Neutral Citation Number: [2008] EWHC 2790 (QB)

Case No: HQ07X00932

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/11/2008

Before :

MR JUSTICE FOSKETT

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Between :

GRAHAM TREVOR ANDERSON	**Claimant**
- and -	
MICHEL LYOTIER and WENDY LYOTIER (t/a SNOWBIZZ)	**Defendants**
-and-	
JEROME PORTEJOIE	**Part 20 Defendant**

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Christopher Wilson-Smith QC and Harry Trusted (instructed by **Wolferstans**) for the **Claimant**
Simon Davenport (instructed by **Hextalls**) for the **Defendant**
Richard Davies QC and Bernard Doherty (instructed by **Bates Wells & Braithwaite LLP)** for the **Part 20 Defendant**

Hearing dates: 7th, 8th, 9th, 10th, 13th & 15th October 2008

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Judgment

MR JUSTICE FOSKETT:

Introduction

1. This claim arises out of a skiing accident that occurred on 7 February 2004 in the resort of Puy St. Vincent in the Ecrins Mountains in the French Alps.

2. The Claimant, who was aged 41 at the date of the accident, sustained injuries that have rendered him a complete tetraplegic at level C6. He is now wheelchair-bound and will be so for the rest of his life. It goes without saying that the accident has had a devastating impact upon him and significant direct and indirect consequences for his wife (who, though continuing to be supportive, separated from him after the accident) and their two sons.

3. There must undoubtedly have been low moments in the Claimant's life since the accident, but he displays quite remarkable resilience and cheerfulness in the circumstances. He ascribes that, to some extent, to having observed his father who, for some 40 years or so, has been paraplegic as a result of an accident and who, it

seems, has made light of his problems. If that is so, it reflects a remarkable familial trait that few would find easy to comprehend or indeed emulate.

4. Nonetheless, as I have indicated, the consequences for the Claimant have been extremely serious and, if he can establish that the accident was wholly or partly the fault of the ski instructor, which has been the primary issue in the trial before me, he will be entitled to substantial damages in due course.

5. The central issue is whether the ski instructor, who is the Part 20 Defendant in the case and to whom the Claimant was assigned for the duration of his holiday, should have permitted or encouraged the Claimant to ski in an off-piste area where the accident occurred, the essential suggestion being that it was too difficult a terrain for the Claimant to negotiate successfully. If that is the conclusion and compensation would *prima facie* be recoverable, the next issue would be whether the Claimant bore some responsibility for his own misfortune. Or was the accident merely one of those unfortunate events in what is recognised to be a risky pastime that occurred without negligence on the part of anyone? Was it, as has been suggested, a freakish accident with consequences far beyond what anyone could have foreseen?

6. That, in a nutshell, is what the case is about. I must give a more detailed general background first of all.

General background

7. The Claimant was on a family holiday which had been booked in England with the Defendant, Snowbizz, the trading name of a partnership run from premises in Peterborough, Cambridgeshire, by Mr and Mrs Lyotier. Mr Lyotier had previously been a ski instructor in Puy St. Vincent. Their headed notepaper describes Snowbizz as 'The Family Ski Specialist'. The partnership is the "tour operator" for the purposes of the claim. I should say at the outset that, whilst it was necessary for Snowbizz to be made a defendant to the claim for reasons I will summarise shortly, there is no suggestion that the Snowbizz partnership as such was in any way at fault in the events that occurred. The issue raised in the claim relates solely to the role of the ski instructor for whose actions, under English law, Snowbizz is responsible by virtue of Regulation 15 of the Package Travel, Package Holidays and Package Tours Regulations 1992. If liability is established, it is accepted on behalf of the instructor's insurers that they will ultimately be responsible for meeting the claim.

8. Mr Simon Davenport, who represented the interests of the Defendants at trial, provided a Skeleton Argument that analysed helpfully the legal framework that applies to a claim of this nature. There was no issue taken with his analysis. In essence, so far as the allegation of breach of duty is concerned, it is for the Claimant to establish that the ski instructor failed to provide his services to the Claimant with reasonable skill and care. In their Skeleton Argument, Mr Richard Davies QC and Mr Bernard Doherty, who represent the ski instructor, indicated that investigations into French law revealed no significant points of difference between it and English law in relation to the issues raised in the case and, accordingly, the court would be asked to resolve the disputes solely according to the principles of English law. This has resulted in assessing the ski instructor's role by reference to the English law of negligence, the nature of the duty involved being identical to that embraced within the duty to act with reasonable skill and care.

9. This was the third holiday taken by the Anderson family at Puy St. Vincent through Snowbizz. The first had been over Christmas in 2001 and the second in February 2003. I will say a little more about the relevance of those holidays in due course, but it is plain that Mr and Mrs Anderson saw the resort and its facilities as providing them and the two boys with the kind of skiing holiday they wanted. The ill-fated holiday was booked in June 2003. The cost included the cost of the ski school.

10. The Claimant and his family arrived at the resort on Sunday, 1 February 2004. On the following day, in accordance with the usual arrangements, they were assessed by Mr Francois André, the Director of the Ski School, who assigned them to a group led by M. Jerome Portejoie, an experienced ski instructor who, as will be apparent, is the Part 20 Defendant. The other people assigned to the group were Mr William Hall, Mr Paolo Tarquini and Mrs Alison Richardson although she was not with the group on the Thursday and Saturday. The skiing instruction for the older of the two boys, Joshua, was provided by the school separately.

11. The members of the group had differing levels of skiing ability and experience. I will say a little more in paragraphs 25-30 below about the experience and abilities of the members of this group, including those of Mr and Mrs Anderson, but they and Mr Tarquini were the least experienced skiers whereas Mr. Hall had been skiing regularly for a good number of years. It is not maintained that the selection of the group was negligent or inappropriate, but there is an important factor concerning how the activities of such a group are organised to which I will refer specifically in paragraphs 90 and 93 below.

12. The accident took place on what was to be the last day of skiing before the family were due to return home on Sunday, 8 February. In order to understand the background to the accident it will be necessary to trace the activities of the group through the week before the Saturday and indeed on the Saturday itself before it occurred. I will do that in paragraphs 31-60 below.

13. Before turning to a more detailed analysis of the circumstances it is necessary to give an appreciation of the relevant parts of the skiing facilities provided at the resort.

The resort

14. A detailed description of the resort at Puy St Vincent is unnecessary for the purposes of this judgment. Inevitably, only parts of the terrain within the resort are relevant to the circumstances of this case.

15. The highest peak within the resort is La Pendine which is 2,750 metres above sea level. From the piste map produced in evidence (and which, for anyone reading this judgment and requiring further elucidation, can be found on the Defendant's website at http://www.snowbizz.co.uk), there would appear to be two red runs (one of which is called Grand Combe) and one black run that start near to this peak. (The general hierarchy of piste runs in ascending order of difficulty is green, blue, red and black.) In the broad area of the slopes below this peak are a number of blue runs and in one sector, looking down from the peak, is an area called Rocher Noir. From a particular point within that area three runs commence: a blue run called Crête du Rocher Noir, a red run called Bartavelles and comparatively short black run itself called Rocher Noir. In order to get to the top of each of these runs a draglift called the Téléski Rocher

Noir is provided. As I will indicate later, the Claimant's accident occurred in an off-piste area between the lower end of the Bartevalles piste and the Téléski Rocher Noir.

16. That part of the mountain area to which I have been referring appears from the piste map to be generally above the tree line for this particular slope. Starting at or a little above where the tree line begins is a series of runs, mostly red, running down towards what is known as Station 1600. That is where, as I understand it, the bulk of the shops, restaurants, bars and other buildings associated with the resort, together with the ski school, are to be found. One of those runs is called Bergerie and another Clos d'Aval.

17. From Station 1600 there is a blue run that leads down to Station 1400, some 200 metres (in relation to sea level) further down the slope. As I understand it, there are other hotels and buildings associated with the general resort at this level.

18. The other run that I should identify by name is a red run called Draille. It runs into Station 1600 from a point some way down the Crête du Rocher Noir.

19. The runs that I have described are all, of course, on-piste runs. As I have already indicated, the Claimant's accident occurred in an off-piste area. Before going further I should define the difference between the two. The distinction will be well-known to skiers, but possibly not so for non-skiers.

What is "off-piste" skiing?

20. A cursory reading of a newspaper or the casual viewing of a piece on a television news programme might convey to a non-skier that skiing off-piste simply involves skiing in areas where an avalanche may occur. The expression can connote in the mind of the non-skier very high risk skiing. It is, however, clear that there is a wide spectrum of off-piste conditions, all of which do probably carry a somewhat higher risk of danger than the relatively more straightforward on-piste skiing, but which nonetheless represent established and accepted features of a skier's enjoyment of the sport. The experts agreed a definition which I should record:

> "… in European ski resorts … skiing operates on the basis of the existence of designated and marked plates or trails. These trails are marked, patrolled, and generally prepared by machine. Anything outside of these trails is defined as being off-piste. However, it must also be recognised that "off-piste" encompasses a broad spectrum of terrain, differentiated in terms of both the degree of technical challenge involved in skiing it, and the range of objective hazards to which skiers may be exposed. This broad spectrum of terrain usually extends from the non-prepared snow alongside the marked pistes to areas of the mountain which are designated "Out of Bounds", i.e. areas where skiers are actively discouraged, or which are formally marked as closed by the ski area management."

21. Whilst matters of insurance are irrelevant to the issues before me, it is common knowledge that it is possible for a skier to obtain insurance cover for the risks of an accident occurring off-piste - though doubtless at a greater cost than merely in respect of on-piste skiing and, one supposes, subject to clearly defined conditions.

22. I will return to the nature of the off-piste area where the accident occurred in paragraphs 61-83 below, but it is right to note immediately that it was not in an "Out of Bounds" area: it was in an area where skiers were permitted to go and indeed did go. It appears to have been an area where M. Portejoie took groups from time to time to introduce them to features of off-piste skiing. It is common ground in the case that skiing off-piste requires a different technique from skiing on-piste, albeit that the manoeuvres that need to be deployed will have been learned initially on-piste.

23. The rules of the International Ski Federation concerning off-piste skiing state as follows:

> "Except for the obligation of the ski centre to provide information regarding the weather and especially avalanche dangers, any skiing off-piste is undertaken at the skiers own risk or at the risk of his instructor or guide."

24. An important issue in the case is the extent to which it can be said that the terrain, tree cover and snow conditions in this area were significantly or materially different from those where the group had skied previously that week. If the conditions were different, were they so different as to call into question the judgment made by M. Portejoie that the area was within the group's capabilities? Before dealing with that and before tracing what the group did earlier in the week I should record briefly the previous experience and capabilities of the members of the group as at the time they arrived in the resort on the first Sunday.

The group

(i) Mr William Hall

25. Mr Hall, like the Claimant, was at the resort with his family. They too had visited Puy St Vincent the previous year for similar reasons to those given by Mr and Mrs Anderson. Mr Hall had, however, considerably more experience as a skier. He had skied regularly over the previous 13 years in each of which he took at least one skiing holiday. He also used a dry ski slope for practice purposes about once a month during the year. He had obtained a ski instructor's award that enabled him to teach beginners on a dry ski slope. Although he said (modestly) that he was "possibly…the best" in the group, the rest of the group were of the view that he was significantly ahead of them in experience, ability and confidence. Mrs Richardson said that he struck her as "being much better than the rest of us" and the Claimant said that he "was by far the best skier in the group". Mr Tarquini did not give an assessment of Mr Hall as such, but certainly spoke of him wanting to do a black run when he, Mr Tarquini, and the others did not. Mr Portejoie said that Mr Hall was "the most competent" of the group, although he did not put him "extremely higher than the others".

