



Neutral Citation Number: [2013] EWCA Civ 410

Case No: B3/2012/1823

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**Mr. Justice Owen**  
**[2012] EWHC 1777 (QB)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18 April 2013

Before :

**LORD JUSTICE PILL**  
**LORD JUSTICE MOORE-BICK**  
and  
**LADY JUSTICE BLACK**

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Between :

**Jennifer Wilkin-Shaw**  
**(Administratrix of the Estate of Charlotte Shaw**  
**(Deceased))**  
**- and -**  
**(1) Christopher Fuller**  
**(2) Kingsley School Bideford Trustee Co Ltd**

**Appellant**

**Respondents**

(Transcript of the Handed Down Judgment of  
WordWave International Limited  
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Official Shorthand Writers to the Court)

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**Dr Michael Powers QC, Mr. Mark McDonald and Mr. Brent McDonald** (instructed by  
**Ashfords Solicitors**) for the **Appellant**  
**Mr. Ronald Walker QC, Mr. Neville Spencer-Lewis and Mr. Henry Charles** (instructed by  
**Plexus Law Solicitors**) for the **First and Second Respondents**

Hearing date : 19 February 2013  
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Judgment  
As Approved by the Court



**Lord Justice Pill :**

1. This is an appeal by Jennifer Wilkin-Shaw (Administratrix of the Estate of Charlotte Shaw (Deceased)) (“appellant”) against the decision of Owen J dated 28 June 2012 whereby he dismissed a claim for damages by the appellant against Mr Christopher Fuller (“the first respondent”) and Kingsley School Bideford Trustee Co Ltd (“the second respondents”).
2. The judge set out the basic facts:

“1. Introduction

During a training exercise on Dartmoor on 4 March 2007 Charlotte Shaw, who was 14 years of age, fell into a fast flowing stream, was swept away by the strong current and drowned. She had been on the Moor with ten other children from the Independent Preparatory Secondary School, Edgehill College, (now called Kingsley School), Bideford, North Devon, training for the Ten Tors expedition which was to take place in May 2007.

2. The [appellant], Jennifer Wilkin Shaw is Charlotte Shaw's mother. She claims damages for personal injury, namely a chronic grief reaction and severe PTSD resulting from the death of her daughter, and as administratrix of her daughter's estate, damages for loss to the estate. She claims that the death of her daughter, and the consequential loss and injury both to her and to her daughter's estate, were caused by the negligence of the first and/or second defendants.
3. The first defendant [now first respondent] was at all material times employed as a teacher at Edgehill College, and was the Team Manager responsible for the training of the children for the Ten Tors Expedition.”

It is accepted that the second respondents are vicariously liable for any negligent acts or omissions on the part of the first respondent and/or other servants or agents of Edgehill College.

3. The judge described the background to the events of 4 March 2007:

“6. The Factual Background

There is a large measure of agreement as to the events leading up to the tragic death of Charlotte Shaw. The Ten Tors is an annual event that has been held since 1960 over the rugged terrain of Dartmoor, which is known for its tors, hills topped with out-crops of the

bedrock. It is organised and supervised by the Ministry of Defence (MoD) and takes place over two days. It now involves some 400 teams, each consisting of six youngsters aged between 14 and 19. The teams cover a distance of 35, 45 or 55 miles depending upon their ages, checking in at check points located at ten tors. The teams must be self contained, and must complete the appropriate distance within 34 hours, camping on the moor overnight.

7. The event is not a competition, but a challenging adventure that demands careful planning, determination, endurance, skilful navigation and team work on the part of the participants.
  8. During the event the duty of care for the participants falls on the MoD; but during training for the event it is the Team Manager who is responsible for the planning, organisation and supervision of the training of his or her team.”
4. On 8 January 2007, Major Pether, Secretary of the Ten Tors Expedition, wrote to team managers with a set of detailed instructions for the event. Edgehill College had previously entered teams in the Ten Tors. The first respondent had trained teams for the 2006 event which took place on the weekend of 13/14 May. The 45 mile team was “removed from the moor” on the second day having failed to reach a checkpoint in the specified time but the 35 mile team completed the event successfully. It was for the 35 mile event that Charlotte and her team, as 14 to 15 year olds, were training.
5. The judge described the early part of the training for the 2007 event:

“20. The 2007 Ten Tors

The first defendant began training a team for the 2007 Ten Tors in September 2006. It involved weekly meetings of pupils who had indicated an interest in participating, and included sessions on map reading, navigation, first aid, kit, packing a rucksack, cooking and nutrition. The first defendant also arranged for individuals with relevant expertise to provide training for pupils. A paramedic conducted a first aid training session which covered the symptoms and treatments of hypothermia, a subject that was also addressed in other sessions in which the first defendant says that pupils were instructed as to what to do if someone displayed symptoms of hypothermia, namely to seek shelter, put up a tent and/or stay inside the tent to share body heat. He also arranged for an ex-Army officer to attend a session to talk to pupils about preparing themselves for the event, coping under pressure, and generally what to expect during the event.

