Dangerous Sports and Inherent Risks

An English Perspective

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The Principles

- *Condon v Basi [1985] 1 W.L.R. 866; [1985] EWCA Civ 12*
  - Those participating in sporting activities are deemed to consent to the risk of injury which occurs in the course of the ordinary performance of the sport.
  - However, a player cannot be deemed to have accepted the risk of injury which occurs beyond the rules of the game.
  - Additionally, the standard of care owed will vary depending on the level of expertise of the individual players involved.

- *Caldwell v Maguire [2001] EWCA Civ 1054*
  - Considering negligence in the context of sporting competitions is 'fact specific'.
  - "In an action for damages by one participant in a sporting contest against another participant in the same game or event, the issue of negligence cannot be resolved in a vacuum. It is fact specific" [para 30].
  - a finding that a jockey has ridden his horse in breach of the rules of racing does not decide the issue of liability in negligence [34].

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Boxing

Watson v British Boxing Board of Control [2001] QB 1134 [2000] EWCA Civ 2116

- Michael Watson, a professional boxer, was seriously injured in a professional boxing match, sustaining near-fatal brain injuries.
- The match was governed by the rules which had been established by the Defendant.
- Whilst the BBBC provided ringside medical facilities, there was no immediate resuscitation available following the injury.
- By the time the Claimant received the required resuscitation in hospital, he had already sustained permanent brain damage which could have been prevented.

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Boxing

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Watson v British Boxing Board of Control [2001]

- Held: the BBBC had breached their duty of care to Mr Watson by failing to ensure that he had access to the necessary medical treatment.
- The BBBC had established the conditions of the boxing match and had assumed responsibility for Mr Watson's medical care. If the BBBC had established appropriate provisions for ringside medical care, Mr Watson's injuries would not have been so extensive.
- "It is not necessary for a supposed tortfeasor to have created the danger himself. In my view there is a quite sufficient nexus between the Board and the professional boxer who fights in a contest to which its rules obtain to be capable of giving rise to a duty in the Board to take reasonable steps to try to minimise or control whether by rules or other directions the risks inherent in the sport. To my mind it is difficult in such a situation to profess a concern for safety and to deny a duty such as I have described".
- Therefore, despite the inherent risk in boxing, the Board had a duty to reasonably minimise those inherent risks.
- It was submitted that, as some boxers have their own doctors ringside owing to the inherent risks in the sport "Mr Watson voluntarily submitted to any risk associated with inadequacy of medical safeguards."
- This was not accepted by the Court who held that the Board had medical expertise and Mr Watson was reliant on the skill and care of the Board to look after his safety.

Rock Climbing/ Bouldering

Poppleton v Trustees of the Portsmouth Youth Activities Committee [2008] EWCA Civ 646, [2008] All ER (D)

- The Claimant sustained serious injuries (rendered tetraplegic) whilst bouldering (climbing without ropes) at the Defendant's activity centre.
- The Claimant was an inexperienced climber. He was not referred to the rules displayed in the area which forbade jumping.
- Mr Poppleton tried leap from a wall to grab hold of a buttress or the top rope bar on the opposite wall. He leapt, lost his grip and somersaulted in the air, falling to the matting below, landing on his head. The manoeuvre which he was attempting was described as "dangerous and risky for a novice climber such as he was".
- The key issue was that the risk of injury was considered obvious and inherent in such a dangerous sport.
- At trial the Judge held that the Defendant had a 25% responsibility for failing to warn climbers that the presence of thick foam did not remove all the risk, and could provide climbers with a false sense of security.

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Rock Climbing/ Bouldering – The Appeal

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Poppleton v Trustees of the Portsmouth Youth Activities Committee [2008] EWCA Civ 646, [2008] All ER (D)

The Defendant appealed against the 25% liability finding and the Claimant cross-appealed against the finding for contributory negligence.

The Court of Appeal granted the Defendant's Appeal and dismissed the Claimant's cross-appeal.

The Court held that there was an inherent risk which was voluntarily undertaken.

"No amount of matting will avoid absolutely the risk of possibly severe injury from an awkward fall and that the possibility of an awkward fall is an obvious and inherent risk of this kind of climbing."

"There being inherent and obvious risks in the activity which Mr Poppleton was voluntarily undertaking, the law did not in my view require the appellants to prevent him from undertaking it, nor to train him or supervise him while he did it, or see that others did so. If the law required training or supervision in this case, it would equally be required for a multitude of other commonplace leisure activities which nevertheless carry with them a degree of obvious inherent risk – as for instance bathing in the sea".

Rugby

- The English Rugby Football Union released new rules surrounding tackling on 1st July 2023. The tackle height across the community game has been lowered to below the base of the sternum.
- Research suggests this will reduce the risk of “head acceleration events”
- *Czernuszka v King [2023] EWHC 380 (KB)*
- Czernuska and King were playing a developmental level women’s rugby league game. During a scrum, Czernuszka was forced to the ground by King and, as a result, sustained a fractured spine leaving her paraplegic.
- The Judge found that King tackled Czernuska in a way that was “wholly unconventional, dangerous and committed without concern” for her safety.
- An illegal or dangerous tackle was not enough to establish liability. There had to be a finding that King had failed to exercise the required degree of care.