26. Whilst I do not think that any kind of precise finding can or indeed needs to be made, I do, however, conclude that Mr Hall was measurably ahead of the rest of the group in his ability to ski and in the confidence he possessed to try more challenging activities.

(ii) Mr Paulo Tarquini

27. Mr Tarquini was also there with his wife and two boys. They had been to the same resort the previous year and, as a family, had gone to Soll in Austria the year before that. Although Mr Tarquini had skied once before when he was about 18 with friends, his skiing experience was about the same as that of the Claimant. He, the Claimant, assessed Mr Tarquini as less cautious than him and more prepared to take on the challenges, an assessment essentially mirrored by Mr Portejoie when he said he thought that Mr Tarquini was "perhaps more courageous" than the Claimant. Having seen Mr Tarquini in the witness box I can accept that, perhaps because he was younger and had a stronger build than the Claimant, such an assessment was probably correct.

(iii) The Claimant

28. As already indicated, this was the Claimant's third skiing holiday. He had taken up skiing at about the age of 39 and, perhaps partly as a result of that, he was, on his own account, more cautious than, say, Mr Tarquini though probably about the same in terms of technical proficiency. He was still, at the beginning of the holiday, trying to improve his parallel turns as, he said, was everyone else in the group with the exception of Mr Hall.

(iv) Mrs Lesley Anderson

29. Mrs Anderson, who is very nearly exactly the same age as the Claimant, had also had the same amount of skiing experience by the start of this holiday. She said that they had started skiing largely because their elder son wanted to ski and she and her husband, both being "sporty" as she put it, were prepared to have a go. She said they were not into "extreme sports" or looking for "adrenalin rushes". Those expressions reflect a cautious approach on her part to the sport, something confirmed in M. Portejoie's assessment that she and Mrs Richardson were "at the bottom of the group" in terms of what he said was their "undertaking" by which he meant confidence and commitment.

(v) Mrs Alison Richardson

30. Mrs Richardson was at the resort with her husband and three children. They too had chosen the resort as an ideal family destination. She had not skied for about 10 years, though she had done so on seven or eight occasions before that. By the time she took her break in skiing activities she assessed herself as being a reasonably competent intermediate skier of a conservative disposition. As she put it, she was "not big on risks". She said she was happier on red or blue runs (not black runs). This assessment is consistent with the assessments given by the others, including M. Portejoie, to which I have already referred. The Claimant said that she was "rusty" and I do not think she would have dissented from that assessment. She was not going to be with the group on the Saturday in any event because she and her family, who had driven to the resort, were leaving by car that day. She was not with the group on the Thursday either.

The activities of the group in the week leading up to the accident

<u>Monday and Tuesday</u>

31. The various members of the group, including the Andersons, arrived on the Sunday. It was on the Monday that they were all allocated to M. Portejoie's group. There is a consensus that on that day they were given general tuition (by way of reminder of what they had all previously been taught on other occasions) and embarked on nothing more challenging than descending on blue pistes. These are regarded as easy, gentle slopes with wide open runs. This was, therefore, a general reintroduction to the basics with no serious challenges presented.

32. There is also a general consensus that blue runs were repeated on the Tuesday. There had been a suggestion at one stage in the proceedings that there had been some work on a red piste on the Tuesday, but that suggestion had disappeared before the trial began.

Wednesday

33. On the Wednesday, it is common ground that the group did go on a red run and had a taste of some off-piste skiing. M. Portejoie's aide-memoire, created two days after the accident, recorded that the group had progressed to red pistes which he identified as the Clos d'Aval and the Bergerie. The Claimant thought it was the Draille. I do not think it is necessary to resolve this difference of recollection because no one has suggested that there was anything particularly remarkable about the red run undertaken that day. However, the first taste of off-piste skiing that day is potentially relevant.

34. M. Portejoie's aide-memoire refers to the session on the Wednesday (a session running from 10am to midday) as ending with a "descent off marked piste (just beside the Bergerie piste)." I do not think that the location is in dispute. The Claimant's recollection was that they followed a terraced descent down a well-worn track that had been well-skied before their descent. He said that the exercise involved keeping inside the track and following it down. He suggested that the conditions were very different from those that he experienced on the day of the accident. Mrs Anderson also recalled this piece of off-piste skiing. She said it lasted for only a short while and that the first bit was "quite flat" and involved going under the branches of some trees. Although she said in her witness statement that she was "right behind Jerome", she said in her evidence that she followed Mr Hall through and down such slope as there was by endeavouring to keep her skis in his tracks. She said it was essentially straight and involved no turns. Her reference to being "right behind" M. Portojoie referred, I think, to the fact (which was agreed) that he led the group through this particular section. Mr Tarquini did not say a great deal about this occasion, but Mrs Richardson had a recollection of doing what she described as "a little off-piste skiing" which involved "going round some trees" in a relatively flat area. She said that it "wasn't scary". Since she did not ski on the Thursday and there was no off-piste skiing on the Friday, it appears that this was the only piece of off-piste skiing she did during the week. Her recollection of the off-piste skiing that she did was that the runs involved were short and that the "bit [she] did was not nearly as steep as the red runs" that she did.

35. M. Portejoie said that this particular run was "very much an off-piste run for beginners/skiers at a lower level of ability". That assessment would seem to accord with the general recollection of the group, Mr Hall recalling that the angle of the slope

on this occasion (and indeed on the occasion I shall refer to in paragraphs 39-41 below) was "fairly benign".

36. Notwithstanding that assessment, the Claimant's recollection is that he did not find it a particularly easy experience, saying that he "struggled" with it, particularly in the sense of keeping the skis within the path that had been formed by others. He said he did bump into a tree on this occasion, but that this was not seen by M. Portejoie. He told Mr Tarquini that he did not like skiing off-piste.

37. Mrs Anderson said that she would not have done this piece of off-piste skiing on her own. Indeed that was not, of course, something that M. Portejoie expected. What is or may be relevant, however, is that this was the only piece of off-piste skiing that she did that week before being confronted with the off-piste area where the Claimant had his accident on the Saturday. It may also be potentially relevant to record that, according to her recollection (which was not challenged by M. Portejoie and which I accept), she told M. Portejoie that day that she found off-piste skiing "quite difficult" and asked him what the benefits were. Having, according to her, been told that there was not necessarily a transfer of skills from the off-piste technique to the on-piste technique, she told him she would be one of those who would prefer skiing on-piste. I will return to the implications of those matters in due course.

Thursday

38. I must now move to the following day, the Thursday. On that day neither Mrs Richardson nor Mrs Anderson were with the group. Accordingly, it comprised Mr Hall, Mr Tarquini and the Claimant with, of course, M. Portejoie.

39. M. Portejoie's aide-memoire for the Thursday indicates that the group warmed up on "blue and red pistes" and then skied off the marked piste, his note indicating that this was at or in the region or direction of the Gîte de Tournoux (a restaurant with rooms). Mr Hall, in his witness statement, described this run as follows:

> "… he took us part of the way down the Itinerary Run towards the Gîte de Tournoux, where the slope was quite gentle and had been skied by others before, but the snow was about knee-deep. This run also involved going through some woods but we all managed the run with only occasional falls."

Mr Tarquini said this of this particular experience in his witness statement:

> "We skied off piste through some trees. It was just the three men together with Jerome. We skied through a proper wood on powder snow. It was not particularly steep but it was powdery deep snow, which I found quite difficult to control my skies in. I remember that I kept falling over. All of us were doing okay but Graham and I were falling over quite a lot really. I thought it was a challenge to my ability because I couldn't do it very well but I realised that as I wanted to progress this was something that I would have to conquer. I remember laughing and joking about falling over with Graham. He and I seemed to

> be of a similar standard. He seemed to be fine but was finding it difficult to get to grips with it. The snow was deep and that was the reason I kept falling."

40. The Claimant said this in his witness statement about this run:

> "We … skied down the blue Crêtes run to warm up. Shortly after the run leaves the mountain ridge there is a pathway through the trees on the right signposted to the Gîte Tournoux which is a small restaurant away from the main resort that can be reached by skiing off-piste or by cross-country skiing. Jerome took us onto this pathway and we followed the narrow but well-worn path through the trees to a more open off-piste area. Instead of turning right here towards the Gite Tournoux we turned left towards the resort pistes. We went through off-piste territory which was neither steep nor particularly wooded. It was quite pleasant. Paolo and I fell a number of times because the snow was quite deep and soft in places. Bill was more capable and didn't fall. Jerome told us that the condition of the snow varied depending upon whether it was in a sunny or a shady position. The only advice he gave me when I fell was to keep light on my skis and lean forward. Jerome also told us that turns off-piste need to be gentle not sharp. This session lasted for 15-20 minutes. We skied a little further off-piste and ended up on a wide track that led back to the new mountain restaurant next to the Chemin and 4 Fontaines runs."

When he gave his evidence orally, the Claimant emphasized that the slope in this area was very gentle compared with the slope where the accident happened.

41. M. Portejoie, when asked about this particular off-piste section, accepted that it possessed a less steep slope than the area where the Claimant had his accident. His view, for reasons I will return to later, was that the snow conditions were easier in the accident location than in this off-piste section. Although Mr Hall had spoken of "occasional" falls, it is clear that the Claimant and Mr Tarquini spoke of rather more frequent falls. M. Portejoie acknowledged that he had observed that they had fallen over and, as I understood him, thought that this was principally due to the deeper snow.

42. To complete the picture of the skiing that the Claimant engaged in on this day (the Thursday), two further aspects should be noted. First, after completing the off-piste section that I have described, the three men who comprised the group that day spent some time skiing down the mogul slope. (Moguls are small hard mounds or bumps on a ski slope around which the skier is required to ski.) The Claimant spoke of his lack of proficiency on the mogul slope (and indicated that Mr Tarquini displayed that lack of proficiency also whereas Mr Hall did not). He acknowledged that moguls had nothing to do with the accident that in due course befell him, but his experience on the mogul slope indicated, he said, that he was much more comfortable skiing on-piste. Second, in the afternoon, he and his son, Joshua, went on an off-piste guided tour to the Gîte de Tournoux, something they together with Mrs Anderson had done the previous year. The Claimant's recollection was that, whilst the slopes were variable,

they were, as he put it, "gentle", the tracks were well-beaten and well-skied and the trees were fairly sparse. Mrs Anderson recalled it as being like cross-country skiing. The Claimant was cross-examined on the basis that the initial section of the run was more steep than a typical red run, but the Claimant rejected this suggestion. I do not know if there had been confusion about other areas of the off-piste area on the route to Gîte de Tournoux, but I see no reason to doubt the Claimant's recollection on this issue. This was an off-piste run along which families, which would include children and adults of all ages and levels of ability, were encouraged to go and which was used regularly for that purpose. In those circumstances, I cannot accept, if it was the suggestion being made, that there was anything particularly difficult or hazardous about it. The Claimant said that the terrain he traversed on that run was "nothing like" the terrain at the region where the accident occurred. When M. Portejoie gave his evidence I did not understand him to challenge that general position and, accordingly, I accept it. It follows that the Claimant's ability to negotiate this route successfully (as he accepted he did) represented no clear testimony to his potential for negotiating the accident site safely.