21. The second element of the training was field based. Within the school grounds the pupils practised putting up tents and cooking. A practice walk was held on the Tarka trail on 24 September 2006. It was followed by a further practice walk on the coastal path on the weekend of 25/26 November 2006, which involved camping out overnight followed by a walk on the coastal path lasting approximately half a day during which there was training in navigation. On 28 January 2007 there was a full day training walk on Exmoor.”
6. There was a further training weekend on Dartmoor on 3/4 March 2007. The school’s route plan and a tracing of the route were sent to the MoD, in accordance with the rules. Dry conditions were forecast for 3 March but rain on 4 March with conditions deteriorating in the course of the day. The judge found:
  - “24. The first defendant was to be assisted by Alice Fuller and John Hickson. The plan was for two further members of staff, Kathryn Timms and Alistair Hawksford, to meet the group on the moor on the Sunday. The first defendant also arranged for Andrew Hodges, a school master and a highly experienced leader of outdoor activities who had been a member of the Dartmoor Rescue Group since 1994, to accompany the group on Saturday 3 March. Another member of staff, Philip Hanner, whose daughter Elizabeth was one of the group, was to be the minibus driver who would transport the group onto the moor.
  25. On Thursday 1 March, the eleven pupils who were to participate, nine girls and two boys, brought their kit into school where it was checked by the first defendant and Kathryn Timms.
  26. On Saturday 3 March the group, accompanied by the first defendant, Alice Fuller, John Hickson and Andrew Hodges, successfully completed the planned route, and camped for the night near Beardown. That evening the first defendant discussed arrangements for the following day with those assisting him; and it was decided that the group had shown sufficient ability to progress to remote supervision, which involved the group walking unaccompanied, and being met at check points. It was also decided to shorten the route for the following day by removing Sittaford and Steeperton Tors, so that the group was to walk from their camp site to Rough Tor, from Rough Tor to Watern Tor, from Watern Tor to Eastmill Tor and thence to Okehampton camp.”
7. The judge described the events of Sunday 4 March:

“27.     Sunday 4 March

The group woke early at about 5.00 a.m. At about 6.20 a.m. the first defendant, Alice Fuller and John Hickson, set out for Rough Tor. The group left the campsite at about 6.30 a.m. and arrived at Rough Tor at the latest, per the first defendant's evidence at the inquest, at 8.23 a.m. The condition of the members of the group on arrival at Rough Tor is an issue to which I shall return. But a decision was then made that one of the group, Harriet Mitchell, would come off the moor. John Hickson was also suffering a recurrence of a knee problem; and it was decided that he too would leave the exercise. The first defendant, Alice Fuller and John Hickson therefore accompanied Harriet Mitchell to Postbridge where the first defendant's car had been left.

28.     After a stop of about 20 – 30 minutes the remainder of the group set off for Watern Tor. The plan was that they would be met at Watern Tor by Kathryn Timms and Alistair Hawksford. The distance from Rough Tor to Watern Tor was approximately 7.5 miles, and was the longest leg of the route to be walked that day. Their estimated time of arrival at Watern Tor was 1.30 p.m.
29.     The group successfully navigated the route to Watern Tor, arriving at about 12.30 p.m., much earlier than had been expected. On arrival Charlotte Kennedy, who had assumed the role of leader of the group, telephoned the first defendant to say that they had arrived but that Miss Timms was not there. He told Charlotte Kennedy that Miss Timms and Mr Hawksford were on their way, that the group should seek shelter and have something to eat while waiting for the arrival of Miss Timms. I shall return to the issue of why Miss Timms and Mr Hawksford were not at the tor to meet the group.
30.     Following the call from Charlotte Kennedy, the first defendant telephoned Miss Timms to tell her that the group had arrived. He then attempted unsuccessfully to telephone Charlotte Kennedy and instead telephoned another member of the group, Harriet Pengelly, reiterating the advice that he had given to Charlotte Kennedy.
31.     The next call received by the first defendant was from Charlotte Kennedy's telephone; but the speaker was a man called Trevor Wills, a scoutmaster, who with his

companion Steven Lambell, had encountered the group at Watern Tor.

