SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 47

PN3187-17

JUDGMENT OF SHERIFF FIONA LENNOX REITH, QC

in the cause

JAMIE KIERAN

Pursuer

against

ACE ADVENTURE LIMITED

Defender

Pursuer: Brian Fitzpatrick, Advocate; Digby Brown LLP
Defender: Cowan, Advocate; Plexus Law

Edinburgh, 1 May 2019

The sheriff, having resumed consideration of the cause, finds in fact:

(1) The pursuer is 31 years of age. He is married.

(2) The defender is a company incorporated under the Companies Acts and has a place of business at Relugas Gardeners Cottage, Dunphail, Forres, Moray. The defender has premises at Auchnagairn, Dunphail, Forres ("the premises"). They run a number of outdoor activities from the premises. The outdoor activities include white water rafting.

(3) On Saturday 25 April 2015 the pursuer attended the premises as a member of a party of men attending a white water rafting experience on the River Findhorn organised by the defender. This was one of a number of activities planned for a stag weekend on both the Saturday and the Sunday for a member of the party. The white water

rafting was planned for the Saturday. At this point, the pursuer weighed about 17 and a half stone. He now weighs about 17 stone.

(4) The pursuer had travelled up from Glasgow by car on Friday 24 April 2015 to join other members of the party to stay overnight at a nearby bunkhouse. Members of the party, including the pursuer, had a meal and some drinks on the Friday evening. The pursuer was slightly hungover when he awoke the following morning at about 8am. He had a cooked breakfast and a rum and coke. He was not drunk. Alcohol did not contribute to the accident referred to below. It did not contribute to the manner in which the pursuer made his way down the slope referred to below.

(5) After breakfast on 25 April, the eight members of the party who were to be going white water rafting were taken to the premises by mini-bus. The journey to the premises took about 40 minutes. It was a cold day. There was rain and sleet on and off.

(6) The party, including the pursuer, was given a briefing at the premises about the activity. This briefing was given by an employee of the defender, Nick Ball. It lasted between five and ten minutes. It was principally about the white water rafting itself. It did not include any mention of the geography or topography of the location where the white water rafting would be commenced or how access was to be taken to the activity. The party was not told about the steep slope, referred to below, which they would have to negotiate in order to reach the departure point for the white water rafting on the river. There was also an instructor called Siana Hughes. The pursuer was issued with a wetsuit, a life-jacket and a hat. He was also given the option to pay an additional sum for the use of wet suit boots. The pursuer opted to pay for the use of wet suit boots as he thought they would be a good idea for rafting. The party

members got changed in a changing area at the premises and left day-clothing and their own footwear (other than the wet suit boots) in the changing area. It is likely that the pursuer had been wearing trainers to come to the premises. He left them there after he had got changed. The party was at the premises between about 30 and 45 minutes. The party was lively. They were excited for the day. One member of the party had been a bit too boisterous at the premises. The best man in the party was asked by a staff member to speak to that party member to get him to calm down. He did calm down. He was allowed to continue with the activity.

(7) The party was then taken in two mini-buses from the premises to the drop-off point known as Drynachan for the white water rafting. There had been some delay in the party leaving the premises, although the length of the delay was not proved. One of the mini-buses had been running late with a party of children. The pursuer went in the first of the two mini-buses. Nick Ball was in this mini-bus. Tracey Lamb was the driver of this mini-bus. The drive to the Drynachan drop-off point took between about 30 and 45 minutes. During the course of the journey, the mini-bus stopped at least twice so that Nick Ball could check water levels in the river. There are three different sections of the river. The section of the river chosen for the white water rafting that day was the higher, "top and upper", section. This was due to the height of the river levels that day.

(8) Drynachan is a recognised put-in point in the sense that it is used by outdoor activity operators, including the defender and Glenmore Training Lodge, in order to access the River Findhorn for activities such as white water rafting, kayaking and canoeing. This put-in point is included in the Scottish White Water guide book (2nd edition), produced by the Scottish Canoeing Association, number 6/8 of process, under the

heading "134 Findhorn (Top)" at page 224. Drynachan is the recognised put-in point for the "top section" of the River Findhorn. This "top section" is the furthest upstream that would ordinarily be used for activities such as white water rafting. There are no recognised put-in points upstream of Drynachan. Upstream beyond the put-in at Drynachan is too shallow for white water rafting or kayaking. The passage in the guide under the heading "134 Findhorn (Top)" includes a description of the "access" to the river at this point. The access described includes reference to "a steep slope". This is the same steep slope referred to below. This is also the same as the "grassy bank to scramble down" referred to in the extract from the UK Rivers Guidebook in relation to the put-in point for the River Findhorn shown in number 6/9 of process which is also the same put-in point at Drynachan. The red marker shown on that map near the figure "89" is not a recognised put-in point.

(9) The party in the first mini-bus waited at the top of the slope at the drop-off point for a period (the precise length of which was not proved) until the second mini-bus arrived. Number 6/11 of process, photograph 2, shows the drop-off point at the top of the slope. Number 5/12 of process, photograph 7, shows part of the slope looking back up towards the drop-off point shown in Number 6/11 of process, photograph 2. Number 5/12 of process, photograph 2, shows a view of the slope from an area at the bottom of the slope, also looking back up towards the drop-off point. The party members required to make their way down the slope in order to reach the river for the white water rafting at the Drynachan put-in point.

(10) The acting trip leader was Nick Ball. There were two other members of staff with the party, Siana Hughes and a trainee called Rosie.

(11) The conditions underfoot on the slope were wet and slippery grass and dead bracken. The slope was steep. It was about 22 metres in length. The pursuer had not been to this location before. The first the pursuer was aware of the slope was when he was at the top of the slope after having been dropped off by the mini-bus. There was a discernible muddy path down the slope running through the grass. It was about a foot wide. It first went diagonally across the slope, then turning and going down the hill. It is likely that it had been created by use by people going down to the river over time. The pursuer was told by Nick Brown that the slope was slippery and so he needed to be careful and make sure that he followed the path on his way down. The pursuer was also given a paddle and was told that he could use it to help with getting down the slope. He was not told or shown how to use it to assist. He did not use it. He did not think that it would help.

(12) The ground conditions and degree of slope were obvious.

(13) There were two white water rafts in a trailer towed by the first mini-bus. The first was slid down one part of the slope before the pursuer started to make his way down another part of the slope a few metres away from the part where the raft was slid. The gradient of the slope at the point at which the raft was slid down was 1 in 2.5. The part of the slope down which the pursuer was making his way was, albeit still steep, slightly less steep than the part down which the rafts were slid.

(14) The wet suit boots provided to the pursuer, one of which is number 5/13 of process, were of a neoprene fabric with rubberised soles. The soles were rounded on both sides. There was no edge to them. They had some grip. The soles are flat, soft and malleable rubber. They mould to the ground creating increased friction. When the whole of the foot is flat to the surface below, this creates a lot of friction. Edging is

not the only way to walk down a slope. They had a shallow wavy tread pattern. They are primarily designed to afford warmth and protection for water-sports participants. Nick Ball was also wearing wet-suit boots. Walking boots are not suitable for white water rafting. Wet suit boots were safe for use on the slope if the path was followed. The defender had previously used the slope for many years since 2006 without incident. The Drynachan put-in point, using the same drop-off point and slope, had been used by the defenders since about 2006 between about 10 and 15 times a year, although less so in the last two years as water levels have been lower.

(15) The pursuer began to make his way down the slope. Another member of the party, Patrick Cassidy, was ahead of him on the slope. Nick Ball was also on the slope. He had entered the slope before the pursuer. Nick Ball was making his way down the slope on the path diagonally across the slope. The pursuer slid down the initial part of the slope from the top on his bottom. He stopped when he reached the path where Nick Ball was. Nick Ball told the pursuer not to slide on his bottom, to follow the path and to be careful and go slowly down the slope and not to run. The pursuer declined to follow these instructions in that he instead stood up on the path and then carried on effectively straight down the slope, not using the path. He took a small number of steps at a fast rate and then flipped over, going head over heels. He ended up on his back with his head facing the top of the slope and his toes pointing to the bottom of the slope. As a result, the pursuer suffered the loss, injury and damage referred to below. Another member of the party, Finlay Davison, also slipped when he was making his way down the slope. His foot slipped on the wet grass on the slope and he fell onto his bottom. He had been behind the pursuer on the slope.

(16) There was no alternative route to the Drynachan put-in point reasonably available.

(17) At all material times the pursuer was an adult of full capacity.

(18) The risk assessment in force at the material time, numbers 5/10/3 to 5/10/7 of process, was a suitable and sufficient risk assessment as required by regulation 3 of the Management of Health and Safety at Work Regulations 1999.

(19) The defender is licensed by the Adventure Activity Licensing Authority (AALA).

(20) There was a de-briefing session at the offices of the defender on the evening of the date of the accident. It was attended by Mr James Davies, managing director of the defender, Nick Ball and Siana Hughes. The trainee, Rosie, may also have attended. The operational trip report, part of number 5/10 of process, was completed that day.

(21) There was a further meeting on Monday 27 April 2015 at the defender's offices. This was attended by Mr Davies, Nick Ball and Siana Hughes. The RIDDOR report, also part of number 5/10 of process, on the pursuer's injury was submitted that day to the Health and Safety Executive.

(22) At the scene, one of the defender's drivers, Tracey Lamb, had to leave to find mobile phone coverage in order to call the emergency services and to contact Mr Davies. The pursuer was unable to move at the scene. He was splinted by fellow party members, two of whom had had first-aid training.

(23) As a result of the accident, the pursuer sustained a fracture dislocation of his left hip with a type 3 comminuted posterior wall fracture of the left acetabulum, an impaction fracture of the left femoral head and a fracture of the posterior rim of the acetabulum. He was in great pain as a result of the injury. The pursuer was air-lifted to Raigmore Hospital, Inverness. He underwent initial manipulation under anaesthetic. His hip remained unstable and dislocated on a further occasion. An

MRI scan confirmed that the pursuer required surgery to stabilise the hip joint. On about 29 April 2015, he was transferred by air ambulance to Glasgow Royal Infirmary. He required the insertion of a plate and multiple screws. The plate and screws cannot be removed in the future due to the extent of the damage and subsequent repair. There was significant damage to the joint surface of the left hip. This was reconstructed as well as possible but a non-anatomical reduction of the fracture was achieved. He remained as an inpatient for approximately a week post-surgery. He was thereafter discharged into the care of his general practitioner, Dr Joseph McConnell, but continued to attend the orthopaedic out-patient clinic for about six months. He was then discharged to physiotherapy and underwent intensive physiotherapy at Queen Elizabeth University Hospital, Glasgow until about February 2016. He was reliant on crutches and was non-weight bearing for about three months following the accident. He also engaged in exercises himself, including swimming, the exercise bike and other rehabilitation exercises, to regain good function in the left hip.

(24) The pursuer suffered and continues to suffer from neuropathic pain throughout his left lower limb, including the left foot and calf. He has been left with persisting pain in the left groin, stiffness in the hip and some discomfort over the thigh and buttock. He will be limited in his ability to engage in anything other than light to moderate physical work. Driving remains uncomfortable. Sitting at a desk is also uncomfortable for any prolonged period of time. He requires to take care on uneven ground. He required analgesics for a prolonged period following the accident but, although his continuing symptoms are now permanent, they are not now sufficient to merit the pursuer taking analgesics. He has surgical scars. It is likely that he will

develop post-traumatic arthritis. It is likely that he will require a full hip replacement during his working life in his late 40s or 50s. It is also likely that he will require a further revision hip replacement thereafter in his retirement years.

(25) Prior to the accident, the pursuer enjoyed running and cycling. The pursuer remains unable to run. He is limited in his ability to return to physical exercise. Running and impact or contact sports are not advisable now or in the future. He also cannot now go hill-walking, an activity which he occasionally enjoyed prior to the accident.

(26) The pursuer is employed by BBC Scotland, Glasgow, as an assistant producer. He was off work for about five months following the accident. He then had a phased return to work over a period of about one month. He remained on full pay during this period. Following his return to work, he required to use holiday entitlement to attend physiotherapy appointments. Following each hip replacement it is likely that he will require to take about 12 weeks off work. The pursuer's long-term ambition is to work as a freelance producer. If working freelance, he would not be paid or receive sick pay during any period off work.

(27) Following the accident the pursuer required care and assistance from his mother and his wife. They assisted him with personal care, medical care, mobilising, household chores and meal preparation. He will require assistance in the future following each operation for hip replacement. It is agreed that past services are valued at £800, inclusive of interest, and that future services are to be valued at £800, inclusive of interest, in respect of each further operation for hip replacement. It is more likely than not that he will require to have two such further operations.

(28) It was not proved that the pursuer remains restricted in his ability to undertake his employment. It was not proved that he has been placed at a disadvantage on the labour market.

Finds in fact and law:

1. The defender exercised reasonable care for the pursuer.
2. That the pursuer has failed to prove that there was negligence on the part of any of the defender's employees.
3. The pursuer not having suffered loss, injury and damage through fault and negligence on the part of the defender, or those for whom they are liable, the defender is entitled to be absolved of liability.
4. That the accident was solely caused by fault and negligence on the part of the pursuer.

Therefore, assoilzies the defender from the first crave of the initial writ; reserves meantime all questions of expenses and appoints parties to be heard thereon on 22 May 2019 at 9.30am within the Sheriff Court House, 27 Chambers Street, Edinburgh.

NOTE

Introduction

[1] This is a personal injury action in which the pursuer seeks an award of damages in respect of injuries sustained by him when he was making his way down a slope to get to a put-in point to go white water rafting on the River Findhorn. Quantum remained in dispute other than in relation to quantification of past and future services, but depending on whether or not he was likely to have further operations for hip replacement.

[2] The pursuer's claim was based on breach of the defender's common law duty to take reasonable care of the pursuer. Reference was made to Regulation 3 of the Management of Health & Safety at Work Regulations 1999 ("the 1999 Regulations"). The case was also based on the defender's vicarious liability for the negligent acts and omissions of its employees.

[3] The defender pled that it was not under any duty to protect the pursuer against obvious risks, that in any event the pursuer had not suffered loss, injury and damage through fault and negligence on the part of the defender, and that it had been caused or materially contributed to by the fault of the pursuer.

[4] There were a number of joint minutes, numbers 19, 23, 28 and 29 of process, principally agreeing such matters as medical and wage records. There was also a notice to admit, number 25 of process, on behalf of the pursuer and a corresponding notice of non-admission, number 26 of process, on behalf of the defender. However, these were not founded by either party.

[5] The proof was held over ten days in October, November and December 2018 and January 2019. The pursuer gave evidence on his own behalf and led evidence from Kenneth Maclean, Finlay Davison, Patrick Cassidy, Andrew Petherick and Mr Angus MacLean. The defender led evidence from James Davies (managing director of the defender), James Gibson, Nicholas Ball and Mr Graeme Holt.

