Neutral Citation Number: [2023] EWHC 1597 (KB)

Case No: QA-2022-000143

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
On appeal from the Cambridge County Court
County Court case number: F09YM491

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/06/2023

Before :

MR JUSTICE JACOBS

- -

Between :

Merlin Entertainments PLC

Appellant /Defendant

- and -

Mrs Emilia Idziak

Respondent /Claimant

- -
- -

Harry Lambert (instructed by **Kennedys Law LLP**) for the **Appellant/Defendant**
Simon King (instructed by **Buckles Solicitors**) for the **Respondent/Claimant**

Hearing dates: Tuesday 20th June 2023

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Approved Judgment

This judgment was handed down remotely at 9.30am on 28th June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

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A: Introduction

1. This appeal arises from a successful personal injury claim in respect of injuries alleged to have been suffered by the claimant on 24 August 2016 at the Chessington World of Adventures theme park ("Chessington") which is operated by the appellant ("Merlin").

2. The claimant went to Chessington with her 8 year old son on that day, together with a friend, Ms Iwona Cetin, and Ms Cetin's daughter. They went on a rollercoaster called "Dragons Fury" ("the ride"). In addition to the usual ups and downs of a rollercoaster, an additional feature of the ride is that the top part of the carriages or cars, in which the passengers are sitting, spins during the journey. I have seen videos of the ride in normal operation, and it is clearly not for the faint-hearted.

3. The claimant's case as set out in her Particulars of Claim was that the carriage in which she and her son were riding accelerated at excessive speed. It proceeded at pace, travelling out of control, and throwing the claimant from side to side, until it suddenly came to a halt. The carriage then started to spin and did so for some minutes before coming to a stop, leaving the claimant trapped at the top of the ride. It then took some time before the claimant could attract the attention of people on the ground. It was a very hot day and the claimant and her son endured an extended wait before they were finally rescued.

4. In the proceedings, Merlin disclosed documentation relating to the operation of the ride on that day. This documentation demonstrated that the ride experienced a fault designated a "car overspeed" earlier that day, at 11.55 hrs. The ride was out of action before restarting at 12:10. The ride then experienced a second "car overspeed" at 12.55 hrs, and again the stoppage was 15 minutes. (The Particulars of Claim wrongly identified this as the stoppage affecting the claimant). There was then a third "car overspeed" at 14.20, and a stoppage of 2 hrs and 55 minutes. This was the event which, on the claimant's case, impacted upon her. Merlin's internal "Daily Inspection Document" or "DID" identified the cars involved in these "overspeeds": cars 8, 9 and 5 respectively. The evidence at trial indicated that the claimant was travelling in car 4. However, an "overspeed" on one car would potentially affect other cars: if the computer detected an "overspeed", the overspeeding car would be stopped and so would other cars behind it, thereby ensuring that cars did not crash into each other.

5. The claimant alleged that the events which she relied upon were the result of breach of contract or negligence of Merlin. A number of particulars were pleaded, in which it was alleged, principally, that: the ride was operated with faulty brakes, in circumstances where it was known that brakes were prone to fail in hot weather; Merlin had permitted the ride to operate despite knowing of the car overspeed malfunction earlier in the day; there had been a failure to repair the brake failure and/or overspeed problem; and that it had failed to withdraw the ride from use.

6. The claimant alleged that, in consequence, she had sustained injury to her back, neck, wrist, arm and fingers. As at the date of the Particulars of Claim served in 2019, the claimant continued to experience pain in her neck that spread to her head, shoulders arms and fingers. It particularly affects her right arm, but also her left elbow fingers

and coccyx. She also suffered from anxiety, depression and nightmares, and was treated with anti-depressant medication.

7. In its defence, Merlin admitted that the ride in question experienced a fault known as "car overspeed" on the day in question. But they denied that this was due to the hot weather causing the brakes not to work. The fault meant that the car passed between two designated points quicker than the usual specifications and as a result the ride showed a fault which is the ride's inbuilt safety feature. Merlin said that the additional speed would be in the region of 0.5 seconds. It denied that the overspeed fault posed a risk of injury to those using the ride: the speed might be "very slightly higher than normal but would not cause a foreseeable risk of injury". The ride could safely be used. Merlin said that they did all that was reasonably practicable to ensure the safety of their guests when using the ride.

B: The trial

8. The trial took place over 1 ½ days on 13 and 14 June 2022. On the first day, evidence was given. On the second day, there were closing oral submissions and the recorder immediately gave an ex tempore judgment dealing with issues of liability and general damages. Although issues of special damages, such as loss of earnings and care costs, had featured in the parties' closing arguments, the recorder did not deal with those issues in her judgment. She asked for some further help from counsel, and there was then a dialogue, led largely by the recorder, in which she made decisions on special damages, sometimes without reasons, as the dialogue progressed. The case was therefore finished before lunch on the second day, and the time available in the afternoon was therefore not used.

The evidence on Day 1

9. On the first day, the parties each called two factual witnesses. The claimant gave evidence. So did Ms Cetin, for which the claimant required permission since no witness statement had been served. For Merlin, evidence was given by Mr Matthew Simms, who had been Head of Park Operations at Chessington since September 2020, and involved in the management of the theme park's rides and attractions operation since October 2017. Since he had only joined in 2017, he had not been working at Chessington at the time. The recorder said in her judgment that his evidence could not add a great deal other than referring to documentation in the file as to what happened, and what steps were taken, looking at the staff log in particular.

10. The more significant witness for appellant was Mr Daniel Burton. His job description was "Ride Engineer", although this denoted that he was a technician rather than a professionally qualified engineer. He had been working in that capacity since around 2005. In her judgment, the recorder described Mr Burton as "honest, candid and in many ways an impressive witness". He had some involvement with the ride on the day in question: he had carried out the regular checks in the morning, and he was later involved (either on that day or the following day) in looking into why the "overspeed" issue had arisen. He had not himself witnessed the incident involving the claimant, or indeed the two prior recorded overspeeds. Although some points were made to the recorder as to Mr Burton's ability to provide relevant evidence, it is clear that the recorder considered that he was in a position to do so on at least some important matters. This is unsurprising: he could give direct evidence about the checks in the morning, the

investigation into the problem, and he was also in a position to assist in explaining Merlin's usual procedures concerning the ride and the entries in DID on which the claimant herself was relying. I will describe this evidence in some detail, since it provides the context and forms the foundation for some of the arguments which were advanced by Merlin to the recorder—and which Merlin now contends were not properly addressed by her.

11. In his witness statement, Mr Burton described how – on a review of the relevant documentation – the usual checks were carried out prior to the park opening to ensure that the ride was safe for use during the day. The checks involve running at least one car on the track to ensure that the brakes and the ride were working correctly. He explained the "car overspeed" fault that arose on the ride. It arises when a car on the track passes between 2 sensors quicker than the ride has been set to do. The ride detects this issue and shuts the ride down until the cause of the fault can be located and the ride re-set. Having considered the documentation, he could see that this problem had occurred earlier in the day. The ride would then have been evacuated and all cars brought back to the station. The appellant's staff would then identify which cars had caused the problem. The fault can sometimes occur because the ratio of the weight of passengers means that the car travels slightly fast. It can also be affected by hot weather. The ride safety system was designed to shut the ride down so as to allow for the ride to be reviewed and the fault dealt with. The ride was not unsafe during this process. The ride stops at the point that the fault is detected. If the car is past lift 1, it will continue to spin, but in a controlled way: a centrifugal brake within the top section of the car will stop overspin.