Friday

43. I should now turn to the activities of the group on the Friday. On that day the group was rejoined by Mrs Anderson and Mrs Richardson.

44. M. Portejoie's aide-memoire records that on that day the group "warmed up" on the Bartavelles piste, which was a red piste, and then ascended to La Pendine and descended on the red piste which he described as "very steep". I do not think it is disputed that this was the Grand Combe piste: Mrs Anderson thought that it was.

45. Whilst I do not consider it to be a material matter, the Claimant raised the issue in his evidence of whether the Bartavelles piste was closed that week. I think that his recollection there was incorrect. M. Portejoie was probably best placed to recall matters of that nature and his more or less contemporaneous note suggested that this particular piste was indeed open. Since there is no evidence of anything that would have caused it to be closed, I would hold, on the balance of probabilities, that it was open that week. However, as I have said, I do not think that anything turns upon it save that it demonstrates that some features of the Claimant's recollection may now be a little hazy. That would hardly be surprising in the circumstances.

46. At all events, there is no dispute about the proposition that the group were indeed invited that day to make a descent on a red piste from La Pendine. It was a day also upon which the members of the group were asked to perform some exercises including an episode of "synchronized skiing". This was performed on one of the red slopes according to the Claimant's recollection. It required, of course, a degree of coordination of those involved and more than just beginner's luck to perform it, but the Claimant rejected the implicit suggestion that it demonstrated the achievement of a fairly high skill level. With characteristic good humour he said that those engaged in the exercise did not "look much like the Red Arrows." Again, I do not think that it evidences an ability or potential necessarily to negotiate successfully another kind of snow-covered terrain that may contain unfamiliar features.

47. As I have indicated, the group was invited to make a red run descent from the top of La Pendine. In fact Mr Hall elected to go with another group on the black run from

La Pendine which indicates, of course, his own confidence in his ability to tackle such a run. The rest of the group, including Mrs Anderson and Mrs Richardson, undertook the red run. Mr Tarquini described it as "particularly steep" and steeper than the other red runs they had done earlier that week. He said that Mrs Anderson and Mrs Richardson were "quite worried" about doing it and, speaking about his wife, the Claimant said that she did it "with a lot of coercion". Mrs Richardson said that she felt scared at the top of the run and described it as "daunting". M. Portejoie encouraged her by saying, according to Mr Tarquini, something along the lines that he would not take her on the slope if she could not manage it. She and Mrs Anderson were encouraged to follow M. Portejoie closely, which is what they did. Mrs Anderson, who the previous year had walked down most of this run, said they did it "very, very slowly" in small stages and followed M. Portejoie's tracks by tucking herself in behind him. With, as she put it, "a lot of practical instruction" and many controlled turns, the whole group got down without falling. That, she said generously, was a testament to M. Portejoie's "fantastic guidance". It is, I think, a fair way of describing what happened to say that Mrs Anderson and Mrs Richardson were certainly "nursed" down this steep slope. The evidence does suggest, contrary to the Claimant's recollection, that this run was quite a long one, running to over 2 kilometres. Mrs Anderson's recollection is that it took about an hour for her and Mrs Richardson to complete it in the way I have described. It may be that the Claimant and Mr Tarquini, who both accomplished it successfully, may have taken a shorter while.

48. At all events, this is what occurred on the Friday during the course of the teaching session. It was the steepest slope that the group had encountered that week, but it was, of course, a piste slope and not an off-piste slope.

49. Before making any qualitative assessment of what the members of the group were invited to do on the Saturday when the Claimant had his accident, it may be worth pausing at this point to review briefly what experience the members of the group other than Mrs Richardson (who was not present on the Saturday) had had by then under the supervision of M. Portejoie.

50. Given that the Monday and Tuesday focused on a general reintroduction to basic skills and nothing occurred that really impacted on what happened on the Saturday, I will restrict my remarks to Wednesday, Thursday and Friday.

Wednesday

All members of the group undertook a red run that they all managed satisfactorily. The off-piste terrain they undertook was relatively flat and not otherwise very challenging, although the Claimant found aspects of it difficult. Mrs Anderson told M. Portejoie that she preferred on-piste skiing.

Thursday

In the absence of Mrs Anderson, the three men in the group undertook the off-piste skiing in the direction of the Gîte de Tournoux that I have described. There were no steep slopes or heavily wooded areas, but the snow was quite deep such that Mr Tarquini and the Claimant fell quite frequently and M. Portejoie was aware of this.

Friday

Mrs Anderson had rejoined the group and the principal activity was negotiating the steep red piste from La Pendine. No off-piste skiing took place that day.

51. The following conclusions about what each member of the group (except Mrs Richardson) achieved in those few days can be summarised thus:

i) Mr Hall. He accomplished all that he attempted, including the off-piste work and a black run. He was enthusiastic about attempting more adventurous skiing.

ii) Mr Tarquini. He had accomplished the skiing tasks set during the week, though he had found the off-piste skiing something of a challenge.

iii) The Claimant. More or less the same comments as those made in respect of Mr Tarquini apply.

iv) Mrs Anderson. She had managed one relatively untesting red run and one relatively undemanding off-piste experience, albeit the latter not being an experience she wished to repeat. She (together with Mrs Richardson) managed one steep red run over a number of short sections with a lot of encouragement and support from M. Portejoie.

52. In relation to the off-piste skiing on the Thursday, it is clear that Mr Tarquini and the Claimant fell a fair amount. It is, of course, one of the normal incidents of skiing, even for the experienced and accomplished skier, to fall from time to time. However, the point of potential relevance is that this was relatively easy off-piste terrain.

53. M. Portejoie did acknowledge in cross-examination that he had never seen the Claimant coping competently on an off-piste slope.

54. That is the backdrop to the events of the Saturday to which I must now turn. Whatever conclusion I may form about what it was the group was asked to do on the Saturday, the mere fact that members of the group had not coped particularly well with certain aspects of the tuition would not necessarily preclude the instructor from suggesting something more demanding thereafter. Experience in many fields suggests that occasionally asking someone to do something they have not achieved before can be a way of overcoming inhibitions that have hitherto prevented that person's development. In contemporary language it is necessary to move outside one's "comfort zone" in order to be able to progress. However, the question of where the dividing line is between the reasonable suggestion of something more challenging and the unreasonable suggestion is one to which I will have to return.

Saturday

55. Although there were some differences of recollection about how the Saturday morning's supervised session started, the consensus seems to be that the group (minus Mrs Richardson) met, as usual, at the 1600 Station and then skied down to the 1400 Station as a warm up. That is what M. Portejoie recorded in his aide-memoire and I see no reason to doubt it.

56. After that they ascended by the four-man chairlift called the Télésiège débrayable La Crête de Bans to the 2000 metre sector which is above the tree line which I referred in paragraph 16. The ski lift ends at a point somewhere down the blue run called Crête du Rocher Noir to which I referred in paragraph 15. At that point it would be possible to choose one of two pistes upon which to ski: either the continuation of the blue run called Crête du Rocher Noir or a red run which appears to be called Vallon des Auffes. However, it is also possible to ski off-piste on a relatively flat traverse from the direction of the Crête du Rocher Noir in the direction of the Bartavelles piste which, as indicated in paragraph 15, comes from a point somewhat higher up the Crête du Rocher Noir. As I will indicate shortly, that is what the group started by doing after they had got to the top of the chairlift. However, I should indicate what had happened beforehand.

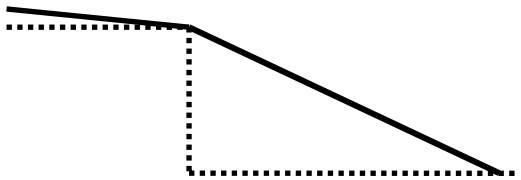
57. The recollection of the Claimant and Mrs Anderson, supported by Mr Tarquini, is that they were unsure where M. Portejoie had in mind taking them that day. On the previous days he had told them in advance of his plans, but this day was different. Mr Tarquini recalls Mrs Anderson asking him where they were going and he said he did not know. Mr Tarquini recalls that they skied with another group that had been formed at the same time as their group, the intention being that they would all have a drink later on. The Claimant recalls M. Portejoie saying that they would take things easy as it was the last day. The impression one gains is of everyone being in light-hearted mood which is entirely what one would expect. According to Mrs Anderson, M. Portejoie asked them at one stage to ski backwards (which they did for a bit) and then he said it had been a joke. He made a comment that that day he would say certain things he meant and certain things he did not and it was for them to guess. I do not think that anything turns upon this, but the general position seems to be (and M. Portejoie did not really challenge it himself) that the group would have had no clear idea when setting off on the chairlift what it was that M. Portejoie had in mind. It does, I think, follow that they would not necessarily have had in mind the prospect of skiing off-piste. Mrs Anderson would certainly not have relished that prospect and I do not consider that Mr Anderson would have done so either, probably on account of his own lack of confidence in negotiating off-piste conditions and also because he knew that his wife would have been concerned about it.

58. At all events the group eventually arrived at the top of the chairlift and, at M. Portejoie's instigation, they started the traverse I identified in paragraph 56 above. It is common ground that the traverse they undertook was relatively flat and wide open. It involved skiing across the Bartavelles piste. Mr Tarquini described it as "gliding along the side of a hill" and generally the group managed the traverse though with some falls. Mrs Anderson fell twice and on one occasion, as I find, M. Portejoie helped her up.

59. I have said that "the group" managed the traverse in the manner I have described. At one stage in his evidence, Mr Hall said he thought that he had joined the group again after having completed a black run. However, I do not think that that can be right. Mr Hall had skied the black run on the previous day. His witness statement indicates, as Mr Tarquini had recalled, that they skied together with the other group for a while and the other group took a slightly different route after they had completed the traverse that I have described. However, what is clear, and I so find, is that Mr Hall had a good appreciation of the traverse they completed and its relationship to or its

comparison with the off-piste slope where the Claimant's accident occurred that M. Portejoie asked them to ski after the traverse had been completed.

60. Shortly after the accident Mr Hall produced a couple of diagrams that indicated two material matters. The first of these was his diagrammatic representation of the slope of the traverse and the slope of the off-piste section where the accident occurred. One of the diagrams was in drawn form and the other was computer-generated. Each followed the form that appears below:



The gradual slope in the left half of the diagram represents what he described as the "gradually descending traverse" and the steeper decline in the right half of the diagram represents the off-piste section. In his first drawn attempt, he annotated the diagram relating to the off-piste section with the words "35 metres downhill at an angle of 45 degrees?" In the computer-generated diagram he annotated it with the suggestion that the downhill section was 30-50 metres at an angle of 35 degrees.

61. It is accepted by everyone in the case (including Mr Hall) that his assessment of the incline in terms of degrees was incorrect. The experts who have had the opportunity of visiting the accident scene (albeit not in the precise snow conditions of the day in question) are agreed that the average gradient of the slope was 25 degrees, the range of gradients would in the overall length of the section in question being 22-29 degrees. However, Mr Hall's layman's appreciation of the situation from the perspective of a reasonably experienced skier is of some importance, in my judgment. Mr Hall was, it should be noted, a witness who was to be called on behalf of the Defendant and who, as the trial turned out to be conducted, was called on behalf of the Part 20 Defendant. In other words, he had not been called specifically in support of the Claimant's case. He accepted that, whilst the diagrams could not be regarded as entirely accurate, they did represent an attempt soon after the accident to reconstruct the scene and they were intended to convey the impression that the area where the accident occurred was on a steep descent which was significantly steeper than the terrain that had preceded it – and indeed the terrain that followed it.

