Neutral Citation Number: [2013] EWHC 353 (QB)

Case No: HQ08X02890

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2013

Before :

MR JUSTICE FOSKETT

- -

Between:

Robert Lee Uren	**Claimant**
- and -	
Corporate Leisure (UK) Limited	**1st Defendant**
- and -	
Ministry of Defence	**2nd Defendant**

- -
- -

Sir Geoffrey Nice QC and **Matthew Stockwell** (instructed by **Stewarts Law LLP**) for the **Claimant**
Richard Lynagh QC and **Shaun Ferris** (instructed by **John A Neil**) for the **First Defendant**
Derek Sweeting QC and **Keith Morton QC (**instructed by the **Treasury Solicitor**) for the **Second Defendant**

Hearing dates: 10-14, 17-19 and 21 December 2012

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE FOSKETT

Mr Justice Foskett:

Introduction

1. This case arises out of a serious injury sustained by the Claimant, then a 21-year old Senior Aircraftman ('SAC') with the Royal Air Force, when taking part in one of the games organised under the auspices of a 'Health and Fun Day' at RAF High Wycombe on 28 July 2005. The injuries sustained have rendered him tetraplegic.

2. He seeks damages for the injuries sustained against the First Defendant, Corporate Leisure (UK) Limited ('CL'), the company that supplied the equipment and personnel for the series of games undertaken during the 'Health and Fun Day', and the Second Defendant, the Ministry of Defence ('MoD'), his employers, who commissioned the programme of events.

3. In a nutshell, his case is that, as played, the game in which he sustained his injury gave rise to an unacceptable risk of serious injury and that steps should have been taken by the Defendants to avoid that risk. This could have been achieved, he argues, in a way that did not diminish the value of the game from a social point of view and, it is contended, both Defendants failed properly to assess and respond to the potential risks. The Defendants contend that the risk of serious injury was very slight and that there was no reason for modifying the way the game was played. The tragedy that befell the Claimant was, it is argued, a freak accident occurring in unique circumstances for which no-one was to blame.

Procedural background

4. The case comes before the court in somewhat unusual circumstances. The original trial took place in November/December 2009 before Field J. He found for the Defendants and dismissed the claim: [2010] EWHC 46 (QB). The Claimant's appeal to the Court of Appeal was heard in December 2010 and the judgment was handed down on 2 February 2011: [2011] EWCA Civ 66. For a full appreciation of what occurred it is necessary to read in full the judgment of Field J and the judgments of Smith LJ and Aikens LJ (with both of which Pitchford LJ agreed). In a nutshell, the appeal was allowed and the Court of Appeal directed a re-trial limited to two issues:

> (a) What was the degree of risk of serious injury entailed in the game as played on the day of the Claimant's accident?
>
> (b) Was that degree of risk acceptable in the light of the social value of the game?

5. Those issues were formulated in that fashion because the Court of Appeal held that Field J had not explained fully or sufficiently why he preferred the evidence of the First Defendant's expert (Professor David Ball) on the issue of the magnitude of the risk of serious injury arising from the way the particular game was played over that of the Claimant's expert, Mr Andrew Petherick, and the opinion of the Second Defendant's expert, Dr Simon Jones, who was not called at the trial but whose report was admitted in evidence on the Claimant's behalf (see paragraphs 133-138 below). Concern was expressed at the use to which certain statistics put forward by Professor Ball may have affected Field J's view and whether it was right for the views of eye-

witnesses on the safety of the game to be ignored. The views of Smith LJ can be found at [46]-[67] and her conclusion at [68] was in these terms:

> "My conclusion … is that I cannot be satisfied that the judge reached a sound and tenable conclusion when he held that the game as played carried only a very small risk of serious injury. I say that for three reasons. First, I am not satisfied that the judge carried out a sufficient analysis of the conflicting opinions of the experts. In particular, he failed to deal with the obvious point that this game was to be played competitively by a group of people, most of whom were fit young servicemen, who might be expected to display a considerable degree of enthusiasm. Second, I think that the judge was wrong to disregard the impressions of eye-witnesses …. Third, I am concerned about the use to which the judge put the statistics which he quoted. Considered together, those three reasons give rise to very serious concerns that the conclusion was not sound. I do not say that the judge was wrong, let alone clearly wrong, to hold as he did on this crucial issue. However, I cannot say that his decision is sound. It follows that my view is that this judgment cannot stand."

6. Aikens LJ expressed similar views at [75]-[79].

7. If the questions posed for my consideration by the Court of Appeal are answered in a way that establishes the case in favour of the Claimant, the issue of apportionment of liability between the two Defendants would arise. It has been agreed that I do not have to consider that issue at this trial if I find liability established.

8. Given the way in which the matter comes before me it is, as it seems to me, clear that (i) some matters previously in issue should be treated by me as established already and (ii) whilst ultimately the evaluation of the evidence on the issues sent to me for consideration and the consequences of that evaluation are for me, I must have some regard to the views expressed by the Court of Appeal about the evaluation of those issues to the extent that they have been articulated. Inevitably, however, any views expressed by the Court of Appeal on matters that are before me for evaluation must necessarily be treated as tentative for all the obvious reasons, principally, of course, that that court did not hear the new evidence on those issues that I have heard.

9. I held a pre-trial review on 22 October. One of the directions I gave was that the parties should prepare (a) an agreed composite schedule of those facts which are admitted and those which are not admitted and (b) if and to the extent that it was not embraced within the schedule referred to in (a), a further schedule setting out what additional facts are said by any of the parties to be binding on me at the re-trial, indicating whether there is or is not agreement to that effect. I will turn to the consequences of that direction in paragraphs 11-16 below.

10. Another issue I was invited to consider was the extent to which the evidence of Dr Jones might be relied upon at the trial before me, it being clear that the Second Defendant was not proposing to call him. I received written submissions on this

question and gave a written ruling on 7 November. For completeness, that ruling is attached as an Appendix 1 to this judgment.

11. Pursuant to that direction the following composite schedule of facts was agreed:

> 1. The Claimant's accident occurred in the course of a Health & Fun Day held at RAF High Wycombe on 28 July 2005.
>
> 2. The event consisted of 16 health stands and 4 fitness classes in the sports hall and 6 "It's a Knockout" style games in the open air (save it is not admitted that the particular games that formed part of the package were identical to any game seen in the television programme "It's a Knockout").
>
> 3. These games were played by teams representing the different "flights" present on the Station. The games were part of the Commanding Officer's Cup, a tournament between the flights that is run throughout the year.
>
> 4. The Health & Fun Day had been arranged by the Physical Education Flight under the leadership of Flight Lieutenant Taylor. The RAF contracted with Corporate Leisure ("CL") for CL to provide the above games.
>
> 5. It is common ground that the Claimant was taking part voluntarily, albeit that he was on duty.
>
> 6. During the course of the Health & Fun Day (and during the course of the various games run by CL) members of the RAF Physical Education Flight were present and were able to observe the games being played (no admission is made as to who was present at any particular time and what might have been observed by whom).
>
> 7. The last of the 6 games ("the pool game") was in the nature of a relay race. Members of the teams had to run up to an inflatable rectangular pool ("the pool"), get in over the side, grab a piece of plastic fruit floating in or under a shallow depth of water, carry it out of the pool and deposit it in a bucket, at which point the next team member was free to repeat the routine.
>
> 8. The pool belonged to Corporate Leisure (UK) Limited, a company that specialised in managing and providing equipment for "corporate entertainment" events and of a type popularised in the television series "It's a Knockout".
>
> 9. The pool had been installed on a grass playing field (rugby pitch). Inflated, the sides of the pool were cylindrical and were approximately 1.04 metres high and 0.98 metres wide. The pool's internal dimensions were approximately 4.94 metres x 3

metres. The depth of the water was about 460mm (18 inches). The run up was around 14-15 feet. Alongside part of the side of the pool over which the competitors were to make their entry and exit were 4 plastic-covered mats placed on the grass. The purpose of these mats was to provide a relatively clean surface for the competitors to land on when exiting the pool.

10. The pool was manufactured by Supa-Bounce Ltd but as an inflatable to be filled with balls, not water.

11. The Claimant was a member of one of the two teams representing IT Ops Flight and took part in the second heat of the pool games. The other IT Ops Flight team took part in the first heat. 4 teams of 4 members took part in each heat.

12. By reason of the dimensions of the pool it was not possible to enter the pool without coming into contact with the side wall of the pool.

13. Mr Berry was in charge of the First Defendant's team attending the event and before the pool game took place he told the contestants how the game was played and for this purpose he used Mr Brill or Mr Brent to walk from the start line to the pool and back again. These instructions included an outline of the object and rules of the game. Mr Berry told the contestants to be careful, use their common-sense and avoid other people when entering the pool, he did not give them any specific instructions as to how they should enter the pool.

14. The Second Defendant's individual primarily responsible for Health & Safety at RAF High Wycombe was a civilian employee called Mr Richard Cassford. He did not carry out a risk assessment for the overall Health and Fun Day or for its constituent parts such as the pool game. Field J held that Flight Lieutenant Taylor is an officer with an unblemished reputation. He prepared the risk assessments on behalf of the Second Defendant for the pool game and he did so without knowing the dimensions of the pool and without knowing in any real detail how the pool game was played or taking any steps to find out. Such assessments as were prepared by Flight Lieutenant Taylor were fatally flawed.

15. The risks assessments of the game relied upon by CL were defective.

16. During the course of the relay game, CL supervised the game.

17. Mr Berry of CL was at the side of the pool observing the game and commentating (save that for the avoidance of any doubt the Claimant's recollection is that Mr Berry was not

stood at one spot but was wandering around to the side of the pool observing the game and commentating). CL's other staff Brent and Brill were at the start point of the game.

18. Before participating in the relay game the Claimant had:

a) Already been into the pool during an earlier period of horseplay.

b) Watched contestants in the first heat

c) Watched other contestants in the second heat.

d) Was aware of the depth of the water

19. The Claimant had watched the first heat during which about half of the contestants had entered the pool by sliding over the side headfirst with their arms outstretched in front of them.

20. The other contestants had vaulted or scrambled over the side landing in the pool feet first.

21. Such were the dimensions of the side of the pool and the shortness of the run up that it was impossible to dive over the side of the pool without one's body making contact in a sliding fashion with the side.

22. The "drop" on entering the pool was about 1 metre.

23. The Claimant entered the pool headfirst with his arms outstretched in front of him. The Claimant came into contact with side of the pool.

24. The Claimant's legs flipped upwards so that he entered the pool at a steep angle.

25. None of the RAF Physical Education Flight staff who saw the games being played intervened in any way with the way in which the various games were run.

12. In relation to matters not admitted by the Claimant, the following was recorded, the Claimant's comments being italicised:

1. CL had provided the same package of games to the RAF the previous year.

The Claimant notes the ambiguity identified at Paragraph 20 of the judgment of Field J.[1]

[1] [20] of Field J's judgment was as follows: "Flight Lieutenant Taylor gave Corporal Thom the task of identifying a company which could provide a package of suitable competitive events at an acceptable price. Corporal Thom obtained details of a number of events companies from the internet and thereafter obtained from

> 2. The members of the RAF Physical Education Flight have received training in safe practices and the assessment of risks for physical activities and are capable of assessing the risks presented by such activities.
>
> *No relevant finding was made by Field J. The findings of Field J in relation to the Second Defendant's risk assessments would suggest otherwise.*
>
> 3. It was inevitable that, by contact with the side wall of the pool, the participant's entry speed would be reduced to some extent.
>
> *No relevant finding was made by Field J. This will be the subject of expert evidence.*
>
> 4. It is impossible to make sports or games of this nature risk-free.
>
> *This is not a fact but a statement of opinion and relates to issues that are for determination by the trial judge.*
>
> 5. There is an element of acceptable risk associated with the relay game.
>
> *This is not a fact but a statement of opinion and relates to issues that are for determination by the trial judge.*

13. In relation to matters admitted by Second Defendant, but not admitted by the First Defendant, the following was recorded:

> 1. When it came to his turn, the Claimant ran up to the side of the pool, launched himself over it in a continuous movement headfirst with his arms outstretched ahead of him. He hit his head on the bottom of the pool and broke his neck, fracturing his mid-cervical spine at C4, C5 and C6. The Claimant is now tetraplegic and confined to a wheelchair.
>
> 2. The Claimant ran up to the side of the pool with the intention of sliding in headfirst with his arms outstretched. He saw three people in the pool, which caused him to adopt a diagonal entry

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CL its brochure. CL had provided a package of It's a Knockout games for RAF High Wycombe's Health & Fun Day the previous year which it was felt had been a success. Corporal Thom spoke to CL's Events Manager, Katrina Oakley, who quoted a price for the same package that had been provided the previous year. Corporal Thom reported this information to Flight Lieutenant Taylor who instructed him to place an order for the proposed package of games and equipment at the quoted price. On 27 July 2005 Flight Lieutenant Taylor signed a contract issued by CL on 15 July 2005 for the provision of the six games and for "equipment only" for "Gladiator Duel" and "Barfly Stickup". Although it is plain that a game involving the pool had been provided in 2004, it is not clear that the very same relay game was played on that occasion. The view in PEd Flt was that the package of games had been a success in 2004 but no-one was certain what the pool game involved."

> to avoid landing on them. The next thing he remembers is waking up face down in the pool unable to move.
>
> 3. The person on behalf of the First Defendant who produced the risk assessment for the pool game did not appreciate that contestants might enter the pool headfirst. Mr Berry who reviewed the risk assessment for the Second Defendant in 2003 did not amend the risk assessment in any way to indicate that any thought had been given to the method of entry.

14. A matter not admitted by either Defendant, but asserted by the Claimant, is as follows:

> The Claimant went over the side of the pool headfirst with his arms outstretched and with his body sliding over the side. He went into the pool in the same way as approximately 50% of the other contestants but as his legs were sliding over the side something caused them to be lifted from the thigh forcing him down at a steep angle.

15. One further agreed matter is recorded as follows:

> Further [to] paragraph 12 of the judgment of the Honourable Mr Justice Field, it is agreed that the Claimant was not attempting a manoeuvre which he must or ought to have appreciated was dangerous.

16. Paragraph 12 of Field J's judgment was in the following terms:

> "In my judgement, [the Claimant's] legs were lifted up as a result of the flatness of his trajectory as he went over the side headfirst with his arms outstretched in front of him. He was trying to enter the pool by sliding in over the side as quickly as possible. In my judgement, he was not attempting a manoeuvre which he must or ought to have appreciated was dangerous."

17. At [11] of her judgment in the Court of Appeal Smith LJ expressed some reservations about that conclusion, but did not think "for present purposes what was the precise mechanism of the accident" mattered. What mattered, she said, was that "while doing the same thing as others had done before and which had not been forbidden, [his] entry went disastrously wrong for no very clear reason".

18. That then reflects the evidential position in the case that, as the trial judge in this re-trial on the discrete issues identified in paragraph 4 above, I have, as it were, "inherited". Much of the jigsaw has been completed: there are two particular pieces currently missing that I must endeavour to put in place, but there are also one or two areas of fact that also need addressing.

19. When addressing those issues of fact it will be necessary to refer from time to time to what witnesses said at a Board of Inquiry instigated and conducted by the Commanding Officer at RAF High Wycombe. It was conducted over a several

separate days in August 2005 and was thus relatively soon after the accident. Sir Geoffrey Nice QC, Leading Counsel for the Claimant, has (with, it seems to me, some justification) questioned the thoroughness of the investigation, but I can proceed only on the basis (a) of what has been revealed and (b) that what a witness said to the Inquiry was recorded accurately (and there has been no complaint from those who gave evidence before me that this was not so, though some suggestion that what has been revealed are merely edited highlights). What was recorded has certainly been of some assistance to me in arriving at appropriate conclusions given the relatively contemporaneous nature of what was said by the witnesses.

20. I will revert as necessary later in this judgment to the non-admitted issues referred to above and to certain other factual matters that were canvassed at the re-trial. The non-admitted facts do reveal one potentially important factual dispute (if indeed it is a dispute) to which I will refer later concerning the Claimant's mode of entry into the pool when he sustained his injury (see paragraphs 28-60 below). As a general proposition it should, however, be noted that some of the factual witnesses called before Field J were not called before me and that some witnesses who could speak to potentially material facts who were not called before Field J were called before me. Inevitably, the factual picture presented to me is in some respects different from that presented to him. Equally, I have heard evidence from two expert witnesses who did not provide reports prior to that earlier trial and thus did not give evidence in that trial. This means that the overall content, or at least the overall emphasis, of the expert evidence has been different in some respects from that presented at the first trial.

Some preliminary observations

21. Because this case comes to me in the unusual way I have described there are, perhaps, a few matters that I should record, some of which will have been apparent from a careful reading of paragraphs 7-12 above and some of which were or became common ground during the trial before me.

22. First, no-one is now seeking to blame the Claimant for what occurred. There was in the early stages prior to the first trial some attempt on the part of the Defendants to do so, but that has long since been abandoned. It is important to emphasise that this is not a case where a young man under the influence of drink elected to do something that was foolish and foolhardy: cf. *Donoghue v Folkestone Properties Ltd* [2003] QB 1008.

23. Second, this was not an accident that took place in a swimming pool as such. As the agreed facts demonstrate, there was some water in the pool, but that was simply to increase the fun of the game by ensuring that all participating got wet. It follows that no-one should see this case as involving a "swimming pool accident".

24. Third (and this follows to some extent from the first point), subject to the considerations to which I will refer later (paragraphs 28-60) the Claimant was doing nothing different from what about half of those taking part in the game did – in other words, he was not trying some obviously different and foolhardy means of getting into the pool. His misfortune was to execute the manoeuvre that many of them undertook in a way that led to the devastating injury to which I have referred.

25. Fourth, and again this is related to some of the other matters I have mentioned, this accident did not occur during some impromptu party which was out of control (cf. *Grimes v Hawkins and ors* [2011] EWHC 2004 (QB)): it took place in what was otherwise a well-organised event in which, so far as the evidence demonstrates, all those who participated did so responsibly.

26. Fifth, the "pool" into which the Claimant was entering when he sustained his injury was not manufactured or intended for use in the way that it was used on the occasion of the accident. (That, of course, would not have been known to anyone taking part in the game.) It was manufactured to be filled with balls, not water, and presumably any game that involved getting into it rapidly when filled with balls meant that the risk of injury caused by impacting with the relatively thin ground level surface of the "pool" was minimal, if not indeed non-existent, because of the presence of the balls.

27. None of these points conclude the case in the Claimant's favour, but they highlight the different category into which this case should be placed compared with some of the other (doubtless well-publicised) cases in which serious injury has been caused by someone using a diving technique when getting into water when it was obviously unsafe to do so.

"Diving" and the way the game was played

28. Before turning to the essential issues, I need to say something about the use of the word "dive" or "diving" in the context of this case. It caused some difficulty before and during the first trial (see *per* Smith LJ at [8]) and still causes difficulty. That is why I used the expression "diving technique" in paragraph 27 above. This will also be a convenient point at which to review the evidence about the way the game was played that afternoon and to resolve any outstanding issues about that. The importance of that issue is that my task is to assess the risk of serious injury arising from "the game as played on the day of the Claimant's accident" (my emphasis). In that connection it is necessary also to consider the extent to which the way it was played on that day ought reasonably to have been foreseen when the rules of the game and any safety instructions were formulated.