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Rugby

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Czernuszka v King [2023] EWHC 380 (KB)

- In examining the necessary degree of care, the Court considered the following:-
  - The size of King.
  - The level of experience King had.
  - The level of game.
  - The number of times Czernuszka had played the game.
  - When the tackle occurred, Czernuszka was not in possession of the ball.
  - Czernuszka was in a vulnerable position.
  - King did not compete for the ball, instead she went straight for Czernuszka.

- Therefore, the “volenti” principle did not apply as the conduct of the individual involved was vital to establishing liability. The Court found that, from King’s actions, it was clear she was looking for revenge. King’s comments included “I’m going to break her”.
- “In general, injuries, even serious injuries, are an accepted risk of the sport and do not sound in damages. However, sport is not exempt from, or immune to, the law of negligence. As will be seen (see paragraphs 35-45 below), the courts have deemed actionable injuries sustained where the conduct of the opposing player fell below the standard of care appropriate and to be expected in all the circumstances. Sometimes, by reason of the particular circumstances, the bar for that standard will be set high requiring recklessness or a very high degree of carelessness.”

Motorcycling

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Lambert v MIB [2022] 3 WLUK 208

- Motorbike track day accident in Spain on 5th November 2017.
- The incident occurred on what is known as ‘the back straight’ between turns 5 and 6 at the Circuito de Jerez, a race circuit near the town of Jerez, within the municipality Cadiz, Spain.
- A motorcycle being ridden by Mr. Lambert was travelling along ‘the back straight’ on the race circuit when it was involved in a collision with another motorcycle being ridden by Mr. Prentice. As a result of the collision Mr. Lambert suffered serious injuries including a head injury.
- A claim was brought against the Motor Insurers’ Bureau (“MIB”) as Mr Prentice was not insured (often the case in track day events as the bikes are not road bikes).
- EVERYTHING was disputed by the MIB from the cause of action, applicable law, and limitation, to liability, contributory negligence, causation, and quantum. By the time of the 3 day High Court split liability trial, the issues related to the liability of Mr Prentice and any contributory fault against the Claimant – both issues to be determined under Spanish law.
- Each party was permitted to rely on written and oral expert evidence from a motorcycle expert and a Spanish lawyer.

Lambert v MIB [2022] 3 WLUK 208

Motorcycling: Lambert v MIB

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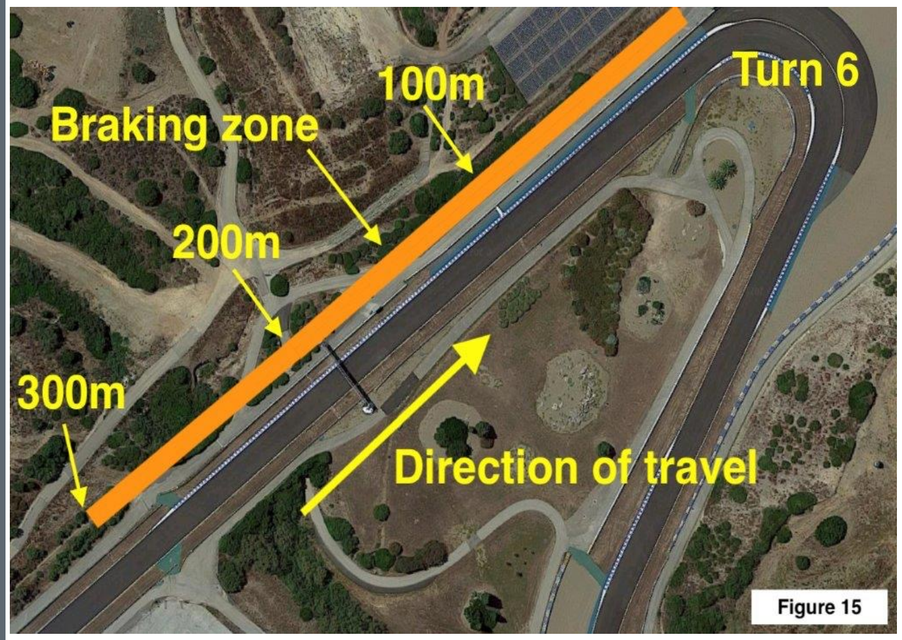