12. Mr Burton said that it was not correct to say that the brakes did not work. Accordingly, information allegedly given to the claimant at the time she was evacuated was not accurate. He said that the "fault that arose on the ride which caused it to stop was due to a car travelling between 2 points too quickly". He then explained that, having reviewed the documentation, the fault in fact occurred because the 2 sensors were "too close together, which meant that the time allowed for the car to go through the 2 points was not large enough". This evidence was relied upon by Merlin as showing that the "overspeed" problem did not actually involve a car going more quickly than usual. Since the sensors were out of position, and closer to each other than they should have been, it simply appeared that way to the computer which was controlling the ride. Mr Burton said that it was possible that the heat of the weather meant that the cars went slightly quicker on the day in question, which meant that the fault was arising more frequently. However, the fault had not occurred again between the time of the incident and the date of his statement in 2020.

13. Mr Burton provided documentary evidence of annual checks carried out by an independent inspector to ensure that the ride met all required safety standards. He also said that assessments were carried out to ensure that the guests were not exposed to excessive speed and associated g forces whilst on the ride even in the event of a "car overspeed" situation. In that situation, he said that the car would go in the region of 0.5 to 1 second quicker than usual "for this fault to arise".

14. In that regard, he referred to a report carried out by Health, Safety & Engineering Consultants Ltd which was attached to his statement as exhibit DB 6. This report had been written in 2005, and it was an assessment of the safety of the ride. The full report was not included in the hearing bundle, but certain excerpts were included in DB 6 and

some other pages were added at the start of the hearing. The excerpts showed that the consultants were addressing the "Safety Requirements" which the ride had to meet in order to be regarded as safe. The report stated that the design and operation of the device should therefore guard against, amongst other things, "injury to passengers by rapid deceleration of the device during emergency stopping, or as the result of any failure". Paragraph 6.2 stated that the system "must also ensure that the levels of acceleration and retardation (including during emergency stops), and the ultimate speed of the car remains within predetermined limits". However, the excerpts before the court did not specifically address "retardation". The excerpts did, however, include the statement, in the context of accelerations, that "there should not be any foreseeable risk of injury as a result of the g forces experienced on this ride."

15. Mr Burton said in his statement that he understood that the ride was checked regularly by an independent inspector as part of the "ADIPS" (Amusement Device Inspection Procedures Scheme) inspections to ensure that the ride met all of the required safety standards. Those checks were carried out annually. The ride had passed this inspection prior to the incident in question, and Mr Burton exhibited a copy of the ADIPS certificate valid for a year from 29 April 2016.

16. The cross-examination of Mr Burton did not concern the 2016 ADIPS certificate, or the general safety analysis which had been carried out by Health, Safety & Engineering Consultants Ltd in 2005. The focus of the cross-examination on the latter document was on Mr Burton's statement that in a car overspeed situation, the car would go in the region of 0.5 to 1 second quicker than usual. It is fair to say that, as emerged in Mr Burton's cross-examination, the excerpts from the report exhibited as DB 6 did not provide any clear support of the 0.5 to 1 second figure which Mr Burton had given.

17. In cross-examination, Mr Burton said that although overspeed was listed as a fault, it was not actually a fault "down to the fact that it's two sensors too close together". The magnetic pulses that went to the computer system were too many, so the computer "thought it was going quicker, but the car was travelling at the same speed". The computer system monitored these magnetic pulses every micro-second. He accepted that this was a "fault". He also accepted that his own involvement that day had been to carry out various checks in the morning prior 09.40, and that his knowledge of what happened that day was therefore based on the documentation that was later completed by others. However, he could say that, when he handed things over in the morning, everything was working correctly.

18. He was asked about when the problem with the sensors had been discovered, and he said that he could not remember the time off the top of his head. It may have been the day after, but he could not give a definite time. He accepted that if the fault that was causing the problem had been found at the 11.55 investigation, then the other faults that happened later during the day "potentially" would not have occurred. He could not assist on what investigations had actually been carried out when the 11.55 incident, or the later 12.55 incident, occurred.

19. The recorder was interested in how the sensors had actually been moved. Mr Burton could not really assist on how this happened. He did explain that the sensors were just off the track, and they measure a magnetic strip on the side of the car. In relation to the three overspeeds recorded in the morning and early afternoon, it was the same sensor that was in the wrong position, but nobody had thought that this was the problem at the

time. He could not comment on what the people attending the ride actually did, but he would like to think that they would have done something. The recorder put to him: "Just stopped it for the time it took to work out what the problem really was", and Mr Burton answered "Yes". He explained that the whole ride was split into separate "blocks" (in other words segments), and if there was a "problem with a block it will stop the car, like an emergency stop, in that block". The next car along will stop in the block behind and it will stop the two cars colliding.

20. Mr Burton was asked why, according to the DID, it took 2 hours 55 minutes (from 14.20 to 17.15) for the ride to be restarted. He explained, by reference to an entry under the heading "Maintenance action taken as a result of the above", that there was a "Block 6 air line blow". This was a reference to the blowing of the air line that supplied the air to the safety brake. If the air supply is lost, then the brakes spring closed. This occurred in block 6, and the cars in the other blocks behind it – including the claimant's car in block 2 – would have stopped. He said that all the guests had been removed from the ride by 14.50, some 18 minutes after the claimant had entered the car for the ride with her son. From 14.50 to 17.15, someone would have been working on the air line.

21. It was put to him by Mr Wheatley, for the claimant, that "part of the cause of the incident at 14.20 was the air line blown". Mr Burton said: "Yes, that would've been probably the main, the main contributing factor, the air line blown. Once that, once that had shut down that would've shut the rest of the ride down and would've closed the blocks and stopped the two cars". The brakes are air open, sprung close; and so would have closed as soon as it lost its air: "once it's shut down, it's stop dead". This was a fail safe. He was asked whether the air line would have been affected by the overspeed problem, and said that "speed has nothing to do with the braking pressure". He said that the problems at 11.55 and 12.55 had nothing to do with the hose (i.e. the air line). The recorder then checked with Mr Burton whether he was saying that there were two separate issues: Mr Burton confirmed that this was the case, and that they were not connected. He said that the "14.20 one was ultimately due to the air pipe blowing the shutter brakes and closing them".

22. He was then asked about the passages in his witness statement concerning the overspeed being only 0.5 or 1 second. He said that in a "car overspeed situation it's going to be minimal speed". He agreed, however, that the excerpts at DB6 did not say that in an overspeed situation, the car would be going 0.5 to 1 second quicker. He could not actually say what speed the car was going on the day.

23. In re-examination, he explained that he had been part of a group of engineers who had investigated the overspeed issue, and that it was eventually found to be the speed sensors being in the wrong position. After they were moved back into the correct position, there had been no overspeed problems on the ride. He explained again that the problem was the computer seeing too many pulses, and thinking the cars were going faster than they were.

24. He was asked about the car affected by the overspeed issue at 14.20. This was shown in the DID to be Car 5. He explained that this would stop the car behind, to stop it going into the next block: it was a fail-safe to stop the cars colliding. Similarly, the air line issue would have affected block 6, and then the cars in the blocks behind would be stopped as well. This would engage an emergency stop: it would "shut the brakes up and stop the cars dead".

25. Finally, the recorder asked some further questions. Mr Burton explained that the car was driven up the lift by the drive chain, then dropped off the stop and it was gravity which then took it. Mr Burton agreed that the speed at which the car is going will affect the effect on guests when the emergency brake was triggered.

Submissions on Day 2

26. In his oral closing submissions, Mr Lambert for Merlin started by referring to the skeleton argument that he had provided in advance of the hearing. That skeleton had summarised the case on breach of duty as follows:

> "In summary, the Claimant's case on breach of duty is misguided: the ride was audited as complying with relevant guidance/ industry practice; the brakes specifically had been checked and were in working order; there was nothing about the 11.55 error that ought to have put the Defendant on "notice"; the overspeed signal was caused by the sensors being too close together rather than any overspeed; and in the alternative any overspeed was de minimis. Further, temporary repair is part and parcel of day to day practicalities of running a theme part and not indicative of failure or breach of duty".