29. As will be apparent from the agreed fact numbered 12 (see paragraph 11 above), it is accepted that it was not possible to enter the pool without coming into contact with the side wall of the pool. It might, one supposes, have been physically possible for some very accomplished athlete or gymnast to jump into the pool without touching the tubular wall, but for all lesser mortals (including all those who were taking part on the day in question) this would not be possible. That means that anyone attempting to go headfirst into the pool in what ordinarily would be described as a diving motion would not be able to achieve entry to the pool without some part of his or her body coming into contact with the wall of the pool, the most likely areas being between the stomach or upper thighs of the person concerned and the upper surface of the tubular wall. Some photographs were taken that day by SAC Stewart Plant who gave evidence at the original trial and before me. He was still in the RAF at the time of the first trial, but has since left and is now working in the retail industry. The first photograph in the bundle of photographs provided (photograph 1 which is attached as Appendix 2 to this judgment) shows in the foreground (what is thought probably to be) a female whose head is just entering the surface of the water with her body stretched out in the manner of a relatively shallow dive but with her upper thighs still

in contact with the upper quadrant of the inner surface of the tubular wall. There was some debate at the hearing about the shutter speed being utilised (SAC Plant saying that it was a "fast" speed of about 1/250th of a second which I have no reason to doubt), but if anyone were to be asked by reference to the photograph what the lady in question was doing, the word "dive" would immediately come to mind even if, in the classic sense of the term, it did not involve a free-flowing dive before entry into the water (cf. the comments on the photograph made by Smith LJ at [8]-[9]). The photograph captures the existence of a good deal of water splash above and to the rear of the lady's head, suggesting a forward motion as she entered the water. This does not appear to be the action of someone simply slithering over the side from a more or less static position and essentially feeling for the bottom of the pool surface: it appears to be a manoeuvre involving some degree of reasonably rapid forward motion. That is what one would expect of a person who had run up to the side of the pool as part of a race (which, of course, this game involved) and propelled him or herself over the side.

30. Perhaps not surprisingly repeated reference was made to that photograph during the trial in order to clarify precisely what it was that people who were going into the pool headfirst were actually doing. I think this is a convenient point to review the nuances of the most direct evidence there is about that issue. I do so because the submissions of Mr Derek Sweeting QC, Leading Counsel for the MoD, in closing seemed to be to the effect that the "standard" form of headfirst entry effected by those who chose to enter in that fashion was in the relatively static form of sliding over the wall of the inflatable in the manner I endeavoured to describe in the penultimate sentence of paragraph 29 above and that the Claimant's entry was somewhat different. Given that the MoD has admitted the matters referred to in (1) and (2) under paragraph 13 above, it did not seem to me that, as between the Claimant and the MoD, there was much, if any, issue between them about how the entry came to be effected. However, if there is an issue (which arguably the non-admission referred to in paragraph 14 above suggests), I must seek to address it.

31. As my conclusion based upon the photograph above shows (see paragraph 29 again), I do not think that Mr Sweeting's submission can be correct because the lady in question almost certainly had some reasonably rapid forward momentum as she was going over the side of the pool and entering the water. That does not, of course, mean that some people did not adopt a sliding or slithering motion from a relatively static position, but to suggest that they all did this does not, in my judgment, reflect accurately the totality of the evidence to which I will now turn. I will not refer to every feature of the evidence in this regard, but only that that seems to me to illuminate the issue clearly.

32. Mr Plant, as I have said, took the photograph. He was there in his capacity as a photographic recorder of the events of the day. He was, as he said, of very junior rank. He photographed both heats of the particular game in issue as well as taking photographs of other aspects of the day. He gave evidence at the MoD's internal Board of Inquiry in August 2005 and the note of his evidence, given on 9 August that year, records him as saying he was "watching people dive into the pool under the supervision of the guys organising the event" and that "people were being encouraged to dive in" which he clarified by suggesting that "the guys on the speakers were almost egging people on to get in the pool as quickly as possible". He did not qualify

the word "diving" in any way. He was questioned about all this at the trial before Field J and was questioned about it before me. In answer to Mr Richard Lynagh QC, Leading Counsel for CL, he said that the majority of competitors "were entering headfirst into the pool". He agreed that "quite a lot" of those who adopted a headfirst entry technique slid into the pool until their hands made contact with the bottom of the pool and then pulled themselves forward into the pool at various speeds. He accepted that he would have included that kind of action within the word "dive". When invited to look at photograph 1 he described the person shown as "diving". He was asked questions by Mr Sweeting about the distinction between what is depicted in the photograph and the action of "diving over" the side of the pool (the expression used in his statement for the purposes of these proceedings and the emphasis being on the word "over"), but he said that, so far as he was concerned, the person shown in the photograph was "diving <u>over</u> the side". He confirmed that his photograph did not show a snapshot of a still or almost still movement.

33. It seemed to me that what he was saying was tolerably clear, but I sought to clarify it at the end of his evidence and since we had the luxury of a daily transcript I will record, with a little editing, the interchange between us:

> MR JUSTICE FOSKETT: Could I just go back to the photograph … because I just want to be absolutely clear [that] I understand ….
>
> As I understood your answer to Sir Geoffrey … this shows someone who's been part of a continuous running movement from wherever … he or she had started?
>
> A: Yes, sir.
>
> MR JUSTICE FOSKETT: Comes straight down towards the side of the pool and goes straight over.
>
> A: Goes over, yes.
>
> MR JUSTICE FOSKETT: That is what this depicts is it, as far as you are concerned?
>
> A: This is what this depicts, just because of what seems to be the motion of the person travelling. Obviously looking at the photograph without having the technical details for it I would say it is roughly around 250 of a second shutter speed on it - purely just from my experience as a photographer. So the fact that there is movement on them shows that they are moving at speed, sir.
>
> MR JUSTICE FOSKETT: Right. Speaking for myself I can envisage that conduct, a run and over the side, whether you call it a dive or a slide, perhaps doesn't matter for present purposes. The other possibility is that someone runs up to the side and effectively stops and then … does a fairly gentle clamber over

the top, hands first and hands down on to the base of the pool. Do you understand the difference between the two?

A: Yes, sir.

MR JUSTICE FOSKETT: It doesn't appear that that is depicted on your photograph?

A: No, sir.

MR JUSTICE FOSKETT: What I would just like to know is whether to your recollection you saw that kind of conduct as well as this kind of conduct or whether this kind of conduct was the norm? [*I should say that by "this kind of conduct" I was referring to the action of the lady "diving" in photograph 1*.]

A: There [were] lots of different types of people entering. The majority were diving in. Some controlled, some uncontrolled, as well, sir.

MR JUSTICE FOSKETT: When you say "diving" you are talking about … the motion shown on the photograph?

A: Both types of what you yourself described, I would call "diving" as well, sir.

MR JUSTICE FOSKETT: There were some who were going forward with continuous motion from the start of the run-up, if I can describe it as that.

A: Yes.

MR JUSTICE FOSKETT: There were others who perhaps ran up and paused a bit before they actually went in …

A: Yes, sir.

MR JUSTICE FOSKETT: … but did go over with their hands ….

A: Did go over headfirst into it.

MR JUSTICE FOSKETT: And others presumably took a different, perhaps vaulted over …

A: Yes, some people would go over and sort of slide with their behind over.

MR JUSTICE FOSKETT: I think we have seen that from the photograph. Does anybody want to ask any questions?

34. No further questions were asked.

35. Mr Plant was called on behalf of the Claimant. He denied, in answer to a question from Mr Sweeting, that the Claimant was a friend of his. There is no evidence of any close relationship and, if it matters, I accept his evidence about that. On the evidence concerning the photograph and what he witnessed himself that afternoon I have no reason at all to doubt it and I accept it.

36. Mr Sweeting called Sergeant Andrew Thomas. He gave evidence to the Board of Inquiry and also at the first trial. He was (and remains) a Physical Education Senior NCO and, at the material time, was part of the team of which Flight Lieutenant Taylor (as he then was) was head. When he gave evidence to the Board of Inquiry he described his role as a "troubleshooter" for the day and was, therefore, walking around the site watching most of the events. He said to the Board of Inquiry that he was "watching the event concerned and watched all of the individuals dive into the pool". He confirmed that he saw the Claimant go into the pool and described it by saying that he thought "one of the personnel had not surfaced after diving into the water". His description of how the Claimant tried to get into the pool was that he had "tried to do a flat dive but misjudged it and caught his legs on the side of the pool as he entered which caused his legs to flip up and make his dive much steeper". That evidence was given on 8 August 2005. It is, of course, to be noted that, like Mr Plant, he used the word "dive" to describe what many of the people were doing and, in particular, what the Claimant did at the time he sustained his accident. This was before the word was dissected forensically during the first trial.

37. Sergeant Thomas was called primarily on the issue of whether, had he thought the game as played was dangerous, he might have intervened or would have expected others to intervene. I will return to that in due course, but again I was anxious to understand from him, as an eyewitness to what happened and what was going on, the kind of manoeuvres or actions being undertaken by those entering the pool headfirst. Again I will quote an edited passage of some questions I asked him:

> MR JUSTICE FOSKETT: Yes, I'd just like to try and chase this down if I can. Can you have a look at … your testimony to the inquiry? I'm going to assume this is your best recollection of what happened. It's the nearest in point of time …
>
> A: Yes.
>
> MR JUSTICE FOSKETT: … if you could just help me what you probably meant by what you said here … "I was watching the event concerned and I watched all of the individuals dive into the pool." And then you said: "After this had happened I thought that one of the personnel had not surfaced after diving into the water." So if I can just stop there, this conveys to me, but you must tell me whether this is right or wrong, that you … you saw a number of individuals engaged in what you described as a dive at the time, and then one individual … did the same and didn't come up. Now, first of all, is that a fair description of what you [were] conveying there?
>
> A: Yes. But we've already established that there are the dive and the headfirst, but what I was trying to come across there I

would think was just using one word to sort of sum up gaining entry into the pool. I didn't actually mean that every individual ran up, stopped and dived into the pool or took a running dive. It was just my wording for getting into the pool … [because] as you can see on some of the pictures it's plainly obvious [there are] people that are small that can't dive so they're crawling over. But I didn't say's "dive", "crawl", "jump", it was just one word I used.

MR JUSTICE FOSKETT: But … what you were trying to convey was that however they were getting in, arms were going out ahead of them … and they were going over the side.

A: Yes.

MR JUSTICE FOSKETT: And presumably all of them … were … touching the sides as they went over …

A: It's impossible.

MR JUSTICE FOSKETT: Quite. So we are not talking about a straight [or] a loopy dive?

A. I think I mentioned this last time, if you did you'd have to dive up, over and …

MR JUSTICE FOSKETT: Down.

A: This is physically impossible.

MR JUSTICE FOSKETT: There's no way of doing that?

A: No.

MR JUSTICE FOSKETT: Look at … [photograph 1]. You haven't been taken to it but it's the only one I have of something that was happening at the time … this is an instantaneous picture of course and one doesn't have the bit before or the bit afterwards, but … is this what you were describing in …

A: I think that encapsulates it all. You've got some person diving, and you can see their hands in front of them, and then this girl on the far side[2] who's not probably physically able to do that, she's had to crawl out. So it's a variety of people. But yes, the majority were aiming for this type of dive to … speed it up.

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[2] This is, as will be observed in Appendix 2, another person shown in the photograph (obviously female) endeavouring to get out of the pool with her legs astride the pool wall.

> MR JUSTICE FOSKETT: Yes, and presumably running up to the side of the pool and trying to do it all as a continuous motion.
>
> A: That was the ultimate objective, but like I mentioned before, people got tired so some ended up walking. But initially the competitors were running and then sliding over with the hands first.
>
> MR JUSTICE FOSKETT: Right. I can take it, can I, from what you say that what is depicted on … photograph 1, was, so far as you can recollect, fairly typical of the way in which people were entering …
>
> A: Yes.
>
> MR JUSTICE FOSKETT: … this is what most people who were diving or using headfirst entry were doing?
>
> A: Yes.
>
> MR JUSTICE FOSKETT: I can take that picture away with me and say to myself that's more or less what everybody was doing?
>
> A: Yes.
>
> MR JUSTICE FOSKETT: It was using that method getting in.
>
> A: Yes.
>
> MR JUSTICE FOSKETT: If we go then from the general to the particular you then do describe Mr Uren going into the pool [as summarised in paragraph 36 above]. So that's a clear picture you had at that time?
>
> A: Yes.
>
> MR JUSTICE FOSKETT: You saw that happen and that's the description you gave.
>
> A: Yes.
>
> MR JUSTICE FOSKETT: And the way he was doing it was similar to what we have seen in … photograph 1?
>
> A: From what I've described, yes.

38. Mr Sweeting asked a few more questions arising out of that as follows:

> MR SWEETING: By headfirst entry it might be possible to be describing a sort of human torpedo where the head was the very

> first part of the body … that was entering the pool. Did you see that?
>
> A: No.
>
> Q: So the only form of headfirst entry that you described is one that has the hands forward. Is that …
>
> A: Yes, they precede the head, so …
>
> Q: Yes. So it's hands forward?
>
> A: Yes.
>
> Q: I think a moment ago you described people coming up in -- adopting that mode of entry and sliding into the pool.
>
> A: Yes.
>
> Q: And so that would be a summary, or a picture, of how that form of headfirst entry was being effected?
>
> A: Yes.
>
> Q: Going up, sliding into the pool off the side?
>
> A: With hands in front.
>
> Q: Right. You were reminded by his Lordship of your description much closer to the events of what happened with Mr Uren and his legs flipping up in the air. Had you seen that happen before?
>
> A: No ….
>
> Q: That particular feature of entry, his legs flipping up in the air, was that something that you had mentioned because it was unusual? Or was it something you had seen on other entries?
>
> A: No, not seen on other entries at all.

39. Sergeant Thomas was less easy to assess as a witness than others largely because, in my judgment, he was being somewhat defensive of the role of Flight Lieutenant Taylor, who was his superior at the time, and who he may have perceived as someone who was being criticised. He remains serving in the RAF. However, his description of the methods of entry into the pool was very much along the lines of what Mr Plant had said and again is consistent with what is seen on photograph 1. The reference to the way that the Claimant's legs "flipped into the air" is consistent with the description given by other witnesses and seems to me simply to be a reflection of the fact that the Claimant's attempt to enter the pool in the way that others did "went wrong" in some fashion rather than, if it is being suggested, the adoption of some wholly unusual method of entry.

40. It does not appear that Field J had the benefit of direct evidence from another person who saw the Claimant's accident, Corporal Gaze. I did not do so either. He was another member of Flight Lieutenant Taylor's team and was one of those who went immediately to the Claimant's assistance when it was apparent that he did not get out of the pool having entered it. Corporal Gaze, whose evidence to the Board of Inquiry was given on 10 August 2005, said that he saw the Claimant "dive into the pool" and that "appeared that he tried to do a shallow dive, but caught his legs on the side of the inflatable pool, which caused him to do a steeper dive into the pool and hit his head on the bottom of the pool". That was the only "dive" that Corporal Gaze described, but it seems plain from one other comment that he made that others were diving within his perception of what "diving" constituted. That comment was that "at no point … were people told not to dive into the pool and I remember commenting on this to my colleagues".

41. The account given by Corporal Gaze to the Board of Inquiry was largely matched by the account given by Corporal Williams, another member of the Physical Education team, who also went to the Claimant's assistance straightaway, but who did not give evidence either at the first trial or before me. He described the Claimant's manoeuvre as a "dive into the pool". He was asked the question by the Board of Inquiry of how people were getting into the pool to which his response was that "a lot of other people were also jumping in" and that "it looked like an accident that he caught his legs on the side of the pool".

42. The other eye witness who gave evidence to the Board of Inquiry, at the first trial and the trial before me was SAC John Scowcroft. He told the Board of Inquiry that he saw the Claimant "take a running dive into the pool" and then he realised that something must have happened because he had not surfaced. He does not appear to have been asked about how other people were getting into the pool. However, in the statement he gave for the purposes of the first trial he said that it was "50/50 between people diving in headfirst and others vaulting in over the sides and going in feet first". He elucidated the word "dive" by saying that using the word "dive" meant "entering the pool by diving in headfirst and sliding in over the top of the side of the pool". He said that this was different from the "sort of classic pool dive that one might do into a swimming pool".

43. To my mind, the conclusion that Field J arrived at (see paragraph 16 above) was entirely in accordance with the evidence before me. I will, however, put my conclusion in my own terms. The Claimant did run up to the side of the inflatable and attempt a flat dive (headfirst and with arms outstretched) over the side wall, albeit with the intention and prospect of there being contact between him and the side wall, probably its upper surface. His intention was not to launch himself in a way that tried to clear the wall completely, but to move forward across the top surface of the wall as quickly as possible using his hands when they reached towards the bottom of the pool as the means of supporting and steadying himself. He was endeavouring to do precisely what a good number of others did that afternoon: those who did it more slowly than him may have found the slithering or sliding down the inner wall of the pool surface easier (although, as will appear, even that was not without its difficulties); those (like the lady in the photograph and like the Claimant) who were attempting it more quickly may have found it more difficult. This seems to me also to be confirmed to some extent by the evidence of Corporal John Woods. Corporal

Woods was someone who attempted his first entry in the manner I have described, succeeded in doing so, but not without some difficulty.

44. He did not give evidence to the Board of Inquiry. It is not clear why not. He may simply not have been identified as someone who could offer any useful evidence or it is possible, as he recalled, that he was posted to Cyprus shortly afterwards and that that contributed to it. That latter fact may also afford some explanation for him not having been called at the first trial. However, the Claimant contacted him via Facebook and as a result he was spoken to by the Claimant's solicitors by telephone and produced a statement dated 25 August 2011. It was thus six years after the incident. However, whilst recognising that his memory had faded in relation to certain parts of what happened, he said that he could recall some aspects quite clearly, particularly the game involving the pool and what happened when he entered the pool.

45. I thought Corporal Woods was an entirely open, honest and straightforward witness who, within the limits of his ability to recall certain matters after this period, was giving me accurate and truthful evidence. I see no reason for doubting his account of his own efforts to enter the pool and I accept it. He used the expression "dive" to describe what he did and, during his cross-examination by Mr Lynagh, said that "other people were diving in just like me". Again, this is consistent with the other evidence to which I have referred.

46. However, in his case, he recalls having difficulty with his first dive. It is, perhaps, important to understand him and his approach to an event like this. He said that he was by nature a risk-taker, albeit a responsible one. He would, for example, go off a big jump if snowboarding and would take risks that he chose to take. He confirmed also that the game in question (like the others that afternoon) was competitive in nature and that he was approaching his participation in it on the basis that he would get in and out of the pool as quickly as possible. His perception was that doing it in the manner he chose to do it was the quickest way of achieving it.

47. In his witness statement he described his first and second attempts at getting into the pool in these terms:

> "The first time that I entered the pool, I dived in over its side and banged my head on its hard bottom. I hit the top, front part of my head, the part of your head that you would hit if you did a forward roll that went wrong. It hurt when I did it so when I dived in the second time I altered my entry. I managed to control my entry a little better by going in a little shallower and sliding in with my hands out to break my fall. The water was too shallow to dive in the way I had done the first time. It was very difficult to get into the pool and the easiest and quickest way of entry was to run up and dive in headfirst over its side."

48. His attention was drawn to photograph 1 when he prepared that statement. He described the person shown as "diving headfirst into the pool". He went on to say that about 50% "were going in headfirst in the same or similar way with the rest going in feet first."