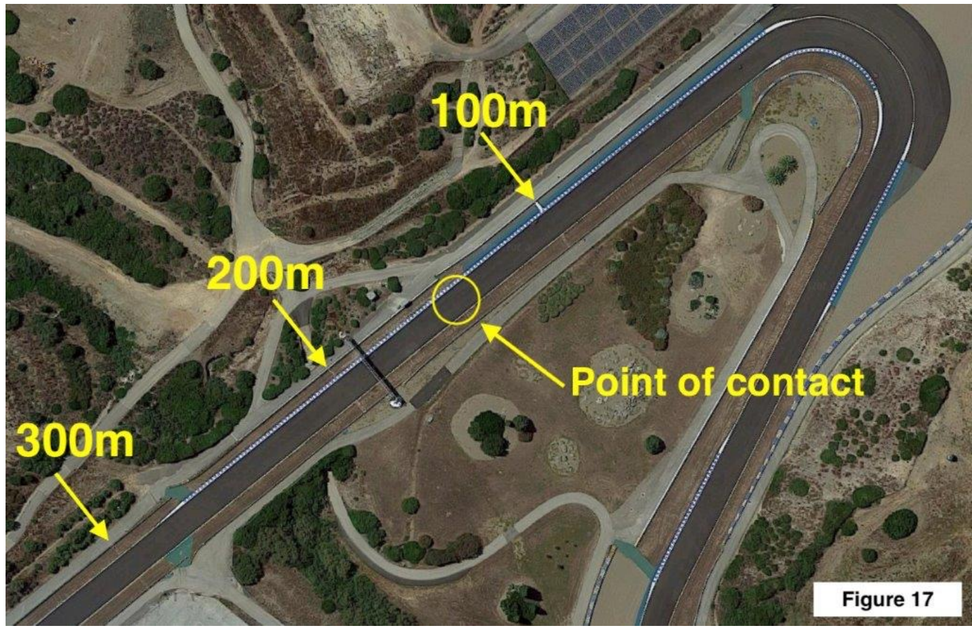

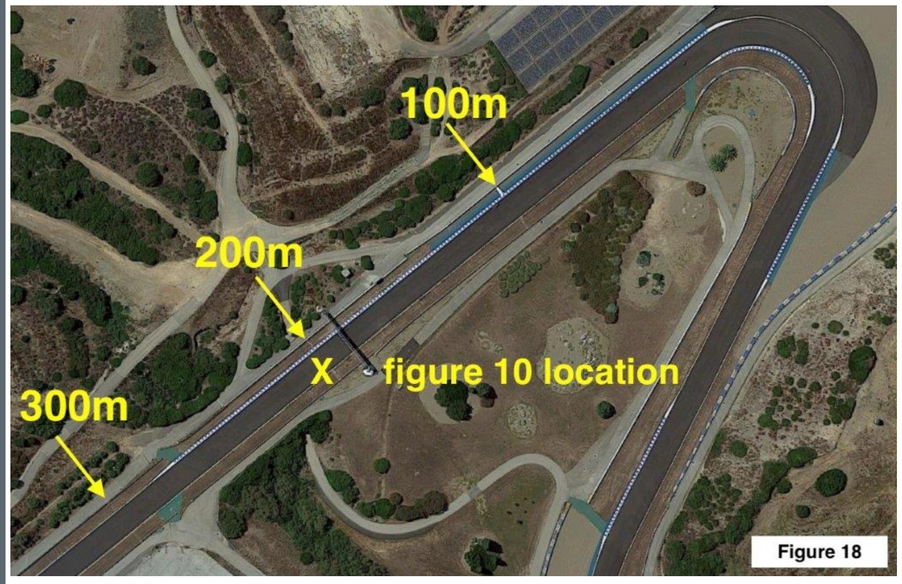

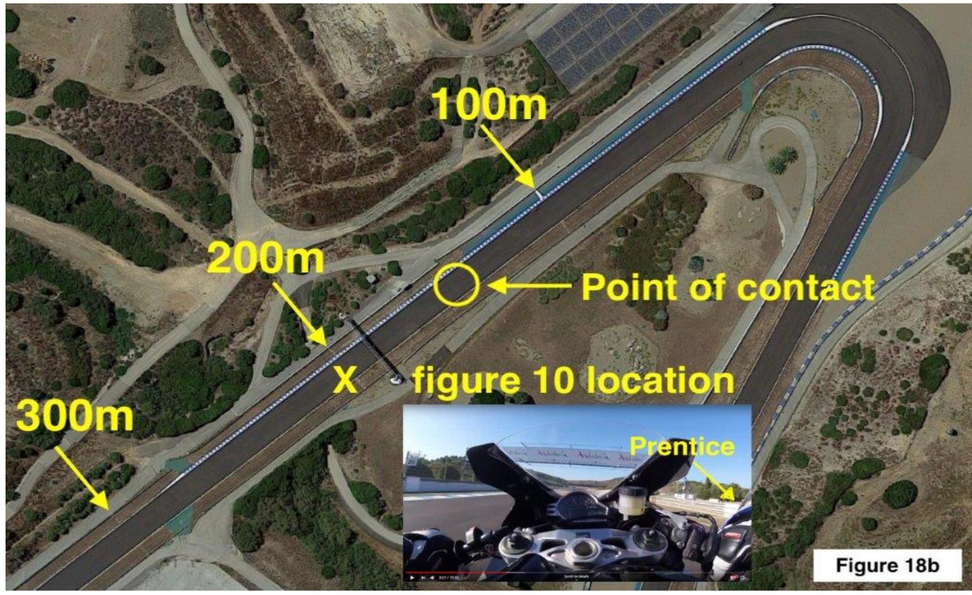

Motorcycling: Lambert v MIB

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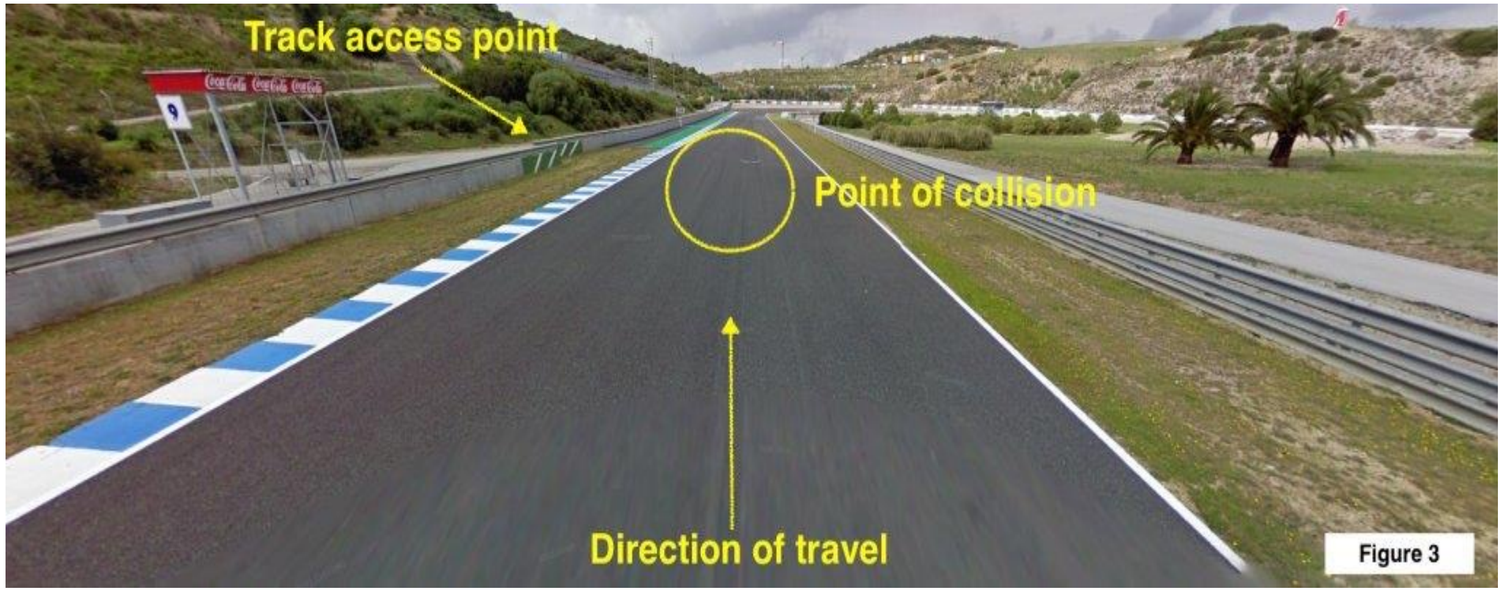