32. It will be necessary to consider the circumstances in which Mr Wills and Mr Lambell encountered the group and the content of Mr Wills' conversation with the first defendant in some detail. But it is common ground that he expressed the view that the group was starting to get cold, and that they should continue walking, advice, which after a further conversation with Harriet Pengelly, the first defendant accepted.
33. The direct route from Watern Tor to East Mill Tor led across the Walla Brook which at that point flowed in a northerly direction below and a short distance to the west of the tor, but from which it was not visible.
34. The group walked down to the Walla Brook. It was flowing very fast and was uncrossable. In attempting to test its depth one of the group, Jessica Berry, slipped, went in up to her shoulders and had to be pulled out by Charlotte Kennedy.
35. The group retreated to Watern Tor where Charlotte Kennedy again rang the first defendant saying that they could not cross the Walla Brook. There is an issue as to precisely what was said in that conversation, although it is common ground that the first defendant told Charlotte Kennedy that the group should go to Hangingstone hill, to the south west of Watern Tor where they could pick up a track that would take them to Okement hill.
36. Mr Wills then again became involved. He has since died, but a Civil Evidence Act notice was served in relation to the statement that he made to the police on 8 March 2007. I also have the benefit of a handwritten note apparently made by him on the evening of 4 March. In his witness statement he said that in his first encounter with the group he had warned them that the Walla Brook was swollen with rain water, and that he had tried to direct them to the point at which he and Mr Lambell had crossed at about 11.45 a.m. He said that when the group returned to Watern Tor, he told Mr Lambell that he would accompany them to the Walla Brook crossing point. In his note he said:

*'Steve and I discussed them crossing at the same point where we had come across which was a bit further upstream and suggested that they could try that crossing. Steve stayed at Watern to wait*

*for our team, whilst I went with them to show them the place which we had crossed earlier'*

37. In his witness statement he gave the following account of what happened when they reached the crossing point:

*'There was a step across from the bank to the first part and I thought I had better be helpful and assist them in getting across. I would say it was now somewhere between quarter past and half past one. I considered that it was safe enough for the group to cross at this point and would have used the same crossing point had it been my own teams that I was supervising. I started to get them across the first brook on the island bit in between the two and then they were helping each other come down and get across on the island bit. We all got onto the island area between the two rivers. There was a good deal of water coming down off the moor but I did not think that conditions were noticeably worse than when Steve and I had crossed the brook earlier.*

*I then stepped off the other side of the island and onto a flat area under the water. I stood in the river with my foot on this flat area and then instructed the others to stride across from where they were. From where I was standing it was just not quite possible to take their hands. They were just out of reach. I asked them to step across and as they stepped across I got hold of their arms and made sure that they got to the other side. I had one foot on the bank and one foot on the flat area under the water.*

*This approach seemed to be working until it came to the penultimate girl who was more nervy about getting across. I told her to take off her rucksack to make it easier to get over. She did this and managed to get across with my help. At this time I think there was a girl standing on the bank to my left hand side and I was on the right and I said to the last girl could she throw the rucksack across. She sort of attempted to throw it and then it dropped. Then she instinctively went down to grab hold of the rucksack and it was being taken by the water at that time. As she grabbed the rucksack so it pulled, toppled her in, dragged her in. I made a grab to try and get her but it happened in seconds and I just couldn't get*



*hold of her and I saw her disappearing down  
through the river'*

38. The girl whom he described as the penultimate girl was Yasmin Moore, the last girl was Charlotte Shaw who was swept away to her death.”
8. The judge analysed the events which led to Miss Timms and Mr Hawksford not being at Watern Tor to meet the group:

“100. The Movements of Kathryn Timms and Alistair Hawksford

Miss Timms was not able to join the training for Saturday 3 March, and the arrangement was therefore that she and Mr Hawksford would go to check points on the morning of Sunday 4 March, one to Sittaford Tor and the other to Watern Tor. But following the decision to remove Sittaford Tor from the planned route both were to go to Watern Tor.