62. For the present, I will confine myself to the steepness of the slope. Mr Hall said that he had personally skied on steeper off-piste slopes that week though not with the group and not in a lesson under the supervision of M. Portejoie. He said that the slope was "the steepest bit of off-piste skiing [they] had done that week in a lesson." He

confirmed that they had been on a red piste that week that was at least as steep, if not steeper, than the slope. However, he made the comment that there is a "huge difference between skiing on and off-piste." As I have said previously (paragraph 22), it is common ground that the techniques are different.

63. M. Portejoie confirmed that the descent at this point (where the accident happened) was steeper than anywhere where the group had previously skied off-piste. He also considered that some parts of the red piste they had skied from La Pendine on the Friday were "much more steep" than this off-piste section.

64. In order to form an overall appraisal of the difficulty or otherwise of this particular off-piste section, it will be necessary to consider any obstructions (in the form of trees, for example), changes in the incline of the slope, the general condition of the surface and, of course, the nature of the snow cover. However, in terms of slope alone, there can be no question but that this slope was steeper than any other off-piste slope they had skied as a group that week. It is impossible on the evidence to find precisely how much greater, but since confidence must have a good deal to do with how a new task is confronted, it was obviously perceptibly steeper to all members of the group. I include Mr Hall in this in the sense that he had not skied off-piste that week in a supervised group on a steeper slope.

65. The Claimant's evidence was that, when he got to the top of this section, it looked like a red slope. Mrs Anderson said that when she was confronted with the slope she considered it to be "frighteningly long and steep" and recalls saying to her husband "I'm never going to get down that." Mr Davies QC, in his closing submissions, reminded me that Mrs Anderson had said immediately after saying that that she thought it was "slightly beyond what I was comfortable doing". She did indeed use words to that effect, but both she and the Claimant were, I thought, people who understated rather than overstated challenges they faced. I do not consider that those words, taken in the context of everything else she said about her feelings when she stood at the top of the slope, conveyed either her true ability to undertake it or her true perception of her ability to do so or, necessarily, M. Portejoie's perception of her ability to do so. She went on to say "I had seen Bill [Mr Hall] and Paulo [Mr Tarquini] do it so I thought 'OK'". But for the fact that her husband had his tragic accident seconds before she was due to take her turn, I think it highly likely that she would have "had a go". I do not think, however, that that answers the question of whether it was right, objectively speaking, for her to be expected to do so.

66. Mr Tarquini says that when he was standing at the top of the slope, he was thinking that it was "quite steep" and said that it was one of those occasions where he looked down and said "I don't fancy that". He said that he reminded himself that he had "done trees and a red run" before. I will say more about his description of the skiing involved shortly, but I mention this at this stage in the context of trying to gain an appreciation of what it was the group was facing. I should say that the sense of apprehension conveyed by the way Mr Tarquini expressed himself in his oral evidence might be thought to be at variance with what he had said in his witness statement when, describing the slope, he said "the slope was not very long and although there were trees in the area there was a route through and the trees did not look that threatening." However, it is important to note that he gave that as his appreciation of the situation <u>after</u> he had seen Mr Hall ski down the slope successfully. The position before he did so was as he had indicated in his oral

evidence. I am satisfied that, notwithstanding what Mr Davies submitted, he did feel a sense of apprehension before commencing his descent.

67. Overall my conclusion is that all members of the group, Mr Hall included, perceived this section to be a challenge and, in the case of Mr Tarquini, the Claimant and Mrs Anderson, a very considerable challenge. Dealing with Mr Hall, who said he did not feel uncomfortable at the prospect of tackling the slope (which, with his experience and confidence, I am sure was an entirely justified feeling), even he said that because of the deeper snow he knew he would have to concentrate fully to make effective turns.

68. My conclusion is that, perhaps with the exception of Mr Hall, the group largely perceived the challenge to be derived from the slope which, as I have said, was steeper than any other off-piste slope they had attempted that week. However, the existence of trees and the snow conditions were matters of some significance also. Mr Hall certainly seemed to appreciate that the snow (which was deeper than they had experienced before) was going to make turning more difficult. M. Portejoie accepted that the deeper the snow the more difficult is the task of skiing.

69. There has been considerable debate about the condition of the snow at the time of the accident. It is common ground that there had been no fresh fall of snow during the week. Basing themselves on the various descriptions that the witnesses gave, including the description given in the police report, the experts concluded that "the snow was soft and …the skiers were skiing in rather than on the surface." Mr Shedden, the expert instructed on behalf of M. Portejoie's insurers, was a party to that agreement and, in association with Mr Foxon, the expert instructed by the Defendants, had questioned whether the police assessment of the snow condition was accurate. That account said this:

> "There is good snow cover. The snow is soft, slightly dampened due to the rise in temperature and the surface is irregular due to the numerous ski tracks. The level of cohesion makes it moderately easy to ski."

Mr Shedden and Mr Foxon, in the joint statement of the experts, said this of that account:

> "It is not clear when the police assessment of the snow conditions was made, nor by whom, but it was almost certainly made after the Claimant's accident. In the intervening period it is most probable that the temperature continued to rise and that other skiers may have added tracks to the area after the Claimant's fall, including the rescue services when they came to evacuate Mr Anderson."

Indeed it is right to say that Mr Exall, the Claimant's expert, made a similar comment.

70. In his evidence, M. Portejoie challenged the suggestion that the snow was soft and that the skiers skied in, rather than on, the snow. His position was, as I understood him, that the snow was compacted in some areas because of the many people who had skied over the snow, but in other areas it was "powdery", though not very thick

powdery snow. He suggested that the snow in the area was about 7-10 centimetres deep.

71. M. Portejoie's suggestion that the snow was in parts powdery and in other parts compacted is consistent with what he noted in the accident report he completed after the accident.

72. Having committed himself to the joint statement, I rather sensed that Mr Shedden had revised his position by the time he gave his evidence. That is, of course, entirely acceptable if something has emerged subsequently to change the material available upon which he made the earlier judgment. I was a little surprised that his assertion that the slope where the accident happened was north-facing (which is essentially correct) had not emerged before and had not been the subject of consideration at the meeting of the experts. It, plus some of his answers in cross-examination, suggested to me that he was straining a little too hard to support what M. Portejoie had said.

73. At all events, the decision about the snow conditions has to be mine based on all the material before me. I do, as invited by Mr Davies, place some reliance on the police report, though I do have to bear in mind (as all the experts agreed) that what the police saw when they arrived will have changed since the moment of the accident (a) by virtue of the temperature change and (b) because other skiers will have skied over parts of the terrain. I have not, of course, heard from the gendarmes directly and it has not been possible to examine with them the meaning of the expression "moderately easy to ski" in the quotation mentioned in paragraph 69 above. It would, one supposes, depend on the standard of skiers they had in mind. What I have felt it sensible to do is to try to judge that expression by reference to what Mr Hall, the most experienced and competent member of the group, thought about the conditions.

74. I have already alluded in paragraph 67 to Mr Hall's belief that "because of the deeper snow" he would have to concentrate fully to make effective turns. In his evidence he confirmed that that indeed is what he had to do. He said that the snow was covering their skis that day and, whilst he accepted that it was inaccurate to call the snow "powdery", he had used that expression in his witness statement to convey the meaning that the snow was soft such that the skis would sink into it. He agreed that it was "about right" to say that the skis sank in about 4-6 centimetres. He said that the off-piste area had been skied because there were tracks in the surface and humps where people had performed turns, though he did not consider that there had been "a huge amount of traffic".

75. Mr Hall said that it would not be fair to put a novice on a terrain such as this. Mr Tarquini was not, of course, a novice, but his recollection of his descent helps to create the picture of what the snow conditions were like. He said that he followed M. Portejoie and Mr Hall down and that he "had to concentrate on their tracks" to maintain control and that he "was looking down most of the time". In other words, he was in a sense skiing rather mechanically in order to complete the run. However, the point to be drawn for present purposes is that M. Portejoie and Mr Hall had created tracks – the snow must have been deep enough for that to occur.

76. I have focused on their evidence rather than that of the Claimant simply because it would be quite understandable if some things about the circumstances on the day of the accident were not as clear now as they once were. However, his recollection of

the long traverse to which I have referred previously, is that the snow was "quite soft and deep", the implication being that something similar was found in the off-piste section where the accident occurred.

77. Overall, I think it is right to say that there was generally sufficient snow to cover the skis of those skiing. There may well have been (and I accept M. Portejoie's recollection to this extent) areas where the snow had been compacted by the skis of other skiers, but on the evidence I cannot hold that this was the predominant feature of the snow conditions on this slope. In my view, the original agreement of the experts was probably correct, but I have had the advantage of hearing at first-hand the description given by at least some who were present on that day.

Trees

78. It is not in issue that there were some trees on or in the vicinity of the slope where the accident occurred. The Claimant, of course, impacted with one.

79. The police report described the area as "lightly wooded" with "young larch trees". Whilst there has been concern expressed during the case about what can be deduced from some of the photographs taken of the area after the accident (and indeed the need for the photographs to be viewed with caution), the photograph that appears as Annex 1 to this judgment (taken five days after the accident by Mr Andrew Deans, then a partner with Hextalls LLP, the solicitors acting for the Defendants) will give a reasonable idea of the kind of tree cover around. Some, although not all, could be described as shrubs, but I do not think that description could fairly be applied to the group of trees on the right hand side of the photograph with one of which the Claimant collided. It may have been a young larch tree, but it <u>was</u> a tree and not a shrub. (I should, perhaps, observe that the fact that a partner from Hextalls should have been photographing the site of the accident within days of the accident indicates that someone, somewhere, realised that there was a potential for litigation arising from it. Indeed within only a few further weeks Mr Paul Maxlow-Tomlinson, a retired solicitor with extensive experience as a skier and in the skiing world, accompanied Mrs Anderson and her sister to the site to investigate and to take photographs.)

80. The photograph that appears in Annex 2 is a "grab shot" taken from a video produced by Mr Stuart Nimmo who accompanied Mr Exall on his site inspection in February 2005 along with Mr Maxlow-Tomlinson. It offers a useful perspective of the site of the accident, the Claimant impacting with one of the trees shown towards the left hand edge of the photograph. However, as Mr Exall pointed out, it is important to note that at the time the video was taken there was approximately 2 metres *less* snow cover than there was at the time of the accident.

81. The photographs are useful, as indeed were the observations of the experts. However, I consider the recollection of Mr Hall also to be useful. He said he was conscious of the trees (most particularly on the right hand side) as he was descending and he was saying to himself "must turn early" as a result. Mr Tarquini was plainly conscious of the trees as he stood at the top of the descent.

Findings as to terrain

82. It follows from all this that the off-piste terrain where the accident occurred –

i) was steeper than any off-piste terrain any of the group had skied that week with M. Portejoie;

ii) that the snow conditions were such that they required more skill to negotiate than the on-piste conditions;

iii) whilst the terrain was not covered with large trees, there were trees (not just shrubs or saplings) on the slope, particularly to the right as the skier descended the terrain.

