Neutral Citation Number: [2020] EWHC 1306 (QB)

Case No: QB-2017-001306

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

Before:

HUGH SOUTHEY QC (Sitting as a Deputy Judge of the High Court)

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Between:

LESLIE BRAND	**Claimant**
- and -	
NO LIMITS TRACK DAYS LIMITED	**Defendant**

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- -

Robert Golin (instructed by **Hudgell Solicitors**) for the **Claimant**
William Clerk (instructed by **BLM**) for the **Defendant**

Hearing dates: 16, 17, 18, 19 and 25 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HUGH SOUTHEY QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 22 May 2020.

Hugh Southey QC:

Introduction

1. This claim arises from a motorbike accident that occurred at around 14.30 on 13 August 2014. That accident occurred at a track day organised by the Defendant at Oulton Park racing circuit. There is no dispute that the incident occurred when the Claimant was on the track participating in an open session with fast riders. During that session a group of riders were taken on the track by an instructor, Mr Glynn Torr, for sighting laps. One of the riders in that group, Mr Steven Hollinshead, collided with the Claimant. The circumstances of the accident are described in greater detail below.

2. The Claimant suffered life changing injuries as a consequence of the accident. Properly the Defendant has extended its sympathies to the Claimant. The Court also extends its sympathies. The issue is whether the Defendant is legally responsible for the Claimant's injuries. The legal principles to be applied when determining that issue are set out below.

3. This trial commenced on the same day as the Government first advised physical distancing as a consequence of Covid 19. As the trial progressed it became increasingly clear that it was unreasonable to expect physical attendance at court. I am exceptionally grateful to all involved in this trial for their professionalism in physically attending court for as long they did and for their flexibility in agreeing to closing submissions taking place by video link.

4. I should apologise that this judgment has taken a little longer than I intended. That was the result of health issues that I experienced following final arguments.

Factual findings

5. When reaching the findings below I have taken account of all of the evidence, whether it is written, oral or physical. I have also taken account of the written and oral submissions summarised below. To the extent that matters below were in dispute (and many matters were not), I have reached findings applying the balance of probabilities. That means I have considered whether matters are more likely than not. I have explained my reasons for those findings below.

6. I don't believe that any witness has deliberately lied. However, I do believe that witnesses for both parties have at times sought to present their evidence in a manner that sought to favour the party that they were giving evidence for. I am also conscious that oral evidence will have been influenced by both the passage of time and the fact that witnesses will have talked to each other. It is significant that this trial took place over 5 years after the accident.

Events preceding 13 August 2014

7. The Defendant is an organiser of track days. The 2014 edition[1] of the manual that the Defendant has produced for instructors it uses ('the 2014 Instructor Manual') states that

[1] I have described this edition as the 2014 edition as that is how it is described in the index to the trial bundle. There is no clear evidence as to when it was produced and whether it was in use on 13 August 2014. It would appear likely it was produced before 8 May 2014 as it provides that the fast group will go out first during open

it is 'the leading track day organiser in the UK and Europe' and that it now organises over 200 track days per year. These track days essentially allow motorcyclists to experience racetracks, such as Oulton Park, at speed.

8. The Defendant relies on instructors to facilitate track days. Instructors are unpaid but play a key role in the success of track days. Mark Neate, the Defendant's owner, said that the Defendant is unique among providers of track days in offering free instruction. Instructors have no formal qualifications. However, they are experienced riders and are trained by the Defendant. The 2014 Instructor Manual states that the Defendant looks for instructors with:

… an ability to observe a rider, understand why they are riding the way they are and then explain a solution in a comprehensible way …

The 2014 Manual goes on to describe how instructors should not merely instruct. They are also required to facilitate and police track days.

9. There are issues raised in the evidence about the training of some instructors and/or the chief instructor. It appears to me that I need not resolve these issues. That was because, as set out below, the evidence shows that Mr Torr was the person who decided to take Mr Hollinshead out for a sighting lap during a fast open session. There was no evidence that Mr Torr was not an appropriate person to take that decision.

10. The riders attending tracks days as clients vary in experience. They include both experienced racers and novices. Indeed the 2014 Instructor Manual states:

Our instruction extends from the nervous Novice Group rider enjoying riding their motorbike on a track for the first time, through to racers trying to fine-tune their riding.

11. As a consequence of the varying levels of customer's experience and skill, the riders are divided into groups that have three levels: fast, intermediate and novice[2]. At most if not all track days there will be one group at each level. That was the arrangement on 13 August 2014 at Oulton Park.

12. The evidence was that the Defendant relied on customers to decide which group they should register for. The lack of any real checks on which group a rider should join suggests that riders could choose to ride in groups that did not reflect their true ability. In practice that seems to have happened. For example, Raymond Read, a former instructor who gave evidence for the Claimant, described how fast riders may drop down to the intermediate group so that they could appear better. Equally, a slow rider could seek to participate in a faster group by joining the intermediate group. There appears to be no dispute that Mr Hollinshead would on some occasions book to ride in the fast group and in other occasions book to ride in the intermediate group. His evidence was that his decision as to which group to book into would depend upon matters such as which group had availability and the experience of other riders that he was attending the track day with. These are matters that had nothing to do with his

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sessions. An e-mail dated 8 May 2014 suggests that practice changed about that time so that intermediates would go first. However, there appears to be no suggestion that the edition used on 13 August 2014 would have been significantly different.

