spoke on the matter during the trial was that there is a strong element of trust placed by a skier in the instructor. That is plainly so. However, it is not the same as a child placing total reliance on his or her parent or teacher. The process involving adults must be a collaborative one. I do not think that the law requires (and, if it did, for my part I would say that it would be adopting the wrong policy) that the instructor takes total responsibility in a situation such as that which obtained in this case. In my judgment, if an instructor does suggest something to a skier under his supervision that the skier believes to be beyond what it is reasonable for him to attempt, there is an onus on the skier to say so. There may be cases where further discussion will resolve the concerns of the skier - or the instructor will agree that what he has suggested is too risky. However, I do not consider it is, objectively speaking, reasonable for the skier not to say something in that situation. The human reaction not to want to appear awkward, difficult or, as Mr Foxon put it, "faint-hearted" is quite understandable from a subjective viewpoint; but objective analysis does suggest that serious concerns must be ventilated."

100. I respectfully agree with the views expressed by Foskett J., and consider that there are sufficient similarities between the challenges faced by those involved in skiing and mountain biking, that, at least with adults, the nature of the relationship between the trainer and trainee is analogous. Therefore, in the present case, I consider that just as the defendant owed a duty of care to the claimant, so too did the claimant bear some responsibility for his own safety.

101. On behalf of the claimant it is submitted that contributory negligence should not be found in this case, as there is no evidence that the claimant felt that he was

outside his comfort zone when faced with the prospect of riding down the slope. In other words, that he neither knew that he lacked the ability to ride down the slope, nor had sufficient concerns as to warrant notifying the defendant about them. Moreover, it is submitted that, as a novice mountain bike rider, he was entitled to assume that if the defendant instructed him to ride down the slope, that it was safe for him to do so.

102. I acknowledge that, in the course of his evidence, the claimant did not state in terms, that he either knew that he lacked the ability to ride down the slope, or that he felt sufficiently concerned for his safety so as to warrant notifying the defendant. However, in my judgment the clear import of the evidence from both Kerry Turnock and Aiden Nixon, was that that the claimant appeared to be so hesitant and unsteady about riding down the slope, that, not only should the claimant have appreciated that he lacked the ability to do so in safety, or at the very least to be sufficiently concerned for his own safety, but he ought to have raised the matter with the defendant.

103. I appreciate that, in so far as mountain bike skills were concerned, the claimant was a novice. However, I do not consider that this would entirely preclude the claimant's appreciation of his ability to ride down the slope in safety, nor do I consider that it entitled him to abdicate complete responsibility for his own safety. The claimant is an adult, and it is of relevance that he had been riding a mountain bike for a number of years, albeit on less challenging terrain, and would therefore have some appreciation of his own ability to meet the challenge presented by the slope in question. Indeed, it is of significance that the claimant's injury occurred during his second descent down the slope, rather than the first during which he would have gained further insight into his inability to descend the slope in safety, not least from his initial fall.

104. It is also pointed out on behalf of the claimant that, after his first descent down the slope, not only did the defendant inform the claimant that his technique was OK, but he also advised the claimant that on his next descent he should ride down the slope at greater speed. It is argued on behalf of the claimant that these matters would have provided him with a wholly misleading impression as to his ability to ride down the slope with safety, and thus deprived the claimant of the opportunity of making an appropriate reassessment of his own ability to descend the slope on the second occasion. Although, I accept that these two matters would have been likely to have provided a measure of false reassurance to the claimant as to his ability to ride down the slope again in safety, I do not consider that they had the effect of totally eclipsing the claimant's responsibility for his own safety, in that despite them he would have retained some insight into his own abilities. However, due to the fact that there was some measure of false reassurance, I do consider that these matters are of relevance to the apportionment of liability between the parties, and they have led me to a slightly different determination upon this issue than that considered appropriate in the circumstances of the *Anderson* case.

105. Accordingly, and in order to seek to reflect these matters, I consider that the appropriate amount of responsibility which the claimant should bear in relation to his contribution to the cause of this accident is one of 20%.

Additional matters

106. I would only add two matters. Firstly, to acknowledge the considerable dignity with which the claimant conducted himself during the course of the trial, despite the obvious physical restrictions which the injuries he suffered in the accident have caused him. Secondly, to acknowledge that the adverse findings in relation to the defendant's tuition relate to a course which took place over 4 years ago. I am aware that since then the defendant has continued to provide mountain bike instruction and training, and have no reason to believe that he has done so in anything but a satisfactory manner.