[6] Written submissions were lodged on behalf of both parties. The written submissions for the pursuer were numbers 32, 35, 38 and 39 of process and the written submissions for the defender were numbers 30, 33 and 41 of process. They are referred to for their terms, all of which I took into account. Brief oral submissions were also made for both parties, which I have similarly taken into account. I have addressed all the points raised in so far as I have considered them to be relevant to the issues requiring to be resolved in this case.

The averments

[7] The pursuer averred in statement of fact 4:

> "The slope was steep…The footwear provided was of neoprene fabric with rubberised soles…The soles were rounded on both sides with no defined edging. They had only a shallow tread pattern. They were inadequate and inappropriate for descending a steep slope safely, had poor grip and were unsuited to providing suitable foot retention when moving over wet grass or a slippery slope. As the pursuer proceeded down the slope, his left foot slid forward and away from him. He moved his right foot forward to try and stop himself from sliding. He planted his left foot. As he did do his left heel caught in a hole in the ground resulting in him suffering the injuries hereinafter condescended upon."

In relation to his actions at the material time, the pursuer further averred:

> "Admitted the pursuer slid down the slope on his bottom, under explanation that he slid only part of the slope and the party had been instructed to do so by Nick Ball as the ground was so slippery, and other participants did likewise…in the circumstances, doing so was a reasonable precaution to be adopted… Had the pursuer been instructed to use a path he would have done so. No such instruction was given. There was no obvious route down the slope. There was no clear track".

The pursuer also averred:

> "The route chosen by the defender's employees as a means of access to the river was unsafe. The access selected required the participants to proceed down a steep and precarious slope. Approximately 100 yards further along the main road, the road dropped to water level. There was an area in which vehicles could be parked. The defender and their employees failed to carry out a suitable and sufficient risk assessment of the risks associated with the conduct of their undertaking, including clients making their way to activities and safely gaining access to the river. The risks entailed to which the pursuer was exposed while undertaking the activities ought to have been assessed in the light of the general principles of prevention in terms of regulation 3 of the Management of Health and Safety at Work Regulations 1999 ("the 1999 Regulations"). Had the defender considered the risks sufficiently they would not have instructed participants to use the unsafe access…The footwear provided to the pursuer…was not appropriate as it provided only a shallow tread pattern. Tying off a rope would have allowed the participants a hand-hold as they descended the slope. Walking boots would have avoided or materially reduced the risks of injury to participants descending the slope…A suitable and sufficient assessment would have included consideration of alternative routes."

He further averred:

> "Admitted that the pursuer had a duty to take reasonable care for his own safety under explanation that the pursuer fulfilled all duties incumbent upon him." and: "…the risks of serious injury when descending the slope in boots were obvious and ought to have been obvious to any reasonably prudent activity organiser making a suitable and sufficient assessment of the risks of injury arising from the activities."

[8] In statement of fact 6 the pursuer averred:

> "The pursuer's claim is based on the defender's breaches of their common law duty to take reasonable care for the pursuer. The defender had a duty…to have due regard to the requirements on them under the Management of Health and Safety at Work Regulations 1999 and to prepare a suitable and sufficient risk assessment; to take such measures as were required to avoid or minimise or reduce the risks of injury to the pursuer including identifying a safe route to the river; providing adequate and suitable instructions for safely descending the slope; tying off a rope or other device as a hand-hold and providing appropriate equipment, including protective footwear. Separatim, the pursuer's case is based on the defender's vicarious liability for the negligent acts and omissions of its employees."

He further averred that he fulfilled all duties incumbent on him and that he was "left to fend for himself".

[9] The defender averred in answer 4:

> "Admitted that participants were provided with wet suits and rubber wet suit shoes under explanation that they were given the option of continuing to wear their own footwear…At the location for the rafting the pursuer and his group were each given a paddle. They were instructed to walk carefully down the grassy bank and to use the path. They were warned that the route might be slippery because it was damp. The pursuer slid down the slope on his bottom. Nick Ball instructed the pursuer not to slide or run down the slope. He instructed him to use the path. The pursuer refused to do so. The pursuer then started to run and had run two or three steps before catching his foot…The rafting experience was to commence at a designated put-in point for rafts…The defender had used the same route to access the put-in point for a number of years. The route was marked by a well-trodden path." The defender also averred: "The pursuer had a duty to take care for his own safety. He had a duty to follow safety instructions provided by the defender's employee. He had a duty to pay due care and attention to where he placed his feet and to avoid slipping and tripping hazards. He had a duty to use the path. He had a duty to take reasonable care to adopt a safe method to descend the slope. The pursuer in failing in these duties **caused or** materially contributed to the accident. Esto there was a risk of injury to participants descending the slope (which is denied), any such risk arose as a result of the degree of the slope and/or the ground conditions. Both of those factors were obvious to the pursuer. At the material time, the pursuer was an adult of full capacity. He made a genuine and informed choice to descend the slope. He was *free to take such steps as he considered necessary* to protect his own safety. He was

> free to use the paddle provided to him to assist with his stability, or to slide down on his bottom."

[10] In answer 6 the defender averred:

> "…the defender was not under any duty to protect the pursuer against obvious risks…esto the accident was caused to any extent by the fault, negligence and breach of duty of the defender…the accident also having been materially contributed to by the fault of the pursuer, any award of damages should be reduced…"

Statutory provision

[11] Regulation 3 of the Management of Health and Safety at Work Regulations 1999 ("the 1999 Regulations") reads:

> "**3.— Risk assessment**
>
> (1) Every employer shall make a suitable and sufficient assessment of—
> … (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,
> for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions…"

Objections renewed

Pursuer

[12] On day 5 of the proof, counsel for the pursuer objected to a line of evidence from Mr Davies in evidence-in-chief about review by the Adventure Activities Licensing Authority (AALA) of the defender's risk assessment, part of number 5/10 of process, and the defender's standard operating procedures, number 6/2 of process. This was on the basis of lack of record. It was a question of fairness. The pursuer had had no information or notice about this. The defender did not point to any averment on record. He instead submitted that the pursuer had taken earlier witnesses to both the risk assessment and the standard operating procedures and criticisms had been made of these documents. It was therefore

legitimate to ask Mr Davies whether they had been reviewed by the AALA. I allowed the question and line under reservation of all questions of relevancy and competency.

[13] The pursuer renewed this objection in submissions, inviting the court to exclude evidence given under reservation on day 5, from page 201 of the transcript, at line 20 to page 210, at line 10. He re-iterated the lack of record for this line of evidence in relation to any review by the AALA, including advice said to have been given, suggesting accreditation or auditing by the AALA. In any event, its primary remit is in relation to activity centres and young people under the age of 18 (which was accepted by Mr Davies in cross-examination) whereas, in this case, the risk assessment affected somebody over the age of 18.

[14] The defender invited the court to repel the objection. He submitted that the pursuer had sought to elicit evidence from Mr Petherick and Mr Davies to the effect that both documents were not fit for purpose. In those circumstances, the fact that the documents had been reviewed by the AALA was a legitimate line of questioning. I have to observe that this objection came in evidence-in-chief and, therefore, before Mr Davies was asked about the documents by the pursuer in cross-examination.

[15] In my opinion, the defender did not give fair notice to the pursuer of the evidence which was ultimately led from Mr Davies about this issue. It was clear from the pursuer's averments on record that he was to be criticising the risk assessment. This was, therefore, not a new matter raised for the first time when Mr Petherick was led in evidence by the pursuer about the risk assessment. The issue of any licensing, review by, or advice from, AALA was not put to him for his comment. I noted from the defender's written submission that some reliance was placed on the fact that the defender was licensed by the AALA, that the risk assessment had been reviewed by AALA and that they had only raised one issue to the effect that it should be more generic because of the dynamic environment in which the

defender operated. In all the circumstances, I am not persuaded that it would be fair to allow the evidence to be relied upon. I, therefore, sustain the objection and exclude the evidence given by Mr Davies on this aspect of the matter on day 5 from pages 201 to 210 as sought by the pursuer.

Defender

[16] On day 1 of the proof, the defender objected to the question "When you're given the briefing at the centre, were you told anything about what might comprise suitable footwear other than in relation to the water booties?" This was on the basis that there were no averments regarding any failure to give advice regarding suitable footwear to this effect. The pursuer pointed to averments about the wet suit boots provided, and averments to the effect that the defender was responsible for providing participants with the necessary clothing, footwear, instruction, transport and equipment. I allowed the question to be answered under reservation of all questions of relevancy and competency. The pursuer's reply to the question was: "No…there wasn't any talk about what was appropriate footwear."

[17] The defender renewed this objection in submissions, inviting the court to exclude evidence given under reservation on day 1 at page 150 of the transcript at lines 9 to 11. This was the answer I have just quoted. He re-iterated the lack of record. The only averments regarding footwear were to the effect that the footwear provided was not appropriate and that walking boots would have avoided or materially reduced the risk of injury.

[18] The pursuer invited the court to repel the objection. He submitted that there had been ample notice given, although he did not point to any specific averments. He further submitted that this in any event arose in response to an averment made by the defender in

answer 4: "Admitted that participants were provided with wet suits and rubber wet suit shoes under explanation that they were given the option of continuing to wear their own footwear."

[19] In my opinion, the averments pointed to did not provide a proper basis for this evidence. The pursuer did not have a case based on any alleged failure to give advice regarding suitable footwear and, in my opinion, it did not arise out of the averment made by the defender in answer 4. I therefore sustain the objection and exclude this evidence.

[20] On day 1 of the proof, the defender also objected to a question put to the pursuer in evidence-in-chief where he was asked if he thought that trainers would have had better or lesser retention on the slope than the wet suit boots that he was wearing. The objection was on the basis that this was not a matter upon which the pursuer could be expected to comment as he was not being put forward as an expert on such matters. The court was invited to exclude evidence from the transcript at page 211, line 1 through to page 215 at line 13. The pursuer submitted that the pursuer could give evidence on the basis of his own, normal, experience of wearing trainers as compared with his experience of wearing the wet suit boots. I allowed the question and the line under reservation of all questions of relevancy and competency.

[21] The defender renewed this objection in submissions on the same basis. The pursuer re-iterated his invitation to repel the objection on the same basis, adding that the pursuer had given evidence of his experience of wearing trainers often. I repel the objection. The pursuer was not being put forward as an expert. However, in my opinion, the pursuer was perfectly entitled to give evidence about this based on his own experience of having worn both forms of footwear.

[22] The defender further objected to a line of evidence being taken in evidence-in-chief from Mr Petherick on day 4 regarding "alternative route B" and an alternative launch site referred to in his report, number 5/11 of process, at page 11. The defender invited the court to exclude evidence-in-chief from the transcript at page 46, line 13 to page 55, line 12, from page 57, line 4 to page 58, line 2 and from cross-examination starting at page 234, line 2 through to page 240, line 16, and from the evidence-in-chief of Mr Davies on day 6 from page 63, line 1 through to page 66, line 18 and in cross-examination from page 413, line 25 to page 414, line 7. This was on the basis of no record. I was reminded that, in statement of fact 4, the pursuer had averred: "The route chosen by the defender's employees as a means of access to the river was unsafe. The access selected required participants to proceed down a steep and precarious slope. Approximately 100 yards further along the main road, the road dropped to water level. There was an area in which vehicles could be parked. This was "alternative route A" referred to at page 11 of Mr Petherick's report and photographs there. These averments did not give notice of any further alternative route or of any alternative launch site. The pursuer submitted that the following averment in statement of fact 4 provided sufficient notice: "…the risk assessment carried out by the defender…failed to identify the measures needed to comply with the 1999 Regulations including, as a control measure, the use of an alternative route where one was available". I allowed the line of evidence under reservation of all questions of relevancy and competency.

[23] The defender renewed this objection in submissions. He reiterated the lack of record for evidence about "alternative route B" and an alternative launch site. I was reminded that the pursuer's averments were directed solely towards alternative route A. The pursuer relied again upon the averment to which he had earlier referred.

[24] In my opinion, the averment relied up by the pursuer did not provide a proper basis for the evidence about either "alternative route B" or an alternative launch site. I, therefore, sustain the objection and exclude this evidence.

[25] The defender also objected to evidence of the likelihood of the pursuer being unfit to work during the period leading up to hip replacement. This was on the basis that there was no record for future wage loss other than during periods post-surgery. I allowed the evidence under reservation of all questions of relevancy and competency. The objection was renewed in submissions and was not now opposed by the pursuer. I, therefore, sustained the objection and excluded this evidence also.

The witnesses

[26] In addition to the pursuer, the witnesses for the pursuer were Kenneth Maclean, Finlay Davison, Patrick Cassidy, Andrew Petherick and Mr Angus MacLean. Mr Davison had known the pursuer since childhood, but Mr Maclean and Mr Cassidy had not met the pursuer before the stag weekend. Mr Petherick is the managing director of RAE Sport and Leisure Consultants Ltd, based in Clapham in Bedford. He prepared the report, number 5/11 of process. He is involved in advising on the design, development and management of sport, recreation and leisure facilities, both within schools and in the community, and the promotion of various sporting activities, courses and events. The sports are climbing, hill-walking, canoeing, sailing and surfing. He has also held teaching, coaching and examiner qualifications in a variety of adventure activities, including a mountain leadership certificate. This covers climbing, mountaineering, sailing and canoeing. He would not classify himself as an expert in white water rafting. His involvement in instruction or teaching has including touching on ground conditions. Footwear is linked to that. He still

takes groups out, including for climbing and hill-walking. He has a Master of Education degree. His specialist area was physical education. He had been asked to address three main points in his report. In summary, the first concerned the systems of management that should be in place to address the suitability of a location for accessing a river for white water rafting, the second was whether alternative access routes to the river were feasible and the third was whether the wet suit boots were suitable footwear for descending the slope. He undertook a site inspection in this case with his instructing agent and the pursuer on 21 May 2018. Mr Angus MacLean is a consultant trauma and orthopaedic surgeon at the Glasgow Royal Infirmary and is the Clinical Lead of the West of Scotland Trauma Network. He prepared a report in relation to his examination of the pursuer in November 2017, number 5/1 of process.

[27] In relation to the defender, Mr James Davies is managing director of the defender. White water rafting is the core activity of the business. The defender has offered white water rafting on the River Findhorn since July 2006. The main season is from March until October. They change the places where they start and stop trips on the river based on the level of water flow. The accident in this case took place on the "top and upper section" of the river. Mr James Gibson is a director of Aquaplay Scotland. The company offers water activities including kayaking and canoeing on rivers throughout Scotland. He is the Scottish Canoe Association (SCA) river advisor for the River Findhorn. He has held that role for about 20 years. He contributed the entry relating to the River Findhorn at pages 224 and 225 of the SCA publication entitled "Scottish White Water", 2nd edition, number 6/8 of process. It relates to the top section of the river, from Banchor to Dulsie, which is suitable for white water rafting. He has used that section of the river an average of about five to ten times a year over the last 20 years both working through Aquaplay and personal paddling. He uses

the same drop-off point as that used by the defender for the same put-in point on the river. Nicholas Ball was working with the defender in April 2015. He started working for the defender in 2013. He was guide or head guide depending on the date concerned. On the date of the accident in this case he was acting trip leader. The party went to the top and upper section of the River Findhorn as the river was too high for a lower section.
Mr Graeme Holt is a consultant orthopaedic and trauma surgeon based at Crosshouse Hospital, Kilmarnock. He prepared a report in relation to his examination of the pursuer in June 2018, number 6/12 of process.