27. In his oral closing, Mr Lambert submitted that there were three fundamental factual hurdles for the claimant to overcome before even reaching the issue of standard of care and breach. First, was there actually a genuine overspeed or a genuine problem with the brakes? Secondly, if so, was that something that actually affected the claimant in her car. And thirdly, even if there was and it affected the car, how much was the overspeed and could it have caused foreseeable injury. Those questions arose before one reached the question of whether the defendant did anything wrong and whether the injury could have been avoided but for doing anything wrong.

28. On the first point, Mr Lambert submitted that there was no actual overspeed; it was just that the computer thought that the car was going too fast. In that connection he referred to the evidence of Mr Burton, who was a witness in whom the court could have complete confidence. He also submitted that nothing was out of control: it was just the safety mechanism working. An overspeed in any meaningful sense was actually impossible; because as soon as the car goes over the prescribed parameters the system will shut down. This was not a case of the brakes not working or a car spinning out of control.

29. On the second point, Mr Lambert said that even if there was a genuine overspeed, this did not affect the claimant. She cannot have been going very fast at the time when she stopped. She had just gone up the incline, and this would be slow: for some of the inclines, a car is pulled up by chains. So she could not have been going very fast at the time she stopped. Reliance was placed on a photograph taken at the time when the car stopped. In addition, the claimant's car was not directly affected. The overspeed is recorded as having occurred on other cars (not the claimant's car, which was car 4), and the air line problem occurred on block 6 – which was not where the claimant's car was. The shut down then occurred in a controlled way.

30. Thirdly, any overspeed was no more than de minimis, and could not therefore have caused injury. Mr Lambert referred the recorder to his skeleton argument on this point. He submitted, as he had in paragraphs 24 – 28 of his skeleton argument, that any difference between the speed that the car was going, and the speed that it should have been going, was de minimis. It could not be characterised as negligent, causally significant or giving rise to a foreseeable risk of injury. Reference was made both in oral closing, and in the skeleton argument, to various passages in 2005 consultants' report, including the statement that:

> "Examination of the available guidance advising allowable accelerations suggests that the forces likely to be experienced by a passenger during a normal ride cycle are within acceptable limits."

Reference was also made in the skeleton to the April 2016 ADIPS certificate.

31. Mr Lambert then submitted that if those problems could be overcome, then the court would need to decide if Merlin's conduct was negligent in any way. Mr Lambert referred in this connection to Mr Burton's evidence that the main or sole cause was the air line rather than the overspeed: that is why the system shut down, and the two problems were unconnected. It had not been suggested that there was any negligence in relation to the air line.

32. Mr Lambert submitted, again, that this was not a dangerous situation where, for example, brakes were not working or a car was out of control. What happened here was all part of the fail safe.

33. Next, turning to causation, Mr Lambert submitted that there was no link between what happened in the morning and the burst air line. Furthermore, the cars affected by the overspeed were different; so repairing car 9 would not have affected car 4, which was the claimant's car.

34. However, the "real fatal blow" on causation was that the claimant had to establish that she would not have been injured if the ride was travelling at its normal speed, whatever the normal speed is; but because of the overspeed she had been injured. In that regard, reliance was placed upon evidence from Merlin's medical expert: that the claimant had experienced forces on her spine that would have been expected in the absence of the slight acceleration of the ride. If somebody with a bad back goes on a ride, and is exposed to forces, it may have caused the injury; but that was because the person went on the ride. It had nothing to do with the de minimis amount by which it oversped, if indeed it did overspeed. Accordingly, any overspeed was not the cause of any injury.

35. Mr Lambert also advanced an argument on contributory negligence, albeit that this has not featured on appeal. He also criticised aspects of the claimant's evidence, submitting (amongst other things) that she was prone to exaggeration. He referred to her evidence that her car, after the stop, had been spinning for 30 minutes; whereas the documentary evidence showed that she was evacuated within 18 minutes of having started the ride.

36. Mr Lambert then made some points in relation to quantum. He referred to expert agreement as to a relationship between deceleration forces and the scope of injury. Here, there had been a very minimal extent of deceleration and therefore a

commensurately minimal injury. It is not necessary here to describe the other points which Mr Lambert made in relation to quantum.

37. In his closing submissions for the claimant, Mr Wheatley said that whilst part of the claim referred to acceleration, the claimant's case was also that the ride should guard against deceleration. In that regard, he referred to the agreed views of the orthopaedic experts that it was deceleration that caused the claimant's injury.

38. Mr Wheatley submitted that Merlin's case, that the speed was not such as could have been injurious, had "collapsed fairly dramatically yesterday afternoon". He said that Merlin had admitted, in its defence, that the overspeed issues were a "fault". The argument that the car was going slower rather than faster was in contradiction to the defence, and would require an amendment, although he was making that point as an evidential rather than a pleading point.

39. There was no witness called by the defence who had witnessed the ride or the speed or the sudden deceleration or the evacuation. The documents relied upon by Merlin were not self-proving, and the recorder was invited to prefer the eye-witness evidence rather than seeking to extract a conclusion from the documents. He said that the salient point was that both the claimant and her friend were not moved on their evidence that the ride on that day was "frighteningly fast and that it stopped abruptly". Both women had experience of other rides at other parks, and could properly draw a conclusion that this ride was very different to what they expected: it was too fast, it was too frightening and it undoubtedly stopped abruptly. Those ladies were sitting on the ride and experienced this. They were in the best position to say what took place on the day.

40. If their evidence was accepted, then in the light of Merlin's records of problems on the day, there was negligence. This was the third failure that had occurred on the day, and there was no evidence to explain what had been done by way of repair on the first two occasions. The ride, having been repaired twice, should have been stopped by Merlin. In that context, reliance was placed on Mr Burton's evidence, in particular in response to the recorder's question as to something needing to be done. The problem with the sensors should have been discovered, but was not discovered until the following day, on Mr Burton's evidence. It was grossly negligent to expose people to this risk on a fast-running potentially dangerous ride. Mr Burton's evidence was that the emergency brake system stops the cars dead: these cars were going at speed, and there was deceleration. This incident was wholly avoidable: the speeds but also the deceleration should have been avoided.

41. In relation to speed, Mr Wheatley submitted that Mr Burton's evidence, that the car was only going marginally faster, was based on a misunderstanding of exhibit DB6, and this had become clear in cross-examination. That point had gone. The case that the claimant was not exposed to "high levels of speed and a high level of acceleration" had vanished.

42. In relation to causation, Mr Wheatley referred to the claimant's evidence that she had been on other rides at Alton Towers and elsewhere and these had not triggered any reaction. He referred to the agreed orthopaedic evidence that the claimant had been subjected to a deceleration force to her spine following the emergency stopping of the ride. The issue identified by the experts was whether the overspeed had or had not initiated a planned, slowly controlled shutdown following a minor overspeed. The recorder was invited to prefer the view of the claimant's expert, which was based on

the claimant's evidence (which the recorder should accept) as to what had happened. It was for the court to decide whether this was or was not a slow deceleration, which (the experts agreed) would suggest minimal trauma to the spine and consequently minimal symptoms. The recorder was invited to accept that the claimant was telling the truth.

43. Mr Wheatley then made various points in relation to quantum.

C: The judgment

44. The recorder proceeded to give judgment immediately following the close of submissions, and the appeal has been argued by reference to the approved judgment. It is a brief judgment, running to 33 paragraphs and just under 3 pages of single-spaced text. Bracketed numbers hereafter refer to the paragraphs of her judgment (save where I refer to authorities in section E below).