83. At the top of this section, M. Portejoie asked the group how they were to ski down it and they all agreed that it had to be by way of making turns on the way down. Mr Hall accomplished it in about 4-5 turns, as he recalled. Mr Tarquini, following Mr Hall's tracks, also achieved it in the manner I have described.

84. It is to be noted that M. Portejoie asked the skiers to ski to the right of the 'bush' and then turn. It is not entirely plain from the evidence what the 'bush' was, though it is probably the small tree (which is more accurately to be described as a sapling) almost exactly in the centre of the photograph at Annex 1. The effect of asking them to turn and then ski to the flat area I will describe in paragraph 97 below is that the final part of the descent did involve skiing towards the group of trees to be seen on the right of the photograph before endeavouring to turn to the left to reach the flat area.

The experts' views on what confronted the Claimant

85. Before I move to describe the Claimant's descent of this off-piste section it would, I think, be helpful to record the views of the experts instructed by the various parties on what it was that the group were being asked by M. Portejoie to do, those views being expressed before they heard any oral evidence about what happened.

86. At various stages of this judgment so far I have mentioned the names of the experts engaged. I should say a little more about each.

87. Mr Chris Exall was called on behalf of the Claimant. According to his unchallenged CV, he has been a professional ski instructor since 1983. He is qualified and appointed as an examiner of ski instructors in the UK and the USA and as a coach in the UK and the Netherlands. He has worked as a coach, ski teacher and examiner in most of the skiing nations in the Northern Hemisphere and has coached skiing extensively in France under the authorisation of his IVSI (the International Federation of Ski Instructors) International Diplomas. He is a former Chairman of the English Ski Council (now Snowsport England), the governing body for English skiers, and is now one of its most senior tutors. He went to the scene of the accident at more or less the same time of the year, but one year later in February 2005.

88. Mr John Shedden was called on behalf of M. Portejoie. He has many years experience as a professional ski teacher and coach and, at various times, he has been a coach and/or selector for the British Olympic Teams. For a good many years he has been the senior tutor and examiner for the ski instructors and coaches for Snowsports. I note that his CV suggests that he has "trained all the other English experts (skiing)

who hold both Instructor and Coach qualifications and [had been] responsible for issuing their coaching qualifications." Whatever advantage it is thought that that gives him over other expert witnesses, it was counterbalanced in this case by the fact that, through no fault of his, he did not become instructed until earlier this year and had made a site visit only a week or so before the trial began. When he visited in October there was, of course, no snow on the ground at all.

89. Mr Fred Foxon had been instructed on behalf of the Defendants. The Defendants played no active part in the trial given that the principal issue was between the Claimant and M. Portejoie. Mr Foxon was not called by any party as a witness. He went to the scene in January 2007. He is an experienced skier and skiing instructor who, for about 18 years, has, in addition to his other responsibilities, prepared reports in a large number of personal injury cases arising out of skiing and snowboarding accidents. Mr Davies, on behalf of M. Portejoie, indicated that he wished to rely upon Mr Foxon's report, as he was entitled to do, under CPR Part 35.11: see *Gurney Consulting Engineers (Firm) v Gleeds Health and Safety Limited and another* [2006] EWHC 43 (TCC) and *Shepherd and Neame v EDF Energy Networks* [2008] EWHC 123 (TCC). His evidence has not been tested and, plainly, I am unable to give it as much weight as might have been the case had he been called. However, I am aware of what he said and, as will be apparent in due course, I have borne in mind his views. He was, of course, a party to the joint statement of experts and so I know where his views either agree with or disagree with those of his colleagues. As with Mr Exall and Mr Shedden, Mr Foxon was plainly qualified to express a view on the matters in issue in the case.

90. The position taken by the experts in the joint statement about the suitability of this off-piste section of terrain is demonstrated by the following paragraph in the joint statement:

> "We are agreed that for at least some of the group members the slope was indeed a suitable choice. However…the instructor's judgement must always take into account the needs of the weakest member of the class. It is the opinion of Mr Exall that it was more likely than not that the slope was beyond the capabilities of the Claimant (and his wife) under the circumstances of the day. Mr Foxon and Mr Shedden on the other hand believe that it is more likely than not that at the time of the accident, the slope *was* suitable for the Claimant, albeit towards the upper end of what he would have been capable of descending."

91. Each justified his position in detail in later parts of the joint statement, but that summary is sufficient for present purposes. They had each, of course, prepared reports before their discussions. Mr Exall had concluded that M. Portejoie had led the Claimant "to an area which [he] was unlikely to be able to descend successfully as a result of a combination of his lack of skill and the degree of difficulty of the route (particularly the gradient and profile of the route, the quality of the snow and the presence of trees)." He summarised it by saying that the Claimant had had less than four weeks skiing experience and was taken to a steep, off-piste, area where the snow was of variable and inconsistent quality and which was surrounded by trees. Mr Shedden did not, as I understood his report, express any direct opinion about the

suitability of the off-piste area chose (probably because he had not seen it for himself by the time he prepared his report), though he did conclude, on the evidence available to him, that there was a "high probability of any one or all [of the group] falling during their practice of off-piste skiing." Mr Foxon expressed himself in his report in the following way:

> "As for the appropriateness of the actual area in which the accident occurred, my personal opinion is as follows:
>
> i. When I inspected the slope, I felt it was steeper than I might myself have chosen for skiers of the group's state of ability. This impression was however coloured by there being many more trees than at the time of the accident, and by the slope being rather bumpy, having been heavily skied. Under the conditions as described and photographed in 2004, I do *not* consider that it was beyond the range of what might appropriately be selected by a competent and conscientious instructor, for skiers of the level described.
>
> ii. In qualification of this opinion, I should add that, not having seen at first hand the skiing of Mr Anderson or any of his fellow group members, my view is based on what, on average, I would expect to be within the competence of skiers of his level of experience. If I were presented with more detailed evidence of Mr Anderson's abilities, I might wish to revise my opinion."

92. The manner in which Mr Shedden and Mr Foxon had expressed themselves in their reports did <u>not</u>, in my judgment, amount to an unqualified acceptance that the area <u>was</u> a suitable off-piste area for the Claimant to attempt. Placing it, as they did by the time of the joint statement, "towards the upper end of what [the Claimant] would have been capable of descending" conveyed, in my judgment, that at that stage, and before hearing any live evidence, they had some concerns about the choice of the area.

93. Before turning to other matters, it is also right to record the agreement of all the experts that "when teaching, leading or guiding a ski group, the instructor's decisions should be based on the needs and capabilities of the weakest members of that group."

94. The experts have not (probably for the reasons to which I will refer in paragraph 117 below) been asked whether they considered that the off-piste area chosen had taken into account Mrs Anderson's "needs and capabilities" since, on any view, she was the weakest member of the group with very limited experience that week of off-piste skiing. Mr Exall, in his report, had said that he wondered "at [the] train of thought taking her into this area."

95. I will return to these considerations after I have considered the evidence concerning the Claimant's descent of the off-piste area.

96. I will record, first of all, the Claimant's description of his descent. I have already observed that it would be hardly surprising if some aspects of his recollection are unclear. I accept without hesitation or question the honesty of his evidence. Equally, I regard some aspects of it as either understated or more optimistic about his achievements than reality justified, comment I have already made in relation to Mrs Anderson (see paragraph 65 above).

The Claimant's descent

97. Before turning to his description of what happened, it is as well to record the disposition of everyone else including M. Portejoie, at the time the Claimant began his descent. There was a marginal issue as to whether M. Portejoie had skied down about halfway first and was then followed by Mr Hall, or whether Mr Hall went first. I suspect that Mr Tarquini's recollection, which is that he watched M. Portejoie go first followed by Mr Hall is the best and, to the extent that it matters, I accept it. It was common ground that by the time the Claimant's turn came, Mr Hall and Mr Tarquini had made it to the bottom of the descent which, for this purpose, can be described as the more level area almost exactly in the centre of the photograph at Annex 1 just a little to the right and below where the long dark shadow ends. It was equally common ground that M. Portejoie was someway down the slope (perhaps a little above halfway or thereabouts). He marked on the photograph at Annex 1 where he thought he was and he had drawn a diagram on the accident report soon after the accident which also indicated roughly where he was. The two were not exactly consistent with each other in relation to the way in which he would have been facing when the Claimant began his descent, but the level down the slope was about the same and would be a little above (but to one side or the other) of the small tree (which, as I concluded in paragraph 84 was probably the 'bush' they were asked to ski towards) in the centre of the photograph.

98. So the view that the Claimant had was of Mr Hall and Mr Tarquini having finished the descent and standing as indicated above and M. Portejoie someway down the slope. According to the account to be distilled from his witness statement, it was in these terms:

> "Jerome stopped the group at the top a steep slope. I could see that we were not far from the Rocher Noir drag lift. I felt that the terrain here was steep. We had not skied off-piste on this kind of slope before and I felt anxious, knowing that I had found off-piste skiing difficult earlier in the week. However I trusted Jerome's judgement. Below us the upper part of the slope was open apart from a small bush on the left. Further down there was small clumps of trees. Jerome said we were to ski down the slope here…Jerome pointed to the bush and said we were to make a turn around the bush…then Bill started to descend the slope with zig zag turns. Jerome and Paulo followed…I could see that further down on the left of the slope there was an area of snow about 15 metres in width and 15-20 metres long with trees to the left, right and below it. Bill skied into this patch of snow. I guess he must have been told to go there…I set off again to my left and then made quite a controlled turn to my right around the small bush. The turn

> went well and I felt very pleased. I skied on for 6 or 7 metres. Before making my next turn I stopped and looked over my right shoulder up the slope to see how Lesley was getting on, aware that she had had less off-piste experience than me during the week. I was in a position about 5 or 6 metres above the trees to the right of the area where Bill was. I was aware that I was quite close to the trees but there was enough room to make my turn. I did feel uncomfortable about the steepness of the snow slope and the proximity of the trees but realised that I needed to make a turn to reached Bill. I set off again to the right and with a little momentum started to make my turn to the left. Before completing the turn I suddenly lost my balance. I don't know why I lost control during the turn. My weight shifted backwards causing me to sit back on my skis, but I was still leaning forwards and ended up in crouched position. At that stage in the turn my skis were pointing down the slope. The next thing I felt was that I was descending very quickly on my skis and out of control. I was startled by the loss of balance and control, and then the acceleration."

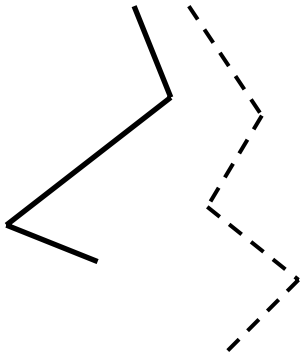
99. In his oral evidence the Claimant said that he skied down the slope making turns above the bush. He then came to a stop near the bush having turned right to do so. He said he turned to look at his wife who was still at the top of the slope. He then needed to make another turn to get down to where Mr Hall was. As he was making the turn, he lost his balance with the skis pointing down the slope, his weight shifted back, he lost control of the skis and plunged into the trees. (He collided with a tree on the left side of the group of trees on the right of the photograph about level with, or slightly above the level of, the pole or pylon of the Téléski.)