49. He was questioned closely about this by Mr Lynagh, in particular, and by Mr Sweeting on other matters. He confirmed that, in relation to his first entry into the pool, he was intending to get on to the top of the pool wall, hands and head going first, in order to slide off or over it into a forward roll on the surface of the pool, but since the lower surface of the pool was not as deep as he had expected he misjudged his attempt and hit his head in the manner he described.

50. His second attempt was, he said, flatter "although he did run up fast" and he thought it was somewhat similar to the dive being executed by the person shown in photograph 1.

51. The final witness to whom I would wish to refer in this general context is Lieutenant Colonel Philip Westwood. He was Major Westwood at the time of the incident and has since retired from the Army. He gave evidence to the Board of Inquiry, but was not called by any party at the first trial. I think it is unfortunate that Field J did not have the advantage of hearing Lieutenant Colonel Westwood (and indeed Corporal Woods) because, subject only to minor reservations about his recollection of certain matters, he was a compelling witness upon whom a court would instinctively place reliance. He was entirely straightforward and open.

52. At the time of the incident he was aged 48 and thus quite a bit older than many of the participants. Nonetheless, he obviously entered into the spirit of the day fully and one of the photographs shows him lining up to take part in the game in question with a smile on his face. However, his age, he said, made him somewhat more cautious about the way he got into the pool.

53. In the note of his evidence to the Board of Inquiry (which was given on 17 August and thus a little after some of the others), he spoke of seeing people "dive and jump" into the inflatable pool. He said that this was during what he described as the "second round" and he is recorded as saying that it was only during the second round "that people started diving into the pool". I will return to that shortly, but in answer to direct questions from the Board he said that the only brief at the beginning of the game was how to play the game (there were no health and safety points mentioned) and that the supervision of the game was "minimal". He spoke of encouragement being given (by implication from the game's organisers) and he recalled the words "nice diving, I'm liking that", which he said were words used during the game. Asked whether he was concerned about safety he said that "in hindsight maybe I should have approached the game organisers, but looking back it was only the last game that anything dangerous occurred."

54. His statement for the purposes of the trial before me was not given until 25 May 2012 and so was nearly seven years after the event. His evidence was given well over seven years after the event. However, it is plain that he had a good recall of some aspects of the afternoon and, as one would expect, a less good recall of other aspects. As with all witnesses, I have looked to see where there is other reliable evidence to inform areas of uncertainty. It is, for example, clear from the evidence of other witnesses that "diving" in the sense already described took place during the first heat, not just, as Lieutenant Colonel Westwood said to the Board of Inquiry, during the second heat. It seems quite clear that he was asked about this when he prepared his witness statement and he said in that statement that he could not remember seeing the first heat. When asked further about this by Mr Lynagh he said that he believed that after the initial

briefing about the game, he was helping to organise a team and, to that extent, was not focusing fully on the first heat. He did say in his evidence that when he saw people diving he was, as he put it, "quite surprised to see people sort of hurling themselves over the side". He described the game as "quite a robust game" and was the only game of the day where there were more than two teams pitted against each other – it was, as he said, a "bigger team event". He spoke (with the experience of someone who had been in the Services since just before his sixteenth birthday) of the competitive nature with which all who enter the Services are imbued from the outset and, if part of a team, of the desire to beat other teams. He spoke also of the peer pressure of not wanting to be seen not to achieve and also of the desire, as part of the Commanding Officers annual competition, to impress superiors if not already part of a sports team.

55. I will return to his view that the game as played was potentially dangerous below (see paragraph 155), but I would simply record that his evidence was that he did not himself dive over the side of the inflatable; he described himself as having scrambled over the side which, at the age of 48, was, he said, about as much as he could manage. However, the short point for present purposes is that he confirmed (albeit undoubtedly mistaken about what happened in the first heat), that there was a good deal of "diving" in the context of a robust and hard-fought game.

56. I will not set it out in detail, but Mr Beeken gave evidence to similar effect.

57. All this evidence is, in my view, quite sufficient to justify the conclusion that at least half the participants were adopting a form of headfirst entry in the fashion of a dive as their chosen method of entry into the pool and a good number were not just stopping and sliding carefully over the side but were propelling themselves forward as quickly and as forcefully as they could. It is quite obvious from the evidence that many saw this as the obvious way of getting into the pool as quickly as possible.

58. That seems to me also to be confirmed by the attitude of Mr Berry and also of many of those present. Field J concluded that Mr Berry had not used the word "dive" in his commentary: [27] of his judgment. He heard from Mr Berry; he did not hear directly from Lieutenant Colonel Westwood. I have heard from Lieutenant Colonel Westwood; I have not heard from Mr Berry.

59. I cannot, of course, decide what Field J would have concluded had he heard from Lieutenant Colonel Westwood, but I have already described his demeanour as a witness in paragraph 51 above. I have to decide the facts on the evidence presented to me and, on that basis, my conclusion would be that Mr Berry did use the word "dive" at times during his commentary. Lieutenant Colonel Westwood said that he was "very confident" that he recalled those words (which, of course, he recorded very soon after the event in his evidence to the Board of Inquiry) as having been used by the "guy with the microphone at the end of the pool", that person being Mr Berry who can be seen himself on photograph 1. Very fairly, Lieutenant Colonel Westwood said that the encouragement was not coming solely from Mr Berry, but all team members were encouraging each other. If, as I am sure is the case as I have already found, a good number of people were "diving" over or across the side of the pool, it would be very surprising if, in such an environment, people were not using a variety of expressions to describe the efforts made and I find it impossible to believe that the word "dive" never crossed anyone's lips. No-one (including, of course, Mr Berry) would have had

any dangers associated with the action of diving specifically in mind when it was being encouraged in this way, but that is not really the point: the point is that this obviously seemed the natural way (or, at least, one of the natural ways) of getting into the pool quickly. What it means, from Mr Berry's perspective, is that he did not think diving was dangerous or that he (and/or those who had risk assessed the game previously) had not thought about the issue in advance.

60. That conclusion, of course, leads inevitably to the question of whether the risks associated with headfirst entry into this pool in the circumstances in which the game was played ought reasonably to have been foreseen and also what the extent of that risk was.

The risk assessments carried out

61. The starting point for consideration of the extent to which either or both of the Defendants gave consideration to the question of the safety of this game is the risk assessment conducted by each. As already found, these risk assessments were either "defective" or "fatally flawed" (see paragraphs 14 and 15 of the Agreed Facts: paragraph 11 above). I should set out how Field J arrived at the conclusions he did, conclusions that remain undisturbed by the Court of Appeal's ruling. In relation to CL, Field J said this at [25]:

> "There was no evidence that the individual who produced the original risk assessment for the game appreciated that contestants might enter the pool headfirst. I am also not satisfied that when Mr Berry reviewed the assessment that he had in mind contestants might enter the pool headfirst. For these reasons I am bound to find that the risk assessments of the game relied on by CL were defective."

62. In relation to the risk assessments done by the MoD (through Flight Lieutenant Taylor), Field J said this at [37] and [38]:

> "Both assessments were completed without Flight Lieutenant Taylor knowing in any real detail how the pool game was played or the dimensions of the pool. He understood that it had featured in the previous year's Health & Fun Day and he saw a photograph of what might have been this event, but he did not know how the game was played and took no steps to find this out. His attitude was that if there were particular risks arising from the pool game, CL would advise him of them.
>
> The obligation to prepare an adequate risk assessment was part of the non-delegable duty of reasonable care owed by the MOD to Mr Uren. Flight Lieutenant Taylor was not entitled to leave it to CL to assess the risks of the game. Further, no risk assessment of the pool game could be adequate unless the person undertaking it was aware of how the game was played and the ways the entrants, after being told to exercise care, might enter the pool. It follows that the two risk assessments

> prepared by Flight Lieutenant Taylor, particularly the second, were fatally flawed."

63. In a nutshell, the relevant risk assessments were defective because no-one had addressed the question of headfirst entry into the pool. Neither Defendant could show that this potential risk area had been addressed.

64. Field J's conclusion concerning CL's risk assessment was not challenged in the Court of Appeal. His conclusion in relation to the MoD's risk assessment was challenged by way of cross-appeal, but the cross-appeal was dismissed: see *per* Smith LJ at [70]-[72].

65. The relevance of risk assessments generally was described thus by Smith LJ at [39]:

> "It is obvious that the failure to carry out a proper risk assessment can never be the direct cause of an injury. There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a proper risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. A decision of that kind will necessitate hypothetical consideration of what would have happened if there had been a proper assessment."

66. Inevitably, given the issues I have been directed to consider, a fair amount of time at the trial before me was spent examining what a properly conducted *ex ante* risk assessment (see paragraph 69 below) would have concluded about the game as played, namely, by permitting headfirst entry as a means of getting into the pool.

67. I must turn now to those issues.

The first issue

68. The first issue to be addressed is the degree of risk of serious injury arising from the way the game was played on the day of the Claimant's accident. That broad issue depends for its resolution on an appreciation of how it should be approached.

69. In the first place, there can be no doubt, in my judgment, that the essential focus has to be on what has been termed an *ex ante* assessment of risk – in other words, an appraisal of the potential risks associated with the game before it took place. Reference was made during the trial (as it had been in the case of *Blair-Ford v CRS Adventures Ltd* [2012] EWHC 2360 (QB)) to the concept of a "dynamic risk assessment": I understand that in a general sense this is a risk assessment that takes place during the operation or event in question rather than one carried out exclusively before. In the context of this case a dynamic risk assessment would have involved those responsible for providing the game considering the game as it was played and intervening if it appeared to have become dangerous. The Claimant's case has not in

reality been advanced on the basis that there was some deficiency in this respect[3]: his challenge is more fundamental than that and is focused on what he says should have been foreseen before the game took place. Indeed, as I have already indicated (see paragraph 59 above), there is positive evidence that demonstrates that Mr Berry from CL did not observe anything occurring that made him consider that any danger was arising from what was taking place.

70. Second, whilst it is ultimately for the court to decide what ought reasonably to have been foreseen by way of risk of serious injury, exercising its well-recognised function of evaluating the material on the question of what ought to have been taken into account by those providing the game in question, that decision should be informed by what a properly considered *ex ante* risk assessment would have concluded on that issue. This would seem to be the approach implicit – if not indeed explicit – in Smith LJ's judgment in the Court of Appeal in this case at [39] – [45].

71. Third, it is to be noted that the issue raised is, as I have emphasised above, the "risk of serious injury". By this is meant an injury of the sort sustained by the Claimant or a serious injury to the head. A distinction was drawn by the Court of Appeal between this kind of injury and what was characterised as a "moderate injury" (e.g. a fracture of an upper limb) or other injuries of a more trivial nature: *per* Smith LJ at [47]. The focus of the evaluation of the evidence is, therefore, in relation to the assessment of the risk of a serious injury of the kind I have indicated arising from the game as played. I shall say a little more in due course (see paragraph 77 *et seq*) about how the "quantum" or measure of risk is to be evaluated in this context, but the important point for present purposes is that the area for consideration is that of the risk of <u>serious injury</u>.

72. Finally, the question arises as to what information or material each Defendant had or ought reasonably to have had available when addressing hypothetically (because neither in fact addressed it or, in the case of the MoD, not adequately) the issue of the extent of the risk of serious injury arising from the game in question. To what extent, if at all, is the obtaining of an expert opinion relevant to that question? This has been reflected upon in a number of cases helpfully collected and commented upon in paragraph 8-151 of Clerk & Lindsell on Torts (20th Edition). Omitting footnotes the following is said:

> "The likelihood of harm is gauged with reference to the state of knowledge which could be attributed to the defendant at the time of the occurrence. In *Roe v Minister of Health*… disinfectant, in which ampoules of anaesthetic were stored, had seeped into the ampoules through invisible cracks. The possibility that this might occur was not generally known at the time of the incident, which occurred in 1947. The claimants, who received spinal injections of the anaesthetic, became paralysed. The hospital authorities were held not liable because the risk to the claimants was not reasonably foreseeable at that date. "We must not look at the 1947 accident with 1954 spectacles" said Denning L.J. In *Roe* the conduct in question was that of doctors and it was judged according to what

[3] See Postscript to judgment.

> reasonable doctors would have foreseen in 1947. In other cases the technical evidence may be less clear as is evident from the conflicting outcomes of *The Wagon Mound* in which the fire damage was held to be unforeseeable, and *The Wagon Mound (No. 2)* … in which in relation to the same occurrence, it was held that a small but significant risk of the same fire damage was foreseeable …. Further difficulty may arise where the views of the layman and expert as to likelihood differ. Suppose that the defendant is a layman and that a reasonable layman would foresee a particular kind of harm as likely to result, will special scientific knowledge to the contrary be relied on to hold him not liable, even though this is disproved by the event? If he is held not liable, it would be contrary to the principle that a criterion of foreseeability is the defendant's standard of knowledge. Conversely, will specialised knowledge be relied on to hold a layman liable for damage which a reasonable layman would not have foreseen? *Graham v Co-operative Wholesale Society Ltd* … suggests that it will not. The test seems to be the actual or constructive knowledge which a reasonable and prudent defendant would have had if he consulted such literature or made such inquiries as were reasonably expected of him."

73. The cases relied upon for the test propounded in the final sentence of that quotation are *Wright v Dunlop Rubber Co.* (1973) 13 K.I.R. 255 and *Wallhead v Ruston and Hornsby* (1973) 14 K.I.R. 285.

74. In *Whippey v Jones* [2009] EWCA Civ 452, Aikens LJ (with whom Waller and Rimer LJJ agreed) said that the test is as follows:

> " … The question of whether a person has acted negligently is not answered simply by analysing what he did or did not do in the circumstances that prevailed at the time in question and then testing it against an objective standard of "reasonable behaviour". Before holding that a person's standard of care has fallen below the objective standard expected and so finding that he acted negligently, the court must be satisfied that a reasonable person in the position of the defendant (ie. the person who caused the incident) would contemplate that injury is likely to follow from his acts or omissions …."

75. The test thus depends on what "a reasonable person in the position of the defendant" would have assessed as the risk of causing injury. The circumstances of that case did not engender any need to consult experts: the defendant knew his own dog. However, the statement of principle is consistent with the conclusion of the editors of *Clerk & Lindsell*. Whether expert guidance is required will depend on all the circumstances. It is some forty years since the two cases relied upon for the proposition in the final sentence of the paragraph quoted in *Clerk & Lindsell* were decided: see paragraph 73 above. However, rightly or wrongly, and despite the influence of a case such as *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 and section 1 of the Compensation Act 2006, we live in a more "risk averse" age now than when those

earlier cases were decided. In those circumstances, consulting an expert experienced in risks associated with physical activities would almost certainly be expected of those promoting or putting forward an event of the nature of the 'Fun Day' in question in this case. Ultimately, of course, the decision on the potential for risk will have to be taken by the person or body who has taken the expert's opinion, but it would certainly represent the actions of such a responsible person or body to take appropriate expert advice. The failure to take such advice may not of itself constitute negligence, but taking it would evidence a proper concern on the part of those responsible.

76. In evaluating the position of the Defendants, I will need to consider what expert advice they would or might have received if they had sought it. There is no evidence that either did so, although the MoD did have a civilian employee, Mr Cassford, who had experience of risk assessments.

The "quantum" or measure of relevant risk

77. In *Whippey* (see paragraph 74 above) Aikens LJ, immediately after the quotation set out above, went on to speak about what I have characterised as the "quantum" of relevant risk. He said this:

> "Nor is the remote possibility of injury enough; there must be a sufficient probability of injury to lead a reasonable person (in the position of the Defendant) to anticipate it."

78. In the following paragraph he said this:

> "This is clear from classic statements of the law on the standard of care that is expected of people in circumstances where they owe a duty of care to others. In *Donoghue v Stevenson*, Lord Atkin stated the standard of care that a person must adopt is: "… [to] take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". I would emphasise the word "likely". In *Bolton v Stone* (the case of the cricket ball that was hit out of the ground and injured a passer by), Lord Porter elaborated Lord Atkin's statement by saying: "… it is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must be also such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it". In the same case, Lord Normand referred to statements of various of their Lordships in *Glasgow Corporation v Muir* concerning the proper test to define the standard of care that must be adopted by the reasonable man. Lord Normand agreed with a statement of Lord Clauson in the *Glasgow Corporation* case that the test is whether the person owing the duty of care "had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which in fact took place might well be expected"."

79. Mr Sweeting submitted that the common thread running through the cases, culminating in *Whippey*, is that for negligence to be established the requirement is "to have a probability of the harm that occurs and for that to be significant enough for it to require some action to be taken" - though he acknowledged that the more contemporary expression in the light of *Tomlinson* is whether the "degree of risk" has reached a level that requires a response from the creator of the risk. Mr Lynagh's formulation of the relevant test is whether "there a real or substantial risk of foreseeable injury that was likely to be serious and against which measures should have been taken".

80. I am not sure that there is truly any dispute about this, but the emphasis placed by Mr Sweeting and Mr Lynagh on the words "probable" and "likely" does, in my judgment, have to be seen in its proper context. I do not think that Mr Sweeting was submitting that the words of Aikens LJ were intended to convey the proposition that unless an injury was probable, in the sense of being more probable than not, there was no need to consider taking any precautions against the realisation of that risk. I do not think that is what Aikens LJ, whose words must, of course, be seen in the context of the case in question, was suggesting. The word "sufficient" before the word "probability" shows that what was in contemplation was the need for there to have been a sufficient risk of the dog in that case causing injury for its owner to have taken steps to avoid the risk materialising. The kind of injury that might have been contemplated in that case was, in any event, very less serious than the kind of injury with which this case is concerned.

81. If every potential injury of whatever level of seriousness had to be foreseen to the extent of the injury being more probable than not, the logic would be that death or other life-threatening injuries would have to be foreseen to the extent of at least a 51% chance before it fell to be considered as a candidate for measures designed to reduce the risk. That cannot be what is intended by the use of the word "probable" or "likely".

82. It is worth remembering that in *Overseas Tankship (U.K.) Ltd. v The Miller Steamship Co. Pty ('The Wagon Mound (No.2)')* Lord Reid, giving the judgment of the Board, said this at page 634:

> " … Another word frequently used is "probable." It is used with various shades of meaning. Sometimes it appears to mean more probable than not, sometimes it appears to include events likely but not very likely to occur, sometimes it has a still wider meaning and refers to events the chance of which is anything more than a bare possibility, and sometimes, when used in conjunction with other adjectives, it appears to serve no purpose beyond rounding off a phrase."

83. In that case, unlike in *'The Wagon Mound (No. 1)'*, the findings were that "some risk of fire would have been present to the mind of a reasonable man in the shoes of the ship's chief engineer". The question to be addressed was whether that risk ought to have been addressed rather than, as it was, ignored. Lord Reid said this:

> "Before *Bolton v Stone* the cases had fallen into two classes: (1) those where, before the event, the risk of its happening would

have been regarded as unreal either because the event would have been thought to be physically impossible or because the possibility of its happening would have been regarded as so fantastic or farfetched that no reasonable man would have paid any attention to it - "a mere possibility which would never occur to the mind of a reasonable man" (*per* Lord Dunedin in *Fardon v. Harcourt-Rivington* - or (2) those where there was a real and substantial risk or chance that something like the event which happens might occur, and then the reasonable man would have taken the steps necessary to eliminate the risk.