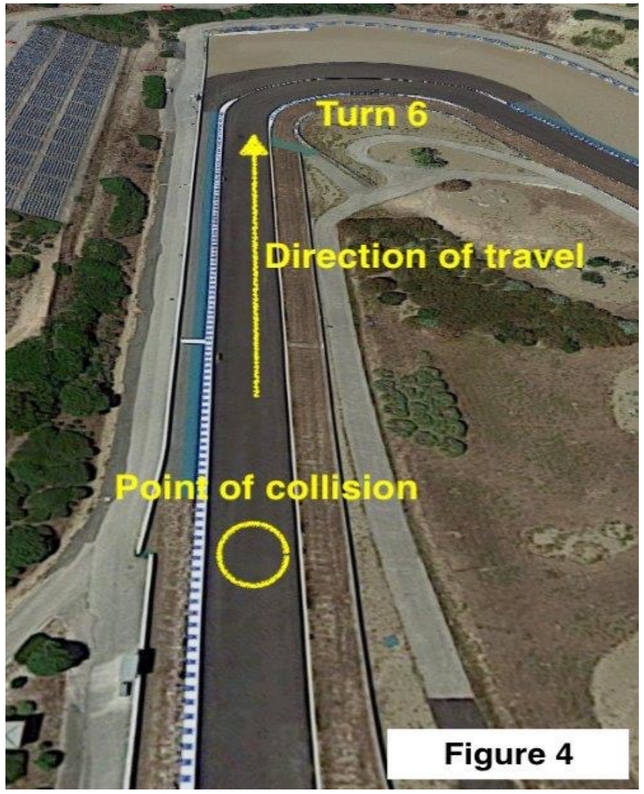

Motorcycling: Lambert v MIB

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