45. The recorder began by summarising the evidence of the claimant: she was aware from an early stage that there was something unusual and wrong with the ride – it was going faster than she would have expected and faster than was her experience. The ride had stopped, leaving her trapped at the top of the ride on a particularly hot day: [3] – [5]. The evidence of the claimant's friend, Ms Cetin, was that she felt that there was something wrong with the ride. The car had then stopped suddenly at the top of the rollercoaster: [6] – [7]. She accepted the claimant's evidence that her car had stopped spinning rather later than Ms Cetin's car [8].

46. The recorder then referred to the DID, which showed the three separate incidents of car overspeed that day, saying that there was no doubt that there were faults with the ride [10] – [12]. The third incident was the more serious of all of these episodes.

47. The recorder then referred to

> "a further and, I think, unrelated problem, block six airline blown, which happened, I believe, in the morning".

48. The recorder said that Mr Simms could not really add a great deal other than referring to documentation in the file as to what happened. The documentation showed the ride stopped at 14.20, that the evacuations started in 12 minutes, and the last evacuation took place 13 minutes after the ride had come to a halt [13] – [14].

49. She then said that the "more important and more significant evidence" came from Mr Burton [16]. She referred to his evidence that an explanation of the overspeed was that the sensors had been moved manually. Mr Burton could not give an explanation as to why this had happened, but "in itself this raises serious questions as to how the ride is operated". Mr Burton had said that the sensors were not checked between the incidents. The recorder found him to be an "honest, candid and in many ways an impressive witness". She referred to his conclusion that those operating the ride would have been perhaps a little reluctant to examine exactly what was going on because they did not wish to close the ride down [17] – [18]. She then discussed his evidence as to the minimal overspeed, and his acknowledgment that there was no evidence as to what speed the cars were travelling at the time [19].

50. The heart of the recorder's reasoning on liability is contained in paragraphs [20] – [25].

> "[20] It therefore appears to me that on the facts of this case there clearly was [fault] on the ride on the day in question, and that fault is a breach of contract and negligence and it is, as I say, significant that it did not just happen once or twice, but three times and that the real problem was not discovered until, on Mr Burton's evidence, the following day.
>
> [21] He also accepted in evidence, when the brakes come into action because of some form of overspeed, whatever the cause may have been of the overspeed, the car will stop dead and clearly the faster you are going the greater will be the impact when the car stops dead and the greater will be the impact of the deceleration.
>
> [22] Mr Wheatley says there is no evidence before me other than the evidence of the claimant and her friend as to what was actually happening on that day. The evidence of Mr Burton is based on his reading of the manual and what he would expect the situation to have been, and Mr Simms, as I say, was not there in any event.
>
> [23] I have no hesitation therefore in accepting the evidence given to me orally by the claimant and her friend, that there was significant overspeed on this particular day, that it was as described unpleasant and frightening and that the deceleration was accordingly quite significant; it was not simply a minor matter.
>
> [24] Therefore, as I say, on the issue of liability I have no hesitation in concluding that the contract itself was broken, plainly you do not expect this to happen when you go on a ride, and it is obviously also a question of had they been negligently maintained on the day in question.
>
> [25] The ride is designed to travel within specified tolerances and if you exceed those tolerances you are exposing the passengers to a risk, which they have not contracted for."

51. When dealing with quantum in paragraphs [26] and [27], the recorder made a point relevant to liability as well.

> "[26] Then we come to the question of quantum and Mr Wheatley accepts that on the evidence of Mr Norrish, who is the orthopaedic expert for the claimant, the claimant must be limited to two years from the date of the accident.
>
> [27] It is also right to say the evidence from Mr Norrish is that if you take a more serious deceleration then the damage done to the neck and back region would have been greater than if the deceleration had been less, that must be right and as I have said

> I accept that in this case the deceleration was considerable and certainly more than the defendants were arguing for."

52. The recorder then addressed other aspects of quantum, awarding the claimant £ 18,000 by way of general damages. There was then a discussion with counsel as to other aspects of the quantum.

D: The arguments on appeal in relation to liability

Merlin's argument

53. On behalf of Merlin, Mr Lambert's principal submission, and the first ground of appeal, was that the recorder had failed to engage with Merlin's central arguments and had not therefore given any or any adequate reasons on breach of duty. He said that there was no discussion or analysis of four points, but he emphasised the first two.

54. First, there was no discussion or analysis of Merlin's central submission that there was not a genuine overspeed. The recorder had accepted the central tenet of Merlin's argument that the speed sensors had been moved. Logically, that should have led to the finding that there was no true overspeed but only a true computer error. Thus, reconciling this with a finding for the claimant required an explanation. (Ground 1(a))

55. Secondly, there was no discussion or analysis of contemporaneous documentary evidence which proved that, to the extent the roller-coaster "oversped", this occurred on a different car; not the claimant's car. (Ground 1(b))

56. Thirdly, there was no discussion or analysis of how much faster the claimant's car was travelling and how this was technically possible given Marlin's override system, which shut off a car as soon as it is even fractionally over the default speeds. (Ground 1(c))

57. Fourthly, there was no discussion or analysis of the air line pipe as an alternative cause of the claimant's alleged accident. This would be unrelated to overspeed and the previous repairs. (Ground 1(d))

58. In the alternative, as ground 2, Mr Lambert put forward essentially the same points as mistakes of fact which the recorder had made.

59. Ground 3 concerned causation. It was contended that the recorder did not give reasons as to whether, and if so why the overspeed caused injury, but the "normal" speed and jolts of the ride would not have done so.

The claimant's argument

60. The claimant's response to the appeal was initially contained in a skeleton argument written by trial counsel, Mr Wheatley. He was unavailable for the appeal, and Mr Simon King then submitted a short supplementary skeleton. Whilst adopting and relying on the points made in Mr Wheatley's skeleton, it is fair to say that Mr King's argument was rather different or at least involved a considerable refinement of the case.

61. In the original skeleton argument, the first 8 pages dealt with the case advanced and the evidence at trial, before turning to the specific grounds of appeal. In those opening 8 pages, it was submitted (consistently with the case previously advanced) that the

claimant had travelled at enormous speed in the rollercoaster car, and she and her son had been thrown around. The car then stopped abruptly. The usual speed of the ride and any additional speed caused by the fault were "central matters for determination". Reference was made to the evidence of the claimant and Ms Cetin that the ride had behaved unusually and travelled too fast. The emergency stop was a surprise. Reference was made to a central part of Mr Burton's witness statement being the suggestion that the guests were not exposed to excessive speeds, and that even in a 'car overspeed' situation the car would not be travelling significantly quicker. But it was submitted that the oral evidence of Mr Burton in relation to speed, referred to by the recorder in paragraph [19] of her judgment, had "removed the central plank" of Merlin's position, and that this "cannot be underestimated". It was argued that, in consequence, it "meant that Mr Burton had to concede that he could not challenge the Respondent's evidence in relation to the speeds she had experienced on the day in question". It was submitted that none of the documents relied upon by Merlin, or answers given by the claimant or Ms Cetin, detracted "from the [claimant's] case that the Dragon Ride malfunctioned and caused the cars to travel too quickly".

62. It will be apparent from the above that the focus of the claimant's case, both at trial and in these pages of the grounds of appeal, was that the cars were indeed travelling too quickly. Under the heading "Conclusions of the Recorder", it was submitted that:

> "By the end of the evidence … it had been established that Mrs Idziak and Mrs Cetin had experienced excessively high speeds on the ride, requiring an emergency stop which was unpleasant and frightening. The main plank of the Defence, namely that any overspeed would be minimal and unlikely to cause harm. … [I]t was entirely foreseeable that a further overspeed would occur, and foreseeable that when it did the Respondent would be injured".

63. Each of the grounds of appeal was then addressed. In relation to ground 1 (a) (the argument that there was no genuine overspeed, as opposed to a computer error), it was submitted that Merlin had failed to amend its defence "or withdraw the evidence of Mr Burton which clearly suggested the contrary, namely there had been a physical increase in speed". The overspeed had resulted in a physical increase in speed (rather than the computer merely thinking one had occurred). It was submitted that Mr Burton had given evidence that the overspeed caused the cars to increase in speed.