Bolton v Stone posed a new problem. There a member of a visiting team drove a cricket ball out of the ground onto an unfrequented adjacent public road and it struck and severely injured a lady who happened to be standing in the road. That it might happen that a ball would be driven onto this road could not have been said to be a fantastic or far-fetched possibility: according to the evidence it had happened about six times in 28 years and it could not have been said to be a far-fetched or fantastic possibility that such a ball would strike someone in the road: people did pass along the road from time to time. So it could not have been said that, on any ordinary meaning of the words, the fact that a ball might strike a person in the road was not foreseeable or reasonably foreseeable - it was plainly foreseeable. But the chance of its happening in the foreseeable future was infinitesimal. A mathematician given the data could have worked out that it was only likely to happen once in so many thousand years. The House of Lords held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it.

But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. If the activity which caused the injury to Miss Stone had been an unlawful activity, there can be little doubt but that *Bolton v Stone* would have been decided differently. In their Lordships' judgment *Bolton v Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it.

> In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately.
>
> It follows that in their Lordships' view the only question is whether a reasonable man having the knowledge and experience to be expected of the chief engineer of the *Wagon Mound* would have known that there was a real risk of the oil on the water catching fire in some way: if it did, serious damage to ships or other property was not only foreseeable but very likely. Their Lordships do not dissent from the view of the trial judge that the possibilities of damage "must be significant enough in a practical sense to require a reasonable man to guard against them" …."

84. Given the existence of a "real risk" of damage, Lord Reid continued thus:

> "If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense."

85. Much of that which I have quoted was quoted by Tomlinson LJ in *Berent v Family Mosaic Housing and London Borough of Islington* [2012] EWCA Civ 961, where he analysed Lord Reid's words in this fashion at [20] and [21]:

> "There are at least two points to note about this important passage. First Lord Reid uses the expression "a real risk", which was the expression used by the judge in this case. Secondly one cannot in this context separate the enquiry as to reasonable foreseeability of damage from the related enquiry what is it reasonable to do in the light of the reasonably foreseeable risk. It may be reasonable to take no steps to eliminate a risk which is unlikely to eventuate and which will be of small consequence if it does. The social utility of the activity which gives rise to the risk falls to be considered. Carelessly leaking oil into a harbour is an activity of no value from which it is obvious that anyone should desist if it gives rise to only a very small risk of a disastrous fire. Playing cricket on the other hand is a socially useful activity – players should not be expected to desist unless at the location at which the game takes place it poses a risk the nature and extent of which outweigh the undesirability and/or inconvenience and/or difficulty and/or expense of eliminating the risk by stopping

> play at that ground and/or finding another more suitable location.
>
> The latter point emerges clearly from Lord Hoffmann's speech in *Tomlinson* …."

86. The point is made, albeit without specific reference to *Tomlinson*, in paragraph 8-153 of *Clerk & Lindsell* which is headed 'Degree of Likelihood of Harm':

> "What is relevant is the degree of likelihood that harm may occur. In Lord Dunedin's words: "People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities." The point is well illustrated by contrasting the cricketing cases of *Bolton v Stone* and *Miller v Jackson*. In *Bolton* the claimant was hit by a ball driven from the defendant's cricket ground on to a quiet road. The evidence was that balls had been hit out of the ground on perhaps six occasions in 30 years. The risk of harm was foreseeable but the chances were small. The House of Lords held that the defendants were not liable for continuing to play cricket as it was reasonable to ignore such a small risk. In *Miller* by contrast, balls were hit out of the ground eight or nine times a season and had damaged the claimant's property on a number of occasions. The Court of Appeal held that the risk of damage was so great that the defendants were negligent each time the ball was hit out of the ground and caused damage. It should be noted that *Bolton* is not authority for the view that it is always reasonable to disregard a low likelihood. The other factors in the balance, *e.g.* the severity of the harm and the cost of precautions, must also be taken into account."

87. To the extent that it is necessary to refer specifically to *Tomlinson* in this particular context, I should record a passage in the speech of Lord Hobhouse of Woodborough to which Mr Sweeting drew attention, albeit for a somewhat different purpose from the purpose for which I cite it. The passage is as follows:

> "79. The second point is the mistreatment of the concept of risk. To suffer a broken neck and paralysis for life could hardly be a more serious injury; any loss of life is a consequence of the greatest seriousness. There was undoubtedly a risk of drowning for inexperienced, incompetent or drunken swimmers in the deeper parts of the mere or in patches of weed when they were out of their depth although no lives had actually been lost. But there was no evidence of any incident where anyone before the claimant had broken his neck by plunging from a standing position and striking his head on the smooth sandy bottom on which he was standing. Indeed, at the trial it was not his case that this was what had happened; he had alleged that there must have been some obstruction. There had been some evidence of two other incidents where someone suffered a minor injury (a cut or a graze) to their head whilst diving but there was no

> evidence that these two incidents were in any way comparable with that involving the claimant. It is then necessary to put these few incidents in context. The park had been open to the public since about 1982. Some 160,000 people used to visit the park in a year. Up to 200 would be bathing in the mere on a fine summer's day. Yet the number of incidents involving the mere were so few. It is a fallacy to say that because drowning is a serious matter there is therefore a serious risk of drowning. In truth the risk of a drowning was very low indeed and there had never actually been one and the accident suffered by the claimant was unique. Whilst broken necks can result from incautious or reckless diving, the probability of one being suffered in the circumstances of the claimant were so remote that the risk was minimal. The internal reports before his accident make the common but elementary error of confusing the seriousness of the outcome with the degree of risk that it will occur.
>
> 80. The third point is that this confusion leads to the erroneous conclusion that there was a significant risk of injury presented to the claimant when he went into the shallow water on the day in question. One cannot say that there was no risk of injury because we know now what happened. But, in my view, it was objectively so small a risk as not to trigger section 1(1) of the 1984 Act , otherwise every injury would suffice because it must imply the existence of some risk. <u>However, and probably more importantly, the degree of risk is central to the assessment of what reasonably should be expected of the occupier and what would be a reasonable response to the existence of that degree of risk. The response should be appropriate and proportionate to both the degree of risk and the seriousness of the outcome at risk. If the risk of serious injury is so slight and remote that it is highly unlikely ever to materialise, it may well be that it is not reasonable to expect the occupier to take any steps to protect anyone against it. The law does not require disproportionate or unreasonable responses</u>." (My emphasis.)

88. That case, of course, involved the question of the legal obligations of the occupier of the piece of land (or, more accurately, the piece of water) where Mr Tomlinson suffered an injury very similar to that suffered by the Claimant in this case. However, the underlined passage reflects clearly the way in which the degree (or quantum of risk as I have called it for present purposes) interacts with the issue of the measures that might be considered to obviate or reduce the risk. As Lord Hobhouse makes clear in the passage that follows (which I will not set out in full), there are circumstances in which, despite the existence of a risk of serious injury, it would not be proportionate to prevent an individual from participating in an activity giving rise to that risk because it would restrict an individual in his or her freedom of choice to engage in a variety of activities and pastimes at his or her own risk.

89. The net effect of this is that, whilst I have been directed to consider the two discrete issues previously identified (see paragraph 4 above), in a sense they fall to be considered together. As it seems to me, if my conclusion on the evidence is that, following a properly conducted appraisal prior to the playing of the game, the risk of serious injury was correctly assessed as nil or minimal, the second question could be said not to arise at all (as was the conclusion of Globe J in *Blair-Ford v CRS Adventures Ltd*: see paragraph 69 above). Alternatively, the risk might have been assessed as greater than merely minimal, but nonetheless not high enough to require any steps to minimise the risks having regard to the social value of the game or that the proportionate step required nothing more than, for example, the giving of a warning of the risks of headfirst entry because of the risk of serious injury (but leaving the choice of entry to the individual). Obviously, once a more than minimal risk of serious injury (which could involve permanent paralysis) has been foreseen, active consideration to the need to take steps to minimise that risk would need to be taken: any failure to do so would amount to a breach of duty. However, as I have said, the answer may be that no steps need to be taken, but if steps are necessary, the issue is to determine the proportionate response to the assessed risk.

90. Mr Sweeting reminded me that the net evidential effect of where the case stands is that there is a finding that there is a "very small" risk of serious injury which, as I understood him, the MoD did not challenge. Mr Lynagh submitted that there was no real risk of a serious injury in this game and that it really was an unfortunate freak accident for which nobody was to blame. The positions each adopted are effectively the same.

91. Mr Sweeting contrasted that position with the position taken on behalf of the Claimant which he suggests is at a polar extreme, namely, arguing that a "very high risk, so high that it ought to have been obvious from the outset at the risk assessment stage, that this was dangerous" and that the game should never have gone ahead.

92. If his submission was to the effect that I am forced to accept one view or the other, then, as a matter of principle, I do not, accept it. The Court of Appeal has not confined my appraisal of the level of risk to one end of the spectrum or the other: my first task is to answer the open-ended question of what was the degree of risk of serious injury arising from the game as played on the day of the Claimant's accident. Equally, I am not obliged simply to prefer one expert or group of experts over another. It is often the case that a position somewhere between the extremes taken by the parties through their experts is taken by the court. I merely make that observation so that my overall approach is understood.

93. I will turn to the expert evidence.

The expert evidence

94. Field J heard from Mr Petherick and Professor Ball and had the report of Dr Jones available. Their evidence was the subject of comment by him and by the Court of Appeal. I have had the evidence of Mr Petherick and Professor Ball available, in the sense of having seen how they gave evidence before Field J against the background of their original reports, and I have heard them both give evidence (and be cross-examined extensively) on their original and more recent reports. It is not unnaturally impossible to put out of my mind completely the comments of Field J and the

observations of the Court of Appeal (and I am not sure it is wholly appropriate in the circumstances for me to do so in any event), though I still regard it as my task to make my own assessment of their evidence within the parameters set by the direction of the Court of Appeal and bearing in mind the need to explain how I reach my conclusions about their evidence.

95. I have, of course, heard from Professor Roger Haslam and Mr Andrew Nicholson, neither of whom prepared reports for the first trial or gave evidence before Field J. I too have the report of Dr Jones for consideration.

96. I should say at the outset that all the experts had appropriate expertise and experience to offer to the court and, within the framework each set for himself, I felt each was genuinely endeavouring to assist me. I reject Mr Lynagh's suggestion that Professor Haslam was evasive and partisan: any hesitancy on his part seemed to me to reflect a desire to give a considered answer to difficult questions. As with any case in which expert evidence plays a part, what an expert says has to be capable of withstanding logical analysis in the particular context (cf. *Bolitho v City and Hackney Health Authority* [1998] AC 232) no matter how eminent the expert may be and the expert view, often given on the basis of assumed factual situations, has to be viewed in the light of the ultimate findings of fact made by the court. Furthermore, an expert view on matters such as those involved in this case, whether given to the providers of the 'Fun Day' (see paragraphs 72-75 above) or to the court, can only inform the relevant decision, it cannot dictate it. I must endeavour to apply commonsense to the material before me and, as I have already said, I am not obliged to prefer one expert over others or necessarily reject one with the result that the others are accepted by default. Quite often, as I have already indicated, the ultimate view of the court may well represent a synthesis of competing expert views.

97. I have re-read the reports of all the experts and the transcripts of the evidence each gave for the purposes of formulating this judgment. With no disrespect to any of the experts, this re-reading reinforced the impression I gained whilst listening to the evidence, namely, that it was only of limited assistance to the first of the issues I have to address and that some areas covered in the evidence that did not really inform that issue. If I had been hoping to distil from what they said a sense of the statistical likelihood of serious injury arising from headfirst entry into the pool, then those hopes were unfulfilled. In a case such as *Bolton v Stone* (see paragraph 78 above), the evidence before the court (not, of course, in the form of expert evidence, but simply in the form of factual evidence of the history) enabled the court to see just how infrequently a cricket ball left the cricket field in circumstances that created danger and it was quite obvious that the chances of serious injury were minimal – indeed they were of such a level that there really was no basis at all upon which it would have been reasonable or proportionate to take any particular precautions, least of all ceasing to play cricket on that particular piece of ground. However, there is no equivalent material in this case (largely because of the relative infancy of the game: see paragraphs 158-165) and the experts were able to illuminate the problem only in a very general sense from each of their perspectives.

98. Even Professor Ball, who took the most robust view of the game, acknowledged that there was <u>some</u> risk of serious injury, but that his assessment (which was his assessment at the original trial) was that it was "very low" though he volunteered no percentage chance. Mr Nicholson said that it was "low". I took that up with him at

the conclusion of his evidence and I record the interchange (somewhat edited) as follows:

> MR JUSTICE FOSKETT: … my question is: what does "low" mean? … these words have different meanings to different people.
>
> A: Yes … it refers back to a different European standard …. There is a traffic light system … which is red, amber, green, which corresponds with high, medium, low risk. So what I'm saying here is that low corresponds to green, and I think that's quite a helpful -- I think the reason that it's become a European standard is because everybody can understand the traffic light system, it's common sense that red means stop, amber means caution, green means go. So in my view the risk was low. Meaning green, proceed. Does that help?
>
> MR JUSTICE FOSKETT: Well I am afraid the temptation is to say, "… what does green mean", because … some people might say if there's a risk of serious injury of … five per cent, so five times out of 100 dives somebody is going to sustain serious injury. Others may say … it has to be one in 1,000, one in 1 million, I don't know. … at the moment don't have a real feel for what you think "low" means from a statistical point of view.
>
> A: Unfortunately, ergonomics, I think generally, does not have a lot of epidemiological statistical data. It is in that sense, I think, partly subjective. So I am using my experience of likelihood.
>
> MR JUSTICE FOSKETT: But it is essentially subjective, isn't it, based on whatever evidence you have to hand?
>
> A: It is largely subjective ….

99. Mr Petherick said that he would regard a risk of 1 or 2 in 100 as constituting a "small" risk of serious injury. He said that in the broad context of being asked whether, if the court assessed the risk of serious injury from playing this game as being "very small" he would accept that the social benefit of the game justified it being played. He said that if the risk was "very small" there could be a social benefit in playing the game, but he thought that the social benefit of the game was "minimal" by comparison with other games that could have been played and he was unable to see how the risk in this case could be assessed as "minimal". He made it clear that, in his view, even if (contrary to his view) the risk of serious injury was assessed as "very small", there was insufficient social benefit to justify taking such a risk. It appears that, from the statistical point of view, he regarded a risk rate of 4.5-5 per 100 of serious injury as representing a high risk.

100. Professor Haslam was of the view that there was a foreseeable risk of serious injury to such an extent as to warrant forbidding headfirst entry as part of this game.

101. It is, of course, difficult for anyone to form a view now about what a properly conducted *ex ante* risk assessment would have concluded without being aware that the Claimant suffered the devastating injury that he did. That affects the court as much as it does the experts and those witnesses of fact who have described their feelings about what was taking place on the material afternoon. However, I must do my best to assess what the reasonably careful and prudent provider of a game such as this ought reasonably to have concluded about the risk of serious injury being caused by the game as played.

102. It is, of course, surprising that experts with, as I have said, plenty of experience in this overall field should come to such diametrically opposed views. In order to find a way through these diverging views it is necessary for me to try to distil in summary form how it is that each expert arises at his position.

103. Professor Ball had analysed why he and Mr Petherick had come up with such differing assessments and his conclusion was that he (Professor Ball) tried to assess the risk "from scratch", as he put it, rather than, as he suggested was Mr Petherick's approach, to look for guidance in other relevant contexts (e.g. in relation to swimming pools) to inform the process of risk assessment. He (Professor Ball) said that his approach to a "proper risk assessment" was to assess the risk and then implement reasonable controls. He was asked by Sir Geoffrey what was the purpose of the statistics he referred to in his first report if it was his view that there was no comparable activity that would help evaluating the dangerousness or otherwise of the activity in question. His answer (in edited form) was as follows:

> "… if you look at the particular mode of entry … you can see that it involves, basically, a horizontal dive from waist height onto a soft and yielding surface and sliding down onto a grassy field. So … instead of looking at … advice which has been given by other people in only vaguely similar situations, I try to get some feel for … what the actual risk is associated with carrying out that activity. So one way of doing that is to look at other activities which are carried out, where people are basically making horizontal dives from about waist height and I don't have to look very far because I know that [in rugby there are] diving tackles and diving for touch. In my opinion, the risk of diving tackles and diving for touch is actually considerably higher than the risk of diving onto that yielding surface and sliding down a distance of certainly less than one metre, onto what is basically a grassy surface. So in addition … I looked at the statistics for paraplegia and quadriplegia … to see where they were coming from, and most of them come from driving accidents, and there's a small number, but significant number, which come from sports activities. I think there are about 35 serious cases per year in this country from sports activities. … I've got data on how many people take part in these activities and roughly how many times per year, so from that I can get a feel for what the risk is of serious spinal injury - in those situations, in those sports. So that, generally, gives me a feel for

> how risky this activity might be. I cannot do it any other way. I cannot do it in the abstract …."

104. He repeated subsequently that, in his view, the crux of the present case was the risk associated with a horizontal dive from waist height onto the ground and, when challenged with the proposition that what was involved here was a dive headfirst over a metre high obstacle onto the ground, he replied as follows:

> "Correct, yes. But we are still diving from waist height onto the ground, basically. … the way I look at it is that that metre high obstacle actually provides a platform for you to slide over on, which reduces the risk of injury...."

105. He added later that it was his view that climbing over the top of the side wall of the pool was more risky than sliding in because, amongst other things, a person's centre of gravity would be about half a metre higher with the effect of increasing the impact speed if the person fell off.

106. As a first observation, I do not myself see such a significant difference of approach in principle between Professor Ball and Mr Petherick when the approach of each is analysed. Each is looking for some comparable activity to help assess the risks - Mr Petherick, the activity of diving into a shallow swimming pool, Professor Ball to diving in, for example, a rugby match. An issue may be which is the more apt comparator. I will return to this below.

107. The second observation is that Professor Ball's description of the action he is assessing is that of "a horizontal dive from waist height onto a soft and yielding surface and sliding down onto a grassy field" (emphasis added). There is, of course, no doubt that there was grass under the pool's surface but if the suggestion is that its attenuating characteristics in the height of summer would be the same as they might be during the rugby playing season then this, in my view, is unrealistic: the ground generally would be harder in the summer. It follows that the end result of the activity, however it was implemented, would be a landing onto a hard surface which Mr Gardner (see paragraph 160 below) characterised as the "unyielding plastic-covered ground". Second, it will be apparent from the evidence recorded in paragraphs 33-50 above that not every person either intended or achieved a controlled "sliding down" over the pool wall. Third, the reference to the "soft and yielding" pool wall does not address the issue of the extent to which the wall may operate to disrupt or throw out of kilter a running dive causing the individual to lose control of the dive. In other words, the overall description of the action upon which Professor Ball bases his risk assessment process is, to my mind, a somewhat sanitised version of the reality as evidenced in a number of instances, including that of Corporal Woods on his first attempt. Putting it in layman's terms, there was potentially a fairly bumpy and uncertain process – undoubtedly of itself adding to the fun and excitement of the game. In the light of the evidence I have heard (which, as I have emphasised previously, has been supplemented to some extent since the trial before Field J), I do not accept that Professor Ball's description of the action in question is a totally accurate description of what a good number of those taking part on the day in question were doing. I will return to the question of whether what they did ought to have been foreseen in due course (see paragraphs 184-191).