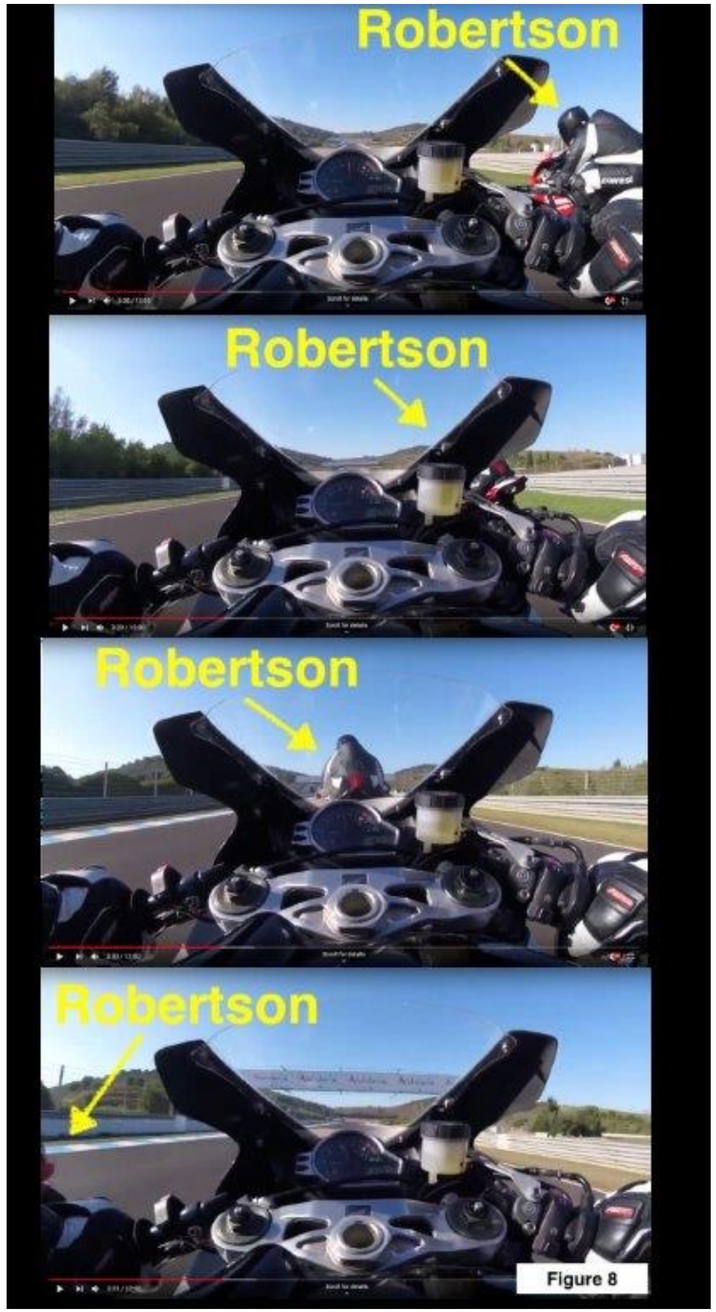
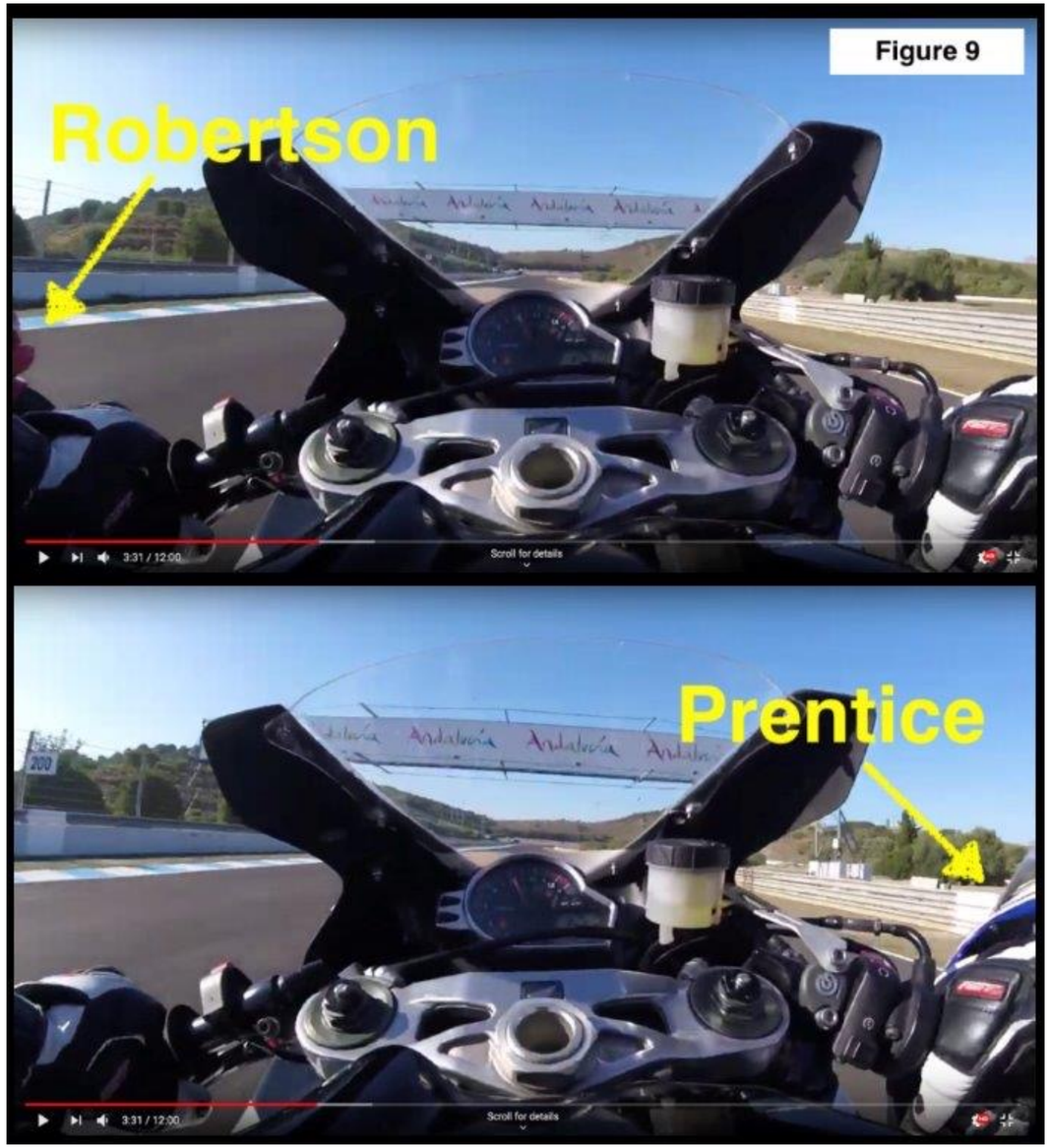
Lambert v MIB [2022] 3 WLUK 208