101. The plan was for them to drive to the car park for the Fernworthy reservoir, to walk through Fernworthy Forest, which is to the south east of Watern Tor, up Manga Hill and onto the ridge running north to Watern Tor.
102. They left the car park at about 10.00 a.m. on the Sunday morning allowing about 2½ hours to cover the six kilometres to Watern Tor. They climbed Manga Hill, but according to Ms Timms, the weather conditions were such that they could not stay on the ridge, and dropped down to lower ground in its lee. In so doing they missed Watern Tor passing it to the east. Ms Timms' evidence is that when they realised that they had gone wrong, she telephoned the first defendant, telling him that they were then fairly sure that they were heading to Hound Tor, which is approximately two kilometres due north of Watern Tor. They decided to carry on to Hound Tor so as to confirm that that was the case, and then to pick up the track leading south from Hound Tor to Wild Tor, which was a little over a kilometre north north west of Watern Tor, and thence to Watern Tor to meet up with the group. The direct route from Wild Tor to Watern Tor would have involved crossing the Walla Brook.
103. They arrived at Hound Tor at about 12 o'clock, 1½ hours before the group was expected at Watern Tor. Subject to their being able to cross the Walla Brook, they were still in plenty of time to get to Watern Tor

before the group's expected time of arrival. But at about 12.30 p.m. the first defendant rang to say that the group had arrived at Watern Tor. By that time Miss Timms and Mr Hawksford were approximately two thirds of the way from Hound Tor to Wild Tor.

104. The first defendant then told them to return to their car, and they began to head back to the Fernworthy reservoir car park. Their route involved crossing the Walla Brook at a point approximately a mile downstream of the point at which the group attempted to cross. They experienced considerable difficulty in crossing. In her witness statement to the police dated 8 March Miss Timms described the brook as being "obviously in flood and fast flowing". She said that when looking for a safe place to cross, she checked the side of the bank with her foot, but lost her footing and fell in. She was fully submerged and was swept downstream until she was able to grab the bank and pull herself out. Their route then took them to the North Teign river, where again they experienced considerable difficulty in crossing, and eventually arrived back at the car park at the Fernworthy reservoir at between 3 and 3.30.
105. Ms Timms and Mr Hawksford unquestionably made a navigational error on route to Watern Tor, and it is pertinent to consider their failure against the success of the group in locating Watern Tor from a much greater distance. But the group had the advantage of being able to follow a line of range posts that in effect led them to Watern Tor. Mr Jones described the leg from Rough Tor to Watern Tor as "... a long one but not very difficult as the posts marking the edge of the military range gave what navigators call a 'handrail'. In contrast Ms Timms and Mr Hawksford had to ascend the ridge that would have led them to Watern Tor into the face of driving wind and rain from the south-west, conditions that forced them to retreat to lower ground, whereas the group had wind and rain at their back. Secondly it has to be borne in mind that, as is clear from the photographs before me, navigation on the moor is not easy. Tors are difficult to distinguish one from another particularly in adverse conditions, although there is force in the argument advanced on behalf of the claimant that they ought to have realised that they had gone too far for Watern Tor.

106. But I am not persuaded that in the prevailing conditions their navigational error demonstrates a lack of competence on their part.”

9. The judge made a finding about a consequence of Miss Timms not meeting the team, as planned. Having briefly summarised the submissions, the judge stated:

“109. Such a hypothetical reconstruction presents obvious difficulties, but I am satisfied that had the group been met as planned, it is unlikely that Mr Wills would have become involved, and in consequence the group would not have attempted to cross the Walla Brook at the point at which the accident occurred.”

10. At paragraph 55, the judge considered the expert evidence before him:

“55. The Expert Evidence

Before embarking upon an analysis of the experience and competence of the first defendant and his supporting team, and of the specific criticisms upon which the claimant now relies, it is convenient to consider the reliance that can be placed upon the expert evidence from John M Patchett, an Educational and Outdoor Consultant instructed on behalf of the claimant, and Doug Jones of D-J Adventure & Consulting on behalf of the defendants. Each was well qualified to assist the court, both in terms of experience and of formal qualifications. I had the benefit of hearing both cross-examined at some length, and came unhesitatingly to the conclusion that where they differed in their opinions, those advanced by Mr Jones were to be preferred. He gave his evidence in a moderate, well reasoned and demonstratively objective manner, being prepared to criticise the defendants where appropriate. In marked contrast I found Mr Patchett to be partisan, determined to criticise virtually every aspect of the first defendant's management of the training. It is to be noted that he was not instructed until November 2010 by which stage both the Particulars of Claim and Amended Particulars of Claim had been served; and there is force in the criticism advanced on behalf of the defendants that he would appear to have been instructed to trawl the evidence in search of 'failures and inadequacies' as he put it, that would support the claimant's case, rather than present his evidence "uninfluenced as to the form or content by the exigencies of litigation" (per Cresswell J in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, at 81). Notwithstanding the preface at paragraph 1 of his report as to his duty as an expert, he did not

appear to me fully to understand his obligation to give impartial and objective evidence.”

