

**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL SCOTLAND SHERIFF COURT**

[2017] SC EDIN 73

PN/2063/16

JUDGMENT OF SHERIFF PETER J BRAID

In the cause

ALEXIS CARNWATH

Pursuer

Against

MAUREEN TAYLOR
t/a Scottish Equi Complex

Defender

Pursuer: Christine

Defender: Pugh

Edinburgh, 8 November 2017

The sheriff, having resumed consideration of the cause, makes the following findings in fact:

1. The pursuer is Alexis Carnwath. Her date of birth is 23 July 1983.
2. The defender is Maureen Taylor, t/a Scottish Equi Complex.
3. On 19 July 2014 the pursuer, and her sister-in-law, Gemma Carnwath (“Gemma”), attended at the defender’s premises to participate in a hack. A hack is an expedition on horseback outwith the riding establishment.
4. Prior to the hack, the pursuer completed registration form number 6/5 of process. She self-assessed herself as a beginner (being the least experienced category of rider after “New Rider (not ridden before)”). She also assessed her riding capabilities as being able to ride at a walk and to trot with stirrups.

5. The pursuer also told the defender that she had not ridden for some 15 years, when she was aged about 15 as was the case.
6. The defender introduced the pursuer and Gemma to her employee, Rebecca King, who was to lead them on the hack.
7. Miss King, then aged 19, had considerable riding experience. She had not yet begun working towards an instructing qualification, although she was accustomed to leading hacks. She had often ridden the route which was taken by the hack on this occasion.
8. After being allocated suitable horses (in the pursuer's case, Melvin) the pursuer and Gemma went out on the hack, led by Miss King. The order in which they rode throughout was Miss King first, then Gemma and then the pursuer.
9. They began by riding along the side of Lanark racecourse for a distance of about one mile. The pursuer's horse was generally several metres behind the others. There was some conversation between Miss King and Gemma, but no conversation between Miss King and the pursuer.
10. Apart from one occasion when they trotted for about a minute along the side of the racecourse, the horses all rode at a walking pace (about three miles per hour).
11. When they reached the far end of the racecourse, Miss King told the pursuer and Gemma that they would now ride through some woods, after going down the short side of the racecourse, at the far end from the stables. She gave general advice about hazards, to the effect that they should lean backwards when going downhill and forwards when going uphill. She also said that if there were any branches, they should either duck down, or steer round but they should follow what she did.
12. The hack then entered the wooded area. The horses and riders followed a path through the woods, in the same order as previously.

13. At that time of year (summer), there was foliage which encroached upon the path, which the pursuer had to swat away. She did this by using her left hand while keeping her right hand on the reins. She was able to do so easily, until encountering the branch referred to in finding in fact 15.

14. The pursuer is 5' 9" in height. Miss King is 5' 2". Miss King's horse was smaller than Melvin.

15. About 50 to 100 metres along the path was an overhanging branch. It was at about eye height for the pursuer and Gemma (but above that for Miss King: see finding in fact 14).

16. It was not possible to move the branch out of the way with one's hand. As such, it was a hazard to the riders, which they had to negotiate either by ducking down by leaning forward or by riding around it.

17. Miss King was aware of the presence of the branch and of the hazard which it posed to riders.

18. Immediately before she reached the branch Miss King issued a warning to duck, which she did by leaning forward on to the mane of her horse. She did not have a clear view of the pursuer. She did not stop, nor did she otherwise satisfy herself that both Gemma and the pursuer had heard the warning, or were able to observe what she did. In any event the pursuer did or said nothing to indicate that she had heard the warning.

19. Gemma heard the warning and did see how Miss King had negotiated the branch. She had just enough time to duck herself, although her initial reaction had been to try to push the branch out of the way.