100. He said, in answer to questions in cross-examination, that prior to the accident occurring he had skied down a steep part of the slope, though he regarded himself as still on a steep part when the accident occurred. He said that he had made "quite a controlled turn" and that he was pleased.

101. That was his description. M. Portejoie, in the accident report, had recorded that the Claimant had "executed a turn and had stopped at my level." He then recorded that he asked him to make "one last turn to reach the ledge where the others were waiting." In his witness statement he simply said that the Claimant had "skied down the first part of the slope and then stopped halfway near where I was standing." He said in cross-examination that, though he had not seen him start his descent, the Claimant had stopped opposite him after making two turns. When I sought to clarify this with him, he said that he did not have a clear recollection of how many turns the Claimant did and, in one answer, said that he did not see him but "imagined that he had done certain turns" whilst he, M. Portejoie, watched Mr Tarquini complete the descent. He then said that he did not see the Claimant set off.

102. This was, I thought, an odd piece of evidence for a witness upon whom I felt I could generally place reliance. He was straightforward and open in his answers and that he was uncertain and slightly inconsistent about this was strange. I will return to it shortly.

103. One person who has maintained from the beginning to have seen what occurred was Mr Hall. He was not asked to contribute to the police inquiry and so there is no contemporaneous report from him about what happened. However, he said that he was conscious that he might one day have to give an account of what happened which is why he prepared the diagrams that I have referred to in paragraph 60 above. In addition to the diagram showing the profile of the descent he prepared two other diagrams, one in freehand form and the other computer-generated, of what he termed a "head on" view of the descents made. He showed the descent of himself and Mr Tarquini as being within a relatively narrow corridor, but that of the Claimant being within a much broader corridor. The diagram contained no description other than to draw attention to the much wider and more extravagant turn or turns being undertaken by the Claimant. Whilst it is not a direct copy of what Mr Hall produced, the figure below gives an impression of what he recorded.



The dotted line to the right shows the general nature of the descents undertaken and achieved by Mr Hall and Mr Tarquini, the latter following in Mr Hall's tracks. The thicker line on the left shows the nature of the Claimant's descent before the accident occurred.

104. I have not been told when Mr Hall was first asked to give a description of what he saw. I suspect it was considerably earlier than the date of his witness statement (to which the diagrams were attached as exhibits), namely, 9 June 2008, but as I have said, I do not have any evidence about that. In his witness statement he described the Claimant's descent in this way:

> "I watched as [the Claimant] started to descend. [The Claimant] did not take the same route as I had and he seemed to be traversing longer before he made his turns. I remember [the Claimant] making two good turns and having done this, I thought [he] had managed to negotiate the more difficult part of the slope already. However, whilst he was making his third

> turn, (at which point he was about 15-20 metres up the slope from me, to the left) he seemed to lose control. [He] seemed to lean back on his skis and increase his speed."

105. Each of the experts had Mr Hall's witness statement and the diagrams, but drew nothing of significance either from the statement or the diagrams. Mr Exall did not mention either and Mr Shedden simply referred to it in the context of the Claimant negotiating successfully the "first and … steepest part of the slope." Mr Foxon said much the same, though his analysis was in these terms:

> "In any event, he appears to have successfully negotiated the greater part of the descent – from the witness accounts and from my own site inspection the total length of the steepest part of the descent was around 50 metres, of which Mr Anderson had already completed at least 30 metres before he stopped. It was when he set off on the last, shorter part that his accident occurred. In other words, the fact that Mr Anderson had already coped with the upper part of the descent, which is at least as difficult as the section on which his accident occurred, leads me away from any conclusion that his judgement to attempt the descent was in error."

The error he mentioned was, by reference to a similar though not identical photograph to that in Annex 1, not skiing further out to the left such that he "would have been far less likely to collide with a tree if he missed a turn."

106. Mr Hall had made no particular comment in his witness statement about what he deduced from the Claimant "traversing longer before he made his turns", but he did so when he gave his evidence.

107. In his oral evidence he said that the Claimant "made significantly longer turns" indicating, in his view, that he was "struggling with the slope really". They were, as I noted them, his words and not words simply accepted as part of a proposition put in cross-examination. But at all events, he was plainly, in my view, happy with the message they conveyed. He agreed with the proposition that beginners turn where they have to and that, by making the long traverses, the Claimant gave the impression of being concerned about turning downhill and completing the turns. Mr Hall described how he made a couple of very long turns and then, as he thought, probably on the third occasion he went to what he described as the "extremity of the piste" and as he tried to make the turn he leant back, lost control and ended up crashing into the tree.

108. Whilst Mr Hall was unsure about some matters and in respect of some issues I have not felt able to rely upon his recollection, he was a patently honest witness who was very clear about this aspect of the events and was in as good, if not better, a position as anyone to make an accurate observation. What he said is indeed consistent with the diagrammatic representation to which I have referred previously. He was a sufficiently experienced skier for his comments to have validity. I accept his account and what he said.

109. As I have recorded previously (in paragraphs 101 and 102), M. Portejoie's evidence about the Claimant's descent was, I felt, somewhat equivocal. I will return to the implications of that shortly, but when I asked him about this part of Mr Hall's evidence, he said that "it is true that when someone feels a little in difficulty they perform traverses that are much longer". He said, in effect, that they give themselves longer to "think of the next turn." He said that this is so whether the skier is on or off-piste. I do not think that Mr Exall or Mr Shedden, who gave oral evidence, took issue with the way M. Portejoie expressed himself in this regard or indeed with Mr Hall's view.

110. Mr Davies QC reminded me in his closing submissions that Mr Hall's perception did not accord with the Claimant's perception of what occurred and, understandably from a forensic point of view, told me that he was "entirely content to let the Claimant's own statement to be the main focus of consideration" in the context, as I understood the argument, of considering whether, if M. Portejoie had seen the whole of the Claimant's descent, he should have been alarmed or concerned by what he saw. So far as the factual scenario is concerned, I must judge this case on all the evidence and, as I have intimated, I found Mr Hall's evidence on this aspect compelling, reliable and consistent with the diagrams he had constructed soon after the accident. As I have observed previously, Mr Hall was a witness called on behalf of the Part 20 Defendant.

111. Mr Davies did, however, address the position if, as I have, I found Mr Hall's recollection to be reliable. He submitted that "there cannot be, as a matter of simple common sense, any axiomatic correlation between a skier finding a particular run (whether on or off-piste) "difficult" and there having been a want of care on the part of the instructor in having chosen that particular descent for the class." As a straightforward proposition, I accept it. However, in a case such as this it is necessary to look for pointers that assist in directing the court to the best conclusion it can on the evidence as a whole. I regard this evidence as a significant pointer.

112. It shows that in the seconds before his accident, the Claimant was "struggling with the slope" and was anxious and concerned about making the turns. It evidences what, in my judgment, ought to have been the result of any prospective conscientious analysis of his capacity to undertake this slope before he did so, namely, that he would find it extremely difficult and would, more likely than not, fall and/or lose control of his skis if he attempted it. The evidence shows that he had not mastered to a sufficient level the skills necessary to undertake a piece of off-piste terrain of this nature in reasonable safety. For example, he had already struggled on a very benign off-piste terrain a day or so earlier and M. Portejoie knew this. Had he addressed his mind to it, he would have concluded this. Had there been no trees of any sort, that might have made a difference – but any loss of control on a slope of this nature for someone of the Claimant's relatively limited acumen could (not, of course, necessarily would) lead to an impact with a tree with potentially serious consequences. The snow conditions were such that skiing was more difficult than it would have been on-piste.

113. Since Mr Foxon did not give evidence, it was not possible to ask whether the evidence of Mr Hall as given orally would have led him to revise the opinion that I recorded in paragraph 91 above. Mr Shedden said that the evidence he heard during the case before he gave his own evidence (which, of course, included that of Mr Hall) strengthened, rather than diminished, his view that the choice of slope was a

reasonable one. I am bound to say that I do not see how, as a matter of logic if Mr Hall's account is correct, that could be so.

114. At all events, my conclusion is that Mr Hall's evidence demonstrates clearly the Claimant was not up to undertaking this off-piste section confidently and competently even though, as luck would have it, he did not fall in the descent down to where M. Portejoie was standing.

115. If I was to hold that M. Portejoie saw this first part of the descent, but that he did not feel that it was necessary to give any particular instructions about the final descent (e.g. for the Claimant to go far wider so as to avoid any prospect of colliding with the trees at all), I would be holding that he adopted a very cavalier attitude to what was happening. The case has not been put on this basis and he was not cross-examined along these lines. Even had he been, I would have been very disinclined to draw such an adverse conclusion about someone who was a popular and approachable ski instructor and who, as I have already said, was someone whom I felt was endeavouring to assist me when giving his evidence. However, if he did not see the Claimant's descent, which seems to me to be the only proper conclusion I can come to on the evidence, then as Mr Shedden himself observed, one would wish to know why. This was the most challenging piece of off-piste work the group had done that week and only Mr Hall could truly be said to be someone who would readily "have a go" at it and probably accomplish it successfully. It is troubling that M. Portejoie was not watching the Claimant.

116. Whilst it is important not to be too critical, because his eyes could not be everywhere, the inference that I draw from this particular piece of evidence is that, as I think the other evidence demonstrates, M. Portejoie simply assumed that everyone in the group (a) was up to trying it and (b) wanted to do so. Not watching the Claimant suggests that he did not think that there was a problem.

117. The other compelling piece of evidence in this regard, in my judgment, is what I have taken as his presumption that Mrs Anderson was up for trying it and was capable of doing so safely. It is, of course, trite law that a breach of duty towards her could not afford a cause of action to someone else in the group injured as a result of that breach of duty; but the fact that, in my judgment, M. Portejoie did not address the question of Mrs Anderson's capacity to undertake this slope is further evidence that he had not on this occasion considered conscientiously the capabilities of <u>all</u> members of the group. His duty was to choose activities for the group that were within the competence of the least able member of the group. That he undoubtedly failed to consider Mrs Anderson's position is, in my judgment, evidenced by the fact that (a) she had had less off-piste experience than the rest of the group had had during the week, (b) the off-piste experience she had had was not a happy one and M. Portejoie knew this, (c) she had found the red piste the day before extremely difficult and daunting and M. Portejoie knew that and (d) she had fallen on the relatively gentle traverse leading to the off-piste section where the accident occurred and M. Portejoie knew that too. These matters were matters which, in my view, any ski instructor in M. Portejoie's position should have taken into account in her case. Mr Exall questioned the thinking that led to the decision to take her to this section of off-piste terrain. I regret to say that I do not think that M. Portejoie consciously considered her position at all. The fact that he so plainly did not do so reinforces my conclusion that he did not apply his mind to the capability of the others in the group either.