The principal areas of fact in dispute

[28] There was no dispute that the pursuer had attended the defender's premises as a member of a party who were on a stag weekend which was to go white water rafting on Saturday 25 April 2015, that he was provided with a wet suit and wet suit boots (his having accepted the option to use them) at the defender's centre, that Nick Ball and Siana Hughes were employees of the defender, that the pursuer and the rest of the party were taken by mini-bus (although there was a dispute as to whether there was one mini-bus or two) from the centre to the drop-off point to make their way to the put-in point on the River Findhorn, that after his accident on a slope leading to the put-in point, the pursuer attended Raigmore Hospital and that he was thereafter transferred to Glasgow Royal Infirmary.

[29] However, there were areas of dispute about a number of aspects of the case and the question of the inferences to be drawn from some of the facts. Ultimately, the principal areas of dispute were as follows: (i) the put-in point on the river; (ii) the nature of the slope down which access was to be taken to the put-in point; (iii) whether there was a path down the slope; (iv) whether the accident occurred in the manner described by the pursuer; (v) the

instructions given to the pursuer at the top of the slope and on the slope; (vi) whether it was safe for the pursuer to descend the slope wearing wet suit boots; (vii) whether the defender should have provided a tied off rope as a handhold, and (viii) the risk of hip replacement. There were also other more minor matters in dispute. I have referred to these where I have considered them to be relevant.

The put-in point on the river

[30] Counsel for the pursuer submitted that it was not clear that the slope was the normal route used to access the put-in point. For example, Mr Petherick had instead identified a red triangle to the left of the map from the UK Rivers Guidebook, number 6/9 of process. This red triangle had not been in the same place as the location of the accident. Mr Petherick also did not agree with the description in Scottish White Water produced by the SCA (2nd edition), number 6/8 of process. I also noted that in his report, number 5/11 of process, Mr Petherick had, at paragraph 5.10, said that he had found great difficulty in comprehending why the defender's staff decided to use the steep embankment as the access route and questioned whether the defender had previously used the access route and put-in area in this case. He had also been proceeding on the basis of an understanding that there was no path down the slope, whereas I have found at finding-in-fact (11) that, at the material time on 25 April 2015, there was a discernible path down the slope.

[31] Counsel for the defender reminded me that, although Mr Petherick had felt able to question the put-in point, Mr Petherick had ultimately agreed that he would yield to Mr Gibson, the author of the entry in number 6/8 of process, if Mr Gibson said that the entry related to the put-in point in this case.

[32] In the event, Mr Gibson did confirm that the entry in number 6/8 of process related to the put-in point in this case. He also confirmed, in relation to number 6/9 of process, that the red triangle to the left of the map is upstream of the put-in point in this case. He is very familiar with the River Findhorn. He has used the same put-in point, and the drop-off point to get to it down the slope, over the last 20 years. I had no hesitation in accepting his evidence about all of this. Mr Davies likewise told the court that there are no recognised put-in points upstream of the put-in at Drynachan and that the left-hand marker which had been generated and placed on the map in number 6/9 of process was not in the correct place as a recognised access point. Drynachan put-in is the place where the trip starts. It is the put-in for the "top and upper" section of the river. The defender has used this put-in point, and the same drop-off point for it, since 2006. Others also use the same access point for the river. He is extremely familiar with the river, like Mr Gibson, having operated on it for many years. I accepted his evidence on this issue also. I am satisfied that the put-in point used in this case was a recognised put-in point on the river and that both the "steep slope" referred to in number 6/8 of process and the "grassy bank to scramble down" referred to in number 6/9 of process refer to the slope being used by the defender in this case to access the Drynachan put-in point. I also have to observe that Mr Petherick did not, as I understand it, have the necessary knowledge and experience to enable him to give expert evidence about what are (and are not) appropriate put-in points (which he referred to as launch sites) on the River Findhorn for water sports such as white water rafting and kayaking. I, therefore, did not find his evidence in relation to put-in points (or launch sites) on the River Findhorn to be of assistance. This included his evidence about his suggested alternative launch site which related to his suggested alternative route B if I was wrong to have sustained the defender's objection to evidence about these.

The nature of the slope

[33] The pursuer averred that the slope was "steep and precarious", and counsel for the pursuer submitted that the evidence indicated that this was a steep and precarious descent. The evidence to which he made reference included evidence from Mr Petherick. His evidence had been to the effect that he had measured the slope at two points about three metres apart and had found the gradient to be 1 in 2.5, with the gradient being broadly consistent across the slope. He had not seen any significant difference between the spot where the rafts had gone down and the spot where he understood the pursuer to have descended.

[34] Counsel for the defender invited the court to find that the part of the slope down which the raft was slid is steeper than the part of the slope on which the pursuer had his accident. I was reminded that, although Mr Petherick had measured the length at two points of the slope (the lengths being the same), he had accepted in cross-examination that he had only obtained a vertical height for the part of the slope down which the rafts had been slid. He had not obtained a height for the part of the slope on which the pursuer had had his accident. As a generality Mr Petherick had agreed that the further apart contour lines are on an ordinance survey map (such as the one at page 34 of his report, number 5/11 of process) the less steep the gradient. However, he had not been prepared to accept, even as a general indication, that it followed that the gradient where the rafts were slid down was greater than where the participants walked down. I was also reminded of evidence given by Mr Davies, Mr Gibson and Mr Ball.

[35] The explanation Mr Petherick gave for not being prepared to accept, even as a general indication, that the gradient where the rafts were slid down was greater than where

the participants walked down was because the floodplain at the bottom of the slope was flat and, therefore, that there would not be a significant change, if at all, between the two points where he had measured the length of the slope. His explanation was not entirely easy to follow, but he was not saying that there was no difference at all in the gradient as between the two points; just that he did not think that it was significant. I noted that Mr Davies gave evidence to the effect that the rafts are slid down what he described as being the steepest part of the slope. In relation to the part where clients walk down, although Mr Davies told the court that it was obvious that it was steep, he said that the difference between the two was that, on the part where the raft is slid, any movement can cause your feet to slip out from under you (and which had happened to him on that part) whereas, on the part where clients walk down the access path, if you are taking care, you are not going to slip. The gradient at that part is lesser. At another point in his evidence, he explained that there were "different facets" to the slope, as is the case on Everest. Mr Gibson gave evidence to the effect that the bit of the slope that people walk down is a bit gentler than the bit that kayaks are generally lowered down (the same part where rafts are slid down) and that, albeit that the part that people make their way down is still quite a steep slope, there is a zigzag track people follow so they are taking a controlled zigzag down. Mr Ball also drew a distinction between the part of the slope that the rafts go down compared with the part where clients go down between about three and five metres away. Mr Petherick told the court that he had spent three to four hours in the area of the slope on 21 May 2018. However, I did not understand him to have been otherwise familiar with the area. By contrast, Mr Davies, Mr Ball and Mr Gibson are extremely familiar with the area and the slope, and I felt that it was significant that Mr Gibson's evidence about the slope was to a similar effect to that given by Mr Davies. I, therefore, do not think that it was fair for counsel for the pursuer to

submit, as he did, in relation to the evidence Mr Davies gave about the slope, "he made that up". Mr Gibson impressed me as being an independent witness who was both credible and reliable. He has no interest in the outcome of the case. He gave his evidence in a clear and measured manner without exaggeration. It was not obvious why Mr Gibson should be other than truthful about this, or indeed about anything else. It was also particularly relevant, and helpful, that he was able to give evidence from the perspective of being a director of an outdoor activities company (as the defender is) with a particular focus on water-based activities, coupled with his being the access officer for the River Findhorn and so, in contrast to Mr Petherick, having detailed knowledge of the river and access to it.

[36] In all the circumstances, although I am satisfied that Mr Petherick found the gradient to be 1 in 2.5 at the point where the rafts were slid down, I cannot be satisfied that this precise measurement was also applicable to the part of the slope down which the pursuer was making his way. I am satisfied that the better view is that it was fair to say that the slope had different facets to it and that the part of the slope down which the pursuer was making his way when the accident occurred was, albeit still steep, slightly less steep than the part down which rafts were slid.

Whether there was a path down the slope

[37] The pursuer averred that there was no obvious route down the slope and no clear track. By contrast, the defender averred that the route was marked by a well-trodden path.

[38] After referring to evidence given by witnesses for the pursuer, counsel for the pursuer invited the court to conclude that there was no such well-worn path visible.

[39] Counsel for the defender compared various passages of evidence from witnesses for both the pursuer and the defender and invited the court to accept that there was a discernible path at the time of the pursuer's accident.

[40] Turning to the evidence, the pursuer's position was to the effect that he was not made aware of any path, Mr Maclean did not remember seeing a path and Mr Davison said that no path was apparent to him. Mr Cassidy's position was not entirely clear. In evidence-in-chief he told the court that there was "only one route you could take, and that was the route we were all taking". However, in cross-examination, he said that there was no path "and no route". Mr Petherick could not see any discernible path or, as he put it in cross-examination, there was no path of note on 21 May 2018 when he attended for a site inspection. However, this was three years later, the accident having occurred in April 2015. By contrast, Mr Davies told the court about the access track which isn't overly defined but it is definitely defined and said that people are asked to take care. The extent to which the track is defined depends on the time of year. There are indentations in the ground from feet where the path is. It has been created through use. The access route meanders because the ground is steep enough to warrant traversing as opposed to going straight down. The photograph, number 5/12/7 of process, is not how the slope looked at the time of the accident. The put-in point had not been used by anybody in the last two years due to the dry summers. Mr Gibson also mentioned recovery of the slope due to lack of use of the river. Mr Gibson was clear that there is what he described as being a zigzag track people follow so they are taking a controlled zigzag down the slope. In cross-examination, he told the court that he finds that the footpath is a natural way to zigzag down the slope and that it is quite obvious where it happens. It has been eroded through use. Mr Ball described a grassy bank with a muddy path going through it. He said that it was about a foot wide of

mud in the long grass going first diagonally across the slope and then turning and going down the hill. I also noted that reference had been made to "the path" in the RIDDOR report, part of number 5/10 of process, which Mr Davies confirmed that he had completed two days after the accident following discussions with employees, including Mr Ball.

[41] If the suggestion was that there was no path, or at least no discernible path, down the slope at the material time, I do not accept that. In the light of the evidence of the witnesses led for the defender, I am satisfied that, at the material time on 25 April 2015, there was a discernible path down the slope. I am satisfied that Mr Davies, Mr Gibson and Mr Ball were credible and reliable witnesses in all material respects in relation to the points which actually mattered. Each gave his evidence in a clear, measured and straightforward way despite robust cross-examination. I regarded Mr Gibson's evidence as being particularly notable and helpful because he was both an independent witness who I had no reason to think was other than truthful and he was extremely knowledgeable about the River Findhorn. I accepted his evidence as credible and reliable. He was making regular use of the slope to access the river at the Drynachan put-in and he was perfectly clear that there is zigzag track down the slope which people use to get to the put-in point. Mr Ball also described the appearance of the slope and path on the day, and I do not consider that he was fabricating his evidence about that. I, therefore, accept and prefer the evidence for the defender on this matter. As I observe below (in the section dealing with the issue of the instructions given to the pursuer), the picture about what was happening as painted by the pursuer, Mr Maclean, Mr Davison and Mr Cassidy on and about the slope was less than clear. I had no reason to think that Mr Maclean, Mr Davison and Mr Cassidy were doing other than attempting to assist the court as best they could. However, each gave rather different accounts as to what each recalled in a number of respects. This might not be surprising given the lapse of time

since the accident coupled with the excitement of the group on the day. I, therefore, did not feel that I could have complete confidence in the reliability of their recollections. My assessment of the pursuer's evidence is dealt with in the following section.

Whether the accident occurred in the manner described by the pursuer

[42] The pursuer averred that as he proceeded down the slope, "his left foot slid forward and away from him. He moved his right foot forward to try and stop himself from sliding. He planted his left foot. As he did so his left heel caught in a hole in the ground resulting in him suffering the injuries hereinafter condescended upon." He also averred that had he been instructed to use a path he would have done so but that no such instruction was given.

[43] Turning to the pursuer's evidence as to how the accident occurred, there were numerous inconsistencies both internally and in relation to other evidence. He came across as apparently pleasant in evidence-in-chief. However, he was noticeably defensive, and on occasion quite combative, in cross-examination. For example, when asked in cross-examination about the bracken growth shown in photograph 7 of number 5/12 of process (taken in May 2018) as compared with the extent of growth on the date of the accident on 25 April 2015, the pursuer said that this was a "totally different time of year". This struck me as a strange – and inappropriately exaggerated – response when faced with what he perceived as being an awkward question.

[44] In evidence-in-chief the pursuer told the court that he had started to make his way down the slope. He could not say where Nick Ball was at this point. He was taking it quite slowly, his left leg sort of slipped out from underneath him, he sort of lunged forward to try to sort of regain his balance but, as he did this, his left heel "planted" in the ground, his leg went rigid and that was when he broke his hip and he then tumbled forward a bit and came

to a rest a couple of metres further down the slope. The ground underfoot was really boggy and that was why his heel had sunk into the ground. When asked if he had done a full flip, he said that he "might have done. I tumbled quite a bit…because there was a bit of momentum because of the lunge forward…and I'd sort of gone over a wee bit again." However, he then added: "I must have done if I was on my back and my head was sort of facing the top of the hill and my toes were pointed to the bottom of the hill."

[45] Turning to cross-examination, despite having himself said in evidence-in-chief that he must have done a full flip, in cross-examination, he said that he could not remember if he had gone head over heels. He then said that he may have stumbled forward "like lunged forward to try and regain my balance and that's when my heel dug into the ground." He confirmed that he had come down the slope shown in the photograph 7 in number 5/12 of process fairly much straight down very slightly to the left. He denied that he walked side to side across the slope. He was asked about paragraph 1.4.2 in the report by Mr Petherick, number 5/11 of process, where it had been recorded that Mr Petherick had understood the pursuer's position to be that he had been "attempting to walk in a cross-slope, 'zigzag', manner…"The pursuer responded that Mr Petherick must have meant zigzagging with his footing. He was also asked about paragraph 1.3.4 of the report where Mr Petherick had recorded that parties were at variance "as to whether any instructions were given to zigzag using sidestepping techniques down the slope." The pursuer denied that the thought that such an instruction had been given had come from him. He confirmed that he had attempted to walk down in a zigzag manner as he had thought that this was a safe way of going down based on common sense. He had not slid down the slope on his backside. When asked about the admission on record about having done so at statement of fact 4, he said that he thought that what had been meant by the admission was that he had tumbled

after falling down on his backside. In relation to the averment that the party had been instructed to do this, the pursuer maintained that no such instruction had been given. He denied that he had been told by Nick Ball not to run and to use the path. He confirmed that photograph D at page 8 of Mr Petherick's report was the same as photograph 7 in number 5/12 of process. He didn't know if he had fallen at the point indicated by the red arrow ("Approximate position the pursuer says he slipped") on photograph D in Mr Petherick's report. He thought that Mr Petherick might have misinterpreted where he had come to rest. He accepted that he had stumbled forward. He then said that he had "adopted the zigzag, crossing my feet going down". This was because of the degree of the slope and the ground conditions. He later re-iterated that he had adopted the zigzag approach as it was the only way that he felt safe at the time.