20. The pursuer did not hear the warning given by Miss King, nor did was she able to see her going under the branch.

21. After Gemma passed under the branch and after she had straightened herself up, she shouted to the pursuer to duck.
22. By that time the pursuer was almost upon the branch, which she had not previously noticed. Her first reaction was to try to move the branch out of the way with her hand. When she realised that was not possible it was too late for her to duck.
23. To avoid being hit by the branch and dislodged from Melvin, the pursuer leaned back, although she knew that by doing so she would likely fall off. In doing so she lost her balance and fell to the ground.
24. A reasonably competent hack leader would have (i) issued a warning to duck and (ii) satisfied herself that such a warning had been heard and understood by all the riders on the hack.
25. If necessary the reasonably competent rider would have stopped the hack to ensure that her instruction had been understood. In deciding whether to stop, the experience of the riders would be taken into account.
26. The pursuer was an inexperienced rider.
27. The care exhibited by Miss King fell below the standard of care of a reasonably competent hack leader.
28. Miss King was at all times acting in the course of her employment with the defender.
29. If the pursuer had heard a warning given in sufficient time she would have been able to avoid the hazard, by leaning forward and ducking.
30. As a result of the injuries sustained in her fall, the pursuer has suffered loss of £24,000 inclusive of interest to 18 October 2017.

Makes the following findings in fact and law:

1. This court has jurisdiction.
2. The pursuer has suffered loss, injury and damage through the negligence of the defender's employee for whom the defender is vicariously liable.
3. The pursuer did not fail to take reasonable care for her own safety.
4. The loss, injury and damage sustained by the pursuer is reasonably assessed at £24,000.

THEREFORE Grants decree against the defender for payment to the pursuer of the sum of TWENTY FOUR THOUSAND POUNDS (£24,000) STERLING; assigns 20 November 2017 at 2p.m. within the Sheriff Court House, 27 Chambers Street, Edinburgh, as a hearing on expenses.

Note

[1] The pursuer seeks damages in respect of a riding accident which she sustained on 19 July 2014, when she fell from a horse while participating in a hack being led by the defender's employee. By the time of the proof, which called before me on 18 and 19 October 2017, damages had been agreed in the sum of £24,000 on a full liability basis. The issues to be resolved at the proof were those of liability and contributory negligence. It was not in dispute that the cause of the pursuer falling from the horse was her failure to negotiate her way past a low-hanging branch on the route which the hack was following. The main issue between the parties was whether sufficient warning was given to the pursuer of the existence of the hazard which the branch presented and how to deal with it. In the event of negligence being established, the parties were also at issue as to the extent, if any, to which there was contributory negligence on the part of the pursuer.

The Evidence

The Pursuer

[2] The pursuer's evidence was that she and her sister-in-law, Gemma, had attended at the defender's riding stables on the day in question to participate in a hack. They had been given vouchers by her husband for Christmas. She had not ridden for some 15 years and made the defender aware of that. She completed a registration form, number 6/5 of process. She self-assessed herself as a beginner having initially ticked novice but she had scored that out because on reflection she considered that she was more a beginner than a novice ("Beginner" being the less experienced of the two categories). She assessed her riding capabilities as being able to ride at a walk and to trot with stirrups. She had ridden with friends when she was a child but seldom, if ever, in wooded areas. After the form had been completed, the defender introduced the pursuer and her sister-in-law to her employee who was to lead the hack, whose name the pursuer did not know, but who was Rebecca King. After being allocated horses, and issued with helmets, the hack began. They initially went on to the racecourse. They went at walking pace except for about a minute when they trotted. The pursuer's horse was falling behind the other two. When they reached the far end of the racecourse, Miss King rode back to the pursuer to tell her that they were going to go through the woods. No warning of any sort was given. They then rode down the short end of the racecourse, towards the left and went through a gap in the fence into the woods. The path was overgrown and she constantly had to brush away foliage with her left hand, which she was able to do without difficulty. That included overhanging branches. Gemma and Miss King were still a bit in front of her. About 100 metres or so into the wood, Gemma had shouted "you need to duck". The pursuer had her hand up to push the foliage away but it turned out to be a really heavy branch which she couldn't move. Her horse was still

walking forward. It was then too late to avoid the branch and she either had to fall off having been hit by the branch, or lie back and fall off anyway. She chose the latter course and duly fell off. Prior to Gemma shouting, the pursuer had not noticed the branch. That was because she was concentrating on the foliage and on the path. She couldn't see Miss King at the point Gemma had shouted. At no time had she received any warning from Miss King regarding the presence of the branch. Voices were not carrying due to the dense wood (and on the racecourse it had been difficult to hear because it was windy). The only time Miss King had spoken to her after the commencement of the hack was when she rode back to say that they were going through the woods.