11. It is relevant to consider the judge’s analysis of allegations not now pursued because they may throw light on the sequence of events and the relevance of the conduct of Miss Timms. At paragraph 62, the judge made his findings in relation to the alleged negligence of the first respondent:

“62. . . . I am satisfied that the first defendant approached the exercise in a methodical and highly conscientious manner with evident attention to detail. I accept his evidence that in the classroom based training he focused on key areas including map reading, navigation, hazard awareness, first aid, kit, nutrition and food, weather conditions, communication and working as a team. His attention to detail in field based training was demonstrated by his evidence that, mindful of the difficulty of putting up tents when cold and exhausted, the training that he organised involved erecting tents on a number of occasions, including doing so whilst blindfolded, as he wanted it to become second nature, given the conditions that could be encountered and that the group would be likely to be very tired when making camp. It was also demonstrated by the requirement that at the training session before a practice walk, those involved had to bring their kit to school so that it could be checked.

63. I am reinforced in my conclusion as to the training prior to the weekend of 3/4 March by the evidence given by Mr Jones to the effect that the training met the minimum standard ‘being progressive and comprehensive in the necessary skills’.”

12. The first respondent arranged for the group to be accompanied on 3 March by Mr Andrew Hodges. Mr Hodges is a qualified teacher and highly experienced in walking and training on Dartmoor, being a qualified Mountain Leader and a member of the Dartmoor Rescue Group since 1994.

13. Mr Hodges’s contribution to the training was described by the judge:

“67. Water crossings

Mr Hodges said that in the course of 3 March he discussed the dangers presented by water with the group and gave guidance as to crossing rivers, first when looking down at Tavy Cleave from some distance, it being notorious as a fast

rising river, and secondly at Sandy Ford later in the day. As to the former the teaching point, as he described it, was to outline the options when faced with a river that could not be safely crossed, either going upstream or following the river downstream to a crossing point. At Sandy Ford he told them that it is standard practice to loosen rucksack straps and face upstream if negotiating a river or stream that is shallow enough safely to cross.

68. The first defendant also gave a detailed account of the guidance given by Mr Hodges in the course of 3 March. He recalled that in relation to Tavy Cleave, Mr Hodges made the group aware of the effect that rain can have on rivers, explaining that Tavy Cleave had two feeders, so that even light rain could affect it. He recalled that after crossing Sandy Ford, the group came to a prison leat, which he described as an area where the ground has been dug out so as to make a channel for water, where Mr Hodges stopped the group and discussed where and how to cross the leat. He advised against jumping as that reduced their level of control, and also told them that if they needed to remove their back packs in order to cross, it was too dangerous and they should not be crossing. When discussing river and water crossings with the group Mr Hodges was regularly asking them questions to check their understanding.
69. In his witness statement Mr Hodges expressed the view that everything the first defendant was doing and telling the group on 3 March was the correct training for the Ten Tors, and that he would not himself have done anything differently. He was impressed by the group's performance, thought that the training was good, and had noted that the first defendant had been evaluating the performance of its members during the day.
70. I accept the evidence of both the first defendant and Mr Hodges, and am satisfied that the group was alerted to the risks to which water crossings gave rise, and was given appropriate guidance as to how to address such risks, notwithstanding that they were not identified in the formal risk assessment.

71. The first defendant impressed as a careful and cautious individual, well aware of his responsibilities to the group, and thorough in his preparation for training events. Again I am reinforced in my conclusion by the evidence of Mr Jones that 'The training given on crossing rivers was correct and to the standards accepted by the national and local training schemes' and that 'the risk assessment was reasonable and up to the minimum standard expected of school'."

14. In relation to Ms Timms, the judge stated, at paragraph 72:

"72. As to those assisting the first defendant on the weekend of 3/4 March, Miss Timms taught art at Edgehill College, and in 2006 became closely involved in the training sessions for the 2007 Ten Tors. Her particular expertise was in first aid, but she was brought up on a farm on the edge of Dartmoor and had considerable experience of the moor."

15. On the fateful day, Ms Timms was accompanied by Mr Hawksford. The judge stated:

"74. Alistair Hawksford was a young Australian working at the college during his gap year. He had some limited relevant experience, having been an army cadet whilst at school in Australia."

The judge also described the experience of the other members of the training team, Mr John Hickson, who had a wide experience of outdoor pursuits, and Ms Alice Fuller who had completed the Duke of Edinburgh Gold Award when at school, had assisted the first respondent in the training for 2006 Ten Tors and had experience of walking on Dartmoor.