[46] Turning to Mr Petherick's evidence, in his report, number 5/11 of process, at paragraph 1.4.2 Mr Petherick had recorded that it was his understanding that the pursuer had been "attempting to walk in a cross-slope, 'zigzag', manner, but experienced great difficulty in retaining his footing due to wet, icy grass, the steepness of the slope, and the boots he was wearing. He lost his left footing and his right foot then became caught in a hole in the ground. The pursuer then fell, causing the injury." When Mr Petherick gave evidence in cross-examination, he told the court, in relation to this paragraph of his report, that the pursuer had indicated to him on the photograph, now number 5/12/7 of process, where he had walked from, he had walked across and then started to come back again, doing a cross and back. This was lower down than the pursuer had indicated to the court with reference to photograph 7 in number 5/12 of process although this is the same photograph as photograph D at page 8 of Mr Petherick's report. He turned and went back

the other way again, cross-slope type routes. He had, therefore, been proceeding on the basis of what the pursuer had actually indicated to him on the photograph.

[47] I also noted that Mr Angus MacLean had recorded the pursuer as having told him (in his report, number 5/1 of process at page 2): "…he tells me he slipped with his foot going into a pothole. He tells me that he fell and tumbled down the slope." Mr Holt recorded the pursuer as having told him (as recorded in his report, number 6/12 of process): "...he slipped forward and that his left foot entered into a 'pothole'…he subsequently fell to the ground." Mr Holt confirmed in evidence that "pothole" was the exact word used by the pursuer. The pursuer did not make mention of any such pothole in his evidence.

[48] The pursuer's position about whether or not he had slid down the slope was also inconsistent and, in my view, unsatisfactory. His position in evidence-in-chief was that he had not slid down the slope on his bottom. However, his position about that changed by the time he was asked questions in re-examination. In the interim, in cross-examination, he confirmed that he was adamant that he had not slid down the slope on his backside, saying: "that didn't happen". He was then asked about the admission on record about sliding down part of the slope on his bottom in statement of fact 4. He sought to explain this by saying that he thought that what had been meant by the admission was that he had tumbled after falling down on his backside. This issue was then re-visited in re-examination. At this point he was asked if he had slid and he said "yes" to that. He then agreed with the proposition that this had been after his injury rather than before it. I also noted that the pursuer had gone on to aver in statement of fact 4 that "doing so" (sliding down part of the slope on his bottom) was "a reasonable precaution to be adopted". However, I have to observe that if the sliding down was done as a precaution, this must have been before the fall and not afterwards. The averment is, therefore, consistent with Mr Ball's account of the pursuer

having slid down the first part of the slope. In relation to the averment that the party had been instructed to do this by Nick Ball, the pursuer maintained that no such instruction had been given.

[49] I found the pursuer's attempts to explain passages in paragraphs 1.4.2 and 1.3.4 of Mr Petherick's report – including how he had come to tell Mr Petherick about zigzagging in a cross-slope manner by saying, for example, that he had meant that he had been crossing his feet – to be unsatisfactory. His explanation about this was very difficult to make sense of, and my impression was that it was contrived in an attempt to provide an explanation to account for evidence which the pursuer perceived might not be helpful to him. There was also a troubling inconsistency as between where the pursuer indicated to the court as the route he had taken down the slope and where he had slipped as compared with where he had indicated this to Mr Petherick. The pursuer told the court that there might have been misinterpretation by Mr Petherick, but Mr Petherick said that he had actually been told this by the pursuer.

[50] I also felt that the pursuer had attempted to backtrack in cross-examination about whether he had done a "full flip", going head over heels, when he thought that this account might not help his case. As already mentioned, his evidence about whether he did or did not slide down the slope was unsatisfactory, and his explanation to account for the admission in statement of fact 4 about sliding down part of the slope on his bottom was also unconvincing.

[51] I also noted that none of the other witnesses led on behalf of the pursuer had actually seen how the pursuer had made his way down the slope before the accident. The pursuer told the court that he could not say where Nick Ball was when he, the pursuer, started to make his way down the slope.

[52] Turning to Nick Ball, he gave a clear and consistent account of the pursuer's actions despite robust cross-examination. This was in contrast to the pursuer's varying descriptions. Having seen and heard all the witnesses and having considered the evidence as a whole, the overall effect of the inconsistences and what I regarded as being unsatisfactory explanations by the pursuer has led me to conclude that I could not have confidence that he could be regarded as being either credible or reliable in relation to the question of how the accident occurred. I, therefore, accept and prefer Mr Ball's description of how the accident happened, and this has been reflected in finding-in-fact (15). This included his description of the pursuer going fast enough to do "a front, full front flip". He did not think that was possible if you were carefully walking down a slope. Having considered the evidence as a whole, it is very difficult to see how that would, realistically, be possible. In all the circumstances, I am satisfied that the fact that the pursuer did such a full front flip is more consistent with Mr Ball's description than with the account given by the pursuer.

[53] I would add that the pursuer submitted that evidence from Mr Angus MacLean had bolstered the pursuer's account in saying that "…it would be very unusual to sustain the injury when running…" and that the impact of the force of his fall was likely to have been due to him being "quite a heavy man". However, the defender submitted that, when what Mr MacLean had said was looked at more fully, his evidence had not supported the pursuer's position. I noted that, in cross-examination, Mr MacLean confirmed that it was the landing on the knee when tumbling down the hill that had been the most likely explanation for the injury rather than the initial falling or tripping. He told the court that it would be very unusual to sustain this injury when running or walking; "it's the falling that's been the important factor… this is usually a higher energy injury, i.e. you need quite a lot of force to cause it. So, that would tend to be either the speed, which is what you are

suggesting, and potentially also his weight…", and he went on to agree that in the same way that he could say that weight may have been a factor speed might also have been a factor. So, it seems clear that Mr MacLean's view was that both weight and speed might have been factors.

The instructions given to the pursuer at the top of the slope and on the slope

[54] The pursuer avers in statement of fact 4 that, had he been instructed to use a path he would have done so, but that no such instruction was given. The defender avers in answer 4 that the group was instructed to walk carefully down the grassy bank and to use the path, that they were warned that the route might be slippery and that, after the pursuer had slid down on his bottom, he was told not to slide or run down the slope and that he was instructed to use the path.

[55] I have already recorded that none of the other witnesses led on behalf of the pursuer saw how the pursuer made his way down the slope before the accident. Similarly, none of them gave evidence about whether or not they had seen him being given any instructions either at the top of the slope or on the slope.

[56] As to what was happening on and about the slope, the picture generally was not entirely clear. There was, in the first place, inconsistent evidence about whether the party arrived there in one or two mini-buses. The pursuer, Mr Maclean and Mr Davison thought that there had been two mini-buses, but Mr Cassidy thought that there had been only one mini-bus. Secondly, although the pursuer said that he had been in the first of two mini-buses and that he had waited at the top of the slope for at least 20 minutes for the second mini-bus to arrive, Mr Maclean told the court that he had thought that there had only been a few minutes between the second mini-bus arriving at the drop-off point and the first mini-

bus. Mr Davison then told the court that the second mini-bus got to the drop-off point "just behind" the first mini-bus. In relation to who was driving the first mini-bus (if there were two), the pursuer's recollection was that Mr Ball was driving that mini-bus, but Mr Ball said that Tracey Lamb was the driver of that bus (and Mr Davies confirmed that she was a driver for the defender) and that he never drove the mini-bus as he does not have a driving licence. I accepted and preferred Mr Ball's evidence about this. It seems to me that it is much more likely that the pursuer's recollection about this is simply faulty; there is no obvious reason why Mr Ball should have been lying to the court about this and whether he has a driving licence. Further, in relation to the launching of rafts from the top of the slope, the pursuer told the court that he could not remember having seen a raft launched, whereas Mr Petherick recorded the pursuer as having told him about the release of a raft from the top in an uncontrolled manner. The pursuer said that the words "uncontrolled manner" had not come from him.

[57] Each witness for the pursuer also gave rather different accounts of what each recalled as having been said at the top of the slope. The pursuer initially told the court that they, the party, were told to go down the hill. He was then asked what he had been told by Nick Ball and he said that he thought he had been told to make his way down the slope carefully, and that that was all they had been told. At a later point he expanded on this to say that someone had said that he could use the paddle to assist getting down the hill. In cross-examination, he was sure that Nick Ball had given no more instruction than that he should make his way down the hill carefully. Someone, but he could not remember who, had said that he could use the paddle to assist.

[58] Mr Kenneth Maclean said that could not remember being told by anyone from the defender that there was a path to follow, but he said nothing about whether he – or anyone else – had or had not been given any instructions about getting down the slope.

[59] Mr Davison told the court in evidence-in-chief that he had been given a quick 10-15 seconds of a talk to go down the hill. However, in cross-examination, the length of this talk extended to variously up to a minute or half a minute. He said that the talk had taken "no longer than a minute, certainly half a minute". However, he was not specifically asked what had been said during his minute or half-minute. He and others were told that they could use their paddle to assist. He was not told about a path. He was also told that if he was having difficulties he could slide down the slope slowly on his bottom.

[60] Mr Cassidy told the court he had been given a paddle which he could use to go down the slope. He had used it to keep his balance. It had been a help. There was no guidance as to where to go although he also said that, when handed the paddle, he had been told "just go down there". Nobody told him anything about a path. Nobody had told him to be careful descending the slope, but he said that he did not need to be told to be very careful as it was a very steep slope and he was quite aware that it was dangerous. He could also see what the ground conditions were like.

[61] By contrast, Mr Ball told the court that he had pointed out to the group where the path was and said to them that this was where they were going to go down, that it was a slippery hill and that they would need to be careful and make sure that they followed the path on their way down. When the pursuer had come down to join Mr Ball on the path by sliding straight down on his bottom, Mr Ball had told him not to do that and to follow the path as it was slippery and wet. When he had then started to go straight down the hill, Mr Ball had told the pursuer to be careful and go slowly down the hill and not to run.

[62] All of this is illustrative of conflicts and inconsistencies in the evidence. This might not be entirely surprising in view of the passage of time since April 2015. I also noted Mr Ball's evidence to the effect that, although the group was not unruly, they had had to be told several times to do basic things. He described the mood of the group as being very lively and that he could see that they were excited for the day. Mr Kenneth Maclean described the group as being "boisterous" and having a laugh and a joke. Again, that may not be surprising for a weekend away such as this one. At all events, there was for whatever reason a less than clear picture of what was happening on and around the slope. This includes the question of what instructions each was given, took in and remembered. In all the circumstances, I did not feel that I could have confidence in the reliability of the accounts given by the group members about this.

[63] Ultimately, it is necessary to focus on the evidence of what instructions were given to the pursuer both at the top of the slope and when he was making his way down the slope. The principal sources of evidence for this were the pursuer and Mr Ball. As I have already indicated, I am satisfied that there was a discernible path down the slope on the date of the accident. That being so, was Mr Ball telling the truth when he said that he gave the pursuer instructions about the path and as he otherwise explained? The pursuer in effect says that he was not. The onus is on a pursuer in any case to prove his or her case on a balance of probabilities. If the court is left unsure which version to prefer, the pursuer will fail to prove his or her case. However, in this particular case, my assessment is that Mr Ball's account falls to be preferred to that of the pursuer. I have already commented on concerns about inconsistences and unsatisfactory explanations from the pursuer which have led me to conclude that I could not have confidence that the pursuer could be regarded as being either credible or reliable in relation to how the accident occurred. That is also my conclusion in

relation to the question of the instructions given to him. It follows that I am satisfied that the pursuer was given the instructions described by Mr Ball and that he declined to follow them in that he instead stood up on the path and then carried on effectively straight down the slope, not using the path. He took a small number of steps at a fast rate and then flipped over, going head over heels.

Whether it was safe for the pursuer to descend the slope wearing wet suit boots

[64] The pursuer avers in statement of fact 4 that the footwear provided was inadequate and inappropriate for descending a steep slope safely, had poor grip and was unsuited to providing suitable foot retention when moving over wet grass or a slippery slope. He also avers that the defender had a duty to provide protective footwear. Specific reference was made to walking boots. It was said that they would have avoided or materially reduced the risks of injury to participants descending the slope. It is also averred that Nick Ball and Siana Hughes were wearing trainers. The pursuer submitted that the wet suit boots provided were inadequate and unsuitable for descending the slope safely. They were provided for use on the rafts when on the river. No thought had been given by the defender to what was needed in the stages before the party were on the river. I was reminded by the defender that the pursuer did not plead a case to the effect that he ought to have been advised to retain the footwear he was wearing when he arrived at the defender's premises.

[65] The pursuer's position in evidence was to the effect that the wet suit boot had slipped out from under him because there was no grip. However, this was in the context of his account of how the accident occurred, which I have not accepted.

[66] Mr Kenneth Maclean was not asked about, and did not comment on, the wet suit boots. By contrast, Mr Davison told the court that, when he was at the top of the slope after

having arrived in the second mini-bus, he had lifted his foot and pointed to the bottom of the sole of his wet suit boots and said "Really?" because he had not felt that the footwear he had on was going to get him down the hill. Nevertheless, he did then set off down the slope. He slipped within a couple of metres; his feet slid forward and he fell onto his backside. His boots had no grip. I noted that, in contrast to Mr Davison and although, according to the pursuer, he – the pursuer – had been waiting at the top of the slope for at least 20 minutes, he did not raise a similar question about getting down the slope in wet suit boots. And this is despite having accepted in cross-examination that both the degree of the slope and the ground conditions had been obvious.

[67] Mr Cassidy found that the wet suit boots he was wearing were no help whatsoever. The ones he was wearing had been a lot smoother than the wet suit boot in court, number 5/13 of process. He said that he would have been safer with his walking boots.

[68] Mr Davison also told the court that his recollection was that both Nick Ball and Siana Hughes were wearing hill-walking type cross-trainers. However, Mr Ball told the court that he was wearing wet suit boots. In cross-examination, he flatly denied having had trainers on. He did not know what Siana Hughes had been wearing on her feet. I have to say that it seemed surprising and really quite questionable that Mr Davison could really remember what the two instructors had been wearing on their feet three years earlier. I have had to consider whether Mr Ball was lying to the court when he said that he was wearing wet suit boots, but I am not persuaded that he was. It was also not proved to my satisfaction what Siana Hughes was wearing on her feet.