[3] In cross-examination the pursuer acknowledged that horse riding carried a degree of risk. She maintained her position that prior to going into the woods no warning had been given, and the hack had not stopped but was prepared to accept that that could have happened; it simply was not her recollection. The branch had been at her eye level. Initially she wasn't sure if it was big or small or just foliage. Putting her hand up to try to move it was just a reaction. She maintained her position that Miss King had not shouted. If she had, the pursuer did not hear it. She thought she was about 15 metres behind Gemma when she heard her shout but it might have been closer. Everything had happened in a fraction of a second.

Gemma Carnwath

[4] Gemma Carnwath gave evidence which broadly corroborated that of the pursuer. The hack began on the racecourse. They went down the right-hand side of the racecourse. Gemma and Miss King were slightly ahead of the pursuer, whose horse was keen to graze and slower. Miss King advised Gemma that they were going into a wooded area further

along. Miss King said that there would be low lying branches or foliage and she would be able to push these out of the way easily with one hand, the other hand being kept on the reins. At that point, the group was still moving. Miss King was talking to both the pursuer and Gemma but it was quite difficult to hear her. The horses continued to walk and they entered the wooded area. The pursuer was still behind Gemma, but a good bit behind. They had had to stop from time to time to let her catch up. When they entered the wooded area there were a lot of low-hanging branches and midges. She had to keep one hand on the reins and push branches out of the way and swat midges with the other. There were a lot of branches. They were riding along when she saw Miss King lying right onto her horse's neck. Gemma did not really know why. At around the same time Miss King told Gemma that she had to duck and she realised that's what she had to do. Miss King was already down when she shouted that. Gemma's initial reaction was to try to push the branch out of the way but when she realised that was not possible she still had sufficient time to duck under the branch, which she managed to do just in time. She was a little bit shaken because she hadn't realised that she would have to do that. Once she had straightened up she shouted on the pursuer to do the same. When she turned her head she noticed that the pursuer was in the process of falling off. She, Gemma, shouted to Miss King who until that point had not noticed that the pursuer was in difficulties.

[5] In cross-examination, Gemma Carnwath continued to assert that the instruction given had been to move the branches using one hand. She also insisted that the group had not stopped before entering the wooded area.

Rebecca King

[6] Miss King began her evidence by relating her experience with horses. Now aged 22

and aged 19 at the time of the incident, it was clear that she had a significant amount of experience and was fully capable of leading a hack. I do not find it necessary to relate her experience in detail, save to say that her experience in hack riding had been gained from on-the-job training rather than from any formal training. She is currently working towards an instructor qualification but was not doing so at that time. She remembered the pursuer and Gemma. She had not specifically discussed their experience with them. She was unaware what had been written on the form. The defender had told her that they had not ridden recently. The hack had begun along the right-hand side of the racecourse which was about a mile in length. The purpose of that was for her to assess the riders' abilities, which she had done. In particular, she was assessing whether or not they were suitable to be taken into the woods. If they had not been suitable there was a possible alternative route which could have been used although in practice that was seldom done and the vast majority of hacks went through the woods. She did not remember a trot while going along the racecourse but that could have happened. She could remember specific details of conversations with Gemma but not with the pursuer. When giving evidence about what conversation if any took place before going into the woods she said "I stop usually just before the extreme end [of the racecourse] and say 'now we are going into the woods. There will be some hills. Lean backwards when going downhill. Lean forwards when going uphill. If there are any branches either duck down or steer round but follow what I do in front of you'". She had that conversation with every client and she remembered having it with Gemma and the pursuer. They then went onto the path. There was no dense foliage for the first 50 metres. About 50 metres in, branches started to come out. Until that point there was no need to brush aside any foliage. She had been aware of the branch in question. It would be about head height for the pursuer but was above that for Miss King, who was 5'2" and was on a

smaller horse. She flatly denied having told the pursuer and Gemma to brush aside branches with their hand. That is not an instruction which she would give. It was not safe to do that because it would involve taking one hand off the reins. The branch in question was about three quarters of the way over the path. You could see it well in advance. It was the first obstruction after walking along a clear path. They were going at walking speed at about maybe two or three miles per hour. Before they got to the branch she turned round and told the riders how to tackle the branch. She remembered doing this. She did not remember if they said anything in response. After she had gone through herself, she heard the pursuer shouting "help". When she turned round the pursuer was falling off her horse.