[2] These groups have been given different names at different times. However, the basic concept of 3 levels appears unchanged.

ability. This was one matter that suggests that the range of ability of riders in any group may be wide.

13. It is obvious that an alternative to relying on riders to decide which group they join would be to keep a record of riders' experience. Mr Read gave evidence that at least one other company providing track days allocates riders to groups based on the number of events a rider has previously participated in. However, it appears to me that this would have its problems. A rider may have significant experience of racing but have never ridden with the organiser of a particular track day. If they were allocated to a group based on their record with the organiser, they would be put in a group that was too slow.

14. A rider's experience will not be the only matter that affects a rider's speed. Mr Read gave evidence that there are other matters that will affect speed such as the motorbike used, the tyres used, whether tyre warmers were used and a rider's aptitude. It seems to me that all of these matters mean that rider speed with any group could vary significantly.

15. The variety of matters that can influence a rider's speed mean that I accept the evidence of Mr Read that it is best to assess the speed of riders during the course of a track day. Consistent with the passage of the 2014 Instructor Manual quoted above, instructors are selected because they are able to assess the manner in which a rider rides. If they conclude that a rider is in the wrong group, Mr Read said that they can suggest a rider drops down a group.

16. The precise detail of the format of track days organised by the Defendant has varied. However, key features are unchanged:

    i) Riders must first take part in sighting laps. These exist because riders need to familiarise themselves with the racetrack. For example, the 2014 Instructor Manual states that sighting laps give riders the opportunity to:

    1. See where the marshals' posts are.

    2. See the layout of the circuit.

    3. See the condition of the circuit.

    ii) The sighting laps involve an instructor leading out a group. The instructor dictates the pace of the group.

    iii) There was a dispute in the evidence about the speed of sighting laps. For example, Mr Read's witness statement said that they would normally be conducted at half speed. Other witnesses called by the Claimant evidence did not consistently accept this assessment. For example, David Charrett, a former instructor who gave evidence for the Claimant, said in his witness statement that a fast group will take between 1 minute 45 seconds and 1 minute 55 seconds to complete a fast open session at Oulton Park while a sighting lap will take 2 minutes 20 seconds. In contrast, John Bunting, the Defendant's chief instructor, gave evidence that sighting laps are only slightly slower. It appears to me that the speed of a sighting lap will be dependent upon a range of matters. However,

I don't accept that sighting laps are as slow as suggested by the Claimant's witnesses. There is good reason to believe that sighting laps need to be conducted at a reasonably fast speed. The 2014 Instructor Manual states that fast group sighting laps must be sufficiently fast to enable riders to keep heat in their tyres for safety reasons. Indeed Mr Read appeared to accept that there could be issues if a fast rider went out for a sighting lap with a group that was too slow. Mark Winzar, a former instructor who gave evidence for the Claimant, also accepted that there could be safety issues if a sighting group was too slow. However, it seems to me that it is likely that, in general, sighting laps will be a little slower than open laps. Riders will be familiarising themselves with the set up of the racetrack.

iv) In general sighting laps take place at the start of the day and at a time when open sessions are not underway. However, there will be riders who for a variety of reasons are unable to participate in the sighting laps at the start of the day but want to participate in open sessions. In those circumstances the rider's sighting lap would take place while an open lap is taking place. The evidence of Mr Bunting was that where this happened, instructors would be told to conduct the sighting lap at the same pace as the open group. It seems to me that the evidence demonstrates that it would not always be possible for this to happen. The 2014 Instructor Manual states that sighting laps should take place at the speed of the slowest rider. As set out below, a later version expressly accepts that there may be reasons why a rider goes slower during sighting laps than they do during an open session. Mr Torr accepted that an instructor needs to ensure that he keeps the sighting group together. That implies he might need to go at the speed of a rider going slower than the open group. However, I accept when sighting laps are conducted at the same time as an open session, the aim will be for the sighting laps to take place at the same speed as the open session.

v) There appears to be no dispute that in practice there would be occasions a sighting lap would take place during a fast open session. For example, Mr Charrett said that it was common for sighting laps to take place while a fast open session was taking place.

vi) Once a rider has undertaken sighting laps, they can undertake what witnesses described as open laps. Each group has its own open laps so that, at least in principle, fast riders participate in open sessions with other fast riders. These open laps will be policed by instructors, who will be looking for things like dangerous driving. However, riders will normally be able to set their own speeds and overtake.

17. Part of the Claimant's case is that sighting laps should not take place during fast open sessions. In particular, understandably in light of his accident, Mr Brand was very clear in his evidence that this should not happen. However, this is not simply a concern that post-dates the accident. It is clear that concerns were raised before the accident in question about this practice of allowing sighting laps during open sessions. In particular:

i) There was an e-mail exchange among instructors prompted by an e-mail from an instructor called Gary Jones. Mr Jones complained in an e-mail dated 27 February 2014 that he had taken two riders out for a sighting lap while a fast

group was 'in full swing'. He said that this was 'not a nice position to be in'. Other instructors supported Mr Jones' concerns. Mr Bunting responded in an e-mail dated 27 February 2014 saying that 'I share the concern'. He suggested that sighting groups should never take place in fast groups. He said this was 'safest'. He asked for further ideas and comments.

ii) Mr Winzar gave evidence that he questioned the practice of sighting laps taking place during fast open sessions during a track day in Valencia in May 2014. Mr Neate accepted that this conversation might have taken place.