[69] Turning to Mr Petherick's evidence, one of the questions he had been asked to address in his report, number 5/11 of process, was whether the wet suit boots were suitable footwear for descending the slope. The opinions he expressed, including those in his report,

number 5/11 of process, had been predicated on the basis that this was a steep slope with no path down it (whereas I am satisfied that there was, as at 25 April 2015, a discernible path down it). It was, therefore, against this background that, for the reasons he gave in his evidence, Mr Petherick's view was that wet suit boots are not suitable for walking on the slope in this case. This included the point that, although they have some grip that would afford some security, there is no edge to them. They are not designed to go down slopes. And in his report, number 5/11 of process, he said at paragraph 5.7, that the "standard" technique that should be adopted to go down the slope is side-stepping, placing weight on the inside edges of the soles to the footwear. That is not possible if the soles have no edges. Mr Petherick was also asked in evidence-in-chief about a passage in the defender's risk assessment, part of number 5/10 of process, which read: "Clients always guided on steep ground". In relation to "guiding", he said that he would have "expected" an instructor to have guided the group down along a route and to have shown them any specific techniques that might be required to go down the slope. He said that instruction requires to be pitched at the basic level of whatever the experience is for those who have never been before. Mr Petherick also suggested that trainer-type walking boots could be used when rafting. He also suggested that there could be separate footwear issued for walking down the slope and for the rafting.

[70] In cross-examination, Mr Petherick said he did not think that the slope should be used at all when there were (as he saw it) suitable alternative routes to the put-in point on the river. He later added that, if the slope was being used, instruction would have to be given as to how to walk down the slope. The ideal would be to do that by a demonstration at the top of the slope.

[71] Mr Davies explained why his view was that wet suit boots are suitable for going on steep grassy slopes. He agreed that they are no good for edging, but his view was that they were probably the best thing for what he called "smearing", namely, putting the whole surface of the foot flat to the surface which creates a lot of friction. He completely disagreed with what Mr Petherick said in his report about the wet suit boots being unsuitable footwear. He did not agree with the suggestion that people attending for white water rafting should be taught a particular technique to walk down the slope as that would be "a course" rather than a day's activity. If people take care and take small steps anyone will get down the slope sufficiently. A rigid boot has less friction as there is less boot touching the surface. If you are going downhill taking small steps that is a smearing technique. That is the easy way to explain it to clients. He would use simple language to tell a client to take care when going down the slope and take small steps. Going slowly and taking care on a steep grassy slope taking small steps is common-sense. He disagreed with the suggestion of walking boots rather than wet suit boots. He queried the suggestion that they would have to change boots every time the terrain changed. That was not feasible and was unnecessary. Most trainers were also not suitable as they offer very little friction. In relation to the passage in the defender's risk assessment saying "Clients always guided on steep ground", Mr Davies told the court that the instructors on the day were guiding the clients. They gave instruction to negotiate the slope. That is guidance. His view was that "guided" is the same. Guidance can be anything from physically holding someone to just giving them instruction.

[72] In a similar vein, Mr Gibson spoke of the sole of a wet suit boot being quite firm so that it gives structure, and that being able to feel the ground was a benefit. He also thought that, if the ground was quite soft, you would be able to edge with wet suit boots. He also

told the court that some people who paddle with him use wet suit boots and that, in his experience, nobody had had an injury descending the slope wearing them. In all the time that his company had used the slope there had been no injury.

[73] Mr Ball did not agree with a suggestion that wet suit boots would not have provided sufficient grip on the slope. He confirmed that he had assessed the risks involved in going down the slope that day and that his assessment was that the risks were manageable with proper instruction. He told that court: "It's perfectly manageable if you take it nicely and slowly and you follow the path". He told the court that he was also wearing wet suit boots. It was put to Mr Ball in cross-examination that, although it was not suggested that the participants had to know what was edging or smearing, what he had to do was achieve the same effects desired from edging or smearing and that that he had made no effort to do that. He responded that if the clients follow the path they don't need to use any of those techniques to safely get down the hill, which the defender had done with hundreds of clients previously.

[74] The defender submitted that Mr Petherick's view about wet suit boots and edging was an example of his applying the standard of climbing or mountaineering to the simple task of walking down a 20 metre slope and that edging is clearly not the only way in which to safely descend a slope such as this. The defender also submitted that Mr Petherick's evidence about "guiding" was a good example of his failure properly to recognise the circumstances in which the accident occurred, namely that this accident had not occurred during a climbing, hillwalking or mountaineering activity (in relation to which Mr Petherick had particular expertise) but had occurred whilst walking down a 20 metre slope in the countryside to take part in white water rafting. Requiring the defender to provide two different types of footwear would be wholly unreasonable and impractical.

[75] Having considered the evidence as a whole, including giving careful consideration to the points made by Mr Petherick and to the submissions made on behalf of the pursuer, the crucial starting point is that I have concluded that I am satisfied that there was a path down the slope as at 25 April 2015 and that it would have been safe for the pursuer to descend the slope wearing wet suit boots if he had following the instructions which I am satisfied were given to him by Mr Ball, including the instructions to follow the path. In this context, the wet suit boots represented suitable footwear. Put another way, the reason the accident occurred is that the pursuer conducted himself in the manner described by Mr Ball and did not follow the instructions given to him. If he had followed the instructions and made his way down the path as instructed, the accident would not have occurred.

[76] I am satisfied that even although, in Mr Petherick's experience (and he clearly has expertise in physical education, climbing, hillwalking and mountaineering and has had experience of taking groups out walking from adventure centres and accessing open ground), the "standard" technique to adopt on a slope such as the slope in this case is side-stepping and using the edges of soles to footwear, this is not the only technique which could safely be adopted on the slope with a path down it. On this matter, I accept and prefer the evidence of Mr Davies, Mr Gibson and Mr Ball about the manner in which the slope can in their experience be – and has been over many years – safely descended by people making their way to the Drynachan put-in point wearing wet suit boots if they are given and following instructions. Mr Davies and Mr Gibson in particular are very familiar with this means of access to the put-in point to the white water rafting. The opinions expressed by Mr Petherick were, as I have already observed, predicated on the basis that this was a steep slope with no path down it. Mr Petherick had also felt able to question whether the defender had in fact previously used the access route and put-in point, whereas I am

satisfied that the defender had previously used the access route and put-in point on a regular basis over many years, albeit less so in the last couple of years due to lower rainfall. I have also found that – contrary to Mr Petherick's understanding – Mr Ball did give the pursuer specific instructions and that this included instructions about following the path indicated to him, but which the pursuer then declined to follow.

[77] I also think that there was some force to the submission made by counsel for the defender to the effect that Mr Petherick was perhaps applying the standards with which he was familiar as being applicable to climbing, hillwalking and mountaineering rather than an outdoor activities provider such as the defender (and Mr Gibson) considering the particular circumstances in this case involving the access being taken down a 20 metre or so slope to white water rafting on the river. Mr Davies made the point that people were attending for a day's activity rather than "a course" and so he did not agree with the suggestion that people attending for white water rafting should be taught a particular technique to walk down the slope. As he put it, if you are going downhill taking small steps that is a smearing technique. That is the easy way to explain it to clients. He would use simple language to tell a client to take care when going down the slope and take small steps. Going slowly and taking care on a steep grassy slope taking small steps is common-sense. This chimed with Mr Cassidy's evidence that he had not needed to be told to be very careful and that it was a very steep slope. I also accepted Mr Ball's evidence that "it's perfectly manageable if you take it nicely and slowly and you follow the path". In all the circumstances, I also accept and prefer Mr Davies' evidence that to have required the defender to provide walking boots would not have been feasible and would, in any event, have been unnecessary.

Whether the defender should have provided a tied off rope as a handhold

[78] The pursuer averred that tying off a rope would have allowed the participants a hand-hold as they descended the slope.

[79] It was submitted for the pursuer that use of a rope was a measure that might have recommended itself in a suitably sufficient risk assessment.

[80] The defender submitted that the use of a handhold could not be regarded as a reasonable and/or practical precaution. Mr Gibson had spoken of participants in the activities he led sometimes (less than ten times in all the time he had used the slope) going down the slope with the assistance of a rope as a hand-hold. But this was in the context of a rope being available after having been used to lower the kayaks rather than as being specifically provided as a hand-hold. This was not the way that rafts for white water rafting were lowered down the slope. In addition, Mr Gibson would hold the rope for what was involved with kayaks; he did not tie it off. The practicality and safety of using a rope in relation to white water rafts was not explored in evidence, including where any such rope would be tied off.

[81] My understanding from what Mr Gibson said is that the purpose of the rope was to allow the kayaks to be lowered down the slope and that, because the rope was already there, some participants decided to use it as a hand-hold. It was not suggested to Mr Gibson that, even if it had not been required for the kayaks, he would still have provided a rope. In all the circumstances, I am not satisfied that it has been proved that provision of a tied off a rope would have been a reasonable and/or practicable precaution.

The risk of hip replacement

[82] The pursuer's position on record was that, on a balance of probabilities, the pursuer will develop post-traumatic arthritis and will require a hip replacement, and that he might require further a replacement in the future. The defender's position on record was that this was unlikely.

[183] In his report, number 5/1 of process, Mr Angus MacLean, consultant trauma and orthopaedic surgeon at Glasgow Royal Infirmary, expressed the view that it was likely that the pursuer will develop post-traumatic arthritis of the hip and that it is likely that he will require a hip replacement between about 15 and 20 years from the date of his examination of the pursuer in November 2017. The pursuer was 31 at that point. If, therefore the pursuer undergoes a hip replacement in his late 40s to 50s, he may require a revision hip replacement in his retirement years. In evidence, Mr MacLean confirmed his conclusions about this. He told the court that the pursuer was, in his view, at very high risk of developing secondary arthritis in the hip as a result of the injury. He described the pursuer as a fairly stoical man who didn't want to be taking painkillers. Mr MacLean thought that if a scan of the pursuer's hip was done now, there would be no question that arthritis would be seen. Mr MacLean deals with about 50 acetabulum fractures a year at the West of Scotland Trauma Network of which he is the Clinical Lead. About 10 or 15 will be posterior wall fractures and, of these, probably only three will be comminuted posterior wall fractures. In his experience, posterior wall fractures are at greater risk of developing arthritis because of the damage to the cartilage at the back of the hip joint. If you are sitting, all of your weight is on the posterior wall of the joint and, every time you get up from sitting or standing, you put the weight on the posterior wall. The pursuer's posterior wall of his hip joint is still incongruent, namely there are not two smooth surfaces rubbing against each

other. If it is irregular, there are rough edges hitting. This incongruity is, as he put it, a harbinger of future symptoms. Mr MacLean pointed out that Mr Holt, who prepared the medical report, number 6/12 of process, on behalf of the defender had not given a prognosis for a hip replacement beyond 15 years. As the joint wears out the pursuer's pain will increase. The posterior wall of the hip is like sandpaper at the back of the ball in the socket and so it is very slowly rubbing it. This will happen over many years rather than immediate pain. It is a slowly progressive condition. It is unlikely that, if the pursuer has a hip replacement at 45, it would last the rest of his life. It will probably fail. Mr MacLean examined the pursuer in November 2017. Mr Holt examined him about six months later. By that time, Mr Holt had noted deterioration in the range of movement of the pursuer's left hip. Albeit that the findings on the two different days giving an estimate was not "scientifically robust", the pursuer's range of movement had certainly not improved and, in Mr MacLean's view, Mr Holt's examination would suggest that it had deteriorated.

[84] Mr MacLean also observed that Mr Holt had given his opinion on the basis of literature dealing with a dislocation of the hip only and that he had not referred to the severity and comminution of the fracture. He had also not referred to the post-operative scans which showed the residual displacement and comminution not anatomically reconstructed.

[85] Mr MacLean carries out about 30 hip replacements a year for trauma patients. He does not now do elective hip replacements. He had probably done about 1,000 hip replacements in his career for elective patients. He did these on a regular basis until very recently. However, his trauma practice is now so great that he spends most of his time doing that. He told the court that he would not defer to Mr Holt. This is because he treats injuries such as the injuries in this case probably to a greater extent than Mr Holt does at the

moment and that the technical aspects of doing a hip replacement was nothing to do with the prognostic management of a young man, such as the pursuer, with an acetabular fracture.

[86] Mr Graeme Holt is consultant orthopaedic and trauma surgeon at Crosshouse Hospital, Kilmarnock. He was led in evidence on behalf of the defender. He spoke to his report, number 6/12 of process. In that report he had expressed the opinion, on the basis of seeing a radiograph of the pursuer's hip, that the hip joint was congruent. He had examined the pursuer in June 2018. In his report he expressed the view that, on the balance of probability, the pursuer will likely develop some degree of secondary degenerative changes affecting his hip due to minor incongruence of the joint but that, as the fracture was located to the posterior wall of the acetabulum, he thought it unlikely that the pursuer will develop severe degenerative disease affecting his hip to the degree that might require a total hip replacement. His risk would be approximately 20-30% at a period of 15 years from the date of injury. If he requires a hip replacement in the future, this would involve a period of absence from work of approximately 12-16 weeks. There is no effect for the employment prospects for the pursuer on the open labour market. The pursuer should be able to work to normal retirement age. In evidence, Mr Holt told the court that he carries out between 150 and 200 hip replacements every year. Injuries such as the injuries in the present case are normally associated with high energy trauma. He would normally come across one of these injuries a year. A CT scan is the best way to assess the congruency of the hip joint. He thought that there was a 100% chance that the pursuer would have arthritis eventually in his hip. He thought it was inevitable that the pursuer would probably require a hip replacement. In the 10-15 year period (which is medium term) he would put this risk at about 30%, but his overall risk of hip replacement within his lifetime will be closer to 100%.

[87] In cross-examination, Mr Holt confirmed that he did not doubt that the pursuer will require a hip replacement. If he has a hip replacement in his 40s there is a likelihood of his requiring a second hip replacement. He described the pursuer as being quite a stoical character. He was not overplaying his symptoms to any degree on examination. His weight is a very strong risk factor in relation to requiring a hip replacement. Because of his injury he will be limited in his ability to lose weight.

[88] In cross-examination, Mr Holt was shown the CT scans, number 5/14 of process, which he had not previously seen. On examining the scans, Mr Holt confirmed that he could see incongruency at the back of the pursuer's hip joint. Now that he has seen the CT scans, this would take him over the 30% estimate in his report. The comminution he can see in the scans is more significant than can be seen on the plain x-rays. Having seen the CT scans, he did not disagree with Mr MacLean's evidence that it was more likely than not that a hip replacement will be required. Normally, one would be absent from work for about 12 weeks following a hip replacement. He agreed that the pursuer will be likely to require a hip replacement before the end of his working life. He also agreed that the pursuer was at risk of a post-retirement hip replacement. For a hip replacement for someone in their 40s, you would probably require two hip replacements. He, therefore, agreed that the pursuer would probably require two hip replacements in the course of his lifetime.