[7] In cross-examination, Miss King refused to accept that the pursuer and Gemma were inexperienced riders. She based this on their being able to walk and to trot with stirrups, which was not the mark of an inexperienced rider. If they had been inexperienced she wouldn't have taken them down that path. She had a good memory of the incident itself. She did not allow any distance to build up between the horses. Each horse was a horse length behind the horse in front. She remembered stopping at the wood that day (she initially said "and at the branch" although retracted this in response to a question from me a few minutes later). She did not accept that she had any motive to lie, or that not having given a warning might have implications for her. She gave the same advice to everyone. That advice was to lean forward under the branch or to go round it. After some hesitation she accepted that it was not only necessary to issue the instruction but also to make sure that the riders had understood it. After another slight hesitation she also accepted that she should check what the riders were doing. She accepted that she had not known whether the pursuer heard her instruction or not but that she had proceeded on the basis of an assumption that she had. If the instruction had not been heard, the pursuer should have

said so but she didn't. When she turned round she had been able to see both riders. "You make sure that they are looking at you when giving the instruction. You don't just look at the first person; you can do that while the horses are still walking." There was no need to stop. While it might be difficult to make yourself heard in the racecourse that did not apply in the woods where it was more sheltered. Although she did not accept that the path before the tree had been covered in foliage, she did accept that from time to time it was cut back by livery clients or by the council. For that to be necessary, she accepted that there must be some level of encroachment. She had not stopped to issue the warning but she did accept that there might be circumstances where that should be done. She insisted that she had given the warning to duck before she got to the tree and that at that time the pursuer would be three horse lengths behind her.

The Expert Evidence

[8] Expert evidence was given for the pursuer by Marissa Cowell, Equine Behaviour Consultant, who spoke to her letter of opinion dated 19 October 2015, number 5/8 of process. Charles Lane, for the defender spoke to the terms of his report dated 28 April 2017, number 6/2 of process.

[9] Ms Cowell and Mr Lane spoke to their respective experience and expertise which I do not intend to rehearse. Mr Lane's CV is appended to his report and Ms Cowell's CV forms number 5/10 of process. I accept, as did the parties, that both witnesses possessed the requisite skill to qualify them to give opinion evidence as expert witnesses. In the event, there was a large measure of agreement between them. Ms Cowell's position as to the standard of care expected of a hack escort was encapsulated in the following passage which

appeared in appendix 1 to her letter, which was an extract from “The Principles of Teaching Riding” (page 105), the official manual of The Association of British Riding Schools:

“During the hack [the hack escort] should check behind him frequently to ensure that he is setting a suitable speed, and that none of the riders is experiencing difficulties. Warning of changes in gait, difficult terrain, or hazards such as low-hanging branches, should be given in plenty of time, and if necessary, the ride should be halted so that advice and instruction may be given as to how to deal with such eventualities”.

[10] As I understood it, Ms Cowell’s opinion was not that the reasonably competent hack escort should have had regard to that specific work, which she herself had become aware of only about two years ago (and therefore after the pursuer’s accident in this case). Rather, it was that the advice correctly encapsulated what the reasonably competent hack expert should do. In particular, her view was that for inexperienced riders, such as the pursuer, the escort should stop the ride before passing the hazard to ensure that the warning of the hazard, and instruction as to how to deal with it, was effectively communicated to the riders. She did not accept that this was a counsel of perfection, nor that the words “if necessary” in the text meant that the matter could be left to the escort’s judgement. However, perhaps the key passage of her evidence came out at the end of cross-examination where she said that the point of stopping was to make sure that the rider understood what was to happen.