64. In relation to ground 1 (b) (the argument that it was not proved that the claimant's car 4 oversped), various factual points were raised. None of these points were in fact made in the recorder's judgment, to which there was no reference in this part of the written argument.

65. In relation to ground 1 (c) (the argument relating to how much faster the claimant's car was travelling), it was submitted that this was an artificial point. There was again no reference to any part of the recorder's judgment.

66. In relation to ground 1 (d), (the argument on causation in relation to the air line), again various factual points were made, but there was no reference to any part of the recorder's judgment.

67. In the remainder of the written argument on the liability issues, the claimant reiterated that it was her case that her car had travelled at excessive speeds. It was also submitted that the recorder "did not make a finding that the sensors had been moved such that there was no overspeed". This was a contortion of logic which Merlin sought to impose on the judgment. It was accepted that the claimant had a medical history which included back pain, but reference was made to her evidence that this had never manifested in back pain when travelling on a ride.

68. The position advanced in Mr King's short supplemental skeleton argument was rather different. This focused on the emergency stop. It was submitted that:

> "despite much time and attention at trial and in the Appellant's 25-page Skeleton Argument being devoted to the issue of what precisely the fault was, this does not actually appear to matter: whether the emergency stop happened because the "car overspeed" caused the car to travel too fast for safety (as appears to be admitted in the Defence), or whether it happened because sensors on the car had been moved manually by the staff to incorrect positions so as, in effect, to "trick" the computer into thinking that the car was traveling too fast for safety (as … Mr Burton appeared to believe …), the result was that the ride shut down in an emergency stop – causing a deceleration injury to the Claimant".

69. In his oral submissions, Mr King submitted that justice in the county court can be a bit rough and ready. The recorder in the present case was not helped by the divergence between Merlin's pleaded case (which suggested an actual increase in speed) and the case advanced at trial, namely that there was no real increase in speed. He submitted, as reflected in his supplemental skeleton, that this did not actually matter. The factual position was that the ride was not functioning as it should have been, and this led to the emergency stop. The vice was not whether the car went slightly faster than it should have done, or whether sensors were in the right place. The vice was that Merlin allowed the situation to continue, and then allowed passengers to be subject to deceleration forces in an emergency stop. He submitted that the recorder was alive to this point, as can be seen from paragraph [21] of her judgment. He accepted that there was, as he put it, a "lack of clarity in analysis" in paragraph [23] of the judgment. But this did not matter, because of what the recorder said in paragraph [21]. The important point is that the claimant was entitled not to be exposed to forces involved in deceleration. This was the essential point and was the essence of what the recorder decided, albeit that she did not express it that way. It was, however, an unanswerable point, on the evidence before the court. Accordingly, there should be no retrial, even if there was some flaw in the way in which the recorder expressed herself.

E: Legal principles concerning adequacy of reasons

70. Mr Lambert's skeleton argument addressed in detail the case-law concerning the need for adequate reasons in a judgment. There was no dispute as to the relevant legal principles in that regard.

71. In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, there was a failure by the judge to give reasons for his decision to prefer the evidence of the defendants'

experts over that of the claimant's. Henry LJ, giving the judgment of the court, said (at 381 to 382) in relation to the duty of a judge to give reasons:

> "(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex parte Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
>
> (2) The first of these aspects implies that want of reasons may be a good self−standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
>
> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence, but it is not necessarily limited to such cases.
>
> (4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same; the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

72. This passage was cited by the Court of Appeal in *English v Emery Reinbold & Strick Ltd* [2002] EWCA Civ 605, where the court said that:

> "[17]. We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.
>
> …
>
> [19] It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process.
>
> …
>
> [21] When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision.
>
> …
>
> [118] In each of these appeals, the judgment created uncertainty as to the reasons for the decision. In each appeal that uncertainty was resolved, but only after an appeal which involved consideration of the underlying evidence and submissions. We feel that in each case the appellants should have appreciated why it was that they had not been successful, but may have been tempted by the example of *Flannery* to seek to have the decision of the trial Judge set aside. There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the Judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision."

73. In *Baird v Thurrock Borough Council* [2005] EWCA Civ 1499, the Court of Appeal was dealing with an appeal in a personal injuries action. The claimant suffered injury when working on a dustcart. Two fellow employees, who had not seen the accident,

gave evidence as to the position of a wheelie bin immediately after the claimant had suffered injury. The judge accepted the evidence of the claimant that he was hit by the right-hand side wheelie bin as it descended. The evidence of two fellow employees (Ms Garwood and Ms Mulqueen) was that, when they found the claimant injured, the bin had been in a raised position, thus suggesting that the claimant's evidence was wrong.

74. The court said (at [17]) that a judge is entitled to express the reasons for his decision briefly, but the reasons must be sufficient to explain why he reached that decision. It concluded that the reasons in that case did not meet the test of adequacy. The court concluded at [18] that the judge had never grappled with the need to explain why it was that he rejected the evidence of the two employees, and also that the judge had not understood the importance of the evidence which they had given. Gage LJ said this in relation to his conclusion that the judge's reasons were not adequate:

> "[19] I reached this conclusion for four reasons. It is not clear, from his judgment, that the judge understood the importance of the evidence given by Ms Garwood and Ms Mulqueen. If their evidence was correct, the claimant could not have been injured by the right-hand side wheelie bin because, on his version of the accident, it would have been found after the accident in the down position. The evidence of the two lady witnesses was that it was in the raised position after the accident, which is wholly inconsistent with the version of the accident given by the claimant. Secondly, the judge made no finding on the issue of whether, when the dustcart drove off, the right-hand side hoist was in the down position or upright. He did not find whether or not Ms Garwood was right when she said that, if the claimant said it was in the down position, the wheelie bin would have been left behind. Thirdly, having said that, in his opinion, neither of the two ladies were in any way trying to mislead the court, the judge did not explain on what basis their evidence was untruthful or inaccurate in respect of the position of the wheelie bin after the accident and after the vehicle drove off. In my judgment, it was necessary for him to explain that inconsistency if he was to say that he was accepting the claimant's evidence in preference to the evidence of those two witnesses. Fourthly, the judge cited the expert's evidence as corroborating the claimant's evidence. As the defendants submitted in their skeleton argument, that is factually incorrect. It is true that Mr Page's statement concluded that the accident was due to lack of proper training but he did not venture an opinion, nor could he, as to how the accident occurred. Put shortly, in my judgment, the judge never grappled with the need to explain why it was that he rejected the evidence of Ms Garwood and Ms Mulqueen on the crucial issue, the issue of how the accident happened. In my view, it was not sufficient for him to say, without more, that, having seen and heard the witnesses, he accepted the claimant's evidence. He ought to have explained why he rejected the evidence of the two ladies as either untruthful or mistaken."

75. The court set aside the judgment and ordered a retrial, and declined a suggestion that it should decide the case on the transcript of the evidence of the witnesses: see [19].