18. The e-mails and the conversation identified in the paragraph above were not acted upon immediately. In particular, the evidence of Mr Bunting was that Mr Neate had not immediately agreed to the proposals that he had made in his e-mail of 27 February 2014. Mr Neate's evidence was that he had spoken to Mr Bunting at some point in time and rejected his proposal. Mr Bunting stated that his e-mail merely offered a view and was an attempt to wind things down. I don't accept that Mr Bunting merely sought to wind things down. The e-mail demonstrates that he had reached a clear conclusion as to how track days can be operated safely. However, I also don't accept the suggestion put to Mr Bunting during cross-examination that the e-mail would have caused the Claimant to believe that sighting laps would not have taken place during open fast groups. There is no evidence that a formal decision was taken to adopt the proposals contained in Mr Bunting's e-mails. There is also no evidence of a change of practice. Indeed, Mr Winzar's conversation in Valencia would have been unnecessary had practice changed. I accept the evidence of a number of the Defendant's witnesses that the Claimant should have been aware that sighting laps can be conducted during open fast groups.

19. I have considered the points put to Mr Neate and Clare Keeley, operations director of the Defendant, during cross-examination, that Mr Neate and Ms Keeley had no adequate training in risk assessment and/or failed to conduct adequate risk assessments generally or following the e-mail dated 27 February 2014. The problem with that argument is that I have no real evidence that approach of the Defendant was inadequate. It appears that a concern was raised on 27 February 2014. Mr Neate then assessed the proposal made by Mr Bunting and reached a conclusion. There is no evidence that the decision making process was inadequate.

20. Although it appears that the communications identified in paragraph 17 did not directly result in change, it appears that the underlying concerns identified in those communications have had an impact on the Defendant's practices. Volume 4.1 of the Instructor Manual (which appears to have been adopted after 13 August 2014) states that:

The instructor should use their <u>own judgment</u> as to when they take latecomers on a live track, bearing in mind the rider will not be up to speed, may be anxious because they are late and unfamiliar with the motorbike or the circuit. It is <u>advisable</u> to take a latecomer out in the Novice (Green) Group, regardless of their group or ability. [Emphasis added]

21. It appears to me that, although the passage above implies that the risks associated with riders on a sighting lap being mixed with the fast group mean that there should be a presumption against sighting laps taking place while fast open sessions are taking place, this is not a rigid rule. It appears to me that there is good reason for this. There is no

reason to believe that speed differences will not be greater if fast riders are conducting sighting laps during open novice sessions. As noted above, there are reasons why fast sighting laps should not be too slow. In novice sessions the majority of riders will have limited experience of dealing with speed differences. I was struck by the evidence of Mr Bunting that he had taken out a World Supermotorbike rider, Xavi Fores, for a sighting lap during an open session. It seems to me that there are obvious dangers associated with taking out such a fast racer with novices even if the fast racer is undertaking a sighting lap.

22. I should add that my conclusions are supported by the Administration Manual version 3, which states that late sighting laps:

… can take place in a separate group … as long as the group is equivalent or lower the riders [sic] chosen group.

This demonstrates that the Defendant continues to believe that there should be an assessment of which group a rider who needs to undertake late sighting laps should undertake those laps with.

23. The conclusion that I have reached that there has never been a rigid rule that sighting laps should not take place at the same time as fast open groups is consistent with parts of the Claimant's evidence. Mr Read accepted that in principle fast riders could be taken out for a sighting lap during a fast group. As noted above, he also accepted that there are safety reasons why faster riders should not be required to undertake sighting laps too slowly. Mr Winzar also accepted that it was a matter of judgment whether people are taken out for sighting in fast groups. Even the Claimant accepted that it was up to an individual instructor to decide whether to take out a rider for a sighting lap during an open fast group.

24. A slightly different issue was raised by Mr Charrett in his evidence. He suggested that one couldn't rely on the statements of a rider when deciding whether it was safe to take a rider out for a sighting lap in the fast group. However, it appears to me that the weight of the evidence is that an instructor such as Mr Torr needs to assess whether it is safe to take a rider such as Mr Hollinshead out for a sighting lap with a fast group. I am not clear how else an assessment could be undertaken to determine which group a rider should undertake sighting laps with.

25. Finally, I have not ignored the evidence that there can be a commercial pressure on the Defendant to allow riders to go out for a sighting lap in the fast group. Racetracks have limits on the number of riders they will accept on the track at any time. If a group is full, there might be no space for riders from another group to go out with them for a sighting lap. In other words, if the novice group is full, fast group riders may be unable to undertake a sighting lap with them. However, it appears to me that there is no evidence that effectively undermines the evidence of Ms Keeley that, even if a group is full, an instructor would still be able to conclude that a rider was not suitable for the fast group. The weight of the evidence is that the Defendant relies on the assessment of instructors to determine whether it is safe for a rider to undertake a sighting lap while a particular open group is on the racetrack. That implies that instructors must be able to conclude that it is unsafe for a rider to undertake a sighting lap while a particular open group is on the racetrack. I should add that there is no evidence that any commercial pressures were present on the 13 August 2014.