Motorcycling: Lambert v MIB

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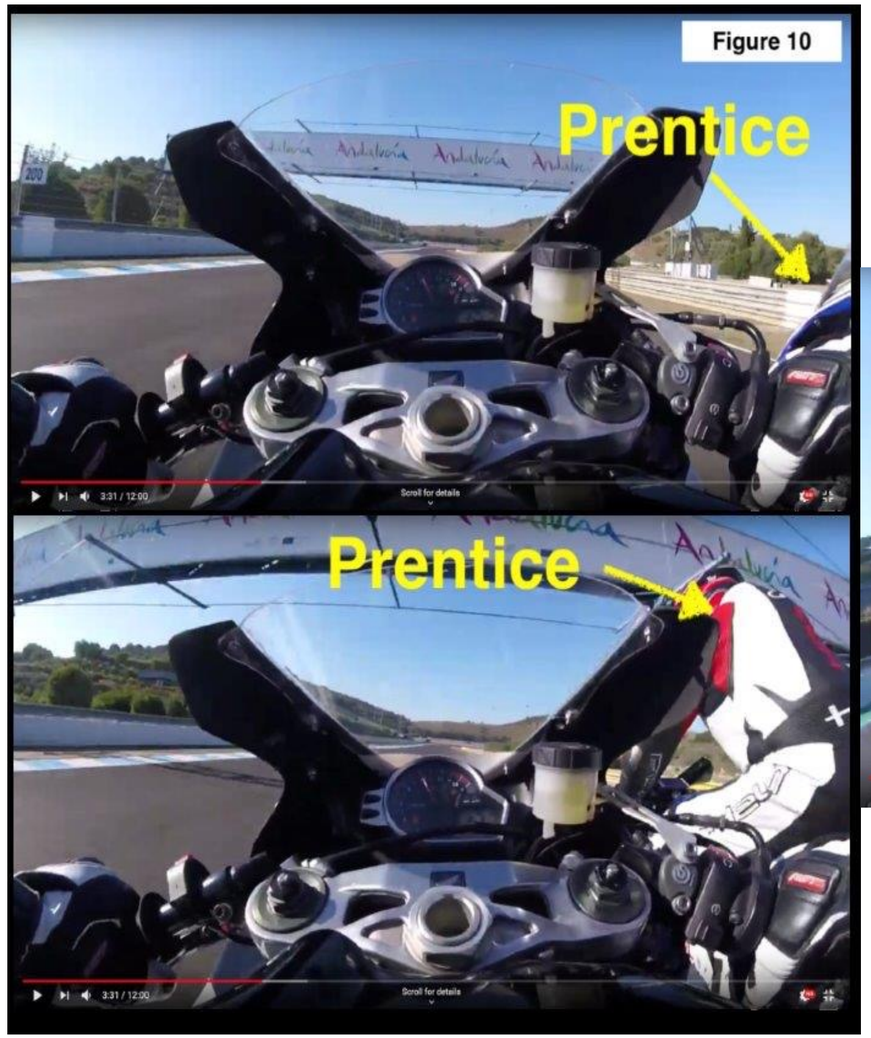

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Motorcycling: Lambert v MIB

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The motorcycle experts agreed that contact between the two motorcycles occurred 1.155 seconds after Mr Prentice would have appeared in the peripheral vision of Mr Lambert

Motorcycling: Lambert v MIB

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The Defendant's case: any individual who takes part in a sport activity is assuming, either tacitly or expressly, the risks that the sports activity involves (i.e. those risks that are inherent to the regular practice of the sport at stake). This was a "hard pass" but normal in track day racing. The Claimant voluntarily participated in a sport activity which entails an inherent risk that is materialised in the damage suffered.