76. In *Weymont v Place* [2015] EWCA Civ 289 Patten LJ said:

> "[1] The Court of Appeal does not usually entertain appeals where the only grounds of challenge to the judgment of the trial judge relate to the judge's findings of fact. Decisions of this Court and the Supreme Court have repeatedly recognised the advantages which the trial judge enjoys in hearing the live evidence and assessing the credibility of the witnesses. The function of the appeal court is not to re-hear the case but to review the decision which the trial judge has made. For this reason, it will only interfere with his findings of fact if it becomes clear that there was no evidence to support them; that the judge misunderstood the evidence; or that he made findings which no reasonable judge could, in the circumstances, have made see *Re B (a Child) [2013] UKSC 33* at [52]-[53].
>
> …
>
> [4] But the relative immunity of the trial judge's findings of fact to interference on appeal depends upon the trial process having been conducted in a way which confirms that the trial judge has properly considered and understood the evidence; has taken into account the criticisms of the evidence advanced by the parties' legal representatives; and has reached a balanced and objective conclusion about points on which differing or inconsistent evidence has been given in making the factual findings which form the basis of his decision.
>
> [5] An important aspect of this process is the production of a properly reasoned judgment which explains to the parties and to any wider readership why the judge has reached the decision he has made. This includes making a reference to the issues in the case; the legal principles or test which have to be applied; and to why, in cases of conflicting factual evidence, the judge came to accept the evidence of particular witnesses in preference to that of others.
>
> [6] The judge is not, of course, required to deal with every point raised in argument, however peripheral, or with every part of the evidence. The process of adjudication involves the identification and determination of relevant issues. But within those bounds the parties are entitled to have explained to them how the judge has determined their substantive rights and, for that purpose, the judge is required to produce a fully reasoned judgment which does so: see *English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605* . The production of such a judgment not only satisfies the court's duty to the parties but also imposes upon the

> judge the discipline of considering the detail of the evidence and the legal argument."

77. In *Simetra v Ikon* [2019] EWCA Civ 1413 para [46], Males LJ made several observations of general application common to all appeals.

> "[46] Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible, I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it."

F: Discussion

78. I consider that the recorder failed adequately to engage with the arguments which had been advanced on Merlin's behalf, and that it is not possible to discern the basis on which she rejected the key aspects of Merlin's case. The result is that the judgment is not coherent and does not adequately explain why Merlin's case failed and the claimant's case succeeded. As explained below, the most important point is Ground 1 (a), but I also accept the points made in 1 (b) and 1 (d). I do not need to discuss Ground 1 (c), since it does not arise in view of Grounds 1 (a) and 1 (b).

79. Before addressing the detail of the points raised on Merlin's behalf, I will say something about the recorder's approach to giving judgment in this case. Judges give "ex tempore" judgments all the time, and there is nothing in principle wrong with that: the system could not properly function if every decision was reserved. However, this was not a straightforward case in which to give a judgment immediately after closing arguments had concluded, without any period of reflection at all. There were a large number of arguments advanced in closing, both on liability and quantum. The liability arguments were made in the context of evidence of a technical nature as to how the systems at the ride operated. Mr Burton had given evidence for some time, and a number of different matters were explored. As well as Mr Burton's evidence, there was technical documentation before the court, such as the 2005 report prepared by safety consultants, and on which Merlin was placing reliance.

80. In my view, on the liability issues alone, this case called for a period of reflection so that the recorder could properly understand the interplay between the closing arguments that she had only just heard and the evidence which she had heard and read, in particular as to the ride systems. The recorder might have been able to give an ex tempore judgment later that day: Mr Lambert explained that the afternoon was available for the hearing, but was not in the event used. Even this might not have been easy, and it would probably have required the recorder to have used the written opening submissions, and her knowledge of the evidence, in order to prepare a draft judgment in advance of closing arguments, and then to reflect on whether the closing arguments raised any new points that she needed to address. However, to give an ex tempore judgment immediately following closing submissions, and without any period of reflection at all, was in my view challenging and ambitious.

81. It is also apparent that the recorder was not well-prepared for the judgment on which she embarked. For example, one of the points advanced by Mr Lambert, based upon the evidence of Mr Burton, was that the cause of the stoppage at 14.20 was not the "overspeed", but rather was the problem in the air line which required an extended period of repair. There was a potentially important causation point here: since, as Mr Lambert submitted, the air line issue was unrelated to the overspeeds that had been recorded earlier that day, and there was no case advanced that Merlin was negligent in relation to the air line.

82. The recorder's judgment refers to the air line only briefly, and with no discussion at all of Mr Lambert's argument. She says:

> "There was also a further and, I think, unrelated problem, block six airline blown, which happened, I believe, in the morning".

83. The statement that the air line problem had happened in the morning was wrong according to the DID and Mr Burton's evidence, and Mr King did not seek to suggest otherwise in his submissions on appeal. If Mr Burton's evidence was accepted, then this was a problem which occurred in the afternoon. If the recorder was rejecting that evidence, despite her view that Mr Burton was honest candid and impressive, then she gave no reasons for doing so. Indeed, it is difficult to see how she could have rejected that evidence, in circumstances where Mr Burton was cross-examined on the basis that part of the cause of the incident at 14.20 was that the air line had blown. The fact that the recorder mistakenly understood the problem to have occurred in the morning, rather than in the afternoon at around the time of the incident relied upon by the claimant, explains why she did not address the causation argument that Mr Lambert had advanced in the course of his closing submissions, but it obviously does not excuse her failure to do so.

84. The recorder also said in this passage that the air line problem was "unrelated". In one sense it was unrelated: Mr Burton's evidence was that it was not related to the "overspeed" problem. In another sense, however, it was related: Mr Burton said that it was related to the stoppage experienced by the claimant. His evidence was that this was the main contributing factor to the ride having stopped the cars on the ride at 14.20. This became the foundation of an argument on causation advanced by Mr Lambert. The recorder does not appear to have understood the potential significance of the point.

85. A second example of lack of preparedness is the recorder's approach to the quantum issues. These had been argued out in the course of the submissions that morning. Ordinarily, they would be addressed in full in a judgment. However, they were not addressed in the judgment given by the recorder. Instead, she said [33] that "then we come to special damages, I may just need some assistance on these figures". There then followed a dialogue in which various points were made, and the recorder gave decisions, in some cases without reasons, in the course of the dialogue.

86. Against this background, it is perhaps unsurprising that there are significant problems with the recorder's judgment on liability issues.

87. The first significant problem, addressed in ground 1 (a) of the grounds of appeal, concerns the issue of whether there was or was not a genuine overspeed at all, as opposed to a computer error. In that regard, the recorder clearly accepted the evidence of Mr Burton as to the cause of the overspeed "faults" that were reported on three occasions on the day in question. She was clearly impressed by Mr Burton as a witness, and referred at [20] to how the "real problem was not discovered until … the following day". The problem which Mr Burton described, and to which the recorder was referring, was that the sensors had been moved so that they were closer together than they should have been.

88. However, the recorder did not then discuss or analyse (and in my view did not appreciate) the consequences of this important finding, even though this had been spelt out clearly in the written and oral submissions of Mr Lambert for Merlin. The significant point is that this movement of the sensors, so that they were in the wrong place, made it seem to the computer that a car was travelling faster than it should have been; because, as Mr Burton had explained, the computer was reacting to impulses received from the sensors and these impulses were too close together. However, it followed, logically, that the car was not actually going any faster. Since the recorder had accepted Mr Burton's evidence as to the cause of the problem, there is no apparent basis on which she could then have rejected the point which logically followed. And if she was indeed rejecting it, there is no explanation as to why she was doing so.

89. This logical conclusion, that the car was not actually travelling any faster, had significant implications for the case advanced by the claimant, and which Merlin was meeting at trial. The claimant's case, advanced in the Particulars of Claim and then in the claimant's evidence and Mr Wheatley's oral closing argument, was that the car was going much more quickly than the claimant expected, and more quickly than it should have been. Allied to this, as discussed below, was the argument that there had then been a rapid deceleration. The recorder accepted the case as to a "significant overspeed on this particular day" [23], and accepted the evidence of the claimant and her friend that the overspeed was "unpleasant and frightening and that the deceleration was accordingly quite significant; it was not simply a minor matter". The recorder then said [25] that the ride was designed to travel "within specified tolerances and if you exceed those tolerances you are exposing the passengers to a risk, which they have not contracted for". In paragraph [27], when discussing quantum, the recorder referred to "a more serious deceleration".