16. In relation to the team as a whole, the judge stated, at paragraph 76:

"76. Subject to consideration of the failure on the part of Miss Timms and Mr Hawksford to meet the group at Watern Tor, I am satisfied that viewed as a whole the team assembled by the first defendant for 3/4 March had the appropriate experience to enable him safely to manage the training exercise with their assistance."

17. The judge considered the specific criticisms made at the hearing before him. He concluded, at paragraph 81, that the weather conditions were not such as to mandate the removal of the group from the moor at Rough Tor. That conclusion is repeated, at paragraph 94, by which time the judge had considered the evidence of the Team Members. The first respondent said that the group were in good spirits when they

arrived at Rough Tor. They were delighted with their achievement as it was the first time that they had walked independently of their teachers. If they had not wanted to continue, he would have taken them off. Mr Hickson spoke to Team Members:

“91. . . . about the route that they were to take to Watern Tor and from there on to East Mill Tor, that he discussed with them what to look out for, that as it was raining rivers might be swollen and that potential dangers should be avoided. That evidence was not challenged.”

18. At paragraph 93, the judge referred to the evidence of Zoe Whiteley, another member of the group:

“93. I note in particular that in her video interview on 8 March 2007, she said ‘...we all wanted to continue so we did.’”

The judge concluded:

“94. I am therefore satisfied that at Rough Tor the group was in the condition described by the first defendant, and the witnesses whose evidence supports his. His evidence was also supported to a substantial degree by the evidence given by Charlotte Kennedy at the inquest to the effect that there may have been some moaning by some members of the group, but that there were no requests to come off the moor (see paragraph 82). The first defendant cannot in my judgment be faulted for not taking the group off the moor at that stage.”

19. Mr Hodges gave evidence that he was impressed by the manner in which the group had performed on the Saturday. Charlotte Kennedy (“CK”), aged 14, who assumed leadership of the group, gave evidence:

“96. . . . As Charlotte agreed in cross-examination "we were an extremely strong group" and "we agreed that on the Sunday we would be alone and would be check-pointed". It was a decision for the first defendant, not for the group, but it is indicative of his careful approach, that in arriving at his decision, the first defendant consulted the group, no doubt to assist him in his assessment of their level of confidence.”

20. The judge found that the decision to permit the group to walk unaccompanied was justified:

“97. . . .It was taken after careful consideration and after a strong performance by the group on the Saturday. Moreover the validity of the decision was borne out by the manner in which the group completed the first two legs on the Sunday morning in adverse conditions, in particular the long leg to Watern Tor.”

The judge quoted the evidence of Mr Jones:

*“Events such as the Ten Tors are designed to challenge young people and to give them the opportunity to respond to those challenges and learn from them. It would be quite normal for the team to exhibit a range of enthusiasm and for the stronger, keener members to try and enthuse the less able ones and get them to continue so that all can share in the success they anticipated.”*

21. A section of the judgment dealt with whether the first respondent gave negligent advice in the course of his second telephone conversation with CK. The judge’s findings on that issue bear upon the issues now before this court. The allegation made at the trial was that the first respondent ought to have instructed CK “that the only safe course was to instruct them to pitch a tent and to await the arrival of a leader from the school, who could safely have removed them from the moor”. At paragraphs 112 and 113, the judge stated:

“112. It is common ground that the first defendant told Charlotte Kennedy that the group was not to attempt to cross the Walla Brook, but was to go around the head of the Walla Brook, and thence to Hangingstone Hill, where they could pick up the track to Okement Hill. But the claimant contends that the instruction to carry on was negligent, in that the group was not in a state in which it could back track around the Walla Brook head, with the consequence that they accepted the advice and guidance of Mr Wills.

113. It is the defendant's case that the instruction to the group not to attempt to cross the Walla Brook and instead to make their way to Hangingstone Hill around the head of the Walla Brook, was appropriate in the circumstances, and certainly did not amount to a breach of the first defendant's duty of care.”

22. At paragraph 115, the judge summarised the evidence of CK:

“115. In her witness statement Charlotte Kennedy said that on arrival at Watern Tor and upon



discovering that the teachers who were due to meet them were not there, she telephoned the first defendant, see paragraph 29 above. She says that he was amazed that they had made it to the check point so fast, and told her to wait until 12.45 p.m., advising her that the group should have something to eat and a hot drink. She amplified that evidence in cross examination, agreeing that her only concern at that stage was that Miss Timms and Mr Hawksford had not arrived, and that the first defendant had said that they were on their way. She agreed in cross examination that the group were all fit and well.”