[11] Mr Lane substantially agreed with the foregoing extract, but his view was that the advice always to stop went some distance beyond best practice. He saw it as a matter which should be left to the judgement of the escort, for which view he gained support from the words “if necessary”. Having regard to the circumstances of the present case he considered that it was not necessary to have stopped before the hazard but that was on the assumption that the court accepted Mss King’s evidence as to the warning she had given before entering the wooded area. Were a hack to be stopped in the manner suggested by Ms Cowell every

time a hazard were approached, the length of time that the hack took could be significantly increased and the riders would “all be bored rigid”. Crucially, however, Ms Cowell did accept that immediately before coming to the hazard the escort should warn, at least, inexperienced riders about it and make sure that they knew how to deal with it. In this regard, he agreed with the evidence of Ms Cowell, recorded at the end of paragraph 10 above.

Assessment of the Evidence

[12] As far as the credibility and reliability of the factual witnesses is concerned, I found the pursuer to be both credible and reliable. She appeared to be an uncomplicated historian and did not appear to me to be fabricating her evidence or to have difficulties in recollection. She did not seek to shrink from answering questions which might potentially weaken her position. For example, she readily acknowledged that horse riding is a sport which carries with it the inherent risk of falling off one’s horse. She also readily acknowledged that she knew that by leaning backwards she would likely fall off. Her account of the accident was also entirely credible. To me, it was very plausible that by the time she encountered the branch and had tried unsuccessfully to move the branch with her hand, it was too late to duck under it. Moreover, although she had not ridden for some 15 years she had ridden as a child and teenager and was aware of the rudimentary principles, in particular, that when going uphill one should lean forwards, and backwards when going downhill. If she had heard a warning to duck, in sufficient time before reaching the branch, it is extremely unlikely that she would not have responded to it and acted appropriately – because she knew that, otherwise, she was likely to fall off. This is not a case, in other words, of a rider who did hear the instruction to duck but thought, for some reason, that it might be safer to

lean backwards. The pursuer's credibility was also enhanced by her willingness to concede that some warning could have been given before entering the wooded area, although she did not recollect it. As far as Gemma Carnwath is concerned, I found her to be credible and generally reliable. Again, she did not appear to me to be fabricating her evidence nor did there appear to have been any prior discussion between her and the pursuer in so far as although their evidence generally coincided there were differences in the detail, as one would expect after this passage of time. Finally, as regards Miss King, I did not consider her evidence to be wholly reliable. That was for a number of reasons. First, much of it was prefaced by what she "would" do rather than what she could specifically remember. Clearly there were aspects of the day that she could not remember, such as whether the group trotted for a minute or so while going along the racecourse and what the weather conditions were. I therefore did not accept that her recollection of the material events in question was as accurate as she claimed. Second, she was less willing to concede points potentially against her interest. For example, she did not concede that she had an interest to paint as favourable a picture as possible, or that any finding of negligence might have implications for her. Third, there were parts of her evidence which she appeared to tailor as it went on. In particular, whereas initially she said that she "spoke" to the pursuer and Gemma Carnwath, in re-examination that became "speaking loudly enough for them to hear", doubtless in response to the line taken in cross examination; and a short time later this had become "shouting". Fourth, her insistence that a rider who did not hear an instruction should let her know that the instruction had not been heard need only be stated in those terms to realise how untenable a proposition it is. It follows that where there are differences between them, I prefer the evidence of the pursuer to that of Miss King.

[13] With those observations in mind I will now specifically turn to the principal disputed factual issues in the case:

- i. *What did the path look like?* I accept the evidence of the pursuer and Gemma Carnwath that there was, at the very least, sufficient foliage encroaching on the path that they had to swat it away with their hands. There was an issue between Gemma and Miss King as to whether the latter gave an instruction to use their hands to clear away foliage. On that particular issue, I am inclined to accept Miss King's evidence as more probably correct, particularly as the pursuer herself did not hear any such instruction being given. However, because she did not hear any such instruction it is unnecessary to decide whether that instruction was given or not. The pursuer's position was simply that swatting away the foliage was something that she was doing, and Ms Cowell accepted that would be an entirely natural thing to do. The photographs annexed to Mr Lane's report do not provide any real assistance in telling us what the path looked like in July 2014. Those photographs were taken in March 2017. Apart from the obvious point that they were taken in spring whereas the accident occurred in July, in the height of summer, we do not know what maintenance had occurred on the path in the intervening thirty two months. We do know that at the very least the offending branch had been cut down and we also know, from Miss King, that from time to time some foliage was cut back which as she conceded meant that there must be some encroachment. It is within judicial knowledge that there is more foliage in summer than in March. It is entirely credible, as the pursuer stated, that not only was there considerable foliage along the path, but also that it was likely to be obscuring what lay ahead, in particular the low-hanging and