13 August 2014

26. The Claimant was an instructor for the Defendant at the track day held at Oulton Park on 13 August 2014. The other instructors were Messrs Read, Winzar and Torr.

27. Mr Hollinshead arrived for the track day as a reserve rider. That means that he was aware the track day was full but was hoping that a space would arise during the day so that he could participate in at least some of the open sessions. His evidence is that he was a very experienced track rider. He is also an experienced mechanic who is used to repairing and servicing motorbikes. On this day he was riding a 1000cc Yamaha R1. While giving evidence Mr Hollinshead said that it was his second time riding the motorbike. However, there is evidence in the papers that he had previously said it was his first time riding the motorbike. On balance of probabilities I accept his evidence at trial that he had ridden the bike once before. The circumstances in which it is said he had said it was his first time riding the bike are unclear. However, in my opinion little turns on whether it was his first or second time riding the motorbike. He plainly was relatively inexperienced on this motorbike.

28. It rained on the morning of the track day. As a consequence, at lunch Mr Hollinshead changed his tyres from slicks to wet tyres. Otherwise the morning appears to have passed without significant incident.

29. There appears to be no dispute that at the start of the afternoon, there were a number of riders who wished to ride but who had not undertaken sighting laps and so needed to undertake sighting laps during an open session. Mr Torr took 3 riders out for sighting laps during the fast open session. There is no dispute that one was Mr Hollinshead. However, there is a dispute about the identity of the other riders. Mr Read gave evidence that these riders were foreign riders. That is consistent with the records held by the Defendant that show that two riders who gave Vienna addresses, Yasser Awavalla and Heinz Schimanko, moved from the novice to the fast group. However, the evidence of Ms Keeley was that her records showed that two fast riders, Rob Tonge and Kevin Sweeny, as well as Mr Hollinshead paid for a half day. As a consequence, it would have been these riders who needed a sighting lap in the afternoon. The records produced by Ms Keeley do suggest a relaxed approach to documenting what level a rider believed they possessed. Not only is there no certainty as to who participated in the sighting lap with Mr Hollinshead, a registration form required by the track owner, MSV, when track days were taking place required riders to declare their level of experience. This was left blank in the cases of Mr Awavalla and Mr Schimanko. The Defendant's own registration form did not require riders to declare their level of experience.

30. Mr Torr gave evidence that he had not met Mr Hollinshead prior to the track day on 13 August 2014. Mr Torr gave evidence that before taking Mr Hollinshead and the two other riders out for a sighting lap he would have spoken to the three riders collectively. Mr Torr would have asked about their level of experience. He would have asked them if they were familiar with Oulton Park. He would also have asked about the equipment they were using. There is no evidence that this conversation did not happen or did not address the matters that Mr Torr said it addressed. The clear evidence that it was for an instructor to assess whether a rider should undertake a sighting lap with a particular group means it would have been surprising if Mr Torr did not ask questions intended to assess the speed a rider was likely to be able to ride at.

31. When cross-examined Mr Torr said he did not agree that he should have not taken riders out for sighting laps during the open fast group. When re-examined he explained that he had established the capabilities of the riders who he took out when he spoke to them. It was pointed out during cross-examination and re-examination that Mr Torr had sent an e-mail on 27 February 2014 endorsing Mr Bunting's proposal in an e-mail earlier that late sighting laps should not take place during open fast groups. He said that there had been subsequent dialogue and he was satisfied that a safe process had been developed.

32. There was very little evidence that the process of Mr Torr questioning riders to establish their competence was unsafe. In fact the evidence tended to support the Defendant's case that the approach of Mr Torr was safe. When pushed during cross-examination, Mr Read accepted that he could not say whether it was the correct decision to take a sighting group during the fast group. Mr Charrett expressly accepted that Mr Torr was in the best position to determine whether Mr Hollinshead should have been taken out for a sighting lap while an open fast group session was taking place.

33. I have considered the evidence of Mr Neate when cross-examined that an instructor should not take a rider out for a sighting lap during a fast open group if on a new motorbike. That is the most significant evidence that Mr Torr's assessment was flawed. Even if Mr Hollinshead had ridden the motorbike before, he was still inexperienced on it. However, it appears to me that ultimately it is accepted by most witnesses that Mr Torr was in the best position to assess the competence of Mr Hollinshead. Mr Hollinshead was an experienced rider. Mr Torr's evidence was that 80% of fast group riders are immediately comfortable on a new bike. As my findings below make clear, there is no basis for finding that Mr Hollinshead rode his motorbike in an incompetent manner on the day in question. That means that there is no basis for concluding that the assessment process produced a flawed assessment.

34. The sighting group containing Mr Hollinshead and Mr Torr entered the racetrack while an open fast group was taking place. It appears to be agreed that Mr Torr led the group and Mr Hollinshead was at the rear. Mr Hollinshead denied that he was riding much slower than the other members of his sighting group or the open fast group. In light of my findings below regarding CCTV, it appears that there is no evidential basis for me to reject Mr Hollinshead's evidence regarding his speed. This group was three quarters of the way into its first lap when the accident occurred.