108. It also follows that, for my part, I cannot see how it could be said that climbing over the wall was riskier than the kind of dive being undertaken by a number of the participants. Even climbing over in haste would, as it seems to me, be a slower process with less risk of losing control than a dive onto and across the upper surface of the pool wall, the likelihood in that latter scenario being that the head of the individual would be in a downward orientation as he or she enters the pool area.

109. Finally, I find the analogy with a dive in a rugby match (or on a cricket field) difficult to accept. In the first place, such a dive does not involve a dive over a 1 metre high obstacle with its potential for interfering with the intended process of execution of the dive, a point emphasised by Corporal Woods who himself played rugby. Naturally, I accept that Professor Ball is right to say that there are risks associated with diving tackles and diving for touch in rugby, but he was unable to point to statistics that showed a significant risk of serious injury (including an injury of the nature sustained by the Claimant in this case) from either of those two actions. The risk of injury generally in rugby is, of course, well-recognised and well-evidenced: anyone who plays in any game of rugby will appreciate that.

110. That final factor also leads into consideration of the statistics upon which Professor Ball relies. The way the statistics were deployed in the first trial was criticised by the Court of Appeal for, if I may say so, the obvious reason that the statistics did not truly reflect on the question of the risks associated with the precise action undertaken by the Claimant on the day in question: see [51] of the judgment of Smith LJ. Although Professor Ball has sought to say that his reference to the statistics has been misunderstood or misapplied, the evidence I have recorded above does suggest that the statistics still figure in his analysis. I regret to say that I am unable to accept that his reliance upon them is valid for the reasons already largely articulated by the Court of Appeal.

111. That I have rejected Professor Ball's analysis of the measure of risk does not necessarily mean that I reject also the proposition that the risk of serious injury was "very small": I am merely saying that Professor Ball's approach does not persuade me of that proposition. A more robust version of the game than he assumed has to be considered in that context.

112. The other expert evidence in support of a "low" risk of serious injury is from Mr Nicholson whose opinion was commissioned on behalf of the MoD. Until 2010 he was a Principal Ergonomics Consultant for Hu-Tech Ergonomics and Human Factors, a consultancy he set up in 1989. In 2010 he left Hu-Tech and founded Axis Ergonomics but the focus of his work has remained the same. From 1976 to 1989 he had worked in the Human Biology Department, and then at the Robens Institute of Industrial and Environmental Health and Safety, both at the University of Surrey, as a Research Officer and then as a Research Fellow. He and Professor Haslam know each other professionally and they share association with similar professional bodies.

113. Like Professor Ball, prior to the trial before me Mr Nicholson had tried out various methods of entry (although excluding headfirst entry because he was not suitably attired on the occasion the pool was made available to him) in the somewhat artificial environment of effectively being on his own (and thus unimpeded by other contestants) when making the entry and, of course, choosing a speed of entry unaffected by being part of a competitive game. He described the side of the pool as a

"meaningful obstacle that would need to have been overcome in some way". On the basis of his appraisal he said that a headfirst entry involving a slide or slither over the pool side was "an almost intuitive way of negotiating it." By that I took him to mean that it would be a natural manoeuvre for people taking part in this game for the first time to undertake. Given that about 50% did so on the day in question, he is almost certainly correct about that.

114. He described a "controlled entry" as a "slither" with one relatively smooth movement leading to the hands coming into contact with the pool base first. He likened it to the position taken up in a "wheelbarrow race". He foresaw the hands then sliding along the wet base because of the momentum of the forward movement whilst the chest, stomach and legs of the contestant would remain in contact with the pool side until the whole body was free from the side and the body would then continue to slide across the base of the pool. He also addressed the possibility of an "uncontrolled entry" which he said was likely to occur either when a contestant had to adjust his or her trajectory during entry with the result that they "lose control of the direction in which the centre of gravity is moving" or making contact with another contestant. He expressed the view in his report that a contestant who uses too steep a trajectory on entry into the pool would still enter the pool in a controlled way even if they have misjudged their entry. In relation to the likelihood of injury from uncontrolled entries he said this in his report:

> "In my opinion the likelihood of such uncontrolled entry causing sufficient force to cause a serious injury will be greatest where the hands, shoulder, hip or head come into contact with a very firm surface where the momentum of the body is so great to cause a fracture. It is human nature to try to [break] the impact of a fall or similar uncontrolled movement where the body will come into contact with a firm, unforgiving surface by holding out one or both hands. This is seen in everyday life, be it in the children's playground, in the home, on a sports pitch, or in an industrial setting. Thus I consider that the greatest likelihood from an uncontrolled entry is a sprain or fracture to the upper limb. If the contestant's trajectory is altered in an involuntary manner during entry then the above rationale remains, in my opinion. We will always try and brake our fall using our hands first. If a contestant is unable to do this then they may fall onto their shoulder, hip or head. I do not consider that an uncontrolled entry whereby the young, fit contestant makes contact with the inflated pool side would give rise to sufficient force to cause serious injury. They may be bruised or winded, or suffer a muscle strain, or similar. An uncontrolled entry whereby the contestant makes contact with the base of the pool as a result of a steep angle of entry would, in my opinion, have the potential to give rise to sufficient force to cause a serious injury, such as a fracture. The likelihood of a fracture of the cervical spine, as that suffered by the Claimant, will depend on the trajectory of the entry, how much the hands and arms would have reduced the momentum of the body, and the angle at which the head hit the pool base. In my opinion the

> likelihood of this occurring is low. I note from Professor Ball's report (paragraph 9.7 of his supplementary report) that in his opinion the degree of risk of serious injury entailed in the game as played on the day of the claimant's accident was tiny."

115. He repeated during his cross examination by Sir Geoffrey that he felt "that [the] likelihood of a vertical head strike is unlikely". He was taken by Sir Geoffrey to his commentary on what had appeared in Professor Haslam's report where, at [27], Professor Haslam had said that prohibition of headfirst entry would have been an easy and cost free precaution. Mr Nicholson's observations were as follows:

> "At para 27 he states that a prohibition of headfirst entry would have been an easy and cost free precaution that would have reduced the risk of a serious injury to an acceptable level. I agree that it would have been easy and cost free. However, I am of the opinion that other means of entry carry with them risk of injury that could also have potentially significant injury outcomes. Vaulting means that one hand is placed on the side of the pool. This is a very small area of contact between the competitor and the pool side. If the pool side was wet, as it almost certainly would have been, what was the likelihood of the hand slipping and the competitor falling headfirst or feet or bottom first into the pool? What if the foot or leg struck the side of pool during the vault? Again there is significant injury risk from these uncontrolled falls. Straddling over – i.e. where one leg is swung over the pool side followed by the other produces postural imbalance. Which type of entry would the organiser have allowed?"

116. He accepted in cross-examination that the foregoing paragraph evidenced his opinion that each mode of entry described there carried a risk of serious injury though, as I have already indicated, he repeated that, in his opinion, the risk was "certainly not significant and was low", the expression used in his report. It was the reaffirmation of his position that led to the questions I asked as recorded in paragraph 98 above.

117. I will return to Mr Nicholson's view after summarising the position of Mr Petherick and Professor Haslam. All I would observe at this stage is that the basis of his opinion concerning the risk of serious injury appears simply to be that the chances of very near vertical entry into the pool were small and thus the risk was low. As is reflected in his answers to me (see paragraph 98 above), he sees this evaluation as "largely subjective".

118. Mr Petherick's view can be summarised fairly shortly. That is not because his views are unimportant, but they were rehearsed fully and comprehensively in the original trial and were commented upon by the Court of Appeal. He adheres to the views previously expressed. I should, perhaps, say that what he may lack in terms of academic credentials compared with the other expert witnesses he makes up for in a good number of years practical experience and a history of playing a number of sports, including rugby, at a good standard.

119. It is a fair point that Mr Lynagh makes that Mr Petherick does set as a significant part of his framework for his opinion the fact that the Claimant was technically "on duty" on the day in question and that the accident should be seen in the context of a workplace environment. That, Mr Lynagh suggests, has resulted in Mr Petherick taking an over-cautious approach to the way that afternoon's "entertainment" should have been organised. There is something in that criticism (and I found his suggestion that 'no diving' pictograms might be used as unrealistic), but the important issue for present purposes is the magnitude of the risk of serious injury arising from the way the game was played and it is that part of Mr Petherick's analysis upon which I propose to focus.

120. For my part, nothing I have heard in the case as presented to me has persuaded me that it was wrong in principle for Mr Petherick to have looked to the considerations arising from diving accidents generally to help form a view on the question of the risks associated with this game. It has to be recognised, of course, that the action involved in the present case was not a dive in the true sense, but the kind of injury sustained is one that is sustained when someone dives into water that is too shallow. Diving into water less than 1.5 metres in depth has been prohibited for some years for this reason. Whilst not a classic dive, headfirst entry over a 1 metre high obstacle after a running start is not, to my mind, that far removed from an ordinary dive and that is what 50% of the contestants were doing that afternoon. That is what led Mr Petherick to refer to the considerations arising from accidents arising from diving accidents. I also agree with him that the act of diving precludes a true analogy between the "playground accident" scenario (reflected in designs of equipment prohibiting a fall from a height of more than 1.5 metres according to the relevant regulations) and what occurred in this case.

121. As Smith LJ said in the Court of Appeal (at [58]), the important issue is whether the contestant entering the pool headfirst could control his entry or whether there was a risk of loss of control. If there was a risk of loss of control, the risk of the kind of injury sustained in a diving accident of the sort I have mentioned is itself an obvious risk. It does not necessarily make it a significant risk statistically, but once control is lost it makes it an obvious risk. At the first trial, Mr Petherick was of the view that a running headfirst entry raised the risk of a loss of control; Professor Ball was of the view that there would be no loss of control. Mr Petherick has adhered to that view at the trial before me and in his supplementary report expressed himself thus:

> "2.1.1 Given the height and width of the cylindrical sides, in attempting a headfirst dive into the pool it is unlikely that the Claimant and others would have been able to clear the obstacle without coming into contact with it. Furthermore, participants would need to move with considerable force to gain sufficient momentum to slide over the barrier in one movement. The required momentum could potentially cause participants to enter the pool at a steep angle, resulting in a heavy landing on the pool base. I also believe that contact with the side will be subject to varying degrees of friction depending upon the interaction of clothing and the extent to which it and the side of the inflatable are wet.
>
> …

> 2.1.3 The fact that the sides of the pool prevented participants from being able to see into the pool, with the possibility of other participants scrambling around the base of the pool searching for a piece of fruit, until the point of take-off could potentially lead to a requirement to re-adjust one's flight path at the last moment to avoid a collision, thus again potentially leading to a false flight path taking place from a headfirst dive entry.
>
> 2.1.4 There is the potential for some bounce effect from the inflatable sides to the pool, when a participant makes contact with it. More than one participant making contact with the side at the same time could increase the bounce effect. This bounce effect would make it more difficult for participants to regulate their method of entry and could lead to a steep entry.
>
> 2.1.5 The PVC base lining to the pool, which was covered with water to a varying degree, due to the slope of the field, is likely to have been slippery and therefore when hands were placed onto its surface as part of the forward dive motion there was a reasonably high risk that the participant's hands would slide away from them, which in turn would cause a loss of control and a sudden readjustment in body positioning and a greater likelihood of their head coming into contact with the base lining of the pool."

122. His view was that there was a significant risk of serious injury in allowing headfirst diving entries to take place into the inflatable pool and that this risk was sufficiently significant to justify a control measure such as a ban on headfirst entry. It was, he contended, "too dangerous to be permitted".

123. Professor Haslam is Professor of Ergonomics at Loughborough University. He has for almost 20 years made human factors aspects of health and safety his particular expertise, with injury incidents as a specialist interest. He has advised a variety of institutions in the construction, distribution, manufacturing, catering, forestry, sports stadia, utility and leisure sectors on injury causation and prevention. He is a Fellow of the Institute of Ergonomics and Human Factors, a Chartered Member of the Institution of Occupational Safety and Health and a Fellow of the International Ergonomics Association. He has taught health and safety and the principles and practice of risk assessment to students at undergraduate and at Master's level for many years. He has been an invited speaker at RoSPA conferences. Whilst he was not questioned about this, it is, perhaps, appropriate always to bear in mind in the kind of context with which this case is concerned what Lord Hoffmann said about an organization such as RoSPA:

> "It is of course understandable that organisations like the Royal Society for the Prevention of Accidents should favour policies which require people to be prevented from taking risks. Their function is to prevent accidents and that is one way of doing so. But they do not have to consider the cost, not only in money but also in deprivation of liberty, which such restrictions entail. The courts will naturally respect the technical expertise of such

> organisations in drawing attention to what can be done to prevent accidents. But the balance between risk on the one hand and individual autonomy on the other is not a matter of expert opinion. It is a judgment which the courts must make and which in England reflects the individualist values of the common law."

124. It is probably fair to say that Professor Haslam is more closely allied to the school of thought that generally favours positive intervention where there is a perceived risk although he said clearly in his evidence (see paragraph 131 below) that he is "not a health and safety zealot". Whether there ought to have been intervention in any situation is ultimately, of course, the result of the balance referred to by Lord Hoffmann that has to be struck by the court. However, Professor Haslam's views on the measure of risk of serious injury from this game as played is as important as the views of his colleagues. Identifying a potential risk is a task that those with experience in the field are well equipped to make; deciding what to do about an anticipated risk raises broader issues. In relation to matters affecting entry into the pool in a headfirst fashion he referred to the following in his report:

> "25. Moving across the 0.98 [metre] width of the pool wall would also have presented a challenge, needing forceful effort and momentum from the run up for competitors to propel themselves across the wall. This would have interacted with possible movement, deformation and bouncing of the pool side wall itself, this not being a rigid structure. The trajectory of each competitor's body across the pool side would have depended on the trajectory of the competitor's launch and the distance into the width of the pool side where their body first made contact. This will have varied from one competitor to another, affected by the speed of their run up and the distance from the pool at which they launched. Another possible factor affecting a competitor's trajectory was the pool side flooring being wet and slippery.
>
> 26. An energetic run up, with a vigorous launch, with the body first making contact with the pool side at a distance from its outer edge, would have had clear potential to present competitors with difficulty controlling their entry into the water. A steep angle of entry could occur from this, also with the possibility of axial rotation. The trajectory of the competitor's entry into the pool carried a high degree of uncertainty.
>
> [He then referred also to the variations in friction arising from the varying amounts of water on the pool side and to the fact that the depth of the water would have had no attenuating characteristics.]
>
> 30. The unpredictable trajectory of competitors across the pool side, together with the forward motion and momentum of their bodies, would have presented difficulties for some competitors controlling their speed and direction of entry into the pool. In my opinion, this posed a clear possibility of a

> headfirst impact with the bottom of the pool. It is well known that the cervical spine (neck) is vulnerable to serious injury from head impact and axial loading."

125. His opinion was that the method of headfirst entry adopted was accompanied by a "high risk of uncontrolled entry to the pool" which led to a "foreseeable possibility of forceful head impact with the floor". Since it is well known that the cervical region of the spine (neck) is a vulnerable region of the body, susceptible to serious injury from head impact, it was his opinion that "a common sense risk assessment by a competent assessor should have given regard to this". He also expressed the view that although the activity was not swimming and diving in a conventional sense, "the fact that the equipment was described as a swimming pool and the game described as a swimming pool activity should have … been sufficient to prompt the risk assessment to consider headfirst entry into the pool."

126. His overall conclusion was that there was a foreseeable risk of serious injury which was sufficient to justify consideration being given to the implementation of measures to reduce it which he said was "the simple measure of prohibiting headfirst entry into the pool".

127. Mr Sweeting attacked Professor Haslam's approach to his assessment of the risks associated with the playing of this game by suggesting, first of all, that he appeared to be approaching the question of what was "likely" by eliding it with what was "possible". He drew attention to what Professor Haslam had said in the Joint Statement of the experts which was as follows:

> "In my opinion there was a 'very high' or 'substantial' risk of serious injury entailed in the game as played. This takes into account that there was the potential for 'extreme harm' i.e. major fracture and injury that would cause substantial disability. I assess the likelihood of harm occurring as 'likely'. The terminology I have used here is taken from risk assessment guidance by HSE and IOSH, using their approach to categorising the potential severity of harm and classifying the likelihood of harm occurring.
>
> After the event, it is beyond doubt that headfirst entry into the pool had the potential for serious harm. This occurred with [the Claimant] ….
>
> Considering the risk of serious harm ex-ante, it is well known that headfirst impact with the ground at a steep angle carries a high risk of cervical fracture. With the game as played, I believe there was a significant foreseeable possibility of forceful steep angled headfirst impact for the reasons given in my previous reports …. I have said that in my opinion there was a "very high" or "substantial" risk of serious injury entailed in the game as played. In plain language, I believe this was a serious accident waiting to happen."

128. Mr Sweeting also relied upon a passage in his cross-examination of Professor Haslam which, he argues, evidences a wrong approach on his part. Mr Sweeting drew his attention to Mr Gardner's conclusion (see paragraph 168 below) and said this:

> Q. …. So his conclusion, no different from yours, that the method of entry which would have accounted for the injury and fits with the witness evidence that you regarded as cogent on this point, points to a near or vertical entry?
>
> A. I hesitate to say "my conclusion". I've taken account of Mr Gardner's advice and I can conceive of movements into the pool that would result in a near-vertical impact with the pool bottom.
>
> Q. Professor Haslam, you are retreating, aren't you, from what you say in your report? On the basis of this evidence, and the evidence of the witnesses that his legs flipped up, you say it's reasonable to assume that his movement towards the pool bottom was near vertical. And then you give a calculation which is based upon a near-vertical impact. So that was your conclusion, wasn't it?
>
> A. I've said it's reasonable to assume.
>
> Q. Now, a vertical entry to this ball pond is the least likely thing that you would have expected any competitor to have ended up doing, isn't it?
>
> A. I think it's the least likely thing that any competitor would have intended to do, but I think it's quite conceivable that that could be the outcome. The outcome from entering over the pool headfirst, over the poolside headfirst.

129. Mr Sweeting highlights the words "conceive" and "conceivable" and submits that it is simply not sufficient for the Claimant to establish that serious injury is "conceivable" because that merely establishes the existence of a risk.

130. It seems to me that this brings the argument in a full circle back to the considerations of law to which I referred in paragraphs 77-92 above. The question remains how "conceivable" is the occurrence of serious injury from the way the game was played. If there is any hint in the thinking of Professor Haslam that merely because a potential injury may be serious, this results in the conclusion there is a substantial risk of serious injury then that would fall foul of the strictures encapsulated in the extract from the speech of Lord Hobhouse in *Tomlinson* to which I referred in paragraph 87 above. The potential seriousness of the injuries is, of course, something to be taken into account in the second part of the overall consideration that has to be given, namely, what steps (if any) should be taken to obviate or otherwise minimise the risk. I agree with Mr Sweeting that there is a glimmer of the wrong thinking in the first two sentences of the extract from the joint statement recorded in paragraph 127 above. However, as it seems to me, Professor Haslam did focus properly, both in his reports, the joint statement and his evidence on what the true issue was, namely, the likelihood

of serious injury arising from the possible losing of control of a contestant attempting entry into the pool in the form of headfirst entry. It is also confirmed by the passage of the cross-examination that followed immediately after that upon which Mr Sweeting placed reliance for the above proposition. The cross-examination continued as follows:

> Q. Because we're not talking, are we, about the method of entry which was used by those half of the competitors who were sliding in? We are talking about an entry that went wrong, because the legs were flipped up in the air?
>
> A. I also have concerns about the other method of entry, which I think I've explained in a previous answer. I think my evidence is that I could conceive and see the possibility for participants to … end up descending towards the pool floor near vertically.
>
> Q. If you were considering this game in advance, you wouldn't consider, would you, that anyone would dive over? You've agreed that that's the case?
>
> A. Not without making contact with the side of the pool.
>
> Q. You've agreed that an entry by which you go in headfirst with your arms out in front of you, is something which would be something you could envisage as occurring?
>
> A. Yes.
>
> Q. And that that would be an entry which resulted, if it was performed intentionally, in the shallow entry that we can see in photograph number 1?
>
> A. I think if competitors were in control of their movements then they would try to enter with a shallow approach. So I think if that was the question, then my answer would be yes.
>
> Q. There's no evidence that anyone else had their legs flipped up so as to put them in a near-vertical position, that you're aware of, is there?
>
> A. I haven't heard that description given to any other of the entries in the evidence that's available.
>
> Q. And this accident didn't, therefore, happen as a consequence of performing the sort of entry that is being shown on photograph number 1?
>
> A. I think it could arise from … the participant intending to make this type of entrance but losing control of their direction and trajectory in the process of propelling themselves into the pool.