[89] In re-examination, Mr Holt confirmed that there is a lot of damage at the posterior wall of the hip which is not evident on x-rays. While the pursuer may have to modify what he does within his occupational role, it should not prevent him from working until retirement.

[90] In the light of the evidence given by both Mr MacLean and Mr Holt, there was, in the event, no dispute that it is likely that the pursuer will require a hip replacement in the

course of his working life. Further, in the light of the evidence from both Mr MacLean and Mr Holt – but certainly from Mr MacLean who has more experience of dealing with injuries such as this than has Mr Holt – it seems likely that the pursuer will require a hip replacement in his late 40s or 50s. Also, it seems clear having regard to the evidence of both Mr MacLean and Mr Holt that it is more likely than not that the pursuer will require a further hip replacement in his retirement years. I have, therefore, made findings-in-fact to reflect these conclusions.

Submissions

Pursuer

[91] **Liability:** The court was invited to grant decree for payment to the pursuer of the sum of £99,900 with interest at 4% from 25 April 2015. There was no visible path. There was no instruction to use the path. There was no refusal of an instruction to use the path. The wet suit boots were inadequate and unsuitable for descending the steep slope safely. There was a foreseeable risk of serious injury on the slope**.** The defender failed to carry out a suitable and sufficient risk assessment. There had been inadequate consideration of the slope and its topography. A dynamic risk assessment was therefore insufficient. There is no exclusion from that duty just because this was an outdoor activity. If the court accepts the pursuer's evidence, it is reasonable to infer that the defender in failing to consider and promulgate any, some or all of the suggested steps and precautions (provision of an alternative route, roping off, guiding, a paddle and proper directions to any path, all possible but none in the event realised) made a material contribution to the causation of the pursuer's injury. There had been no attempt by the defender to weigh up the risk. No thought was given to the likelihood of injury occurring and the potential consequences if it

does. There was no balancing of the risks versus the effectiveness of the precautions that suggested themselves. The pursuer was not saying that the mere absence of a risk assessment brings home liability to the defender, but instead that the failure of the defender to properly assess the risks of injury arising in using the slope as an access route without any thought given to available alternatives, the failure to consider the suitability of the slope, absent roping, absent paddles, absent suitable footwear (particularly in wet and slippery weather) are relevant to determining want of care by the defender. The question for the court is: were the measures that the defender had in place effective in controlling the risks of injury that a sufficient assessment would have disclosed? It cannot be said that the precautions and measures deployed by the defender were suitable and sufficient. The witnesses led on behalf of the pursuer should be preferred to the defender's witnesses. The court has to consider why Siana Hughes was not called as a witness by the defender. The court should draw adverse inferences from the fact standing her unexplained absence. The court should reject any suggestion that the pursuer knowingly made the choice to enter the slope such as to exclude liability. There was no suggestion that the pursuer had been told of the existence of the slope in advance. He had never been there before. It would have to be shown that the pursuer was fully aware of the relevant danger and consequent risk. Although the defender avers that the pursuer made a genuine and informed choice to descend the slope, there are no supporting averments and there was no evidence to suggest that it was realistic for him not to descend the slope or that he was free to take appropriate precautions. In relation to a statutory duty, no individual can absolve another from having to obey it. The defender failed to take precautions against a foreseeable risk of harm. It was an important factor that Mr Ball, at its highest, seems perhaps to have indicated where the party were to complete their descent rather than indicate a safe route or advise a safe

method of descent. The selection of the slope was made in the absence of any consideration of the party at all. It was just a slope that was used. There had been no attempt to assess the abilities of the party, no demonstration of the route, no going first or having someone else from the defender lead off, and no express instructions to the party – especially not to the pursuer – on where and how to descend. There is no scope for excluding liability on the basis that the severe injuries such as suffered in this case were not reasonably foreseeable. The terms of regulations 3(1) and 22(1) of the 1999 Regulations were referred to. The risk assessment – or lack of a sufficient one – informs the common law duty and points to its breach. The Enterprise and Regulatory Reform Act 2013 ("the 2013 Act") had not been intended to level down safety. It simply broke the previous automatic route to damages in civil claims where statutory breach was established. In terms of regulation 22, breach of a duty imposed by the 1999 Regulations had never conferred a right of action in any civil proceedings. Any prudent person conducting an undertaking would have carried out a suitable and sufficient risk assessment (in a similar way to a prudent employer in relation to an employee). There is nothing to suggest that it was contemplated that the regulations that there should be any difference in the standard of what comprises a suitable and sufficient risk assessment as between employees and persons affected by conduct of an undertaking.

[92] **Contributory negligence:** This only really comes home to the pursuer if the court accepts that he was given an instruction on the path and ignored it. There is no scope for a finding of contributory negligence.

[93] **Quantum**

[94] ***Solatium:*** The court was invited to prefer the evidence of Mr MacLean as being more expert with more "on the job" experience and expertise, notwithstanding that Mr Holt was a careful and expert witness too. The pursuer will have significant permanent restrictions. He

will have to avoid running and contact sports such as football or rugby. Mountaineering is out for him permanently. He should avoid impacts. Quantum should be assessed on the basis of Mr MacLean's evidence, the conclusions of which were not substantially challenged. This was a very bad injury suffered by a relatively young man. He sustained a type 3 posterior wall fracture dislocation of the acetabulum. He will inevitably develop arthritis. This would probably be evident now if a further CT scan was done. The chance of this progressing and requiring a hip replacement would surpass 50% by 15 years post-injury. He is likely to require a revision hip replacement post-retirement. The court was invited to assess solatium at a figure of £60,000, with two thirds of that figure being allocated to the past. Interest should run at 4% on two thirds of that figure, namely £40,000, from 25 April 2015. As at 24 January 2019, this would add a further £6,000 (£40,000 x 4% x 3.75 years). Interest should run thereafter at 8%.

[95] ***Disadvantage/future wage loss:*** Mr MacLean gave evidence to the effect that the pursuer may experience increasing stiffness and discomfort in his hip as he ages and may require a period of between three and six months off work should he require a hip replacement in his late 40s to 50s. His evidence was that the pursuer will be likely to continue to experience discomfort for the foreseeable future in his hip which would limit his ability to engage in anything other than light to moderate physical work. The starting point in relation to loss of employability is the judgment of Lord Woolman in *Paterson* v *Paterson* [2012] CSOH 183 in which the test established for a loss of employability claim to be successful was summarised. First, the likelihood of being on the labour market before the end of his working life. Second, when that risk is likely to materialise. Third, what his chances of obtaining a job are if that occurs compared with an able-bodied contemporary. The pursuer submitted that he is at risk and that it is a "substantial" or "real" risk, more

than "merely speculative" or "fanciful". On that basis, the pursuer submitted that an award should be made in respect of loss of employability. In the whole circumstances, a lump sum award should be made. In *Smith* v *Manchester Corporation* (1974) 17 KIR 1, the pursuer was in employment. However, there was a real risk that at some time before the end of her working life, the pursuer in that case would find herself having to compete in the open labour market. A lump sum of £1,000 was awarded. An equivalent award today would be about £10,367. In *Smith* v *Muir Construction* [2014] CSOH 171 in November 2014, Lord Glennie awarded a lump sum of £10,000 in relation to the pursuer. In that case there was a real, albeit slight, risk that the pursuer would lose his job and the court was satisfied that he would be at a disadvantage on the labour market compared to a different joiner of similar skill but without a wrist injury. An equivalent award today would be about £11,108. The pursuer submitted that the pursuer in the present case had suffered more serious injuries. He was hoping to move to freelance work. The court was invited to take a broad approach. It was submitted that, given the pursuer's youth and likely long working life, a reasonable award would be £25,000.

[96] ***Loss of earnings:*** The pursuer invited the court to proceed on the basis of one hip replacement in the course of his working life for a period of three months. On the basis of the wage slips lodged in process, number 5/6 of process, the pursuer's net pay was £1,909 a month on average. The defender did not dispute this figure. Three months at £1,909 a month would total £5,727. On the basis that any wage loss will arise broadly in about 15 years' time, table 27 of the Ogden Tables gives the applicable discount rate as being -0.75%. This is applicable for a term of 15 years and brings out a "factor to discount value of multiplier for a period of deferment" as 1.1195. On this approach, the figure of £5,727 would become a figure of £6,411.37 for an award today.

[97] ***Services (past and future):*** Parties were agreed in a joint minute that past services should be valued at £800, inclusive of interest, net of the defender's liabilities under section 6 of the Social Security (Recovery of Benefits) Act 1997. It was similarly agreed that, if an award was appropriate in respect of future services, this was agreed at £800 inclusive of interest, in respect of each further operation for hip replacement.

[98] Authorities cited in support of the pursuer's submissions were *Kennedy* v *Cordia* 2016 SC (UKSC) 59; *Baker* v *Quantum Clothing Group Ltd*[2011] 1WLR 1003; *Threlfall* v *Kingston-upon-Hull City Council* [2011] ICR 2019; *Uren* v *Corporate Leisure (UK) Ltd* [2011] ICR D11; *Allison* v *London Underground Ltd* [2008] ICR 719; *Bowater* v *Rowley Regis Corporation* [1944] KB 476; *Letang* v *Ottowa Electic Railway Company* [1926] AC 725; *Alford* v *The National Coal Board* 1952 SC(HL) 17; *Ahmed* v *MacLean* [2016] EWHC 2798 (QB); *Anderson* v *Lyotier* [2008] EWHC 2790 (QB); *Smith* v *Heeps* 1990 SLT 871; *Prentice* v *William Thyne Ltd* 1989 SLT 336; *Swan* v *Hope-Dunbar* 1997 SLT 760; *Stanford* v *Kingston-upon-Hull City Council* [2005] 2 WLUK 22; *Rose* v *British Gas Corporation* [1980] 10 WLUK 22; *Mackinnon* v *R&W Scott Ltd* 1987 SLT 448; *Abbs* v *Somerfield plc* [2010] EWHC 735 (QB); *Paterson* v *Paterson, supra*; *Smith* v *Manchester Corporation, supra*; *Smith* v *Muir Construction Ltd, supra*.

Defender

[99] **Liability**: Decree of absolvitor should be granted. In any event, the pursuer was seeking interest on past solatium twice. In summary, in view of the obviousness of any risks, the defender did not owe the pursuer a duty of care. In the event that a duty was owed, it has not been breached. The evidence of the witnesses called for the defender should be preferred to the evidence of the pursuer and his witnesses. Before addressing liability in detail, there were two obvious points to be made. First, the pursuer will not

succeed in his claim unless he can establish fault on the part of the defender. Second, when considering whether common law liability attaches, members of the public and employees are not in the same position. Authorities dealing with the liability of employers should therefore be treated with caution. As to the scope of the defender's duty, any risks associated with the slope were obvious. The pursuer had not disputed this in cross-examination. The obviousness of any risks determines the scope of the duty of care owed by the defender to the pursuer. There is no duty to warn an adult of an obvious risk of which any adult would be aware in circumstances where he is free to take appropriate precautions for his own safety: *Clerk & Lindsell on Torts* (22nd edition) at paragraph 3-116. A duty to protect against obvious risks exists only in cases in which there is no genuine and informed choice. The defender owed no duty to protect the pursuer against the obvious risks associated with the slope. On that basis, the action must fail. If, however, the court finds that the defender did owe a duty to the pursuer, there will be no breach of that duty unless the defender's conduct fell below the standard of the reasonable person. In assessing whether there has been a breach of duty, the court uses a "calculus of risk": *Phee* v *Gordon* 2013 SC 379 and paragraph [28] where the then Lord Ordinary, Lord Hodge, set out four factors. In addition, the practice of others may be a relevant factor. As to the first factor, probability of injury, any risk of injury was remote. The defender had previously used the slope without incident. Mr Davies also had no knowledge of any incidents involving other operators who used the slope. If there are risks associated with the slope, they are obvious. The obvious nature of the risk reduces the probability of injury. It would be reasonable to expect adults of full capacity to adopt a safe method to descend a steep slope. Even if there was no path, a safe descent would be expected. As to the second factor, seriousness of the injury, the severity of the injury suffered by the pursuer was unexpected. As to the third

factor, the utility or value of the activity, this is of less importance than it would have been if the accident had occurred whilst white water rafting. However, if all of the precautions suggested by Mr Petherick were to be taken, the utility of the activity as a whole would be severely diminished. The fourth factor was the practicality (namely the difficulty, inconvenience and cost) of the precautions desiderated by the pursuer. As to the issue of an alternative route, the alternative pull-in suggested would be onto private land and would have the potential to damage the land. Mr Davies had also questioned whether alternative route A had begun at the alternative pull-in site suggested by Mr Petherick. It was not clear that the track at the bottom end nearer the river joined up with the pull-in site. There would in any event be an issue about using any such track on private land for vehicular access. Section 1(3)(c) of the Land Reform (Scotland) Act 2003 provides for a right to cross land for certain commercial purposes, but section 9(f) excludes vehicular access other than for disabled vehicles. If participants were to walk any such alternative route, the line of sight to them would be likely to be lost. As to the issue of footwear, the pursuer's case was that the defender ought to have issued "protective footwear", with specific reference being made to walking boots. The court was invited to find that it was safe for participants to descend the slope wearing wet suit boots. As to the issue of instruction, given the obviousness of the risks, and the not unreasonable assumption that most adults will have walked down a slope at some time in their lives, no further instruction was required. I understood this to mean no further instruction beyond the instruction which the defender invited the court to be satisfied was given to the pursuer by Nick Ball. As to the issue of a handhold, I was invited to hold that it was not proved that provision of a tied off rope would have been a reasonable and/or practicable precaution. As to the practice of others, they too used the same slope to access the Drynachan put-in point. Applying the calculus of risk, the balance comes down

firmly on the side of the defender not being in breach of duty. In the exercise of reasonable care, it was not incumbent on the defender to take any additional precautions.