35. At the time when the sighting group went on to the track, the Claimant was already on the track supervising the fast group. As a consequence of the accident in issue, he has no memory of what happened. However, he says that would not have anticipated riders undertaking sighting laps halfway through an open fast group. As noted above, I find it difficult to accept that evidence.

36. As noted above, the accident occurred when the Claimant collided with Mr Hollinshead. There is CCTV of the accident. However, this is not of high quality as the camera was plainly a significant distance from the accident. What one can see is that one of the wheels on Mr Hollinshead's motorbike appeared to leave the track and it

performed a manoeuvre commonly called an endo or a stoppie[3]. The endo caused the motorbike to fall on its side and Mr Hollinshead collided with it.

37. Other than as described in the paragraph above, the CCTV produced at trial appears to me to be completely unhelpful when viewed without assistance.

38. Mr Read gave evidence that he had seen additional CCTV footage of the crash on the day the crash had occurred. On this he had seen a rider panic and slow down. In his witness statement he also stated that this footage showed the group on the sighting lap going very slowly. However, witnesses seemed agreed that the CCTV shown at trial did not allow conclusions to be drawn about the speed of riders. For example, although Mr Winzar's witness statement had said that the Claimant had braked after a rider in front of him had braked 'excessively', he accepted in cross-examination that one could not see a rider in front of the Claimant braking on the CCTV shown at trial.

39. I have concluded that I can place no real weight on the evidence that is said to be based on additional CCTV that was not shown at trial. Firstly, witnesses were apparently giving evidence about CCTV that they viewed some considerable time ago. Secondly, I have no reason to believe that the CCTV was better quality than that produced at trial. Thirdly, it is clear that witnesses have been discussing this CCTV. For example, the Claimant says in his witness statement that the CCTV shows Mr Hollinshead breaking to avoid another rider breaking. In cross-examination he accepted this was wrong and sought to explain it as an educated guess. It seems to me that it is more likely that witnesses have, understandably, discussed the incident and that have adopted the views of others. That makes it difficult to reach any reliable conclusions about CCTV not shown at trial.

40. I have concluded that:

    i) The only finding that can be made without the assistance of any tools is that the CCTV shows an endo. I will deal later with the purported expert evidence that the CCTV shows more.

    ii) To the extent that witnesses have sought to give evidence that the CCTV shows anything else there is either no basis for that or the evidence purports to be based on CCTV seen at Oulton Park on the day of the incident and not produced at trial. I have already explained why I cannot give weight to evidence as what was shown on CCTV on the day of the incident.

The cause of the endo

41. It appears to me that there is no evidence that allows me to conclude that the Claimant and Mr Hollinshead would have collided had there been no endo. As a consequence, I have to consider whether the Claimant has proved, to the balance of probabilities, that the cause of the endo was a deliberate decision of Mr Hollinshead to brake. Viewing the CCTV without expert assessment does not assist. As a consequence, it appears to me that the expert evidence about the cause of the endo is key.

[3] Most witnesses appeared to use the terms interchangeably. However, Mr Jowitt, the expert called by the Defendant, said that a stoppie is essentially a controlled circus trick while an endo is an accident. As a consequence, I will use the term endo.

42. The Claimant called Paul Tydeman as an expert while the Defendant called Stephen Jowitt. The joint statement they produced makes it clear that both experts were agreed that the endo occurred when Mr Hollinshead's motorbike slowed significantly. It was this loss of speed that caused the endo. What is in dispute is the cause of that loss of speed. Essentially Mr Tydeman's view is that the endo was unlikely to be caused by a mechanical error. Instead it was caused by an application of Mr Hollinshead's brakes that was controlled and progressive. In contrast, Mr Jowitt was unable to conclude that there was a deliberate application of the brakes.

43. At the very least I accept that the evidence of Mr Tydeman cannot establish to the balance of probabilities that the endo was caused by Mr Hollinshead deliberately applying his brakes. I prefer the evidence of Mr Jowitt to the evidence of Mr Tydeman. Indeed, as I set out below, I have concerns as to whether Mr Tydeman was an appropriate expert in the context of an accident that occurred on a racetrack. I have reached these conclusions for the following reasons:

    i) Mr Tydeman's experience is essentially in the investigation of road accidents. His understanding of racing motorbikes was based on reading articles. Mr Jowitt has been a motor racing scrutineer for about twenty years. It appears to me that this is significant as the evidence demonstrated that there are significant differences between road and racing motorbikes. For example, Mr Jowitt's evidence was that brake systems on racing bikes are more effective. That is probably obvious in light of the speeds on racetracks. However, it was highly relevant to his explanation of a mechanism whereby brake fluid contamination could have caused Mr Hollinshead's motorbike to brake without him deliberately applying the brakes.