The Claimant's case: it is for the overtaking rider to drive with reasonable care and skill to avoid any collision by driving across the path of travel of the vehicle he is overtaking. It is not for the overtaken rider to take evasive action to avoid any collision. The relevant standard to be applied is that of a good sportsman and the Defendant fell below that standard.

Spanish law…?

Dangerous (Trend/Fun)Sports for “everybody” and inherent risks

An Austrian Perspective

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The Principles

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BASIC RULE - “at one’s own risk”:

According to established case law,

a ***certain risk*** to the physical integrity of the person practicing sports is ***inherent in the nature of sports***. The necessarily associated risk is therefore accepted by the sportsman (RIS-Justiz RS0023400).

Especially in the case of ***risky sports***, which include so-called fun and trend sports, are generally (also) ***at one's own risk*** (2 Ob 277/05g ZVR 2006/124).

Whoever practices dangerous sports takes on the ***associated risk inherent in the nature*** of this sport concerned, at least insofar as ***he knows or must know*** it, and ***acts at his own risk***.

He is expected to ***provide for his own protection*** (4 Ob 34/16b mwN; 3 Ob 221/02z).

CONCLUSION:
In principle, everybody who takes part in a ***risky sport accepts a certain risk at his or her own responsibility*** (RS0131627).

The Principles

INGERENCE PRINCIPLE / DUTY TO INTERVENE

- According to the general ***ingerence principle*** everybody who ***provides risky facilities or creates a danger area*** has to take special care that nobody - who uses the equipment for its intended purpose – will be endangered.

- The ***extent of the measures of care and information*** of the users about the risks does not have to be adjusted to misuse or a use contrary to the intended purpose, unless this is to be expected due to the circumstances (8 Ob 73/18w).

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The Principles

BURDEN OF PROOF

- The purchase of a ticket to a skilift or other sports facilities creates a *contract* with the duty of the operator to comply with all duties of care so that his clients will not be endangered.

- In these “contract cases” the burdon of proof with respect to fault skifts on the operator who has to prove that he complied with all relevant duties to protect his clients or that he was not able to do so (***reversal of the burden of proof*** with respect to the compliance of all duties of care according to § 1298 Allgemeines Bürgerliches Gesetzbuch – ABGB).

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The Principles

EXTENT OF THE DUTIES

- The required duties must ***not be excessive, but reasonable*** *(Weighing - risk vs. expense).*

- It is not necessary to protect somebody against dangers which are easily recognizable and which anyone can easily avoid (RS0114360).

Principle:
The riskier the facility is and the less avoidable the realization of the risk is for the user, the higher is the duty to take safety measures!

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THE BAGJUMP CASE

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BAGJUMP CASE 8Ob73/18w :

FACTS

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Facts:

- One of the big ski resorts advertises and provides a Bagjump facility for all their winter sports guests (not only for professionals).
- 17-years old swiss freestyler, who already knew this Bagjump facility prepared himself for a contest.
- There was fresh powder snow and therefore the snow was sticky and “slow” so that he could not practice some special tricks from the marked starting point.
- Therefore he and his friends took a longer inrun.
- Consequently he was so fast that he jumped over the cushion and suffered paraplegia.

BAGJUMP CASE 8Ob73/18w :

QUESTIONS

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Discussed questions:

- Was this type of protection (only staggered fences at the start) state of the art?
- Was the ski lift operator obliged to close/fence off also the side areas (as one day after the accident) so that the inrun could not be extended?
- What role plays age and experience in answering the liability question?
- Has advertising of such facilities or downplaying of the risks of such facilities an effect on liability?
- What role does information about risks play?

BAGJUMP CASE 8Ob73/18w :

JUDGEMENT:

ACTION DISMISSED!

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ANSWERS BY THE SUPREME COURT (OGH – 8Ob73/18w) and the appeal court Innsbruck (OLG Innsbruck - 2 R 1/18s):

The **extent** ***of the measures*** and the duties the operator has to comply with depends on the ***special circumstances of the case*** so that only a small member of decisions of the higher court are subject to a further appeal to the Supreme Court.

At the time of the decision there was no rule with respect to the question how such facilities have to be fenced off and there was also no common practice or "state of the art" with respect to this.