[100] As to the issue of a risk assessment, regulation 3 of the 1999 Regulations does not create a common law duty to carry out risk assessments in the manner required by the regulations. The risks which must be foreseen under statute and under common law are not the same. Further, a breach of the duty to carry out a risk assessment has never provided a right of action to a third party (in the sense of a person not employed by the duty-holder) and, following the coming into force of the 2013 Act, employees have also lost their right of action. Moreover, even when employees did have a right of action, failure to carry out a risk assessment could never be the direct cause of an injury. For liability to arise from such a failure, it would require to be proved that a proper risk assessment would have identified a precaution which ought to have been taken and which, if taken, would probably have avoided the accident. The defender took all reasonable precautions. In any event, the risk assessment which was in force at the time of the pursuer's accident (part of number 5/10 of process at pages 5/10/3 to 5/10/7) was "suitable and sufficient" in terms of regulation 3. Mr Gibson told the court that the risk assessments his company have are also not site-specific because of the dynamic environment. A number of the authorities to which the pursuer had referred, including *Clerk & Lindsell on Torts*, had dealt with employers' liability, which was not the relationship in the present case. The defender does not have a plea of *volenti.* The defender does not submit that the pursuer was *volens*. Instead, the defender contends that it owed no duty to protect the pursuer from obvious risks. In contrast to *Ahmed* v *MacLean*, there was no suggestion that the defender undertook to teach the pursuer how to walk down the slope. The defender does not contend that liability should be excluded solely on the basis that the severity of the injury suffered by the pursuer was not

foreseeable. There was no dispute that, in terms of the regulations, the defender was obliged to carry out a risk assessment. But this only takes the pursuer so far in determining whether there was civil liability on the part of the defender. In so far as the pursuer had pointed out that the accident in *Kennedy* v *Cordia* had predated the coming into force of the 2013 Act, the description of liability in that case therefore had to be seen in that light. In that case, breach of a regulation would give rise to civil liability. By contrast, if there was a breach of a regulation in the present case, that did not give rise to civil liability as it post-dated the 2013 act. Even prior to the 2013 Act, in relation to a non-employee, breach of regulations did not give rise to civil liability. What was said in *Kennedy* v *Cordia* at paragraph 108 about common law liability cannot have been affected by the 2013 Act which was only concerned with breach of statutory duty. There has to be fault before there can be an award of damages. What was said by Lords Hodge and Reed in *Kennedy* v *Cordia* about the difference between employees and non-employees has not been changed by the 2013 Act.

[101] **Contributory negligence**: If the court accepts the evidence of Nick Ball regarding the manner in which the pursuer attempted to descend the slope, the pursuer was the author of his own misfortune and contributory negligence should be assessed at 100%. If Mr Ball's evidence is not accepted, that would not have altered the fact that, had he taken reasonable care, he would not have fallen or, at the very least, would not have suffered injury.

[102] **Quantum**

[103] ***Solatium:*** The nature of the pursuer's injury was not in dispute. There was little between the medical experts. Mr Holt did not agree with Mr MacLean's view that the pursuer's condition had worsened between the dates of their respective examinations, or

that it was necessarily the case that the pursuer was already suffering from post-traumatic arthritis. He would not diagnose arthritis on the basis of the difference of range of movement observed between two doctors. Mr MacLean had similarly acknowledged that any conclusions drawn from the apparent difference in examination results would not be scientifically robust. Mr Holt also spoke to a reduced range of movement being initially caused by post-operative scarring as opposed to arthritis and that up-to-date x-rays would be required before a definitive diagnosis of arthritis could be made. However, Mr Holt was quite clear that the development of arthritis was inevitable. In relation to the risk of a hip replacement, Mr MacLean considered the risk to be 50% at around 10-15 years and at 30 years post-injury it would be above 50% (I noted that Mr Holt said that it would be considerably more than 50% at that point). A hip replacement was not inevitable. Having reviewed the post-operative CT scans, Mr Holt considered the risk of a hip replacement to be higher than that expressed in his report. In relation to the possibility of a revision hip replacement, Mr MacLean's evidence was to the effect that revision surgery was likely, but that it would be beyond retirement age. Mr Holt's evidence was to the same effect. The defender submitted that the pursuer's injury fell at the upper end of bracket 7(D)(b)(ii) of the Judicial College Guidelines. The range of award for that bracket is £10,040 to £21,200. The bracket includes "cases where hip replacement may be necessary in the foreseeable future or where there are more than minimal ongoing symptoms". In the present case, the pursuer has ongoing symptoms, but those are not to the extent that analgesics are required. The defender accepted the suggestion that two thirds of any such award should be allocated to the past.

[104] ***Past and future loss of earnings:*** No past loss is claimed by the pursuer. In relation to the future, the claim which is pled is restricted to any post-operative period. The

likelihood is that there will be one such period during the pursuer's working life, but that is not inevitable. The normal period for a patient to be absent from work following a hip replacement was stated by Mr Holt to be 12 weeks. Unless the pursuer has gone freelance by the time that he undergoes a hip replacement, it is a reasonable assumption that he will receive sick pay. During the period of his absence following the accident, the pursuer's sick pay was such that he did not suffer any loss of earnings. The pursuer stated that sick pay provision with his current employers may not now be as generous as it was at the time of the accident, but no detail was provided in relation to that. In his submissions, the pursuer proceeds upon the basis that he will have gone freelance by the time of his hip replacement. However, whilst the pursuer's hope may be that he will become a freelance director, there was no evidence led as to the likelihood of that hope materialising. In the circumstances a very modest award may be justified to reflect the possibility that the pursuer is working freelance at the time that he receives a hip replacement. A figure of £1,000 was suggested on behalf of the defender.

[105] ***Disadvantage on the labour market:*** The pursuer's evidence suggested that his ongoing symptoms did not limit the duties which he was able to undertake. In relation to location work, he said that he still did the same amount but that there may be some exacerbation of his symptoms. Any such exacerbation would appear to be mild. As to whether, during a period leading up to a hip replacement, the pursuer's ability to undertake his work would deteriorate to the point at which he is at a disadvantage on the labour market, Mr Holt's evidence was to the effect that it would not. He would expect the pursuer to be able to continue in his current employment. Mr MacLean agreed that, with the exception of contact or impact sports, a return to near full function would be expected after a hip replacement. In relation to the pursuer's claim for loss of employability, the onus is on

him to prove that he will suffer a disadvantage, in the sense of a financial disadvantage, in the labour market. He made no suggestion that, but for the accident, he might have sought more manual employment which he is now less likely to secure or, for example, that promotion from his current position is less achievable than it previously was. All that is pled in support of this claim is that the pursuer suffers pain when driving and that he requires to exercise care on uneven ground. If the question is asked as to how these "restrictions" translate into a financial disadvantage, no evidence was led which would provide an answer. I was told by the defender that the test for an award of loss of employability was not disputed. However, he submitted that the pursuer's submissions had failed to address the issue of how any ongoing or future symptoms were likely to result in the pursuer being disadvantaged. It is not enough, for example, that the pursuer will never be fit for heavy work. That would not by itself justify an award for loss of employability. Before any award can be made, there would also need to be a "substantial" or "real" risk that the pursuer will seek such employment in the future. In the present case, there was no evidence to that effect. In the circumstances, there should be no award made for loss of employability. In the circumstances, the court should make no award for disadvantage on the labour market.

[106] ***Services:*** The parties are agreed that past services are to be valued at £800 inclusive of interest and that any future services following hip replacement or revision thereof are to be valued in the same sum for each period. Given that a hip replacement, whilst likely, is not inevitable, and there is at least a possibility of revision surgery being required, a total sum of £800 to the future was suggested as being reasonable.

[107] Authorities cited in support of the defender's submissions were *Tomlinson* v *Congleton Borough Council and Another* [2004] 1AC 46; *Kennedy v Cordia (Services) LLP*, *supra*;

Clerk & Lindsell on Torts (2nd Edition) at paragraph 3-116 and 13.24; *Evans* v *Kosmar Villa Holidays Limited* [2008] 1WLR 297; *Poppleton* v *Trustees of Portsmouth Youth Activities Committee* [2009] PIQR P1; *Phee* v *Gordon, supra*; *Morton* v *William Dixon Limited* 1909 SC 807; *Brown* v *North Lanarkshire Council* 2011 SLT 150; *Threlfall* v *Kingston-upon-Hull City Council, supra*; *Uren* v *Corporate Leisure (UK) Limited and Another, supra*; *English Heritage* v *Taylor* [2016] PIQR P14; Judicial College Guidelines at paragraph 7(D)(b)(ii).

Decision

[108] There was no dispute that the pursuer will not succeed in his claim unless he can establish fault on the part of the defender: *Tomlinson* v *Congleton Borough Council, supra*.

[109] It was similarly accepted that a breach of regulation 3 of the 1999 Regulations would not itself give rise to civil liability. The pursuer requires to establish that the defender owed him a duty of care at common law and that, on a balance of probabilities, the defender breached that duty of care and that this, foreseeably, caused the pursuer's accident. Put another way, if the defender owed the pursuer a duty of care, the question would then be whether the activity involved a risk of injury as a foreseeable possibility and whether the defender took adequate precautions against the risk of injury.

[110] The first question, therefore, is: whether the defender owed the pursuer a duty of care, the second question is: if so, whether the activity involved a risk of injury as a foreseeable possibility, and the third question is: whether the defender took adequate precautions against the risk of injury.

[111] *Whether the defender owed the pursuer a duty of care:* The defender submitted that it did not. This was on the basis that the defender owed no duty to protect the pursuer against what were said to be the obvious risks associated with the slope. In the circumstances of this

particular case, I do not accept what appeared to be a broad proposition to the effect that the defender did not owe the pursuer a duty of care. I agree with the pursuer that the duties set out in the 1999 Regulations inform the common law duty. I did not understand the defender to suggest otherwise. An employer in the position of the defender remains under a statutory duty to comply with Health and Safety Regulations. The duties set out in such regulations made prior to the 2013 Act inform and may define the scope of duties at common law. I accept that any breach of such statutory duties is only actionable by a pursuer if it also amounts to a breach of a duty of care owed to that particular pursuer in any given circumstances and that any such breach, therefore, itself requires to amount to negligence. It is accordingly not enough to demonstrate a bare breach of the regulations as not all breaches of the regulations will be negligent: *Brown* v *North Lanarkshire Council*, *supra* at paragraphs [29] and [31]. However, it seems to me that it might be difficult for a defender in breach of a duty imposed by a regulation to argue that he took reasonable care.

[112] Regulation 3 of the 1999 Regulations is the provision suggested by the pursuer in this case as being of continuing relevance in considering the context of the duty of care said to be owed by the defender to the pursuer. Again, I did not understand the defender to suggest otherwise.

[113] In considering this issue (and the defender's position) more broadly, the pursuer accepted that any risks which existed in going down the slope were as a result of the degree of the slope and the ground conditions, and he accepted that both of these risks would have been obvious to him before he started his descent. I am also conscious that, on his own account, the pursuer was waiting at the top of the slope for at least 20 minutes before starting to make his way down the slope and that, despite this and being aware of the risks which he accepted would have been obvious, there was no evidence that he made any

protest, or even comment, about them before starting to make his way down. Having said that, I am not satisfied that it is really fair to say that the pursuer was "free to take appropriate precautions for his own safety", as envisaged in *Clerk & Lindsell on Torts* (22nd Edition) at paragraph 3-116 as contended for by the defender. I recognise that, as I was reminded by the defender, members of the public and employees are not in the same position: *Kennedy* v *Cordia* at paragraph [108] and, therefore, that authorities dealing with the liability of employers should be treated with some caution. An employee might well be obliged to take a risk, in contrast to a non-employee. However, I also recognise that regulation 3(1)(b) deals with risks to the health and safety of persons not in the employment of employers, hence the acceptance in submissions for the defender that there was no dispute that, in terms of regulation 3 of the 1999 Regulations, the defender was obliged to carry out a risk assessment in this case. The reality also is that the pursuer had not known about the slope before he was dropped off from the minibus at the drop off point and that, if he had, for example, simply refused to go down the slope, he would have been left in the rather awkward position of being left behind, waiting at the top of the slope, until the rest of the party returned from the white water rafting activity.

[114] The defender also referred to *Tomlinson* v *Congleton Borough Council* at paragraph 46 where Lord Hoffmann said:

> "A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger… or the despair of prisoners which may lead them to inflict injury on themselves".

In the present case, I am not satisfied that the circumstances were such that it would be appropriate to go so far as to say that the pursuer had a "genuine and informed choice". I accept and prefer the pursuer's submission to the effect that it would have to be shown that

the pursuer was fully aware of the relevant danger and consequent risks. In my opinion, that cannot fairly be concluded in the present case. *Tomlinson, supra*, *Evans* v *Kosmar Villa Holidays Limited* and *Poppleton* v *Trustees of Portsmouth Youth Activities Committee, supra* were not on all fours with the circumstances of the present case. In all the circumstances, I am satisfied that the defender plainly owed the pursuer a duty of care.

[115] *Whether the activity involved a risk of injury as a foreseeable possibility:* The activity included the need to access the put-in point on the river by participants making their way down the 22 metre slope. I did not understand the defender to suggest that this part of the activity did not involve a risk of injury as a foreseeable possibility. Indeed, this was foreshadowed in the defender's risk assessment. There was, however, an argument about the seriousness of any such injury. This issue arises in the context of the next question.

[116] *Whether the defender took adequate precautions against the risk of injury:* The secondary submission for the defender was that, if there was a duty of care, there would be no breach of the duty unless the defender's conduct fell below the standard of the reasonable person and that, in assessing whether there has been a breach of duty, the court uses a "calculus of risk" weighing up the four factors set out by Lord Hodge in *Phee* v *Gordon, supra*. The defender also submitted that the practice of others may be a relevant factor. I am prepared to accept the defender's suggested analysis, no issue having been taken with it by the pursuer. In *Phee* v *Gordon* Lord Hodge, then sitting in the Inner House, said at paragraph [28]:

> "The court in assessing what a reasonable man would do uses a calculus of risk. It weighs up: (i) the likelihood of causing injury; (ii) the seriousness of that injury; (iii) the difficulty, inconvenience and cost of preventative measures; and (iv) the value of the activity that gives rise to the risk".

[117] As to *the likelihood of causing injury*, I accept that there was a risk of injury on the slope. Indeed, the defender's risk assessment, part of number 5/10 of process, identified injury as being a potential risk arising from hazards including (1) steep ground and (2) slips, trips and falls, and identified associated risks such as falling on slippery and technically difficult ground. It then provided as a control measure: "Clients always guided on steep ground". This was to ensure safe movement on steep and technical ground. This was, therefore, recognised and acknowledged in the defender's risk assessment. However, I think that it is also relevant that the defender had previously used the slope without incident. I accepted the evidence of Mr Davies to this effect. He similarly had no knowledge of any incident involving other operators who used the slope. I also think that it is fair to say that the obvious nature of the risk serves to reduce the likelihood of injury resulting. The pursuer himself added, when accepting that the risks resulting from the degree of the slope and the ground conditions would have been obvious, that that was why, according to him, he had adopted the "zigzag", crossing his feet going down. This is also consistent with evidence from Mr Cassidy when he said "No, I didn't need to be told to be very careful; it's a very, very steep slope… I was quite aware that it was dangerous".

[118] As to *the seriousness of the injury concerned*, both Mr Angus MacLean and Mr Holt confirmed that the seriousness of the pursuer's injury was greater than they would each have expected. I also noted that, albeit that Mr Davison slipped whilst on the slope, there is no suggestion that he had suffered any injury. Indeed, he commented to the effect that, due to the nature of the slope, the distance between falling and hitting the ground was very small. The pursuer pointed to a reply by Mr Petherick in re-examination where he was asked what type of injury he thought might be suffered if someone was to trip, slip or fall on the sort of slope involved in this case. He responded that it could range, adding "It could

well be a head injury; it could be a knee injury, a lower limb, even an upper limb… It could be… all-body injuries that could occur". He then went on to say that you could easily twist a knee, break an ankle, suffer a shoulder injury or you could even have a fractured skull or a serious head injury. However, albeit that Mr Petherick could doubtless express general views about possible risks associated with a slope such as this, I did not understand him to have medical expertise qualifying him to give expert opinion in relation to the seriousness, or otherwise, of injuries that might be associated with such a slope.