> Q. But it required, didn't it, the unique circumstances of Mr Uren making a headfirst entry, in the course of which, whilst he was on the side of the ball pond, he'd got into a completely vertical position and then dropped through a reasonably substantial distance onto his head? That was what was required.

131. That proposition was broken down in further questions. Professor Haslam made the point that the pool wall was curved and that there would be an issue as to with which part of the wall a contestant going headfirst would make contact. That could affect, he said, the alignment of the body as it went over the side: impact beyond the top front of the pool could result in a "vertical downwards" element of the person's motion. He said that in response to Mr Sweeting's suggestion that someone attempting a headfirst entry would be "going over horizontally and then descending into the pool on the other side". When later it was put to Professor Haslam that this would have been such a person's "intention" he said that he did not think anyone would have stopped to think about "the fine detail of the movements". Various other scenarios (including vaulting over the pool side) were put to him, the suggestion being that they also gave rise to a risk of serious injury. He accepted that some had some risk of serious injury, but a number were, in his view, very unlikely. At one point he said this:

> A. … I think it's worth saying I'm not a health and safety zealot; I'm not saying that we shouldn't try to have games like this. And I think in games like this there is potential for bruising, I think there is potential for people falling on the ground. But I think I am concerned about people propelling themselves towards the ground headfirst.
>
> Q. Well, there are a number of factors involved in that statement, aren't there, about propelling oneself towards the ground headfirst? I'm asking you about the risk of striking your head other than going over headfirst, the risk associated with vaulting and the risk associated with losing your balance when you're scrambling. The plain fact is, Professor Haslam, that there a risk in both of those cases that you could fall and strike your head?
>
> A. I think there's a possibility and therefore a risk. But I would judge the risk of a serious injury as a result of that to be much less likely.
>
> Q. So the risk of a serious injury as a result of falling and striking your head, you would regard as unlikely?
>
> A. Yes, I think so.
>
> Q. That goes for vaulting?
>
> A. Yes.

132. This, as I see it, confirms that Professor Haslam has examined each potential method of entry on its merits for the purposes of determining the measure of risk of each. It

may have been essentially a comparative exercise, but it is no less valid an exercise than some attempt at an absolute evaluation.

133. The final feature of the expert evidence is the written report of Dr Jones given at the first trial. His background is set out in [45] of Field J's judgment and was commented on by the Court of Appeal at [60]. Whilst it is a fair comment that his experience was less than that of the other experts, it is to be noted the Treasury Solicitor on behalf of the MoD, considered him to be sufficiently experienced and well-informed in the field to commission a report from him. Ultimately his report may have been in terms that did not suit the case that the MoD sought to advance, but that is immaterial. Obviously, neither Field J nor I have had the benefit of seeing him be cross-examined about his views. I must approach his expert report with that in mind, but afresh in the light of the other evidence I have heard.

134. Dr Jones was not given the opportunity to comment on the evidence given in the first trial because he was not called and, of course, he has not heard the evidence in the trial before me. However, it does appear from his report that he had a reasonable appreciation of what the Claimant was seeking to do at the time he sustained his injury and thus the nature of the "dive" he was attempting. Dr Jones was also aware of the accounts of those witnesses who said they saw the Claimant's legs clip the side of the pool as he entered causing him to enter at a steeper angle than he intended. It would seem, therefore, that his opinion was based on a proper understanding of the action being undertaken.

135. There are two particular paragraphs of his report that I should record, first [4.7] :

> "In my opinion, as an obstacle the sides of the pool could have been reasonably safely negotiated by climbing or by vaulting. However, even outside the leisure industry, it is well known that it is dangerous to dive into the shallow end of a swimming pool. The hazard of a headfirst entry is the same albeit the risk of injury from a relatively fast headfirst dive is likely [to be] greater than the risk associated with a slow headfirst entry (eg slowing sliding in headfirst over the side). Due to the likely difficulty in differentiating between slow headfirst entries and fast headfirst dives during the course of the game, it would probably have been advisable to ban all headfirst entries at the outset of the game."

136. He also said that CL, as an experienced organiser of events, should have been well aware of the risks associated with headfirst entry (especially diving) into a shallow pool.

137. The second particular paragraph to refer to is [4.11]:

> "In my opinion, while explaining the game rules [CL] should have ensured that the competitors were verbally warned not to enter the pool headfirst, in particular to dive. If competitors were diving headfirst into the pool during the game, this should have been immediately discouraged or penalised by those in charge …"

138. His view, therefore, seems to be that CL should have banned headfirst entry.

139. Before expressing my conclusions on the basis, so far as it is relevant, of the expert evidence I need to consider the impact, if any, of the attitudes of those attending and witnessing the event on the day.

Relevance of the views of bystanders/participants

140. The Court of Appeal has indicated that Field J was wrong to hold that the views of the spectators on the risks of an accident were "of very little relevance": see, in particular, [62] of the judgment of Smith LJ. It has not been entirely clear to me at which point in the process of evaluation views such as those expressed by some of the bystanders or participants (on the assumption that they were genuinely felt at the time) ought to be taken into account. They cannot have any direct impact as such on any *ex ante* assessment. They could be directly relevant to a dynamic risk assessment, but that, as I have indicated, is not really the issue in this case[4]. At [62] of her judgment in the Court of Appeal Smith LJ said this:

> "The judge said that he thought that what spectators thought of the risks of the game was of very little relevance. I am afraid that I do not agree with him on that. This was a game which no-one had seen played in this way before. There was no evidence that anyone from CL had seen it played in this way, permitting headfirst entry. No-one from the RAF had seen it played until the day of this accident. None of the experts ever saw it being played; they all had to envisage it. It seems to me that the impressions of those who actually saw it that day were potentially important."

141. Mr Sweeting was, I think, right to say that the views of spectators could only be relevant if they were sufficiently compelling to lead to the conclusion that any prior risk assessment had obviously failed (or failed adequately) to recognise headfirst entry as a potentially dangerous method of entry. What is clear, however, is that prior to the playing of the game no-one did consider the risks associated with headfirst entry.

142. I will review briefly below the evidence I received about this issue and what I made of it. However, it is accepted that no-one (apart, perhaps, from Mr Plant) said anything about their concerns in relation to the game that afternoon and no-one intervened to bring them to a halt. Not surprisingly, Mr Lynagh and Mr Sweeting relied upon this to demonstrate that, whatever may now be said, no-one really did consider that anything very dangerous was occurring that afternoon. Indeed it seems clear from the evidence given at the original trial that the Claimant himself did not see headfirst entry as potentially dangerous.

143. There is undoubtedly some force in the submission that Mr Lynagh and Mr Sweeting made. However, I do not consider that it is a complete answer to the issue raised. Professor Haslam put forward as attachments to his report a fair amount of research material the effect of which is to substantiate the common view that "peer pressure"

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[4] See Postscript to judgment.

and simply being involved in and swept up in a collective activity often prevents people from speaking out even if they perceive that danger is lurking. It was unnecessary to consider this material during the trial. However, at the risk of appearing to trivialise the issue, it seems to me clear that, except in the most obvious situation, no-one will want to be the first spokesman for the "safety first" viewpoint on an occasion such as the 'Fun Day' with which this case is concerned. Who will want to be the killjoy or party pooper on an occasion such as that with which this case is concerned? For my part, therefore, the failure to mention any inner concerns that may have been felt at the time counts for very little in my evaluation of the evidence. The other side of the evaluation coin is the proposition, which I accept, that, no matter how hard a witness will have tried, it will have been virtually impossible not to bring some hindsight to bear upon what they have said about their view of the nature of the game.

144. Mr Sweeting's first argument (supported by Mr Lynagh) is that the evidence demonstrates that the game was observed by three experienced RAF physical training instructors (PTIs) who saw nothing dangerous in the way it was engaged in by those taking part. Two of them (Corporals Williams and Gaze) were, he said, first into the pool when the accident occurred and, it is suggested, must have been close to the pool. In fact, Mr Scowcroft and Corporal Williams were first into the pool, but Corporal Gaze was undoubtedly on hand and close by. In his evidence to the Board of Inquiry he said that he was about 15 metres away whilst watching the game.

145. I might have been more impressed with this submission if Corporal Gaze had been called as a witness, either at the first trial or the trial before me. It would have been more satisfactory to evaluate his view of the game if he had come along to give it, rather than to conclude, in his absence as a witness, that he would have intervened had he thought that the game was obviously dangerous. He is recorded as having commented to his colleagues that the organisers of the game at no point told people not to dive into the pool. That rather conveys to me that he might have had some concerns despite Mr Lynagh's comment that he did not say so in the statement to the Board of Inquiry. However, I do not think I can really attach much weight to his views, one way or another, as I have not had an opportunity to hear them at first hand. I do not attach any significance to the fact that the Claimant's advisers took a further statement from him in 2008 which did not advance matters.

146. The same comment (about not giving evidence at either trial) is to be made of Corporal Williams. He made no comment to the Board of Inquiry that indicated his view of the game, one way or the other.

147. The third PTI was Sergeant Thomas to whom I have already referred (see paragraphs 36-39 above). Although he had not heard Squadron Leader Taylor give evidence before he gave his evidence, his views, it seemed to me, rather followed his lead. He had not said anything to the Board of Inquiry or in his witness statements to suggest that he would have intervened if he thought the game was dangerous. However, in answer to questions from Mr Lynagh, he did say, albeit not very explicitly, that the PTI team would have intervened if they thought the game was dangerous. I am afraid that on this issue I did not find his evidence very compelling.

148. Squadron Leader Taylor said strongly that the PTI team would have intervened if they thought the game as played was dangerous. He may be right, but (a) the question is

how dangerous it was perceived by them to be (to which the consideration mentioned in the next paragraph is relevant) and (b) in any event he saw nothing of the game in question. It follows that I do not think his evidence advances this issue to any useful extent.

149. So far as intervention by the PTI team generally is concerned, I question to what extent they would have thought it appropriate even if they saw a risk in the game. Their job was to encourage vigorous activity and I am inclined to think they would have required some real persuasion before intervening to stop the game being played. I appreciate that Field J appears to have attached some weight to this factor (see [58] of his judgment), but for my part, for the reasons I have given, it is not something which weighs heavily in the scales in favour of the Defendants.

150. Mr Sweeting has also placed reliance upon the fact that none of the three CL staff identified anything in the way the game was played as unsafe. Again, I have heard from none of them. Mr Berry's general evidence was not considered reliable by Field J and it is difficult to attach much weight to the fact that he did not intervene when (a) as I have found, he did encourage "diving" (by which I mean an action which did not involve clearing the pool wall without touching it), (b) he had not personally considered the issue of whether diving was dangerous at the time he had dealings with the risk assessment previously carried out and (c) he was undoubtedly the source of the original case on the First Defendant's behalf that the Claimant was the only person who had "dived" that afternoon and that he (Mr Berry) had expressly forbidden diving.

151. The passage from the evidence of Mr Brill at the original trial upon Mr Sweeting places reliance at paragraph 29 of his closing submissions was itself the product of what appears to have been a leading question by Mr Sweeting at the trial and as such inevitably runs into the criticism made of Mr Lynagh's questioning of Sergeant Thomas in the same context: see [63] of the judgment of Smith LJ. The passage is as follows:

> Q. … And as far as you were concerned then, on the basis of the experience you describe, … if you'd seen people going over the side, headfirst with their arms outstretched, that wouldn't have been something that you would have regarded as unusual?
>
> A. I wouldn't have picked, I wouldn't have said, stop that. No.
>
> Q. Or dangerous?
>
> A. No.

152. I will say something about the previous playing of the game in paragraphs 158-165 below.

153. Subject to the evidence of Lieutenant Colonel Westwood and Corporal Woods, to which I will turn shortly (see paragraphs 155-157 below), most of those who now assert that the game was dangerous confirmed that they had not thought this at the time: Mr Scowcroft, Mr Cassford, Mr Bermingham and Mr Beeken all said this. Mr Plant was not very definite about it. I am prepared to accept that he had some thoughts

that there were risks involved which he mentioned to Mr Sutton, but I do not think that those thoughts were very strongly expressed and it is somewhat surprising that he should have used the expression "freak accident" in his evidence to the Board of Inquiry if he really thought, on the basis of his observations, that the game as played was truly dangerous. His opinion does not, to my mind, take matters much further. Ms Chetha had little recollection now of the events of the day and again I did not think her evidence advanced this issue greatly.

154. As will be apparent from the forgoing analysis of the evidence, the opinions of most of those taking part or watching do not, to my mind, advance the case one way or the other. The exceptions to a degree are Lieutenant Colonel Westwood and Corporal Wood.

155. Lieutenant Colonel Westwood said to the Board of Inquiry, in answer to a question whether he was concerned about safety, that "in hindsight maybe [he] should have approached the game organisers, but looking back it was only the last game that anything dangerous occurred" and he continued that it was "only the second round that people started diving into the pool". As is evidenced by the way he expressed himself, even that statement, made only a few weeks after the incident, was to a degree tainted with hindsight. However, my appraisal of Colonel Westwood is as I have indicated already (see paragraph 51 above) and there is a hint in what he said to the Inquiry that he blamed himself to some extent for not intervening to prevent something that he did think was risky. I do not think that this could be taken to suggest that he foresaw the risk of serious injury, but it does convey a sense that he thought that something untoward may occur. I accept that he was wrong to say that there was no diving until the second heat, but that does not diminish the force of his general observation.

156. Corporal Wood's disposition was to be a risk-taker (see paragraph 46 above) and he was undoubtedly someone who would never whinge or complain. My impression is that he realised that there were dangers in the activity because of the way he failed to execute his first "dive" effectively. That he said nothing about it does not surprise me at all; but it does suggest to me that he was being accurate when he said that what happened startled him and he thought it was "a little bit dangerous" to dive in. The expression "huge high risk of serious injury" in his witness statement was, he conceded, expressed with the wisdom of hindsight and I do not consider that this was his state of mind at the material time. However, if only from his own experience, I do think he thought that there were dangers associated with diving in at the time the game was being played.

157. Where does the evidence of the opinions of Lieutenant Colonel Westwood and Corporal Wood lead? Plainly, it is not material that can inform a previous risk assessment. It is, however, some confirmation that had there been a properly conducted risk assessment prior to the game, men of a comparatively conservative disposition towards participating in the game (in the guise of Lieutenant Colonel Westwood) and men of a more adventurous nature (in the form of Mr Wood) would both have offered the view that there were dangers in playing the game in a manner that permitted headfirst entry. Further than that I do not think that this feature of the overall evidence of the case can go. Nonetheless, added to other features of the evidence it completes a picture which I will return shortly (see paragraphs 176-191).

The history of the game

158. The evidence about the history of this precise game is unclear. It was considered by Field J and commented on by the Court of Appeal, but no new evidence was called before me on the question of the extent to which it had been played previously and the extent to which there had been an opportunity to assess the risks involved in adopting a headfirst entry technique.

159. In the first place, it seems to be accepted that, whilst a game involving this pool had been incorporated as part of the previous year's Fun Day (in other words, in 2004), it was not (or at least it cannot be concluded that it was) played in the same fashion as in 2005. Field J said this [20]:

> "Although it is plain that a game involving the pool had been provided in 2004, it is not clear that the very same relay game was played on that occasion. The view in PEd Flt was that the package of games had been a success in 2004 but no-one was certain what the pool game involved."

160. At [22] of his judgment Field J said this:

> "Mr Berry had supervised the pool game once before; Messrs Brent and Brill had no previous experience of the game."

161. Mr Lynagh submitted that this finding had not been overturned by the Court of Appeal. Whilst as a proposition that may, strictly speaking, be true, precisely what was said in the Court of Appeal needs to be recorded. It was this (see [14] of the judgment of Smith LJ):

> "CL's evidence was that this pool was not often hired out as it required a great deal of water. Indeed, there does not appear to have been any evidence that this game had ever been played before using this pool. The risk assessment, as modified (if it was) by Mr Berry made no reference at all to methods of entry and there was no evidence that the person responsible for the original assessment appreciated that participants might enter the pool headfirst. Mr Berry had not seen this game played and had not applied his mind to the question of how participants would enter and leave the pool."

162. There was obvious confusion about this, but, as it seems to me, Smith LJ's analysis more accurately reflects the evidence on the issue. I note that Mr Berry's statement for the first trial was to the effect that, as Smith LJ confirmed, the pool was not often hired out – indeed it did not feature in CL's brochure – because of the need to supply water and then to empty the water from the pool. In his statement he said this:

> "… the pool is not featured in the company brochure because of potential difficulty in supplying water and also emptying the pool after an event. In fact, I think the RAF event may have been only the second occasion on which I have attended an

> event where the pool was supplied. The first was in Yorkshire for Water Aid."

163. Mr Brill, on the other hand, said this in his witness statement for the first trial:

> "I had previously assisted in this game and on one occasion, I believe the previous year, at RAF High Wycombe."

164. When he gave his oral evidence at the first trial, Mr Brill repeated that he thought the pool had been used that at RAF High Wycombe the year before and that he had assisted, but that someone other than Mr Berry was running the event and acting as compère.

165. It is very difficult for me to come to satisfactory conclusions about this. All I think I can safely conclude is that the game as played on the day in question had rarely, if ever, been played before, certainly in circumstances in which any worthwhile evaluation could be made of the safety implications of headfirst entry. It follows that if any prior risk assessment was inadequate, there is no evidence to suggest that there was a subsequent opportunity for a proper dynamic risk assessment to inform and improve upon the earlier risk assessment.

The injury suffered

166. Mr Sweeting submitted that the manner in which the Claimant sustained his injury was very unusual and, as I understood the argument, it was essentially to the effect that it evidenced the "freak" nature of what occurred. The argument is based on a combination of the agreed mechanism for the Claimant's injury and the learning that exists in relation to burst fractures as the level of C5.

167. Mr B.P. Gardner, the Consultant Surgeon in Spinal Injuries at Stoke Mandeville Hospital, reviewed the written evidence available before the original trial and gave the following unchallenged opinion:

> "The medical evidence fits better with [the Claimant] sliding headfirst over the wall and becoming almost vertical before striking the unyielding plastic-covered ground. His trunk was still behind his head when he struck the ground and became limp, resulting in him falling prone. He had sufficient forward momentum at the time of impact to carry his limp body across the pool to the far wall."