118. For my part, on the evidence that I have heard and accepted, this slope was too much to ask of Mr Tarquini, the Claimant and Mrs Anderson. It was, on the basis of their experience and capacity, both generally and on the basis of what they did that week, a step too far and, if the question had been addressed by M. Portejoie, he ought to have seen it as such. Of course, I accept that Mr Tarquini in fact managed the slope safely (by concentrating carefully and following Mr Hall's tracks), but that is not the test. The test is whether, looked at prospectively and objectively, the terrain in the condition that it was in was a reasonably safe piece of terrain for all members of this group. Was it reasonably foreseeable that any one of these three individuals would have fallen or lost control of their skis when negotiating this terrain? The answer is "yes". That, of course, is not a determinative factor in relation to breach of duty: even the most skilled skier will fall from time to time. However, the next issue, in my judgment, is determinative in this case. If, as I have concluded, it was reasonably foreseeable that a member of the group might fall or lose control of their skis, was there a reasonably foreseeable risk of impacting with a tree in consequence? The answer too is plainly "yes" given the presence of the trees as the evidence demonstrates. Subject to the issue that has been raised of whether the seriousness of the injury to the Claimant was foreseeable (as to which see paragraphs 125-133 below), that establishes a breach of duty on M. Portejoie's part. Unless the issue concerning the injury sustained prevents the Claimant from recovering damages, the Claimant will have succeeded in establishing a breach of duty subject to any liability that may rest with him for contributing to the accident. I will deal with that issue in paragraphs 135-144 below.

119. So why did M. Portejoie misjudge the situation? He was a very experienced ski instructor and, I am more than happy to accept, a generally conscientious one who is concerned for the safety and well-being of his students. There are two possible explanations, perhaps interrelated. First, he may have used this off-piste section regularly at the end of a week for an intermediate class, nothing untoward having occurred previously and it did not occur to him that there were any risks in taking the group there. This possibility was not examined in the evidence, but he asserted that he had taken groups to the terrain on at least ten occasions that season. Second, he may have been over-influenced subconsciously by the obvious capacity of Mr Hall to undertake the slope safely. M. Portejoie did describe the group as being "fairly homogeneous" in terms of ability. I do not really think that the evidence justifies that description: as I have already found, Mr Hall was, in my judgment, well ahead of the rest of the group. If, as I think must have occurred, M. Portejoie treated them all as more or less of the same ability, then that was an unreasonable position to take.

120. I do not find it particularly palatable to have to find M. Portejoie in breach of duty. I have already given my view of him, both as a ski instructor and as a witness, earlier in this judgment. However, if I may borrow an expression from another sporting field, I think that he took his eye off the ball on this particular occasion. I think that it can be characterised as involving a short period of inattention to the true capacity of all members of his group and, since it involves the Claimant particularly, the Claimant in particular. Had he stopped and thought about it, in my judgment it would have been clear, based on a proper analysis of what had gone before during the week, that this was asking too much of the Claimant. It may be of some comfort to M. Portejoie to know that there are very many distinguished and ordinarily highly competent and conscientious doctors, lawyers, accountants, engineers, surveyors and the like who, on

an isolated occasion in their professional lives, are found to have been negligent within the meaning of the law. Many ordinarily careful drivers are, from time to time, found to have driven below a reasonably careful standard because of short-lived inattention to the surrounding conditions. He should look on this as one of those isolated occasions.

121. I have been much pressed on behalf of M. Portejoie with the proposition that his decision as to the suitability of the slope was not negligent within the well-known *Bolam* principle. The argument was, to some extent, based on *Chittock v Woodbridge School* [2002] EWCA Civ 915, another claim arising from a skiing accident. There the claimant was on a school skiing trip. He had been disciplined for skiing off piste without permission and then later in the holiday he was injured when skiing on piste. The suggestion made on his behalf was that he should have been prevented from skiing altogether following the earlier incident. The Court of Appeal declined to hold that the failure to withdraw his skiing rights altogether was negligent. Auld L.J. said:

> "Where there are a number of options for the teacher as to the manner in which he might discharge that duty, he is not negligent if he chooses one which, exercising the *Bolam* test …, would be within a reasonable range of options for a reasonable teacher exercising that duty of care in the circumstances."

122. It was conceded that the context of the present case is not identical since *Chittock* was concerned with a schoolteacher, not a ski instructor, but, it is argued, the same approach to M. Portejoie's exercise of judgment should be adopted.

123. Although on behalf of the Claimant the applicability of the use of the *Bolam* principle in the case (which he submitted was no different in its application from the application of all the usual principles of negligence) was conceded I have not found it particularly helpful in analysing the issue of breach of duty because it is necessarily premised on the basis that all relevant risks and benefits have been taken into account in deciding on the course of action under review in the case. I have been unable to find that M. Portejoie did make a conscious exercise of judgment about the abilities of the Claimant to undertake the particular piece of off-piste terrain. The modern statement of the *Bolam* principle appears in *Bolitho v City and Hackney Health Authority* [1998] AC 232. It requires the body of opinion upon which reliance is placed to be capable of withstanding logical analysis such that it can be shown that all relevant risks and benefits of the course of action adopted have been weighed up to reach a defensible conclusion: per Lord Browne-Wilkinson pp. 242-244. I do not see that enunciation of the test as having much application in a situation such as this where, as I have said, the evidence does not permit me to find that M. Portejoie did weigh up the risks and benefits of what he asked the group to do. If he thought about it at all, he simply made the assumption that all members of the group would cope. Had he thought about it properly, he (and any ski instructor in possession of the information he had) would not have asked a group containing Mr Tarquini, the Claimant and Mrs Anderson to undertake this descent with the risk of impacting with a tree. Interestingly, Mr Foxon in his report suggested that it was the Claimant's own faulty technique that caused him to impact with the tree. To my mind, that reinforces the proposition that the Claimant should not have been asked to ski this slope. Mr Shedden said that he continued to support the view that the slope was suitable for the

Claimant, but for the reasons I have given I do not consider that that view can survive the emergence of the oral evidence in the case.

124. Mr Davies submitted that M. Portejoie knew the resort very well, was there on the day and was able to take everything into account in making his decision about what the group were going to do. This comes perilously close to saying that whatever choice an experienced ski instructor makes must be right because his judgment will always be well-informed and within the band of reasonable decisions that could be made. I do not think that the law dictates such an approach.

The foreseeability of the Claimant's injuries

125. An argument foreshadowed in Mr Davies' initial Skeleton Argument was that, taking the case at its highest against M. Portejoie (which, of course, has now been established subject to this argument and questions of contributory negligence on the part of the Claimant), the risks which he ought to have had in mind when assessing the suitability of the slope could not reasonably have included an accident of this sort resulting in an injury of this catastrophic nature. He relied on Court of Appeal decision in *Perry v Harris* [2008] EWCA Civ 907. I understood him to maintain this line of argument in closing, although there was a slight variant in the way it was articulated to which I will refer in paragraph 134.

126. I hope I characterise the argument as formulated correctly by saying that it appears to be that it would be imposing too high a standard of care on someone in M. Portejoie's position to seek to protect someone in the Claimant's position from the kind of harm suffered because it was not reasonably foreseeable that such harm could occur.

127. In *Perry v Harris* a young child playing on a "bouncy castle" was very seriously injured by another older child who had negligently been allowed to use the "bouncy castle" at the same time. That older child undertook an acrobatic jump and twist in the air that caused his heel accidentally to strike the claimant's forehead. The claimant suffered a depressed skull fracture and a subdural haematoma in the left frontal-parietal lobe with, it was said, severe, permanent cognitive, behavioural, emotional and social consequences.

128. The decision of the Court of Appeal (Lord Phillips of Worth Matravers, Lord Chief Justice, May and Wilson LJJ) in relation to the standard of care required in the circumstances can be seen from the paragraphs 38-40 of the judgment of the court:

> "The injury suffered by the claimant in this case was of horrifying severity. It resulted from contact between the claimant's forehead and Sam's unshod heel. The Hire Agreement recommended for 'safety and enjoyment' that the equipment should be supervised at all times and that boisterous behaviour should be stopped. This does not provide any information as to the possible consequences of boisterous behaviour. A reasonable parent could foresee that if children indulged in boisterous behaviour on a bouncy castle, there would be a risk that, sooner or later, one child might collide with another and cause that child some physical injury of a type that can be an incident of some contact sports. We do not

> consider that it was reasonably foreseeable that such injury would be likely to be serious, let alone as severe as the injury sustained by the claimant.
>
> Not only was it not reasonably foreseeable that boisterous play on the bouncy castle would involve a significant risk of serious harm, there was no evidence before the judge, or before us, of the extent of the risk of injury actually posed by bouncy castles. If injuries such as that suffered by the claimant had been suffered by those playing on bouncy castles on even infrequent previous occasions we would expect the risk of such injuries to have been specifically drawn to the attention of those hiring them.
>
> For these reasons, we consider that the standard of care that was called for on the part of the defendant was that appropriate to protect children against a foreseeable risk of physical harm that fell short of serious injury…."

129. The application of that conclusion to the factual scenario presented in that case is summarised in the following passages of the judgment:

> "If our appraisal of the risk that should have been foreseen by the reasonable parent is correct, there can be no justification for holding that the duty of care requires that children who are playing on a bouncy castle must be kept under constant surveillance….
>
> The issue is whether a reasonably careful parent could have acted in the same way as the defendant. The case does not turn on expert evidence or special knowledge. Essentially we have had to place ourselves in the shoes of the defendant and consider the adequacy of her conduct from that viewpoint and with the knowledge that she had. Each of us had the same reaction to the facts. The defendant could not be held at fault for the way that she acted. The manner in which she was supervising activities on the bouncy castle and the bungee run accorded with the demands of reasonable care for the children using them. The accident was a freak and tragic accident. It occurred without fault."

130. Albeit made in a different setting, Lord Steyn's oft-quoted observation in *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 A.C. 532, at para. 28, comes to mind. "In law context is everything." The factual context of that case was, in my judgment, very different from this case.

131. In my judgment, the submission made by Mr Trusted on the Claimant's behalf in relation to this argument is correct. In *Perry* there was no evidence of "the extent of the risk of injury actually posed by bouncy castles". That serious injury can result from a skiing accident hardly needs evidence: even those who do not ski will probably know people who do who return from a skiing holiday with a broken arm or broken

leg or, from time to time, with very much more serious injuries. Mr Shedden, who had many years experience in the skiing world, accepted that injuries can range from the very minor to the catastrophic. The list of injuries that might arise following a skiing accident is set out on the accident report form that had to be completed following an accident. It ranges from a mild sprain and fracture to multiple trauma, including trauma to the head, neck and back.

132. The potential for serious injury is clear. The potential for serious injury when impacting with a tree is obvious. Clearly, if the impact is with a young and flexible sapling, a serious injury would not necessarily be foreseeable. But any tree of any stature or substance must present a risk. Of course, such an impact *may* not result in a serious injury, but there is a more than minimal risk that it will. Mr Foxon said in his report (which, as I have observed, has not been tested in cross-examination) that in 45 years of skiing he had "never encountered an injury of such severity from an accident of this nature", by which he meant a relatively low velocity impact. Whilst I am not in a position to accept or reject that as a piece of evidence – and, of course, the experience of others may have been different - I do not think that it affords any answer to this case. Even a low velocity impact in an awkward position can have very serious consequences, particularly when the individual concerned has no real control over his movements.

133. In my judgment, it is clear that there was a foreseeable risk of serious injury if anyone fell on this slope in the vicinity of the trees.