    ii) Mr Tydeman relies heavily on his analysis of the CCTV to assess the relative speeds of motorbikes shown on that CCTV. It appears to me that this analysis is highly speculative and involves a number of significant assumptions that undermine its reliability. For example, speed was calculated by assessing when the CCTV showed a motorbike crossing a virtual line. However, because the distance between the CCTV camera and each end of the virtual line was significantly different, it appears to me that it was impossible to be certain how far a motorbike travelled within the sector. The value of these calculations is also undermined by the fact that Mr Hollinshead's motorbike performed its endo before he left the sector. The endo is bound to have impacted on speed. These are simply examples of a number of matters that suggested that the findings that Mr Tydeman made regarding CCTV were speculative. It appears to me that it is significant that during cross-examination Mr Tydeman accepted that he had not complied with the methodology in a paper entitled *Positioning Techniques for CCTV Analysis* by Mark Crouch and Stephen Cash. No alternative published methodology was cited by Mr Tydeman to support his approach. As a consequence, there appears to be little basis for the approach he adopted.

    iii) The evidence of the witnesses who participate in track days was clear that it is exceptional for an endo to happen on a racetrack. There appeared to be no previous example of it identified by any witness. That suggests that it is highly unlikely that Mr Hollinshead would have applied his brakes in what must be an exceptional manner. That is particularly unlikely in circumstances in which no witness suggested that braking would have been likely at this point on the track.

Mr Tydeman suggested Mr Hollinshead could have done a running brake test. However, Mr Hollinshead was clear that he had not braked shortly before the accident. Instead he said that his front brake had locked unexpectedly. I have no reason to doubt that evidence. It appears to me that it is difficult to understand why he would have braked in the manner alleged accidentally. Although he was relatively unfamiliar with his motorbike, he was an experienced track rider.

iv) In contrast, it appears to me that Mr Jowitt has identified two potential mechanical causes for the endo. These are matters that are based on the particular features of the braking system of racing motorbikes. The first of these mechanisms is a brake pad sheer. Importantly, although this is obviously uncommon, Mr Jowitt explained how it could occur after a wheel was changed. Mr Hollinshead explained how he changed his wheel in light of earlier rain. The alternative mechanism identified by Mr Jowitt is that of brake fluid contamination. Again the evidence of Mr Jowitt was convincing.

44. The evidence of Mr Neate was that the endo had nothing to do with sighting laps taking place at the same time as an open lap. He said that the accident was due to an unforeseen mechanical accident and the Claimant being too close to Mr Hollinshead. In light of my conclusions regarding the expert evidence, I find that it cannot be proven to the balance of probabilities that the accident was caused by anything other than an unforeseen mechanical accident. To that extent, I agree with Mr Neate.

Legal principles

45. The parties have agreed that many of the legal principles to be applied when determining liability are not in dispute. I appreciate the parties' cooperation. The agreed principles (as well as the areas of dispute) are:

i) The Defendant owed the Claimant a duty to take such care as was reasonable in the circumstances to see that the Claimant was not exposed to a foreseeable risk of injury over and above the inherent risk of injury in the sport of track day motorcycling. As was noted by Davis J in *Wattleworth v Goodwood Road Racing Co Ltd* [2004] PIQR P25, the Claimant must be taken to have consented to the risks inherently involved in track days [175].

ii) The Claimant does not have to prove that that the Defendant foresaw or ought to have foreseen the precise manner in which the additional risk of injury arose. But the Claimant must establish that the Defendant foresaw (or ought to have foreseen) that its acts or omissions may have exposed the Claimant to an additional risk of serious injury over and above that inherent in the sport of track day motorcycling.

iii) The Claimant's case is brought against the Defendant directly as an organiser of motorsports track days, and as vicariously liable for the acts and omissions of its instructors.

iv) The Defendant owed the Claimant a duty to act with the skill and care to be expected of (a) a reasonably competent organiser of motorcycle track days and/or (b) a reasonably competent motorcycle track day instructor.

v) It is for the Claimant to prove breach of duty. The Claimant must prove that no reasonably competent motorcycle track day organiser and/or instructor would have acted as the Defendant (directly or via its instructor) did in permitting three riders including Mr Hollinshead to undertake their sighting laps during an open / live fast group session.

vi) It is for the Claimant to prove both (a) causation in fact; and (b) causation in law.

vii) There is a dispute as to what test must be met by the Claimant if he is to prove causation in fact. The Defendant argues for a 'but for' test. The Claimant argues additionally that a 'material contribution' test applies and it is sufficient if the Claimant can show that the Defendant's breach of duty contributed materially to his injury. In support of this submission, the Claimant cites *M v Newlands School* [2007] ELR 256. In that judgment, the parties were agreed that the applicable test is that stated in *Chester v Afshar* [2005] 1 AC 134. In *Chester* it was held that a 'material contribution' occurs when 'wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates' [18]. I need not resolve which test applies in light of my findings of fact.

viii) There is also a dispute as to what test must be met by the Claimant if he is to prove causation in law. The Defendant argues that where, as here, another factor (i.e. the braking of Mr Hollinshead's bike) is said to have caused the accident, the Claimant must prove that the Defendant's breach was the 'real, substantial, direct or effective cause' of the accident and not just part of the factual background against which it took place such that it provided the occasion for the accident to occur (*Stapley v Gypsum Mines Ltd* [1953] AC 663 at 687 per Lord Asquith). The Claimant argues that the issue is whether the accident was 'so closely mixed up' with the Defendant's breach of duty that it ought to be regarded as causative of the accident (at 677 per Lord Oaksey, and at 681 per Lord Reid). Again I have concluded that I need not resolve this issue in light of my findings of facts.

ix) If causation in both law and fact are established, it is necessary to determine whether there was an intervening act that means that there is no liability. That means it is necessary to consider whether, subsequent to the initial wrong by the Defendant, a non-tortious event occurs:

… which is a sufficient cause i.e. it would have been sufficient in itself to cause the loss, the causative effect of the initial tort is treated as spent or obliterated (*Clerk & Lindsell on Torts*, 22nd Edn (2019) §2-103 citing *Carslogie SS Co Ltd v Royal Norwegian Government* [1952] AC 292).