[119] In relation to the third factor, *the difficulty, inconvenience and cost of preventative measures*, this involves consideration of the preventative measures averred on behalf of the pursuer. These were (a) identification of a safe route to the river – particular reference being made to alternative route A; (b) the provision of adequate and suitable instructions for safely descending the slope; (c) tying off a rope or other device as a handhold; and (d) the provision of protective footwear – particular reference being made to the provision of walking boots.

[120] In relation to the question of an alternative route, the pursuer submitted that his purpose in adducing such evidence went no further than identifying that there were alternatives to what had been done by the defender, that they were "readily available" and easy alternatives with no implications in costs, expense and expertise. Clients could have been dropped off at the start of the alternative route A. A minibus could either have been parked there or, after dropping off clients, a minibus could have been turned round and gone back up the hill to park at the drop off point in this case. The defender's position was that the alternative pull-in for alternative route A would have been onto private land and would have had the potential to damage the land. In relation to this alternative route A, Mr Davies had also questioned whether the track in fact began at the alternative pull-in site.

He suggested that there did not appear to be enough room between the fence and the drain for a track. He was commenting on photograph C at page 13 of Mr Petherick's report, number 5/11 of process. This was said by Mr Petherick to connect to the track shown in photograph D on page 13 of his report. However, Mr Davies gave evidence to the effect that he did not think that the "alternative pull-in area" existed as at the date of the accident. He thought that there had been just a field and no fence (shown in photograph D) at that point. The track from the put-in point at the river began at a point about an inch to the right of the "alternative pull-in area" shown in figure 3 in the report. It did not start at the "alternative pull-in area" as that is a recent development in the last couple of years. However, the figure 3 image was confusing as it is a Google Earth image from 2005. Mr Davies did not think that there was a track running along the left-hand side of the fence in photograph C. The track shown in photograph D is part of the track to the ford at the put-in point at the river. That is the track that starts at a point to the right of the "alternative pull-in area". Notwithstanding his knowledge of the river, Mr Gibson had only previously been aware of the track at the river end. I have to say that it is not clear to me, from looking at photograph C, that this does in fact show a track. If there is such a track which begins at photograph C running alongside the fence, it is unfortunate that the photograph was not taken at the point of the start of the track and showing it clearly. I am, therefore, left in real doubt about whether there is a track there and, if there is, whether it actually joins up with the track shown in photograph D which does lead to the river. More importantly though, it is even less clear that it existed as at the date of the accident. Mr Petherick was not in a position to speak about the layout there at that point. In this confused and confusing state of the evidence, I am not satisfied that it has been proved that there was such an alternative route A or such an alternative pull-in area as at the date of the accident. If the alternative route A existed at that

point, and if participants were to have been dropped off to walk such a route, there would also have been the issue raised by Mr Davies about potential loss of line of sight.

[121] If I am wrong about the objection to alternative route B, the defender submitted that that would involve either driving over private land or having to carry the rafts. Mr Davies was also concerned that the alternative put-in point for this route would have been likely to cause conflict with other river users. Mr Davies is familiar with interactions with other users of the River Findhorn. Mr Petherick is not. Also, as I have already observed, it was not proved to my satisfaction that Mr Petherick has the necessary knowledge and experience to enable him to give expert evidence about what are and are not appropriate put-in points (or launch sites, as he put it) for white water rafting on the River Findhorn. I am, therefore, not persuaded that it would be appropriate for me to dismiss Mr Davies' concerns. Mr Davies also observed that, if the river had been accessed at this alternative point, this would have involved a steep drop-off into the river as opposed to the easy access at the put-in point used in this case. Again, unlike Mr Petherick, Mr Davies is the person with substantial experience in relation to white water rafting on the River Findhorn. I, therefore, accept Mr Davies' assessment about this in comparison to the favourable conditions for the put-in point used in the present case. In relation to the possibility of vehicular access, having regard to section 9 of the Land Reform (Scotland) Act 2003, I am satisfied that vehicular access is excluded from access rights allowed under the 2003 Act, other than for disabled vehicles. Mr Petherick did not appear to have given consideration to this.

[122] In all the circumstances, I am not satisfied that there were alternative routes which would have been "readily available" and easy alternatives at the material time with no implications in costs, expense and expertise as contended for by the pursuer.

[123] The next measure averred was the provision of adequate and suitable instructions. I have already concluded that I am satisfied that the pursuer was given the instructions described by Mr Ball (which I am satisfied were suitable and sufficient) and that he declined to follow them. The pursuer commented in submissions that the risk assessment, part of number 5/10 of process, had set out as a control measure (in relation to steep ground and the risk of falling on slippery or technically difficult ground) that clients were "always guided" on steep ground and that this had not happened in the present case. I do not accept this. Mr Davies gave evidence, which I accept, to the effect that guidance is the same as "guided". Staff gave instructions to negotiate the slope. His position was to the effect that guidance could be anything from physically holding someone to just giving them instruction. The pursuer submitted that Mr Davies was "disingenuous" in suggesting this. Mr Petherick had given evidence to the effect that he would have "expected" an instructor to have guided the group down by leading the group along the route and showing at the same time any specific techniques that might be required. This was given the nature of the ground concerned. In my view, counsel for the defender had a point in submitting that Mr Petherick was applying standards which might be expected in activities such as climbing or mountaineering compared with the circumstances here involving walking down a slope approximately 22m in length to take part in a white water rafting activity. I accepted and preferred Mr Davies's evidence when he said that he did not agree with the suggestion that people attending for white water rafting should be taught a particular technique to walk down the slope as that would be "a course" rather than a day's activity. I also accepted and preferred his evidence that guidance can be anything from physically holding someone to just giving them instruction. In my opinion, the expression "guided" is not restricted to what Mr Petherick said that he would have expected. Unlike Mr Davies and Mr Gibson, he is not an organiser

of adventure activities. In my opinion, the instructions which I am satisfied Mr Ball gave the pursuer were adequate and suitable for safely descending the slope.

[124] In relation to the suggestion of tying off a rope or other device as a handhold, I have already dealt with this at paragraphs [78] to [81] above.

[125] In relation to the provision of protective footwear, reference was made to walking boots in the averments on behalf of the pursuer. In the event, I did not understand the pursuer to have suggested in submissions that the defender ought to have provided walking boots. However, for completeness, in so far as Mr Petherick suggested that walking boots could have been used, Mr Davies explained why walking boots would not be suitable. Mr Petherick also suggested that there could be separate footwear issued for walking down the slope and for rafting. However, Mr Davies, whose evidence on this I accepted, told the court that whether you are on the grassy slope or on the riverbank or negotiating rock, the terrain changes from wet moss and slippery slime to gritty sharp granite. It is a constant change in dynamic. It would not be possible in one day to try to educate everybody at that level. His view was that it would not be feasible and not necessary to have to change boots every time they changed terrain. In addition, most trainers are not suitable. There are actually very few trainers on the market that are suitable for this sort of environment. Counsel for the defender submitted that requiring the defender to provide two separate types of footwear would be wholly unreasonable and impracticable. In the context of the activity provided in this case, I agree. I have in any event concluded that, in the context of the circumstances in this case, the wetsuit boots represented suitable footwear. I have found that it would have been safe for the pursuer to descend the slope wearing wet suit boots if he had following the instructions which I am satisfied were given to him by Mr Ball, including the instructions to follow the path. Counsel for the defender reminded me that

the pursuer does not plead the case to the effect that he ought to have been advised to retain the footwear which he was wearing when he arrived at the defender's premises, namely trainers.

[126] As to the practice of others, I accepted the evidence of Mr Davies and Mr Gibson to the effect that the practice of other operators is to utilise the same slope to access the Drynachan put-in point. I was not persuaded that there was any proper basis for rejecting their evidence to this effect. I have dealt with the issue of this put-in point at paragraphs [30] to [32] above.

[127] The defender submitted that, in applying the calculus of risk, with particular regard to the absence of any prior incidents or injuries and the obviousness of the risks, the balance comes down firmly on the side of the defender not being in breach of duty and that, in the exercise of reasonable care, it was not incumbent upon the defender to take any precautions beyond those which were taken. In all the circumstances of this particular case, I am satisfied that that was correct. There was a path down the slope and I am satisfied that Mr Ball gave the pursuer adequate and suitable instructions to follow that path. The accident occurred because the pursuer conducted himself in the manner described by Mr Ball and did not follow the instructions given to him. If he had followed the instructions given to him by Mr Ball and made his way down the path as instructed, the accident would not have occurred.

[128] There is also the question of the risk assessment. This is not a case where there was no risk assessment. However, in summary, the pursuer's position was to the effect that the risk assessment carried out by the defender was not a suitable and sufficient one. There had been inadequate consideration of the slope and its topography. A generic risk assessment and operating procedures (which were not site-specific) coupled with a dynamic risk

assessment on the day was insufficient. Mr Petherick would have expected there to have been a site-specific risk assessment (specific to this put-in point) rather than the generic one, which is part of number 5/10 of process. However, Mr Davies stood by the defender's risk assessment and standard operating procedures and explained about how participants can be dynamically managed with guidance and instruction. His understanding was that the pursuer had been given the appropriate guidance and instruction by Mr Ball. Specific instructions in relation to equipment and route had not been in the risk assessment and the standard operating procedure as it was a generic risk assessment. This is because the environment is dynamic and members of staff are trained to be able to manage whatever the situation is. I noted Mr Gibson's evidence to the effect that Aquaplay similarly does not have site-specific risk assessments and that, in common with the defender, they do dynamic risk assessments so that they are risk assessing all the time. In my view, this was of no little significance. Mr Petherick's expertise covers a wide range of sporting activities including climbing, hillwalking and mountaineering but, unlike Mr Gibson, he does not have specific experience and expertise as an adventure activities operator or as an organiser of similar activities in a comparable environment. I was not persuaded that, in the circumstances of this case, there should have been a site-specific risk assessment and that the risk assessment in fact carried out was other than suitable and sufficient. I am, therefore, satisfied that the defender did carry out a risk assessment as required by regulation 3 of the 1999 Regulations. I have already commented on the issue of the wet suit boots and "suitable footwear" and on the issue of what "guided" can include in the context of "Clients always guided on steep ground" as it appears in the defender's risk assessment, coupled with the instructions which were actually given to the pursuer at the time. For completeness, if I am wrong about my conclusion about the pursuer's objection to evidence from Mr Davies about review by

AALA of the defender's risk assessment, I would in any event have placed little weight on this evidence. It was vague and appeared to be related to assessments as regards persons under the age of 18. There was in any event no evidence about the standards AALA apply.

[129] The upshot of all this is that I am satisfied in all the circumstances that the defender took adequate precautions against the risk of injury in this case and that it was not incumbent on the defender to take any additional precautions.

Quantum

[130] ***Solatium:*** The pursuer was 28 at the date of the accident and is now 33. He sustained a fracture dislocation of his left hip with a type 3 very comminuted posterior wall fracture. This was a bad injury and he is now at very high risk of developing secondary arthritis as a result of this injury. The injury itself was also a very painful one. He had to have specialist stabilisation of the hip joint and there was significant damage to the joint surface of the left hip. It has been reconstructed as well as it can be, but a non-anatomical reduction has been achieved. The pursuer had limited weight-bearing for about three months after the accident, with help being required from his mother and his now wife. The pursuer was off work for about five months following the accident and then had a phased return to work over a further month. He had intensive physiotherapy for several months after the accident and undertook his own exercises to regain good function in the hip. He still has some persisting pain, stiffness and discomfort. However, although he had to take analgesics following the accident, he prefers not to continue to take painkillers. His symptoms will be permanent. It is likely that he will develop secondary arthritis in his hip. A hip replacement in his 40s or 50s is likely as the arthritis develops progressively. A further revision hip replacement in his retirement years is also more likely than not to be

required. He now has to avoid running, impact sports and physical work. He has also been left with some scarring. In the light of all the circumstances, with which the pursuer has coped remarkably well, an award of £33,000 for solatium would in my view have been appropriate to mark the effect which his injury has had and will continue to have on his life. This is taking into account the range of awards made in the cases to which I was referred by both parties and takes into account the Judicial Guidelines to which I was referred by the defender. Both parties were agreed that two thirds of such an award should be allocated to the past for the purpose of interest.

[131] ***Disadvantage on the labour market***: It was said in the pursuer's submissions that the pursuer was at risk of finding himself on the labour market before the end of his working life and that this was a "substantial" or "real" risk and more than merely "speculative" or "fanciful" as a risk. However, there was no evidence that this was in fact the case. In addition, in so far as it was said that the pursuer was hoping to move to freelance work in the future, the evidence amounted to no more than that, namely a hope. Mr Holt, led on behalf of the defender, expressed the view that, if he did require a total hip replacement in the future, this should not affect his long-term job prospects given his occupation, that there was no effect for the employment prospects for the pursuer on the open labour market, and that he should be able to work to normal retirement age. In all the circumstances, I accept and prefer the submissions made on behalf of the defender in relation to this aspect of the matter. I, therefore, would have made no award in respect of disadvantage on the labour market.

[132] ***Future wage loss:*** The pursuer proceeded on the basis that there would be a loss of net earnings at the rate of £1,909 a month for a period of about three months for a hip replacement in his working lifetime in about 15 years' time and applied a discount rate to

that. However, unless the pursuer has gone freelance by that time, it would be reasonable to assume that he would receive sick pay. During the period of his absence following the accident, the pursuer's sick pay was such that he did not suffer any loss of earnings. Although the pursuer said in evidence that sick pay provision with his current employers may not now be as generous as it was at the time of the accident, no detail was given about that. The alternative was the pursuer's hope that he would ultimately go freelance, but there was no evidence led as to the likelihood of that hope materialising. In all the circumstances, I am not satisfied that a precise award representing three months' net pay in 15 years' time (bringing out a total of £6,411.37) would be appropriate. I am satisfied that there should instead be some modest award to mark the possibility of some loss in this respect. In all the circumstances, I consider that an award at a figure of £2,000 would have been reasonable on this account.

[133] ***Services:*** Parties were agreed that past services should be valued at £800, inclusive of interest, and that future services should be valued at a further £800, inclusive of interest, in respect of each further operation for a hip replacement. In view of the fact that I am satisfied that it is more likely than not that the pursuer will require two hip replacements in his lifetime, I am satisfied that a total award of £1,600 would have been appropriate in respect of future services.

Effect

[134] In all the circumstances, I am satisfied that the pursuer's case fails and, therefore, that the defender is entitled to decree of absolvitor. Had I found for the pursuer I would wish to have been addressed further on the final calculations regarding interest. A hearing on expenses will be assigned as requested by both parties.