168. This opinion was based on the following findings:

> "The CT, MRI and plain films … indicate that he sustained a burst fracture of the body of C5 with a minor degree of anterior wedging at this level. The other skeletal injuries were minor in comparison with the C5 vertebral body.
>
> The burst fracture caused his spinal cord injury.
>
> Burst fractures at C5 are caused by axial loading to the top of the head. The minor anterior wedge of C5 indicates that there

> was a minor element of forward flexion of his head on his neck at the time of impact, but the large majority of the energy vector was axial loading.
>
> To produce a C5 burst fracture the top of the head must strike an object with sufficient energy to cause the body of C5 to burst like a round meringue on which a fist descends."

169. His description of what, on his analysis of the physiological damage, was the likely scenario must be viewed in the context of the evidence from at least two eye witnesses (see paragraphs 36 and 40 above) that the Claimant's legs "flipped up" as he went over the pool side. The expression Mr Gardner used was "almost vertical", but with his trunk "still behind his head when he struck the ground". It is not difficult to see that it could not have been a completely vertical fall otherwise there would have been no forward momentum such as must have existed to carry him (face down) across the pool to the other side where he ended up.

170. Attached to Professor Haslam's report is an Australian review article in Sports Medicine (1997 Apr; 23(4):228-46) by Blanksby and others entitled "Aetiology and Occurrence of Diving Injuries". Under a sub-heading 'Major Diving Spinal Injury Sites and Causes', the following is recorded:

> "The most common injury site of diving accidents is the cervical spine, involving particularly fractures of vertebrae C5 or C6. Injury to these vertebrae usually results in tetraparesis or tetraplegia respectively. The C5 and C6 segments are more prone to injury because they form the functional axis of rotation between the head and the trunk and are capable of a large range of motion. This is further exacerbated by the smallness of the spinal cord, the minimum protection offered by bones and soft parts, and minimal flexibility of the actual spinal canal.
>
> Fractures caused by flexion with or without axial compression, often occur in diving accidents. The most common of these fractures are wedge fractures and compression fractures. A wedge fracture can result from either hyperflexion or from an off-centre impact of the top of the head with the pool bottom. The wedge fracture is the result of pressure exerted on the anterior elements of the vertebral body, causing it to be wedged between adjacent segments. A compression fracture occurs when the vertex of the head directly impacts the pool bottom. The vertebral body is fractured as the compression is increased. In some cases, the anterior inferior angle of the vertebral body may be chipped away. The anterior smaller fragment may displace forward and result in a 'teardrop' fracture. Alternatively, posterior displacement of an intervertebral disc or partial dislocation of the posterior vertebral fragment into the spinal canal may occur causing spinal cord compression. The severity of injury is also dependent upon the amount of neck flexion caused by additional bending of the neck as the diver's body continues in motion. Hypertension spinal injuries can

> also result from flat, headfirst dives into shallow water, or by trying to slow the dive by suddenly extending the neck just prior to contacting the pool bottom. The neurological lesion may be exacerbated by water rescue methods because of instability of the spine after injury."

171. Mr Sweeting draws on that article for the proposition that it is not possible to have the type of burst fracture sustained by the Claimant "unless [there is] axial loading with a slight degree of flexion and the weight of the trunk being driven straight through the spine to the top of the head". I would prefer to have had some direct evidence from someone like Mr Gardner before accepting Mr Sweeting's proposition as it stands. What Mr Gardner says is that "the large majority of the energy vector was axial loading" which, I believe, means that the significantly greater (indeed the major) component of force operating through the torso at the time the fracture was caused was derived from the vertical component of the various forces operating on the body. That does not mean that there was no horizontal component which itself means that the torso was not necessarily exactly at 90° when the top of the head struck the pool surface. Mr Gardner used the expression "almost vertical" which is the scenario Professor Haslam assumed in his report as reasonable on the basis of the medical evidence and the witness statements when calculating the likely impact velocity.

172. Mr Sweeting's contention is that an injury of the kind sustained by the Claimant occurs "in a very narrow range of circumstances" which he characterised as a vertical entry with "the torso at the very least being 90° hitting the crown of the head." He says that the form of entry at 90° is the antithesis of the type of near horizontal or shallow entry which was reasonably to be expected and that it was unique among the contestants. He contended that it had the peculiar features that the Claimant should (a) be thrown into the vertical position but no further and (b) then not be able instinctively to arrest or limit his fall with his extended arms in front of him. He says that Professor Ball was right to say that the Claimant "was extremely unlucky to suffer his injuries which must have been attributable to a very unfortunate and unlikely disposition and orientation of his body on contacting the ground."

173. He also suggested that Professor Haslam accepted this in cross-examination. I did not understand him to have done so. The passage from the cross-examination that I quoted in paragraph 130 above demonstrates this. All he had done was to assume that "near vertical" entry took place which he took to be a reasonable assumption: see paragraph 128 above.

174. At all events, Mr Sweeting submitted, as I understood the argument, that the injury was sustained in a sufficiently unusual way that it could not have been foreseen. He drew on the conclusion to that effect on the facts of Globe J in *Blair-Ford* (see paragraph 69 above) and said there were parallels with this case.

175. Ingenious though this argument was, I am wholly unpersuaded by it. First, whilst I do not for a moment question the correctness of Globe J's conclusion on the facts in *Blair-Ford,* it is to be observed that the "welly wanging" action involved at the outset adopting a very unusual pose before letting fly with a Wellington boot: see [1] of the judgment of Globe J. That is a completely different scenario from the entirely normal scenario of diving (by which I mean projecting oneself forward in an essentially downwards motion with arms outstretched). Second, the argument comes close to

challenging the well-established proposition that it is not necessary, in order to establish liability for an accident causing injury, that the precise mechanism by which the injury is caused must have been foreseen: see generally Clerk and Lindsell on Torts, Twentieth Edition, paragraph 2-148 *et seq*. Third, and allied to that last consideration, there is no doubt at all that a burst fracture of the type sustained by the Claimant is a well-recognised consequence of a dive which results in the diver's head impacting with the hard surface below the surface of the water into which the diver has dived. I cannot, for my part, see what is so unusual about that as a potential consequence. That does not of itself mean that precautions need to be taken in every case where someone dives if it is so unlikely that the dive would result in such an injury that no such precautions need to be taken. All it means is that one cannot dismiss the occurrence of such an injury as a "freak" occurrence.

Conclusion on the first issue

176. I have reviewed the evidential material in this case in some depth because of the unusual circumstances in which the trial has come before me. Despite that somewhat extensive review, I consider that the first issue, to the extent that it can truly be separated from the second (see paragraph 89 above), is tolerably easy to answer.

177. I have not, however, reviewed extensively the evidence and arguments I have received about the various risk assessment parameters that are sometimes utilised in this context. I acknowledge, of course, the importance of risk assessments and, as will be apparent, I do consider that a proper risk assessment would have identified a risk of serious injury from utilising headfirst entry in this particular game. However, the methods of risk assessment under consideration in the trial before me were no different from those considered by Field J and commented on by the Court of Appeal at [42] – [45]. I respectfully agree with the reservations about those risk assessments, even if carried out correctly, articulated in the paragraphs in the judgment of Smith LJ to which I have referred. I can illustrate my reservations about the utility of some of the "industry guides" in this area (and my view that they would not provide a satisfactory answer to the issue raised in this case) by reference to the extract from "Events: from start to finish" published in 2005 by the Institute of Leisure and Amenity Management. It contains a detailed matrix indicting various scenarios of risk that are "unacceptable", "tolerable" (with the need to try to reduce the risk) or "acceptable". It has an ascending scale of likelihood from "very unlikely" ("has never happened before and there are no reasons to suggest it will happen on this occasion") through to "certain" ("has happened before and is expected to happen on this occasion") measured against an ascending list of potential for injury from "no injury", "minor injury" up to "multiple death". Each factor is assigned a number: "very unlikely" is given 1, "unlikely" 2, "possible" 4, "probable" 6, "very likely" 8 and "certain" 10; the same gradation applies for "no injury", "minor injury", "3-day" injury, "major injury", "single death" and "multiple death". Where the two factors are multiplied and a figure of 12 or less is achieved, the level of risk is said to be "acceptable". Where the resulting figure is above 12 but not greater than 24 the risk is said to be "tolerable" in the sense I have indicated. Anything above 24 is unacceptable.

178. This is, I apprehend, a somewhat more sophisticated matrix than the matrix considered specifically by Smith LJ at [43] of her judgment. However, she did refer to

it in that paragraph when she said that it was "potentially a little more sensitive but the essence of the operation [is] exactly the same" as the matrix she described.

179. One difficulty, as it seems to me, arises at the lower levels of likelihood – "possible", "unlikely" and "very unlikely". Something can still be possible if it is very unlikely. I am inclined to think that this is the kind of consideration Smith LJ had in mind when she said at [44] that "the setting of a fixed threshold for acceptability may fail to draw appropriate attention to a 'very unlikely' risk of catastrophic injury." I would add that, in the context of the present case, it is rather unrealistic, in my view, simply to rely on a scale of likelihood that is predicated on the basis of whether something has "happened before". It cannot be right, in the context of assessing the risk of serious injury, that one has to await a significant incident before the possibility of its occurrence is contemplated. What is required is, as Smith LJ said, a reasoning process by an intelligent and well-informed mind (see [45] of her judgment).

180. The first step in that reasoning process prior to any game being put into circulation must, it seems to me, require consideration of what the potential dangers are. That itself requires an appraisal of how the game envisaged by the creator of the game is likely to be played. Having a general conception of a game is one thing; considering the way in which, in a competitive situation, the ingenuity or daring of the participants may affect the way the game is played is another. In this case the creator of the game envisaged that four teams would compete in relays, in effect against the clock, to get in and out of the pool to retrieve various objects. It would involve getting over the pool wall, the dimensions and nature of which are as previously recorded (paragraph 9 of the Agreed Facts: see paragraph 11 above) and the idea would be that there would be some water in the pool area, not very deep, which would result in every participant getting wet.

181. Any risk assessment, whether in the nature of a formal risk assessment, or simply the kind of consideration that the law requires a reasonable person to take in this kind of situation, must as its first step identify all reasonably foreseeable risks. It would, as it seems to me, be obvious that, with four teams competing against each other, with potentially four people getting in and out of the pool at or about the same time, an obvious risk would be of collisions between the individuals perhaps causing minor injuries. Given the existence of the water in the pool, there would also be a risk of slipping up and skidding, not just in the pool area itself, but on the pool wall which was bound to get wet during the course of the game. It follows, therefore, that any reasonable appraisal of the risk of injury arising from the game, however people chose to get in and out of the pool, would include the risk of minor injury arising in this way. If some care and consideration was not shown by a participant to other competitors, the risk of this kind of injury would arise.

182. It seems to me quite clear that anyone taking part in the game would immediately appreciate that collisions could occur, but that is the nature of any game of this nature (and indeed is the case in many sports) and few people would think twice about engaging in such a game if the opportunity presented itself. It would, to my mind, be perfect reasonable for the provider of the game simply to remind people to have an eye for their fellow participants and use their commonsense. All the evidence in this case seems to point to the fact that that is precisely what Mr Berry did and that was perfectly sensible and reasonable and met entirely the requirements of the law so far as injuries in that range of seriousness is concerned.

183. Such a warning would probably suffice to alert people to the possibility that an injury somewhat more serious than a minor injury could occur by reason of contact between two individuals, perhaps by the banging of heads in a straight impact, or the coming into contact with one person's foot with another person's head, although this is, perhaps, debatable. It does not arise for specific consideration in this case and I need not express a concluded view about it. There is, however, some risk of an injury of greater severity than merely a minor injury occurring in this way, but it would probably not stop most people from taking part and, as I have said, it would probably be minimised by an appropriate warning and exhortation to use care.

184. The real issue for consideration is whether headfirst entry should have been foreseen as a likely method of entry by participants and, if so, what risk, if any, of serious injury should have been foreseen. As to the question of headfirst entry, in my judgment, even an appraisal of this game "on paper" (in other words, without any prior practical experiment or "dummy run") should have given rise to an appreciation that some competitors who had the stature and an actual or perceived athleticism to attempt a headfirst entry technique would do so in a competitive, racing environment. Since the surface over and across which they would have to traverse would be a soft and bouncy surface, they would not have seen any impediment (in the sense of pain or injury by colliding with it) to trying something of this nature. The pool wall was only about one metre high and thus waist high or thereabouts for many people.

185. That, it seems to me, would have been a natural and obvious conclusion to have drawn even from, as I have called it, a paper exercise. I would add that the existence of some water in the pool ought to have been foreseen as a further incentive to some to adopt a headfirst entry technique, not because the water would provide any actual attenuation of the impact of a fall, but because in the heat of competition it could have been perceived as doing so. It seems to me that a conversation between two or more reasonably competent and experienced risk assessors (indeed even just those with experience of providing games utilising "inflatable" objects) should have yielded the thought that headfirst entry was something that at least some competitors in a competitive, relay game would undertake.

186. If that is expecting too much (which I do not think it is) I am wholly confident that a conscientiously undertaken trial run of the game with a variety of people participating would have resulted in that conclusion. My conclusion to that effect is borne out by the only reliable evidence about how people would undertake this game, namely, by how it was played on the afternoon in question. 50% chose a diving motion. Corporal Woods (a man of a competitive, risk-taking nature) saw it as the quickest way of achieving entry into the pool (see paragraph 46 above). Mr Nicholson said it seemed the "intuitive way" to get into the pool.

187. Once that threshold is crossed, the next issue is whether a risk of serious injury ought to have been appreciated, and if so, what was its extent. As I have indicated, Mr Sweeting says (and it seems to me that he is right) that everyone accepts (including Professor Ball) that a risk of serious injury ought to have been foreseen. The question, of course, is whether the risk of serious injury arising from the game was sufficiently small for it effectively for it to be ignored. I have already concluded that I cannot accept Professor Ball's analysis of the measure of risk because his perception of the headfirst entry technique involved a rather more sedate, unimpeded and undistracted

action than is the reality when there are four teams competing against each other and against the clock.

188. What ought a reasonably competent, intelligent and well-informed assessment to have concluded? In my judgment, once it is appreciated that any competitor may attempt to dive across and over the top surface of the pool wall (which is some one metre high) with the result that, however executed, the likelihood is that his or her head will be moving downwards in the direction of the pool surface (which, in reality, is the ground), alarm bells should have rung about the risk of a dive "going wrong" and an impact occurring between the diver's head and the ground below. The experience going back very many years prior to 2005 of serious injury (including the sort of injury sustained by the Claimant in this case) arising from diving accidents if nothing else ought, in my view, to have informed the reasonably competent and well-informed assessment of risk that a risk of serious injury existed – including the kind of catastrophic injury that occurred in this case. Mr Petherick's reference to this as an analogous situation seems to me to have been apt. That risk (in the context of diving accidents) usually arose simply because a perfectly normal and controlled dive took place in water that was too shallow. It would not have involved any general launch of the body over an obstacle before the body started heading towards the hard surface with which the head impacted. If one focuses in the first instance on an unimpeded entry into the pool used in this game, a misjudgement of how to execute it (as was the case with the first dive attempted by Corporal Woods), or some unexpected bounce effect of the pool wall, could fairly obviously result in an uncontrolled entry such that the diver's head impacted with the ground through the pool floor. It follows that in the context of this game even an unimpeded solo entry into the pool in this fashion under pressure of time could result in a loss of control. If one then adds in the existence of the other competitors who are trying to get in and out of the pool area at the same time, it seems to me to be obvious that the risk of losing control of a diving entry is even greater. The greater the potential frequency of a loss of control, the greater the risk of a diving motion resulting in the diver's body adopting a configuration whereby the head impacts in an unprotected manner with the pool surface. Whilst, in popular parlance, it might be "unlucky" for someone to get into the configuration that causes a fracture of the type sustained by the Claimant, it is, to my mind, impossible to say that the risk of that occurring is minimal or very small. It is, of course, quite impossible to put a statistical likelihood upon it but, even if the test has (as Mr Nicholson said) a large element of subjectivity about it (see paragraph 117 above), I am unable to see how such a risk could be ignored unless it could be said that there was something in the particular game that made it worth taking the risk. The risk is not just of a spinal injury causing paralysis, but of a serious head injury also, both types of injury being major, potentially life-threatening and life-changing injuries.

189. This seems to me to be the logical conclusion to be derived from what is known about diving into shallow water as applied by analogy to the circumstances of this game, but with the added difficulties constituted by the pool wall itself and the existence of other competitors involved in the game. To my mind, this conclusion could (and should) have been reached "on paper" by a reasonably competent and well-informed person when applying his or her mind to the likely way this game would be played.

190. If some empirical test of how risky the game might turn out to be was required before it was put into circulation for use at events such as the 'Fun day', individuals should

have been asked as part of an experimental dummy run to get into and out of the pool as quickly as they could. A spread of ages and abilities would probably have contained someone like Lieutenant Colonel Westwood and someone like Corporal Woods – both at different ends of the risk-taking spectrum. Both thought that diving over the side carried with it risks. Neither were experts, but they perceived the risk simply from taking part. Their individual reactions are reflected in the expert views of Professor Haslam, Mr Petherick and Dr Jones – and, to some extent, I felt by Mr Nicholson also.

191. All this points to the conclusion that the risk of serious injury arising from headfirst entry in this game ought to have been foreseen and ought to have been foreseen as creating a more than minimal risk – certainly a risk that needed to be considered in order to make a conscious decision whether or not to take steps to obviate or reduce it.

192. I will return to the question of what steps ought to have been taken, if at all, after I have considered the social value of the game.

The social value of the game

193. The question posed by the direction of the Court if Appeal is "Was that degree of risk acceptable in the light of the social value of the game?"

194. What I have concluded so far is that, looked at essentially in isolation from the steps that might be taken to obviate or reduce the risk, the degree of risk was of a level that required a positive and informed decision concerning whether the risk could just be left to be borne by the participants without intervention from the providers of the game or whether some clear intervention by the organisers was required.

195. The focus of the question is upon the particular game in which the Claimant was injured. I will, of course, address that, but it does seem to me that the issue needs to be seen in a slightly wider context. As to that wider context, I would think that there would be no disagreement from any quarter: it is that an event such as the event in which this tragic accident occurred <u>is</u> of great social value, not just in a Services setting, as this one was, but in other settings too. Whilst not every individual might enjoy every aspect of a "Fun day", there is undoubtedly an opportunity on such an occasion for fun and laughter, often at the expense of others, for letting go and losing inhibitions and bonding with other colleagues, friends and possibly strangers in a light-hearted, but competitive setting. Since the day with which this case is concerned was in a Services setting, the value is enhanced in a number of ways. Lieutenant Colonel Westwood's evidence recorded at paragraph 54 above shows some of the considerations that can arise.

196. I cannot attach to this judgment some of the other photographs taken by Mr Plant because to do so would invade the privacy of those individuals seen in the photographs. However, a good number of photographs of the "action", not just in the game in question, show a great deal of enjoyment, laughter and, it appears, good-humoured competitiveness. It requires no imagination to appreciate that a successful event such as this can have a great deal of benefit in a Services setting where, on an ordinary daily basis, rank and discipline count for a great deal.