Submissions of the Claimant

46. In light of the fact that closing oral submissions took place remotely, both parties were invited to submit detailed written submissions. Both parties took advantage of that invitation. The summary of the submissions below does not repeat in full the written and oral submissions. The full submissions have been considered.

47. The matters pleaded by the Claimant in the re-amended particulars of claim dated 19 November 2018 were wide ranging. However, the Claimant's submissions were more focused in light of the evidence. It is the submissions that my reasoning addresses.

48. The Claimant argues that the e-mails from the instructors dated 27 February 2014 put the Defendant on notice that its practice of allowing sighting laps during open fast group sessions was inherently dangerous. The Claimant argues that the evidence given at trial is 'disingenuous'. In particular, before the Claimant's accident nobody had pointed to it being dangerous to put fast riders in the open novice group sessions. The Claimant also argues that no proper risk assessment was undertaken by the Defendant.

49. The Claimant argues that Mr Torr made an unreasonable decision when he decided to take Mr Hollinshead onto the racetrack for a sighting lap while a fast open session was taking place.

50. The Claimant argues that the accident occurred when Mr Hollinshead was travelling slower than the Claimant and then deliberately applied his brakes. In support of that submission the Claimant relies on the evidence of Mr Tydeman. Essentially there were flaws in the conclusions of Mr Jowitt. As a consequence, it is said that causation is made out.

Submissions of the Defendant

51. The Defendant argues that the accident was caused by the sudden and unforeseeable application of the brakes on Mr Hollinshead's bike. This was not intentional. In support of that argument the Defendant argues that the evidence of Mr Jowitt should be preferred over that of Mr Tydeman. That is both because he has greater relevant experience and because his reasoning is more robust. The Defendant also argues that the evidence of Mr Hollinshead that he did not brake should be accepted.

52. The Defendant argues that there was no breach of duty. In particular, the evidence pointed to it being acceptable to take riders out for a sighting lap while a fast open group is being conducted. The Defendant also pointed to the absence of expert evidence to support the Claimant's case that there was a breach of duty.

53. The Defendant argues that causation is not proven by the Claimant. The Claimant cannot show that had the Defendant acted in the manner alleged, the accident would not have happened. In particular, it cannot be shown that the act of holding a sighting lap concurrently with a fast open group had any causative effect. Finally, the mechanical failure of Mr Hollinshead's bike that caused the endo was an intervening act.

Issues

54. There is no dispute that the Defendant owed the Claimant a duty of care. As a consequence of this it is agreed that the 3 issues that I need to determine are:

    i) What, as a matter of fact, was the mechanism of the accident?

    ii) Did the Defendant breach the duty of care owed to the Claimant?

    iii) Was the accident caused by any breach of the duty of care by the Defendant?

Mechanism of the accident

55. It appears to me that it is clear that the accident was caused because Mr Hollinshead's motorbike performed an endo. It appears to me that there is no evidential basis for concluding that there would have been an accident had there been no endo. My findings set out above demonstrate that I have concluded that the Claimant has failed to prove on a balance of probabilities that this accident was caused by anything other than an unforeseeable mechanical failure.

Breach of duty of care

56. It appears to me that volume 4.1 of the Instructor Manual is correct to recognise that there are a range of matters that may cause a rider to ride slower during a sighting lap than they will in an open session. As a consequence, there is good reason why an instructor should be cautious before taking a rider out for a sighting lap in a fast group. However, volume 4.1 of the Instructor Manual does not set a rigid rule. There is good reason for that. As some of the Claimant's witnesses accepted, there are reasons why a sighting lap should not be conducted too slowly. As noted above, there are obvious safety issues if a fast sighting lap is undertaken while a slow novice open session is taking place. Fast riders also need to keep their tyres warmed up.

57. It appears to me that the risks associated with sighting laps involving riders from the fast group taking place at the same time as a fast open group are not as great as might first appear:

    i) One implication of the evidence is that any rider in a fast open session must expect that there will be riders riding at a range of speeds. Firstly, it is not uncommon for there to be sighting laps. In addition, other factors such as equipment and experience will affect a rider's speed. It is implicit in the decision to arrange track days so that there are three groups that each group will include riders riding at a range of speeds.

    ii) I have also reached findings above that the difference in speed between open sessions and sighting laps is not as great as that claimed by the Claimant's witnesses. That is particularly true where sighting laps are taking place at the same time as open sessions.