90. However, once Mr Burton's technical explanation of the problem was accepted, the argument that the claimant's car was actually going more quickly, and outside the design tolerances referred to by the recorder, was no longer sustainable. This was Mr

Lambert's first point put before the recorder in his oral closing: there was no "actual" overspeed, but simply something which was perceived by the computer as an overspeed. This was therefore destructive of the claimant's case that the car had been running much faster than it should have been, resulting in the unpleasant and frightening experience which she described in her evidence.

91. The recorder's judgment does not address this point. Her approach was to accept the evidence of the claimant and her friend as to their perception of the speed of the ride, and that it was not running as it should have done. The claimant's evidence was based upon her experience at other theme parks and was, on any view, impressionistic. She was also a witness that the recorder considered to have given inaccurate evidence in relation to the length of time before she was evacuated, and indeed, on some aspects of quantum, to have exaggerated her case. The evidence given and called by the claimant as to the speed of the ride therefore needed to be considered in the light of Merlin's evidence that the ride was not actually running any faster. There is, however, no explanation as to how the recorder's acceptance of Mr Burton's evidence as to the cause of the problem - placement of the sensors too close together, meaning that there was no actual overspeed – could be reconciled with the claimant's evidence as to the car going far too fast and in a manner in which it should not have been operating. Furthermore, once the recorder had accepted the reasons given by Mr Burton for the "overspeed", there was nothing to suggest that the car was operating outside the tolerances to which the recorder referred in paragraph [25].

92. I do not accept Mr King's submission that paragraph [23] of the judgment was no more than a "lack of clarity" in the reasoning of the recorder. In my view, it shows that a fundamental part of her reasoning was that there was an actual overspeed on the day in question, and that this was unpleasant and frightening. She made a similar point in paragraph [25], as to the ride being designed to travel within specified tolerances, and that if those tolerances were exceeded, then passengers were exposed to a risk.

93. It is no coincidence that this was a fundamental part of her reasoning, because an actual and significant overspeed was a central part of the case that was being advanced by the claimant at trial. This is apparent from various documents, including the Particulars of Claim and the transcript of the oral closing. It is, however, sufficient to refer to the claimant's skeleton argument on the appeal, described above. For example, in paragraph 6 of that skeleton, Mr Wheatley had submitted that the "question of the usual speed of the ride and any additional speed caused by the fault were central matters for determination". Paragraph 11.9 referred to the claimant's case that the ride malfunctioned "and caused the cars to travel too quickly". Paragraph 15 referred to "excessively high speeds on the ride", and argued that the "main plank of the Defence, namely that any overspeed would be minimal and unlikely to cause harm, had disappeared".

94. The true position is that once Mr Burton's evidence was accepted, the "main plank of the defence" had not disappeared. On the contrary, the defence that there was no actual overspeed had succeeded, and it was the claimant's case on overspeed which had disappeared. This argument, and related arguments, advanced in Mr Wheatley's skeleton argument are therefore erroneous. In my view, the skeleton argument fails (as did the recorder in her judgment) to appreciate the significance of the finding which the recorder made that the real problem was that the sensors had been moved closer together than they should have been.

95. Subject to Mr King's argument raised in his supplemental skeleton, this conclusion on Ground 1 (a) is a sufficient ground for allowing the appeal and ordering a retrial. In short, on the recorder's findings, Merlin had established that there was no actual overspeed. The recorder's judgment does not explain how or why, in those circumstances, the claim could succeed. The present case for a retrial is in my view even stronger than the successful appellant's case in *Baird*. In that case, the judge had failed to deal properly with the evidence of the two women employees, including a failure to explain on what basis their evidence was untruthful or inaccurate. In the present case, the recorder positively accepted the evidence of Mr Burton as to the cause of the problem, and then reached a conclusion as to the speed of the car which cannot be reconciled with the acceptance of that evidence. Before considering Mr King's supplemental skeleton point, I will address some other arguments raised as well as the other grounds of appeal to the extent that it is necessary to do so.

96. I do not accept Mr King's submission that any problems with the recorder's analysis, and any "lack of clarity" in paragraph [23], was a consequence of a difference between Merlin's pleaded case, and the evidence adduced by Merlin at trial. At trial, Mr Wheatley made it clear that he was not taking a pleading point, and the recorder did not decide the case on the basis of a pleading point. The point that the overspeed "fault" occurred due to two sensors being too close together was made long before the trial, in Mr Burton's statement served in November 2020. It was then a central part of the case advanced at trial by Mr Lambert. For example, paragraph 11 of his pre-trial skeleton argument said:

> "In other words, the car was <u>not</u> going too fast but, rather, the sensors were too close together. Thus the computer "thought" that the car was travelling too fast, whereas in fact the car was simply travelling a shorter distance".

97. Even if there was some departure from the way in which the case had originally been pleaded, the substance of Merlin's argument was clear and, in the absence of a pleading objection, it needed to be addressed by the recorder. It is not unusual for cases to depart somewhat, and without objection, from a pleaded case. For example, the first matters particularised in paragraph 8 of the Particulars of Claim were allegations that the ride was operated with faulty brakes, and brakes that were prone to fail. Mr Lambert spent some time addressing this point, but it seems to have been implicitly dropped by the claimant and does not feature in the recorder's judgment. A pleading objection would have also have been a very unattractive point in circumstances where the claimant was permitted to call Ms Cetin without giving appropriate advance notice.

98. Ground 1 (b) of the grounds of appeal concerns the recorder's failure to deal with Merlin's argument that the "overspeed" was recorded as having occurred on a different car, and not the one in which the claimant was sitting. Mr Lambert's point was that the documentary evidence in the DID did not refer to the claimant's car, but rather (at 14.20) to another car. Accordingly, there was no evidence that the claimant's car itself was going at a speed which the computer picked up as being too fast. Merlin could therefore say that here was further evidence, contradictory to the claimant's evidence, that her car was not actually overspeeding. The recorder did not deal with this point in her judgment.

99. Mr King submitted that this was not an important point, because the evidence showed that an overspeeding problem in a different car, ahead of the claimant's car, would have a knock-on and indirect effect on the claimant's car; in that the system would cause both to come to a halt. That is true, but it does not deal with the substance of Merlin's point; that the fact that no overspeeding was detected on the claimant's car contradicted her evidence as to the ride operating, as far as she was concerned, significantly faster than it should have been.

100. Accordingly, there was here as well a failure by the recorder to engage with an important point which was made by Merlin. However, once ground 1 (a) is accepted, with the conclusion that there was no actual overspeed but only an overspeed detected by the computer because sensors were too close together, ground 1 (b) does not add materially to Merlin's case. However, the recorder should have addressed this point in her judgment, and did not do so.

101. I will deal with ground 1 (c) briefly. It is concerned with the question of the extent to which the claimant's car was travelling faster than it should have done, if it was travelling faster at all. Again, it seems to me that the important point is ground 1 (a), and the conclusion that logically flowed from the recorder's acceptance of Mr Burton's evidence as to the cause of the problem: i.e. that the car was not actually travelling faster than it should have been. Once that conclusion has been reached, any argument concerning the extent to which it was travelling faster does not arise. Thus, since Merlin succeeds on grounds 1 (a) and (b), ground 1 (c) does not need to be addressed.

102. Ground 1 (d) does raise a separate point. It concerns the air line, and whether this was the reason for the stoppage at 14.20 which affected the claimant. This was not a point which had been pleaded by Merlin. Some points on the air line had been made in Mr Lambert's written argument in advance of trial: one point being that no case of negligence was advanced in relation to the air line. The point on the air line assumed significance as a result of the way in which Mr Burton was cross-examined and the answers which he gave.