134. The slight variant in the way the argument based on *Perry v Harris* was articulated was to submit that even if I held that M. Portejoie was in breach of duty for taking the Claimant to the off-piste terrain where the accident occurred, that would not ground liability unless the accident was held to have been caused by whatever aspect of the risk rendered the selection of the slope a breach. It seems to me that the essential breach here was inviting the Claimant to ski where there was a foreseeable risk of impacting with a tree if he lost control of his skis. I do not see this variant of the argument as making it any more persuasive. Furthermore, the argument, as I understood it, was that it was reasonable to allow the Claimant to continue skiing down the last part of the descent because he had accomplished the more difficult part safely. In my view, that does take the matter further: if the Claimant should not have been on this slope, he should not have been on this slope, whichever part may be concerned. The further difficulty that M. Portejoie faces in relation to this argument is that I have been forced to conclude that he did not see the first part of the descent which means he was deprived of the opportunity to see just how much the Claimant was struggling with it.

Contributory negligence

135. I must now turn to the issue of whether the Claimant, despite M. Portejoie being in breach of duty as I have held, was to some extent the author of his own misfortune by not protesting that what he was being asked to do was beyond what he perceived to be his ability.

136. He acknowledged in characteristically open fashion that he could have said something to M. Portejoie at the time about his distaste for off-piste skiing, but did not do so. Mrs Anderson, who knows the Claimant better than anyone, said that he was very

mild-mannered and courteous ("very English", she said) and would not, unless asked, have offered or volunteered the suggestion that he should pull out of what was being proposed. Indeed she said, including herself in the expression, that "we would not have wanted to split the group".

137. What Mrs Anderson was saying, I apprehend, is that they did not want to disturb the enjoyment of the rest of the group by saying that they would not ski down this particular piece of off-piste terrain. If they had done so, it may have been necessary to find some other way down that could have split up the group.

138. I will return to the question of whether there was a true alternative to attempting this run shortly, but the sentiments expressed by Mrs Anderson, in my view, is a reflection of what Mr Foxon said in his report when considering whether the Claimant could have withdrawn from this run. He said this:

> "Clearly in such circumstances, there is likely to be a degree of peer-pressure to continue, or a reluctance to appear faint-hearted in front of others. However the fact remains that there was no compulsion on Mr Anderson to continue."

139. Mr Shedden did not make any specific criticism of the Claimant, but did say that every skier is responsible for his or her behaviour and that the responsibility is shared with the instructor. He asserted that the skier must make his or her own choice about whether to go with the instructor or not. He drew attention to section F of the FIS rules which states as follows: "Except for the negligence of others all skiers ski at their own risk. Skiers must at all times respect the rules of conduct for skiers." He said that the meaning of that was as follows:

> "…individual skiers are responsible for their own behaviour and must make their own decisions about where and how to ski. It is reasonable for them to put their faith in the ski instructor who has demonstrated sound decision making on their behalf and under those circumstances to trust the judgment of the instructor to balance the risks associated with skiing and the benefits of satisfaction from achieving things they may have thought were beyond their immediate grasp."

140. Mr Exall, addressing the question of whether the Claimant may have been partly responsible for his own injuries, said that, whilst a skier is responsible for his or her own behaviour, that must be overridden where a skier is under the control of an instructor. He said that in practical terms skiers pass responsibility for choice of route and terrain to their instructors "unless the selection is manifestly wrong to the skier as a *layman*." He went on to say that to overrule a decision made by an instructor, especially when in a situation such as that which confronted the Claimant, is "practically difficult."

141. As with all matters in this kind of context, everything has to be judged by an objective standard. What would the hypothetical "reasonable person" do in the circumstances that confronted the Claimant? And what would "reasonable care" for his own safety have required the "reasonable person" to say or do if he was concerned about what he was being asked to do?

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

143. Both the Claimant and Mrs Anderson gave evidence to the effect that they felt trapped and that they had no option but to attempt what they were asked to do. From a subjective point of view, that perception was understandable and the reality is that there was probably not much time for them to form a view as to what to say to M. Portejoie. However, the objective facts are that, had they opted out, whilst it might have split the group, they could have skied back across the relatively flat terrain that they had traversed, got to the Bartavelles piste and skied down it in relative comfort and safety. M. Portejoie might have felt obliged to supervise this, which might have meant that Mr Hall and Mr Tarquini had to come back with them or, if the latter had chosen to attempt the slope, they would have been left to their own devices after they had reached the flat terrain safely. But however the precise facts are analysed, the same conclusion has to be reached: the adult skier, even if he or she feels trapped, must say something in this situation to avoid the suggestion that he or she is not taking sufficient care for his or her own safety.

144. Those conclusions having been reached, the issue of some considerable difficulty is to determine what proportion of responsibility, objectively speaking, should be attributed to the Claimant for not speaking out when he could and, in my judgment, should have done so. Is this to be equated with the position of someone taking the risk of not wearing a seat belt in a car, suffering catastrophic injuries which would have been prevented had he done so and losing 25% of his damages (see *Froom v Butcher* [1976] QB 286)? Or is it a situation in which each ought to be equally responsible? Mr Davies, when I asked him if he cared to put a proportion forward in the event that I found M. Portejoie primarily liable but that there was contributory negligence on the Claimant's part, suggested that the Claimant's share should not be "more than 50%."

145. In a sense, this is another example of the judgment of Solomon, but it seems to me that the correct proportion is that M. Portejoie is ⅔ (two thirds) responsible and the Claimant ⅓ (one third) responsible. Whilst I have not found the issue of

apportionment an easy one, this seems to me fairly to reflect the proper balance between a ski instructor in whom his student invests significant trust but who, by failing properly to address the abilities of his student has asked him to do something beyond his abilities in an unsuitable location, and the adult student who recognises that what is being asked of him is either truly beyond his capabilities or is something about which he feels sufficiently concerned for his safety as to warrant making a protest or comment, but who fails to do so.

Result

146. For the reasons I have given there will be judgment for the Claimant for ⅔ of the damages to be assessed.

Concluding general observations

147. If the decision in this case engages a wider interest than merely for the parties to the case, there are one or two concluding observations of a general nature I would make.

148. First, this case does not mean that anyone who suffers injury, even a serious injury, following a skiing accident, whether on or off-piste, necessarily wins damages. Equally, it does not mean that everyone who suffers an injury when under the supervision of an instructor wins damages. Everyone recognises that skiing is an inherently risky pastime and accidents causing injuries, sometimes very serious, will occur, more often than not without negligence being established on the part of anyone involved.

149. The result in this case has arisen from the application of well-established legal principles to the particular facts. Those facts may not be replicated in other cases and the facts of other cases may demonstrate clearly that no-one was to blame. Whilst I trust that I started hearing this case from a standpoint of neutrality, I was certainly of the view that I would need to be persuaded that a skiing accident was not merely "one of those things" that happens without negligence. It was only as the evidence emerged during the case that I became satisfied that this accident was foreseeable and avoidable with reasonable care having been exercised by the ski instructor and, to a lesser extent, by the Claimant himself.

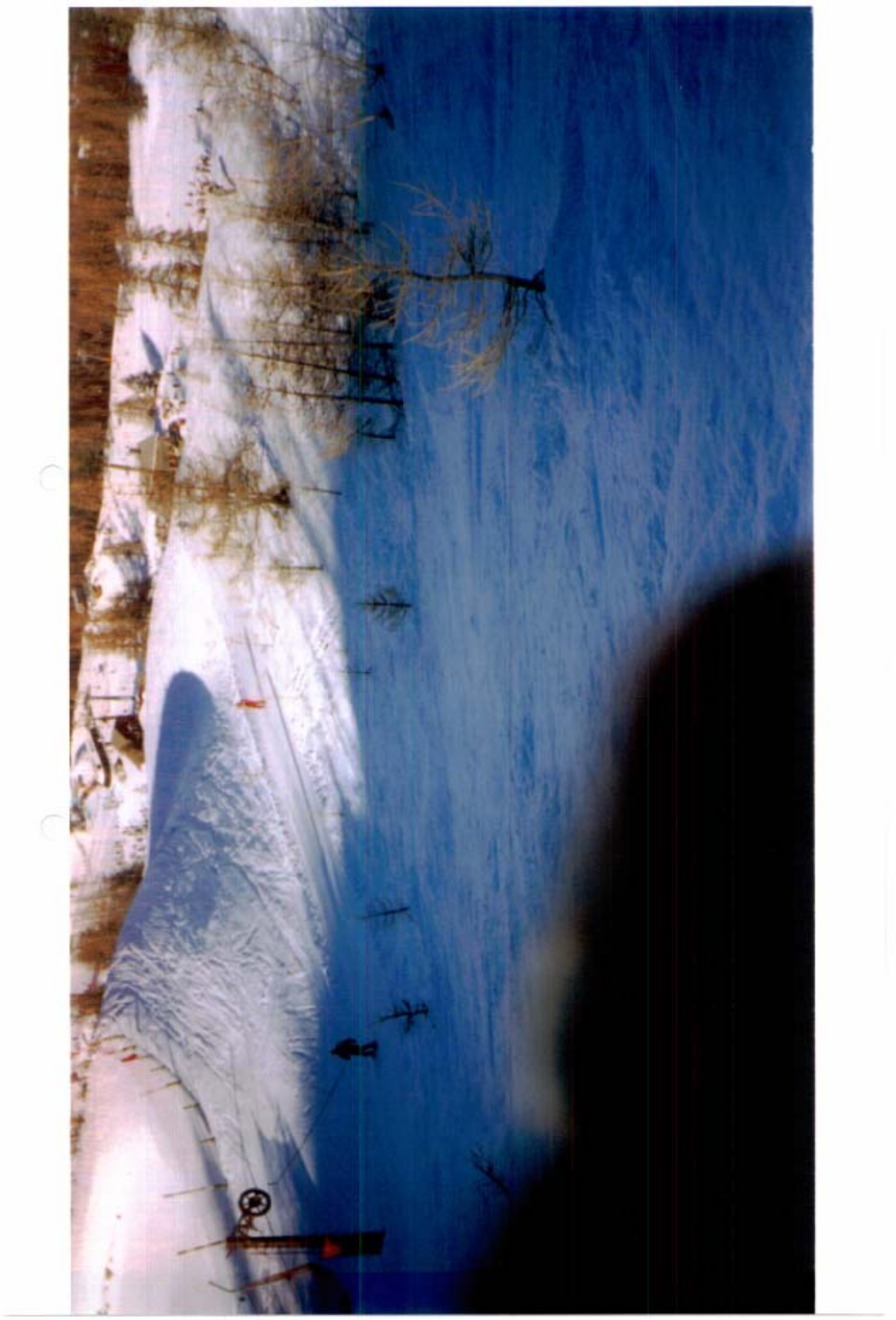
150. Second, and arising from the first matter, nothing in the result of this case should be seen as dissuading anyone embarking on a skiing holiday from taking out suitable insurance cover, including, if it can be obtained, cover that provides substantial funds if permanent serious injury, including paralysis, should occur.

Final comment

151. Finally, I paid tribute to the resilience and cheerfulness of the Claimant at the outset of this judgment and I have referred in the judgment to moments when he has contributed some humour to the proceedings. M. Portejoie, who must have found the proceedings a strain himself and who was, I am quite sure, affected by the sight of the Claimant in a wheelchair across the Court, also handled himself with dignity and good humour. The accident has had very serious consequences for the Claimant and the case has raised serious issues, but it has been conducted throughout in a very good-

humoured fashion. For that I should like to express my appreciation to all concerned, particularly to all Counsel and their respective legal teams.

ANNEX 1 TO
ANDERSON v LYOTIER & PORTEJOIE



ANNEX 2 TO
ANDERSON v LYOTIER & PORTEJOIE