offending branch, and how substantial it was. It is one thing to observe a bare branch in early spring; quite another to appreciate how significant an obstacle it presents in summer when it is covered in foliage. I therefore do accept the pursuer's evidence that she did not appreciate the significant nature of the branch until she was upon it. There is also the point that, being considerably lower down than the pursuer, Miss King may simply have been unaware of foliage which was not an obstruction for her, but was for those behind her, and so there is not necessarily an irreconcilable difference in the testimony of Miss King on the one hand, and the pursuer and Gemma on the other. If there is such a difference, however, I prefer the evidence of the latter for the reasons already given.

- ii. *The distance between the horses at the material times.* There was a divergence here on the evidence. The pursuer said it was about 15 metres; Gemma Carnwath thought slightly less; and Miss King less again (three horse lengths from first to last horse). Given the difficulty in estimating distance which all the witnesses evidently had, it is difficult to assess which estimate, if any, is most likely to be accurate. However, I do not consider that it is of any great importance. What is more important is that I accept the pursuer's evidence that by the time she heard Gemma tell her to duck, she was virtually upon the branch and that she then had insufficient time to react.
- iii. *What could the pursuer/Miss King see as they rode along the path?* To some extent this ties into the previous two issues in that the more foliage on the path, the greater their respective views would be obstructed; and the closer to the pursuer's horse that Miss King was, the more likely she would be able to see the

facial expressions of the riders behind; and of course, the more likely that the pursuer would be able to see what Miss King did and how she negotiated the branch. For that matter, the closer the horses, the more likely the pursuer would be able to hear any instruction given. While I accept that the horses would not necessarily be going in a perfectly straight line – indeed they probably were not – and that it might have been possible for Miss King to have seen, at least, parts of the pursuer and Melvin, Gemma and her horse were likely to form an obstruction to some extent and the fact that the pursuer was on a smaller horse, and therefore below both Gemma in the middle and the pursuer at the back, may also have impeded her vision to some extent (although I accept that wasn't put in cross examination). The pursuer for her part she said she could see Gemma "more or less". Be all that as it may, given that I do not accept that Miss King's recollection of the events leading up to the accident was as accurate as she claimed, I do not accept her evidence that she was able to see the pursuer to such an extent that she could form any impression or understanding as to whether she was able to hear the instruction to duck. On a similar theme, I accept that the pursuer was unable to see Miss King as she went under the branch and was therefore unable to comply with the instruction she had been given to follow what Miss King did.

- iv. *What happened before the hack entered the woods?* I accept the pursuer's evidence that Miss King rode back to her at the far end of the long side of the racecourse, to tell her that they were going into the woods. I also accept, since the pursuer conceded this was possible, that general advice was given as to how to deal with hazards, namely to lean forward when going uphill, backwards

when going downhill and if low branches were encountered, either to duck under them or to go round them but to follow what Miss King did.

- v. *What happened immediately before the incident?* First, I found Gemma's evidence to be persuasive, namely that the warning came as Miss King was going under the branch. I also accept that once she herself had passed completely under it, Gemma shouted back to the pursuer to duck. The crucial issue – perhaps the most important issue in the case – is whether or not the pursuer heard the warning from Miss King and, for the reasons set out above, I find that she did not. Further, there was no reason for Miss King to assume that she had, the reason that she gave – namely that the pursuer had not said that she had not heard – being, as I have said, untenable.
- vi. *Was the pursuer an inexperienced rider?* This is relevant to the extent that Ms Cowell's evidence was tailored towards what level of instruction and guidance a hack leader should give the inexperienced rider. Miss King disputed that the pursuer was an inexperienced rider, because she could walk and trot with stirrups, but not having ridden for 15 years, and seldom if ever in fields, the pursuer was by any normal standards an inexperienced rider, certainly in the context of hacks, and should have been treated as such. Ultimately, nothing may turn on this, given that Miss King accepted that a warning about the hazard did require to be given.