23. The first respondent telephoned Miss Timms to tell her that the group had arrived at Watern Tor and that he had instructed them to have some lunch. Having failed to contact CK, he telephoned Harriet Pengelly another member of the group and repeated his advice to the group to keep warm.
24. At this stage, Mr Wills, who has since died, intervened. He spoke with the first respondent who stated, in his written statement:

*“he told me that the group were well but he was concerned that they were starting to get cold. In his opinion, he thought they should not wait any longer, they should start walking again. I asked Trevor ...(Mr Wills) about the wellbeing and spirits of the group. He assured me they were well but should continue walking.”*

The first respondent stated, in cross-examination, that the ethos of the event is that Team Leaders and those involved in assisting with the training “look out for each other” (paragraph 121).

25. The judge recorded subsequent events:
  - “123. Following the telephone conversation with Mr Wills, the group set out for East Mill Tor, the direct route to which involved crossing the Walla Brook below Watern Tor. They were not able to cross (see paragraph 34 above). They returned to Watern Tor where Charlotte Kennedy again telephoned the first defendant. In her witness statement she says that she told him that they could not cross, and that he told them to go to Hangingstone Hill. She said that she did not remember the first defendant telling her that the group was not to cross the Walla Brook. She checked the map concluding that "the only choice we had was to find a way to cross the Walla Brook or walk south west, straight into the wind, around the Walla Brook head". She said that at that point she went back to speak to Mr Wills and Mr Lambell, whom she thought

were teachers involved with another group on the moor.

124. She went on to say that she did not know how much further it would have been to walk without crossing the river but that '*... it was long enough for me to feel that it was too far for the team to walk after we had been walking since 6.00 a.m. I showed the majority of the team the alternative route and we all agreed it was too far to walk...One of the teachers from the other school at the Tor said that he would go down to the river with us. I welcomed the guidance given by the teacher.*'
125. In the course of her evidence in chief, and in contrast to the content of her witness statement, she said that the first defendant, when asked what they were to do, said that they should not cross the river, but should walk around it and go to Hangingstone Hill. In cross-examination she agreed that at that point she had no reason to suppose that they could cross the brook, not least because other teams with whom they had communicated when they first went down to the brook had said that it was not possible.
126. The first defendant received the call when en route to East Mill Tor. Charlotte Kennedy said "We're stuck. What do we do?" He described how he had consulted the ordnance survey map with Alice Fuller and John Hickson before telling her not to cross the Walla Brook, to head for Hangingstone Hill via the Walla Brook head, and that they would meet the group at Okement Hill. His evidence was confirmed by Alice Fuller and John Hickson, the latter recalling the first defendant having told her not to cross the brook a number of times.
127. In her evidence in chief Charlotte Kennedy said that it was at that stage that she sought help from Mr Wills and Mr Lambell in the knowledge that they were there with their teams. Her evidence continued:

*'They said they crossed that morning, they had jumped across and it was very easy. He tried to tell me whereabouts it was. I didn't understand. So he took us there.'*
128. As to the intervention of Mr Wills she said that he told her that the route to Hangingstone Hill around the head of the Walla Brook was about 5 miles. That was plainly wrong. It was of the order of 2.4 km, about 1

km further than the direct route to Hangingstone Hill crossing the Walla Brook.

[When cross-examined about the additional distance, Mr Patchett agreed that “it’s not that much longer and that the additional distance would take between 17 and 20 minutes”.]

129. In any event her evidence continued to the effect that the scoutmaster had said that he had crossed earlier that morning and that it was very easy to cross. She said that he ‘*seemed competent and in authority*’, and that she ‘*was persuaded that it was alright*.’ In re-examination she accepted that it was her decision for the group to follow his advice.
130. Mr Lambell gave evidence that the groups with which he was involved “would have used the same crossing”, and that he managed to cross fairly easily following the tragedy.
131. In cross-examination Zoe Whiteley was reminded of the evidence that she had given to the coroner in which she described the exchanges with Mr Wills in the following terms:

*‘It wasn’t long before he said I just hopped over ... it was fine, it wasn’t difficult, not trouble ... he was so convincing ... we trusted him ... why go the long way when we could go the short way just as easily.’*

She also explained that Mr Wills made it sound easy, and when an adult tells you something you accept it, he was ‘*so convincing we trusted him – he made it sound easy*’