58. In reaching the conclusions above, I have taken account of the Claimant's reliance upon dicta of Sedley LJ in *Craven v Riches* [2001] EWCA Civ 375. In that judgment Sedley LJ commented that:

    … the defendants' undoubted duty of care extended to preventing the avoidable obstruction of faster riders by slower ones [36]

    However, those remarks were qualified by what followed:

    … not of course by making everyone go at the same speed, but by ensuring, if they could, that a fast rider did not come upon a slow one in circumstances in which he might not have time to take avoiding action. [36]

It appears to me that there is no evidence that suggests a breach of the duty described Sedley LJ. There is no evidence that in normal circumstances the Claimant could not have avoided the sighting group. Riders in open groups can expect to overtake in light of the range of speeds. The issue in this case is the extraordinary incident of an endo.

59. There is one aspect of the evidence that has weighed particularly heavily with me when reaching the conclusions I have reached regarding the duty of care. That is the fact that many of the Claimant's witnesses gave oral evidence that it was ultimately for an individual instructor to decide whether to take a rider out for a sighting lap during a fast open group. It appears to me that that evidence essentially accepts that judgments need to be made during a track day as to whether a particular rider should be permitted to conduct a sighting lap during a particular open lap. Safety is best achieved by assessing the speed that is likely to be appropriate for a particular rider undertaking a sighting lap. It is striking that there is no expert or other evidence that other providers of track days do not adopt a similar practice.

60. I have given careful consideration to the e-mail exchanges on 27 February 2014. It appears to me that it is significant that a number of instructors, including Mr Bunting, were expressing the view that sighting laps should not take place during fast open laps. However, I have concluded that there are good reasons for that view to be rejected. I cannot say that the rejection of the proposal was unreasonable. The actual evidence that there had been problems with riders undertaking sighting laps during fast open sessions was limited. So a system of allowing sighting laps during fast open sessions appears to have operated without serious problem for a number of years at a large number of track days. I also cannot conclude that the decision making process that caused Mr Bunting's proposal to be rejected was inadequate for the reasons given.

61. Once it is accepted that sighting laps can take place at the same time as fast open groups, it appears to me that it is almost inevitable that a decision as to whether that is appropriate in an individual case must be left to the instructor who will take the particular rider out on to the track.

62. In light of the matters in the paragraph above, it appears to me that the Claimant has failed to prove on the balance of probabilities that the Defendant failed to act with the skill and care expected of a reasonably competent organiser of motorbike track days when it allowed Mr Hollinshead and others to participate in a sighting lap while others were participating in a fast open session. There were good reasons why individual instructors should be allowed to decide whether it was appropriate for riders to participate in a sighting lap while others were participating in a fast open session.

63. Further, it appears to me that the Claimant has failed to prove on the balance of probabilities that Mr Torr failed to act with the skill and care expected of a reasonably competent motorbike track day instructor. His evidence was clear that he assessed Mr Hollinshead before taking him out for a sighting lap. I am concerned that there is a lack of documentation but this is not positive evidence that contradicts Mr Torr. I have considered the point made Mr Charrett in evidence. That is that one cannot simply rely on what a rider says when assessing whether it is safe for them to take part in a sighting lap during a fast open group. However, most of the evidence accepted that instructors are in the position to assess whether a rider should be taken out in a particular sighting group.

64. The findings above as to whether there has been a breach of duty of care mean that this claim cannot succeed. However, in case I am wrong about them, I have gone on to consider further issues raised by the claim.

Causation

65. My findings regarding the mechanism of the accident are that it cannot be proved on balance of probabilities that the cause of this accident was anything other than an unforeseeable mechanical accident. However, if there was a breach of duty, the implication is that Mr Hollinshead should not have been on the track at the same time as the Claimant. That implies that the accident would not have occurred 'but for' any breach of duty. It also means that the 'material contribution' test has been met by the Claimant.

66. Although I have found causation could have been established as a matter of fact, my findings regarding the mechanism of the accident mean that it cannot be proved to the balance of probabilities that any breach of duty was the legal cause of the accident. I have essentially concluded that the direct cause of the accident had nothing to do with any breach of duty. That is because it cannot be said that the direct cause was anything other than a mechanical fault. As a consequence, it cannot be said that any breach of duty was the 'real, substantial, direct or effective cause' of the accident or that the accident was 'so closely mixed up' with the Defendant's breach of duty that it ought to be regarded as causative of the accident.

67. If I am wrong about legal causation, it appears to me that there is a more fundamental problem. My findings of fact mean that following any breach of duty the endo occurred. My findings mean that the Claimant has not established that was caused by anything other than a mechanical failure. There is no evidence that suggests that mechanical failure was caused by the tortious acts of Mr Hollinshead or anyone else. That mechanical failure would have been sufficient to cause the accident as it did not depend upon any breach of duty. As there is an intervening act that means that causation cannot be established.

Concluding remarks

68. In light of the matters above, it appears to me that the Claimant's claim must fail. It appears to me that there is no legal liability on the part of the Defendant.

69. The fact that the Defendant was not legally liable for the accident does not mean that there are not lessons to be learnt. It is not my role to determine whether there are lessons to be learnt and I am conscious that further evidence would have been called if that were my role. However, I hope that consideration is given to whether safety can be improved. For example, I have noted that there are issues about the adequacy of records kept when decisions were taken as to whether a rider participates in a sighting lap at the same time as a particular open group.