As it could not be established that users extent the inrun (misuse) regularly or at least at a ***certain frequency*** so that this could be recognized by the supervisors the courts held that it was not faulty not to fence off also the sides of the run to avoid that users extent the inrun.

As the concrete ***freeskier was experienced*** he must have known the risks of the facility and the fact that an extension of the inrun would result in a longer jump and increase the risk that he could overjump the cushion; this despite of his young age (also 1 Ob 400/97y – Snowrafting - case).

The Supreme Court pointed out that the ***extent of the measures of care and the information of risks*** have to be set ***by taking into consideration the intended purpose*** and not a misuse. Therefore, the courts dismissed the action.

BAGJUMP CASE - CONTRARY JUDGEMENT 6Ob183/15b:

1/3 liability

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Contrary „bagjump“- judgement of the Supreme Court in 6Ob183/15b:

Facts: 18 years old ambitious hobby sportsman tried a double back flip although he had no sufficient experience and he was tired

liability of the operator affirmed to 1/3 because of lack of information as

Bagjump Facility was advertised with the risk ***trivialsing and temptating*** slogan:

“Experience the good feeling of a failed backflip.”

In addition cushions give a feeling of security!

According to the judgement, the operator has to provide ***concrete, comprehensive and instructive information*** on the safety risks, so that the user is in a position to assess these risks sufficiently and comprehensively (2Ob 277/05g).

The general hint on the information board at the starting point that a failed jump may result in an injury was not sufficient in this case.

IMPORTANT ASPECT:

INFORMATION !

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DUTY TO INFORM

The operator of a high-risk sport, who also provides the necessary sports equipment, is in any case ***obliged to provide information*** about the circumstances concerning safety risks to enable the participant to adequately and comprehensively assess these risks, whereby the signs, information and advice (instruction) must be ***so concrete, comprehensive and instructive*** that the person addressed becomes aware of the (possible) dangers and is able to assess them on his or her own responsibility (RS0131627).

The information provided by information boards, pictograms and the organizer's staff is sufficient; further written information is not required.

Principles: The riskier it is the higher is the duty to inform!
The more experienced the person addressed is,
the lower the duty to inform!

EXAMPLES

Action granted!

BAGJUMP case 6Ob183/15b: Action granted to 1/3!

Trivilasation of the risk contradicts the duty of inform!

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EXAMPLES

Action granted!

TANDEMPARAGLIDE case 2Ob277/05g: Action granted!

Operator should have informed about the higher starting risk with skiboots!

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EXAMPLES

Action granted!

FLYING FOX case: 6Ob304/02b: Action granted!

Too early start of the next user could have been prevented with simple measures

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EXAMPLES

Action granted!

TIMED SPEED PISTE case 1 Ob 19/10s: Action granted!

Strict monitoring obligation as the speed of the user is very high – no duty of the user to ski on sight

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EXAMPLES

Action granted!

FUNPARK cases ZVR 2015/2016 – 1 R160/14k OLG IBK: Action granted!

Obligation to create adequate run-off areas at the end of fun-parks and clear boundaries to the “public” piste!

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EXAMPLES

Action dismissed!

BLOBBING cases 4Ob34/16b, 1Ob156/17y: Action dismissed

Drumhead rupture – inherent risk (no special information with respect to this injury necessary)

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EXAMPLES

Action dismissed!

BANANA case 8Ob94/17g: Action dismissed!

Information about the risk of capsizing is enough (not additionally about a likely collision with another participant)

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EXAMPLES

Action dismissed!

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TRIAL BIKE PARCOUR
case 4Ob39/18s:
Action dismissed!

Even very dangerous obstacles are inherent risks

EXAMPLES

Action dismissed!

CANYONING cases
8Ob145/06s, 6Ob87/18i,
8Ob15/22x:
Action dismissed!

Unrecognisable rocky ledges are inherent risks

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EXAMPLES

Action dismissed!

MOUNTAINCART case 3Ob92/23k: Action dismissed!

15years old girl did not manage the turn – accepted inherent risk

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EXAMPLES

Action dismissed!

TANDEMPARAGLIDE case 2Ob105/21m: Action dismissed!

Thermal changes -> crash - are an inherent risk

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EXAMPLES

Action dismissed!

WATERSLIDE cases 1 Ob 114/08h, 9 Ob 77/15m, 1 Ob 103/04k
: Action dismissed!

No consideration of misuse with respect to the extent of measures, no permanent supervisor necessary

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CONCLUSION

Relevant factors!

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Relevant factors with respect the question of liabiliy resp the required measures (supervisor, information, security measures, fencing…):

- ✓ age of the user
- ✓ experience of the user
- ✓ recognisable and foreseeable special manner of (mis)use
- ✓ extent of danger of the facility
- ✓ typical risks
- ✓ Probability with respect to realisation of the risk
- ✓ Avoidability and forseeability of the danger for the user
- ✓ Potential injuries
- ✓ Costs/effect of measures
- ✓ advertised security/risklessness – evoked confidence

DANGEROUS SPORTS

Many thanks for your attention!

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