197. In my view, no court would wish to make a decision in any case involving an event of this kind that either did, or was perceived to, undermine generally the taking place of events of this nature: they plainly have a social value and are to be encouraged rather than discouraged. Equally plainly, however, untoward risks of serious injury should not be permitted because, if the risk materialises, it may (a) result in life-changing, devastating injuries for the unfortunate individual concerned with its wider family and social impact for the individual's family, (b) cause distress to others who may have been engaged in the same event and (c) if serious injuries arise too frequently, cause people not to want to take part in events that otherwise do have the great social value to which I have referred. These, in summary, are some of the potential human costs of the realisation in fact of a risk of serious injury. The financial cost, either to the State or to an insurer, of providing care and treatment to someone who is rendered severely disabled as a result of an accident is something also that should be avoided if it can reasonably be avoided.

198. The focus, as I have said, is on the particular game in which the Claimant sustained his injury. It was the final game of the afternoon, though not, as once thought, the final game in the Commander's Cup. It is plain from the photographs I have seen and the descriptions I have received of other games that there were other team activities that afternoon. Whether these games involved as many people overall as this game is unclear. However, it is easy to see the attraction of this game: it involved a number of teams, which comprised men and women, which competed against each other. It involved everyone suffering the indignity of being watched getting over the side of the pool, probably slipping or sliding in the process, possibly getting drenched by slipping over in the pool itself, but certainly getting wet, retrieving a piece of plastic fruit and repeating the process of getting out of the pool over the side to return to the rest of the team. There is another photograph (number 2 in the bundle before the court) of the particular game in action. It is probably the first heat because the Claimant is one of those photographed watching. Of those whose faces are captured by the photographer, I have counted 17 onlookers obviously watching other contestants playing the game. Of those 17 watching 5 are women and there is obviously one female contestant in the pool – or, more accurately, trying to get out of the pool. There is one other man who looks to be trying to get out also and another person searching for some plastic fruit inside the pool. All are very clearly soaking wet. It is likely that there is another contestant in the pool out of the shot of the photograph. Almost everyone is laughing or smiling and it appears that about 10 of the onlookers are laughing at the female contestant trying to get out of the pool - who seems herself to be smiling. No-one, I should say is seen diving in this photograph.

199. It is, of course, difficult to judge something as dynamic as a relay game or race by reference to one still photograph, but this particular photograph seems to demonstrate clearly that a great deal of merriment was occasioned at a time when no-one was diving. It suggests that diving was not essential to everyone's enjoyment of the game. Indeed a number of witnesses have said (obviously with the benefit of hindsight) that the enjoyment of the game would not have been diminished if diving was against the rules.

200. Field J recorded Professor Ball as saying that banning headfirst entry "would have been to reduce the game to a boring and pointless activity." I do not think that that opinion is borne out by the photograph to which I have referred. Whilst, naturally, I

do so with reluctance, on the evidence before me I have to differ from Field J in his conclusion that prohibiting headfirst entry would "neuter the game of much of its enjoyable challenge". I do not, of course, suggest that headfirst entry did not add an extra dimension of challenge and enjoyment to the game, but the evidence does not seem to me to support the conclusion that without it the game would have become dull and uninteresting. The game was undoubtedly competitive, but, as I have already indicated, much of the fun and enjoyment arose from watching people (and being watched) endeavouring to clamber over the wet, slippery and bouncy side of the pool and getting wet in the process.

201. Notwithstanding that assessment of the purpose and value of the game, I do not consider that it necessarily leads to the conclusion that headfirst entry should be "banned". I will turn to that question.

Should headfirst entry have been banned?

202. Having got to the stage of concluding that headfirst entry should have been foreseen prior to this game ever having been played, that a more than minimal risk of serious injury ought also to have been foreseen as a result and that something to obviate or minimise the risk ought to have been considered, did that involve prohibiting headfirst entry? Did it require going as far as saying that a competitor, or his or her team, would be disqualified if anyone dived over the side?

203. Undoubtedly this could have been done and it would have cost nothing. On my appraisal of the game it would not have diminished its enjoyment significantly, if at all. But was it necessary to go that far?

204. I am bound to say that my preference would have been to hold that provided a clear warning of the risks of diving was given by the game organisers, perhaps expressed in terms of very strong advice not to do so, such a step would have been a sufficient and proportionate response to the perceived risk. It would leave the ultimate management of the risk to the individual concerned who would be able to take responsibility for his or her own wellbeing. This seems to me to be the right way in present times of treating adults if adults are taking part in a game of this nature. There is something faintly paternalistic about saying to an adult "you must not do this".

205. But for the expert evidence to which I will refer shortly, I would have been inclined to say that a firm and clear warning about the dangers of diving over the pool side and clear and unequivocal advice not to do so was all that was necessary to meet the duty of the game organisers and providers to reduce the risk of serious injury. Had I so concluded, the Claimant would only have succeeded in his claim if it was established, on the balance of probabilities, that the effect of such a warning and such advice would have been to stop him trying to dive over the side. I cannot, of course, exclude the possibility that he would have been swept along by the actions and influence of other, more intrinsically adventurous, people that afternoon and would have attempted to dive notwithstanding the advice and warning to the contrary. However, the evidence is that he was not the most adventurous of individuals: he was known as "granddad" by his colleagues and the clear inference from this is that he was not a risk-taker. Given that 50% opted for a non-headfirst entry, in my view, on the balance of probabilities, had he heard a clear and strong warning about diving, he would not

have attempted to dive – he would have joined that 50%. In those circumstances, the accident that befell him would not have occurred.

206. On that approach, which, as I have said, I prefer, the Claimant would succeed in his claim.

207. However, the evidence of those with experience of risk assessments of events of this nature and who have assessed this game in much the way I have assessed it (namely, Mr Petherick, Professor Haslam and Dr Jones) all speak of the prohibition of headfirst entry as the simplest and cheapest expedient. I suppose that is true and, given the very serious consequences that could flow from someone ignoring the strong advice and warning given, it would probably have been better in this case simply to have said that the challenge was to get over the pool wall without diving or going headfirst and that the team of anyone trying to do so would be disqualified.

208. With some misgivings for the reasons I have given, I think I must accept this evidence in the context of this case. This is, I emphasise, not to say that a strong warning would not be sufficient in other circumstances, but I think that I must accept the force of the argument that something more definite was required in the context of this particular game. If such a rule had been introduced, the accident would not have happened. Equally, therefore, on this approach the Claimant would succeed.

Conclusion

209. It follows that the Claimant succeeds in his claim against the Defendants. The question of the apportionment of liability as between the two Defendants will have to be resolved by the Court if it cannot be agreed. Equally, the damages payable to the Claimant will have to be assessed by the court if they cannot be agreed.

210. I would not wish to part from this case without emphasising a few factors, some of which I have already mentioned (see paragraphs 21-27).

211. First, this decision represents no kind of threat to leisure and sports events of the type concerned. It is a case which has succeeded simply because the risk assessments of the game in question were, as found earlier in the history of the proceedings, "fatally flawed" in the sense that no-one assessed the risks associated with headfirst entry into the pool. If they had been properly assessed, steps would have been taken to eradicate the real risk of serious injury that there was without in any way spoiling the particular game or diminishing its social value or the social value of the whole afternoon. Provided games on occasions such as these are fully and carefully risk-assessed, it will, it seems to me, be a rare case indeed in which a claim for injury (even serious injury) sustained will succeed if a proportionate and sensible response is taken to any real risk identified, including the giving of appropriate warnings.

212. Second, as I have emphasised previously, no-one blames the Claimant for what happened. All he did that afternoon was the same as about half of the rest of the participants in the game. His misfortune was that the dive he executed "went wrong" for some reason. It could easily have happened to someone else. Indeed it might be said that Corporal Woods got quite close to injuring himself seriously.

213. Third, I repeat what I have emphasised previously: there was no drink or other irresponsible behaviour involved that day, something that unfortunately one does see from time to time in accidents where young men dive into shallow water. This was a responsibly organised day that, sadly, ended in a tragedy that could and should have been avoided.

214. Fourth, I have no reason to doubt that CL and the MoD do not ordinarily conduct full and proper risk assessments and respond appropriately to any risks of serious injury demonstrated by those risk assessments for events such as these. This may simply be one occasion when unfortunately a full and adequate risk assessment was simply overlooked by both. As I have indicated, the responsibility as between them remains to be considered if the issue is not resolved by agreement.

Expression of thanks

215. I should like to express my appreciation to all Counsel and their instructing solicitors for their assistance in a case that arrived before me in unusual circumstances and which has not been free from difficulty in its resolution.

Postscript

216. The Claimant's solicitors, having read the draft judgment (which was sent to the parties on 15 February), have invited my attention to the proposition that, whilst the Claimant's primary case has always been based upon the inadequacies of the risk assessments before the game was played, "it has always been consistently maintained that the Defendants could and should have intervened once diving had been observed during the first heat". They have drawn my attention to the fact that I have made no findings about this.

217. As I said in paragraph 140, I did not see this as "<u>really</u> the issue in this case". I was, of course, aware that there had been an assertion that there had been a failure in the "dynamic risk assessment" that it is contended should have been taking place during the game. However, my sense, having heard the trial, was that this was in reality a very peripheral argument that would only emerge as something of importance if I was to reject the primary case advanced. I have noted that the expression "dynamic risk assessment" does not feature at all in Field J's judgment or in those of the Court of Appeal and the whole focus of the consideration given at that stage in the history of this litigation was upon the prior (or *ex ante*) risk assessments. In the context of the trial before me, whilst there was some discussion about dynamic risk assessments when Professor Haslam and Mr Petherick gave evidence, nothing of any substance was put to Professor Ball or Mr Nicholson when they were cross-examined about the role that a dynamic risk assessment could and should have played in the context of the game as played on the afternoon in question. In those circumstances, I may be forgiven for having thought that the case based upon an inadequate dynamic risk assessment was very much a secondary case that did not require express consideration if I found in favour of the primary case. I recognise, of course, that Mr Stockwell, in his contribution to the closing submissions on behalf of the Claimant, submitted that there was material upon which I could conclude, if I rejected the primary case, that the secondary case was established, but, as I say, that was only, as I understood him, something that required to be addressed if that proved to be so.

218. Since I have found in favour of the primary case, it is not clear to me to what extent any further finding in relation to the secondary case will be of assistance. However, given the unhappy and prolonged history of this litigation, and should it go further and the issue becomes material, I will express my views on the issue, notwithstanding my very clear overall opinion, for the reasons I will give, that the secondary case adds nothing to the primary case in the context of the circumstances of this case.

219. I can deal with the essential issues very shortly. First, was it appropriate that a dynamic risk assessment should be undertaken in the sense that those from CL and the MoD responsible for safety that afternoon should have been prepared to intervene if the game as played was obviously running the risk of serious injury? The answer to that is "yes" and, to the extent that the issue of dynamic risk assessment was dealt with by the experts before me, I think they were agreed in principle on that. Second, was anyone that afternoon truly addressing the way the game was played on that basis? The answer is "no". Mr Berry was, in my judgment, unaware of the potential risks and did not see them – the same applied to his other colleagues from CL present. I do not consider that anyone from the MoD was really focusing on the issue. Mr Cassford, who was nominally the MoD's Health and Safety expert, was not taking part in the particular game itself - although he did participate in some games and is seen in one of the photographs close to Lieutenant Colonel Westwood apparently involved in the events taking place - but I do not think that he was wearing his "Health and Safety hat" that afternoon. Should he have been? Yes, he probably should. I have reflected (see paragraphs 144-149) on the unsatisfactory state of the evidence concerning the PTIs who were present. I cannot add to that analysis. As I have said, as a matter of fact, I do not think anyone had the essentials of a dynamic risk assessment in mind that afternoon: everyone tacitly assumed, to the extent that it entered anyone's head, that all relevant risk assessments had been carried out properly. But they had not.

220. Had a proper dynamic risk assessment been carried out that afternoon, would it have resulted in the game being stopped? It is at this point that I consider that the argument based upon a dynamic risk assessment breaks down unless it can be established that the game as played was so obviously dangerous to a reasonable person that someone ought to have intervened. I have reflected on this in the substance of the judgment (see paragraphs 140-157): the evidence either way is not compelling. I would find it difficult to hold on the evidence that what took place before the Claimant's accident was so obviously dangerous that someone, whether on behalf of CL or the MoD, should have intervened at that stage. If Corporal Woods had emerged from his first dive holding his head and someone else had done something similar, then arguably that ought to have provoked the thought process on the part of those with safety responsibility that something was going wrong with the way the game was being played. However, that was not the way the evidence demonstrated the position to be: people were diving in and doing so without causing injury and, whilst some (like Lieutenant Colonel Westwood) had some feelings of unease, no-one said anything. Against that background, I do not think that anyone present can be blamed for not intervening before the Claimant's tragic accident. The failure to consider properly the safety implications of this particular game arising from adopting a headfirst entry technique took place at a much earlier stage than the day in question and that is why, in my view, it is unrealistic to suggest that the way the game was played that day (which, for the reasons I have given, ought to have been foreseen: see paragraphs 176-

191) should have prompted intervention between the start of the game and before the accident occurred.

221. Had the Claimant's case fallen for consideration on the basis of an inadequate dynamic risk assessment on the day in question, whilst the first stage in the process of establishing a breach of duty would have succeeded because, on the evidence, no-one was conducting such a risk assessment at all, it would eventually have failed because, on the evidence, the circumstances as presented to those watching what was happening would not have conveyed a risk of serious injury being caused. Diving into this pool did risk serious injury for the reasons I have given. That should have been appreciated following a considered and conscientious risk assessment before the game was put out for use. But to hold that what confronted those who were watching or taking part that afternoon should have led to a termination of the game before the accident occurred is a step too far.

APPENDIX 1

1. I am due to preside over the re-trial in this case commencing on 10 December. I held a pre-trial review on 22 October when Sir Geoffrey Nice QC, Leading Counsel for the Claimant, invited me to consider the position at the re-trial of the report of Dr Simon Jones, an expert who prepared a report for the original trial on behalf of the Second Defendant but who, in the event, was not called by the Second Defendant. At that trial Sir Geoffrey sought to rely upon the report (as is permitted by CPR 35.11) and indeed did so. The question is the extent to which he may be entitled to rely upon that report at the re-trial.

2. Because of constraints on my own time in the next week or so and because the parties will be anxious to know how to prepare for the re-trial, I have produced this ruling relatively quickly after having received the helpful written submissions of the parties.

3. As I have indicated, at the original trial before Field J the Claimant was permitted to rely upon the report of Dr Jones although, in the event, Field J did not attach a great deal of significance to it. It is plain from the judgments in the Court of Appeal that it was felt that Dr Jones' evidence was entitled to serious consideration on the issues to which he could contribute expertise even though he was not called to give oral evidence: see, in particular, *per* Smith LJ at paragraph 60.

4. The present application appears to be based upon the assumption that Dr Jones may give oral evidence. I think it is important to emphasise that the entitlement of the party seeking to rely upon a report by virtue of CPR 35.11 is simply to "use that expert's report as evidence at trial" (my emphasis). It does not give a right to rely upon the oral evidence of the expert. (If oral evidence was to be permitted generally in these circumstances, one could see trials becoming very different from what was contemplated at the outset and at the case management stage and one party becoming entitled to rely upon, perhaps, a whole sequence of expert witnesses no longer relied upon by the parties by whom they were commissioned initially. That cannot have been the intention of the rule and I am sure that is why CPR 35.11 was drafted as it was.) To that expert, if it is being suggested on the Claimant's behalf that the Claimant has a right to rely upon Dr Jones' oral evidence at the forthcoming re-trial because the report was received pursuant to CPR 35.11 at the original trial, then that, in my judgment, is wrong. It is equally wrong for the Defendants to suggest (if I understand their written argument correctly) that, because Dr Jones was "available to be called by the Claimant at the first trial, but no application to do so was made", the Claimant is thus precluded from relying upon his report at the re-trial.

5. As I have said, as I see it, the entitlement under CPR 35.11 of a party to rely upon the evidence of an uncalled expert of another party is limited to reliance upon the report only. This appears to be the way the matter was considered specifically in the case of *Gurney Consulting Engineers v Gleeds Health & Safety Limited etc* [2006] EWHC 43 (TCC) and in *Anderson v Lyotier, etc* [2008] EWHC 2790 (QB) (in which I was the trial judge). I do not think that what Aikenhead J said in *Shepherd Neame Limited v EDF Energy Networks* [2008] EWHC 123 (TCC) derogates from that proposition. In that case the expert reports upon which some of the claimants wished to rely came from the experts of the Second and Third Defendants, the claims against which were compromised. The realisation of the wish of some of the claimants in that case to rely

upon those expert reports was opposed by the First Defendant, presumably on the basis of some perceived prejudice to its interests by some of the things those two experts said. In order to ensure that they it was not so prejudiced, Aikenhead J said that the witnesses could be called by the First Defendant, but could be cross-examined on behalf of the First Defendant. He does not appear to have been saying that the Claimants could call the experts to give oral evidence.

6. In this case the Court of Appeal has ordered a re-trial limited to two issues: (a) what was the degree of risk of serious injury entailed in the game as played on the day of the Claimant's accident? (b) Was that degree of risk acceptable in the light of the social value of the game? (I should say that the parties have agreed that I am not being asked to decide the issue of apportionment of liability if liability is established). In a sense, therefore, the trial that was started before Field J is still continuing, but limited to the two issues to which I have referred. Whether that is technically a correct analysis or not, I have no doubt that the Claimant, if he wishes, can rely on the report of Dr Jones at the re-trial if and to the extent that his report goes to the issues that are live issues at the re-trial even if other experts have been instructed on those issues in the meantime. I do not see why the Claimant should lose the advantage he gained at the first trial simply because the matter has gone to appeal and, in effect, come back, albeit to deal with limited issues.

7. As I have said, the Claimant can, in my view, rely upon Dr Jones' report to the extent that it goes to the issues that are left to me to consider at the re-trial. It is said on the Claimant's behalf that aspects of what Dr Jones says can support the Claimant's case on the first of those issues. As I understand it, the Defendants will suggest, or may suggest, that this is not so. I do not need to rule on that at this stage. All I need to say is that, in principle, the Claimant is entitled, without any further ruling from me, to rely upon the report on the issues before me at the re-trial. That, I should add, must also embrace any views he expressed at the joint discussion of experts prior to that trial since that really forms an extension of to the thinking in his report.

8. However, that does mean that only those parts of the report as it exists can be relied upon: I do not see the operation of CPR 35.11 as opening up the updating of the report, further participation in experts' discussion and so on. Other experts have been instructed since the trial and undoubtedly their evidence will be the primary focus of the re-trial. Dr Jones has expressed his views and I will have those views available to consider if I am persuaded that they are relevant to the issues I have to determine.

9. I do not foresee the need for Dr Jones to be available to give evidence in the sense of being available for cross-examination by the First Defendant. As I have indicated, that course was made available by Aikenhead J in *Shepherd Neame*, but that will have depended on the particular circumstances of that case. Although I do not envisage the need for that course in the present case, I will not shut out the possibility of an application being made to me during the trial by the First Defendant, though I make it plain that it is not something that I will encourage. I understand that Dr Jones is free for the trial period. If the First Defendant wishes to secure the possibility of him being called so that he can be cross-examined, they must make appropriate arrangements. All parties will, of course, be free to make submissions about the relevance, weight and so on to be attached to Dr Jones' report.

10. I trust that this ruling is sufficiently clear for the parties to continue with their preparations for the trial in a little over 4 weeks' time.

APPENDIX 2