103. The argument which Mr Lambert advanced in closing – without any objection being taken on the basis that it had not been pleaded – had its origin in questions which Mr Wheatley asked Mr Burton in cross-examination. Mr Wheatley put a point on causation to Mr Burton:

> "Q. So, part of the cause of incident at 14.20 was the airline blown?
>
> A. Yes, that would've been probably the main, the main contributing factor, the airline blown. Once that once that had shut down that would've shut the rest of the ride down and would've closed the blocks and stopped the two cars".

104. This answer, and the evidence which followed, gave rise to Mr Lambert's causation argument. He submitted that the reason for the ride stopping that afternoon was the air line problem, rather than the "overspeed" issue. If so, then the claimant could not show any causal connection between the "overspeed" and the reason that the claimant's car stopped. This was significant because if the cause of the stop was the air line, there was

no case of negligence which posited that Merlin should have identified this as a problem in advance.

105. The recorder in her judgment failed to address this point at all. I have already discussed the reason that she did not do so: she misunderstood the facts, and does not seem to have understood the point. In my view, the point should have been addressed, and Merlin can fairly say that the judgment does not enable them to know why they lost on this point. Mr King submitted that there were factual answers to the point: in particular that the DID indicates that the overspeed was the reason for the stoppage. I can see that there are potential factual answers to the argument, including that it is not clear how Mr Burton, who was not involved on the afternoon of the relevant day, reached the view that the air line was the cause of the problem. However, the recorder needed to deal with the point and make relevant factual findings, and the court is not in a position on appeal to reach factual conclusions as to whether the evidence of an honest and candid witness should, on this issue, be rejected.

106. Accordingly, and subject to the argument made in Mr King's supplemental skeleton and addressed below, I consider that the appeal succeeds on the basis of Grounds 1 (a) and (allied to it) Ground 1 (b). It also succeeds on Ground 1 (d). Ground 1 (c) does not arise. It is not in my view necessary to consider either Ground 2 or Ground 3 as separate points.

107. I therefore turn to the argument advanced in Mr King's supplemental skeleton. The argument, summarised above, is that the critical feature of the claimant's case was that she suffered injury as a result of deceleration. It did not therefore matter whether the emergency stop happened because the car was travelling too fast, or because the wrong position of sensors made the computer think that the car was travelling too fast for safety. The important point was that the ride shut down in an emergency stop, causing a deceleration injury to the claimant. Mr King submitted that the recorder had understood this point, as can be seen in paragraph [21] of her judgment. He also submitted that even if this was not the basis of the recorder's decision, the argument was unanswerable on the evidence before the court, and therefore the court should not order a retrial but allow the judgment to stand.

108. I consider that the first question is whether this was the basis of the recorder's judgment. In my view, it was not. I can well understand the possibility of advancing a case of negligence along the lines set out in Mr King's supplemental skeleton. Indeed, there is a firm starting point, in the recorder's findings, for the argument that there was negligence in the way in which the sensors were wrongly moved in the first place, and in Merlin's failure until the following day, to discover the problem. The claimant was therefore in a position, subject to the air line causation question, to argue that the stoppage of the ride was brought about by the negligence of Merlin's employees. This might lead to a (probably modest) award of damages relating to the disruption of the claimant's enjoyment of her afternoon at Chessington and any distress caused by the evacuation or any delay in carrying it out.

109. However, the main claim – which was the subject of the substantial damages awarded by the recorder – was related to the injuries allegedly suffered by the claimant. This claim was not advanced on the basis now put forward in the supplemental skeleton argument. It was not suggested to the recorder that the alleged overspeeding was irrelevant; i.e. that it did not matter whether the emergency stop happened because the

car was travelling too fast. And it is not how the recorder actually decided the case. It is in my view clear that the recorder decided the case on the basis that the car was actually overspeeding. This is the only sensible interpretation of paragraph [23] of her judgment, and it is reiterated by paragraphs [25] and [27]. There is nothing in Mr Wheatley's skeleton argument for the appeal which suggests that the recorder decided the case on the basis suggested by Mr King. As already discussed, Mr Wheatley's skeleton argument asserts that the central question was whether the car was actually overspeeding, and that this had been resolved in favour of the claimant. The need for Mr King's supplemental skeleton arose from the fact that the analysis in that skeleton is contained neither in the judgment itself, nor in Mr Wheatley's skeleton argument on appeal.

110. I accept that the recorder did refer in her judgment to deceleration. In particular, she referred to it in paragraph [23]. However, her conclusion that deceleration was "accordingly quite significant" was clearly and closely linked to her finding earlier in that sentence that there was "significant overspeed". She reaches no conclusion as to whether the deceleration was "quite significant" even if there was no significant overspeed. This is also apparent from paragraphs [25] and [27], taken together. In paragraph [25], she refers to the ride having exceeded the design tolerances. Her finding in paragraph [27], as to deceleration being considerable, was premised on the design tolerances having been exceeded by reason of the overspeeding. There is nothing to suggest that she applied her mind to the question of whether the deceleration was significant even if the car had been operating within its design tolerances. This is unsurprising; because it was not the case that was actually being advanced by the claimant. However, if anything, the implication of paragraph [25] is that she thought that if the ride was performing in accordance with its design tolerances, then there would have been no breach of duty.

111. The way in which Mr King now seeks to advance the case is, as it seems to me, aimed at overcoming the difficulty created by the recorder's acceptance of the evidence of Mr Burton, and the logical conclusion that the car was not actually overspeeding. The argument is in substance an argument which seeks to uphold the decision of the recorder on grounds other than those which she relied upon, albeit that no respondent's notice was served. It is permissible for a court to uphold a judgment on the basis of a new argument if the point raised is a pure issue of law. The second question, therefore, is whether the court can now decide the case on the basis of this argument, because it is unanswerable on the evidence.

112. In my view, the answer to this question is: no. This new line of argument raises questions of fact, and its success would depend upon favourable fact findings, concerning the speed of deceleration and any negligence in relation thereto, which are not contained within the judgment.

113. For example, it would require fact findings and conclusions in relation to points raised by Mr Lambert, based on the 2005 report of the consultants and the April 2016 certificate, that there was no foreseeable risk of injury. These points were advanced at trial in the context of the claimant's case that the car was going faster than it was supposed to go. But they would also arise, and indeed would likely assume greater significance, in relation to the case advanced in the supplemental skeleton case: since it could obviously be said that there was no foreseeable risk of injury or negligence in

circumstances where the ride was operating in accordance with design tolerances which had been carefully considered.

114. Furthermore, the new line of argument raises the same question of causation as to the role of the air line in the stoppage which occurred, and which I cannot resolve.

115. Accordingly, I do not consider that it would be appropriate or permissible for the court, on this appeal, to uphold this judgment on the basis of the argument in the supplemental skeleton. I am in no position to reach conclusions on liability in relation to a case whose substance was not advanced at trial, nor in relation to causation. It follows that there must be a retrial. I appreciate that this will involve additional expense for the parties, and that the present claim is a comparatively low value multi-track case. However, the case is clearly important to both parties, and in particular for Merlin which operates a well-known theme park which very many people visit each year.

116. Mr King said that justice can be a bit rough and ready in the county court, and drew a contrast with typical judgments from the Business and Property Court in the Rolls Building, where the appeal took place. However, the role of the courts, including on an appeal, is to apply the law and do justice as between the parties. I note that the case-law on the need for adequate reasons (see Section D above) has developed in the context of county court judgments.

117. Since the appeal succeeds in relation to the liability issues, and there will be a retrial, it is not necessary to consider the separate criticisms of the judgment on quantum issues. It is sufficient to say that on many of the points argued on appeal, it seemed to me that Merlin had a strong case. For example, the recorder's award of £ 18,000 general damages seems to be considerably in excess of the applicable figures in the Judicial College Guidelines, and appears to award significant sums for psychiatric injury despite the fact that there was no psychiatric evidence before the court (in circumstances where the claimant had not been permitted to call such evidence).

Conclusion

118. The appeal is allowed and the case should be retried.