Parties' Submissions

[14] Many of counsel's submissions have already been taken into account in the foregoing discussion of evidence and issues, and I outline here only the basic submissions for each

party. For the avoidance of doubt, I have taken all of the issues raised in submissions into account. Mr Christine for the pursuer submitted that the evidence for the pursuer should be preferred. The branch presented a foreseeable risk of injury. The pursuer had not received any warning or instruction with regard to it. I should not find that there had been any lack of attention on the pursuer's part. I should find for the pursuer on a full liability basis. If I did find any degree of contributory negligence, it should be assessed at a modest level.

[15] Mr Pugh invited me to grant decree of absolvitor. I should prefer the evidence of Miss King. The pursuer's explanation did not make sense. The accident was wholly her fault. While both experts were qualified to give evidence as experts, I should prefer the evidence of Mr Lane. The two key issues were whether any warning had been given before entering the wood and whether any warning had been given before reaching the branch and on both of these I should find in favour of the defender.

Discussion

[16] The parties were agreed that the requisite standard of care was that expected of the reasonably competent hack escort. They were also agreed that the outcome of the case largely turned on the view reached on the facts, and in particular on the two critical questions as to whether any warning was given before entering the woods and again before coming upon the low hanging branch. I have already discussed my views on the critical factual issues. On the first, I have found that some advice was given before entering the woods and accordingly there was no breach of duty on Miss King's part in relation to anything done or said there. In any event the pursuer was aware that she should not lean back as to do so would result in her losing her balance.

[17] The case therefore very much turns on what happened immediately prior to encountering the branch. In the event, it is unnecessary to decide between Ms Cowell and Mr Lane as to whether it is accepted practice for an escort to stop inexperienced riders before negotiating a hazard, in the manner described by Miss Cowell. For the reasons given by Mr Lane, however, it seems to me that it is going too far to say that reasonable care demands that be done on every occasion, if only because that would likely diminish the enjoyment of the riders to an unacceptable degree. However, it is unnecessary finally to resolve that question because everyone, namely Ms Cowell, Mr Lane and Miss King herself accepted that a warning should be given to duck, before the rider had to negotiate the hazard. It was further accepted that the warning must not only be given but, in order to be effective, must be heard. The simple fact of the matter is that Miss King did not satisfy herself that the warning had been heard and there was no reason for her to suppose that it had. For that matter, there was no reason for her to suppose that the pursuer, who was bringing up the rear, was able to see how she negotiated the branch by leaning forward and ducking. One way of satisfying herself would have been to stop; another would have been to receive some other acknowledgement from both riders that they had heard and understood it. She did neither. To that extent, I do find that Miss King did fall short of the standard of care expected of her. If the pursuer had received a warning in sufficient time she would have been able to take evasive action, by ducking, and would not have fallen off Melvin. The negligence of Miss King therefore directly caused the pursuer's accident.

[18] As regards contributory negligence, there was in fact no evidence that the pursuer was not paying attention. I do accept that as an inexperienced rider, she might well be concentrating on a number of things. I have accepted that she had to brush away assorted foliage. While the tree was doubtless visible to her for some distance before she reached it, I

also accept her evidence that because of the surrounding foliage, it was not obvious that it contained a branch which could not be moved and which could not be brushed away. She had no particular reason to believe that it was so substantial that she would not be able to move it to one side with her hand. I therefore do not accept that there was any degree of contributory negligence on her part. The sole cause of the accident was the failure by Miss King to give a warning to the pursuer which the pursuer could hear, and to which she could react.

[19] I have therefore found in favour of the pursuer and granted decree in the agreed sum of £24,000.

[20] I was not specifically addressed on expenses and consequently have fixed a hearing thereon. It may be however that the parties can agree that aspect of the case by joint minute, in which event the hearing can be discharged.