132. In cross examination Charlotte Kennedy agreed that had it not been for what they were told by Mr Wills, they would not have attempted to cross the Walla Brook, but would have set out for Hangingstone Hill around its head. Neil Addington [another member of the group] agreed in cross examination that, but for meeting Mr Wills, they would have carried on and gone around the head of Walla Brook, further agreeing that they were ‘*a strong group of individuals*’.”
26. At paragraph 133, the judge summarised the evidence of Mr Waldock, a qualified mountain leader:

“133. . . . Mr Waldock saw the Edgehill College group at about the time that they first went down to the Walla

Brook. He was then on the western side of the brook, and had been attempting to find somewhere to cross. In his witness statement he said that the brook was normally about two foot wide and ankle deep, but due to the downfall of rain, it was about 15 foot wide, at least 5 foot deep where he tested the depth and flowing very rapidly. He described the group in the following terms:

*"Everyone was cold and wet but the two girls I talked to did not look completely exhausted."*

In cross-examination he said that in the course of his exchanges with the two girls '*I advised them to return to Hangingstone Hill, to walk around the head of the brook and to avoid any more rivers or streams*'. He also recalled telling them that he had not been able to find a crossing point, and that they should either go back to where they had earlier crossed it or go around the head. It appears that he was under the erroneous impression that they had come from Hangingstone Hill, and had therefore crossed the brook at some point to get to Watern Tor. In any event he added in re-examination that he got the feeling that they were not going to take any notice of what he was saying, as he was just some person they didn't know shouting to them across the brook."

27. Having considered the evidence, the judge concluded, at paragraph 134, that the advice the first respondent gave to CK in the second telephone conversation was not negligent:

"The instruction not to attempt to cross the Walla Brook, and to make their way to Hangingstone Hill around the head of the brook was entirely appropriate, a conclusion reinforced by the advice given by Mr Waldock (see paragraph 133 above). The claimant's case as to the advice given at that point is that the group were not in a fit state to continue, and that accordingly the only proper advice was to tell them to stay put until adult assistance arrived. But I am satisfied on the evidence that whilst some members were cold, wet and miserable, the group was capable of continuing. Thus the argument advanced on behalf of the claimant lacks an evidential foundation."

#### The judge's conclusions on negligence

28. The appellant's case at the trial, as summarised by the judge, was that the second respondents "failed in its obligation to ensure that the first respondent and his team of assisting adults had appropriate experience and were competent to organise and

supervise such training event (paragraph 54). The appellant identified three “specific criticisms” alleged to be consequent upon such failure (paragraph 53). Each of the criticisms was of the first respondent:

- i) his failure to take the group off the moor on their arrival at Rough Tor, alternatively permitting the group to continue under remote supervision.
- ii) his failure to ensure that the check point at Watern Tor was manned at the arrival of the group,
- iii) the advice given by him in his second telephone conversation with Charlotte Kennedy when the group was at Watern Tor that they could continue, it being asserted that the only appropriate advice that could have been given in the circumstances was for the group to remain at Watern Tor until joined by a member of the supporting team.

29. In the paragraphs from his judgment already cited, the judge rejected the first complaint (paragraphs 94 and 97) and the third complaint (paragraph 134). In relation to the second complaint, which it will be necessary to consider in more detail, he concluded, at paragraph 106:

“But I am not persuaded that in the prevailing conditions their navigational error demonstrates a lack of competence on their part.”

That was the judge’s answer to the question he had posed at paragraph 99 an issue not suggested to be other than appropriate to the case then put by the appellant:

“It is common ground that the group ought to have been met at Watern Tor, and it is submitted on behalf of the claimant that the failure of Miss Timms and Mr Hawksford to meet the group demonstrates a breach of duty on the part of the first and/or second defendant to ensure that those charged with the task of checking in the group at Watern Tor were competent.”

#### Case on appeal

30. It has been necessary to recite the judgment at considerable length to demonstrate the learned judge’s comprehensive description and appraisal of events. It needs to be borne in mind, however, that the appraisal was of a case different from that now put forward. The case at the trial was one of vicarious liability for the negligence of the first respondent in his organisation of activities on 4 March 2007, and decisions taken by him. That included a failure to ensure that those charged with the task of checking in the group at Watern Tor were competent (judgment paragraph 99).
31. The judge rejected the allegations of negligence made at the trial. The case put forward on appeal is different. It is alleged that, although competent to act as a check pointer, Miss Timms, on this occasion, was personally negligent in failing to be

present at the checkpoint at Watern Tor and that the second respondents are vicariously liable for that failure of hers. For the appellant, Dr Powers QC expressly accepted, for the purposes of the appeal, that the second respondents did what was necessary to ensure that there was a safe system in operation on 4 March. He accepted that the plan was a good one. The case on appeal was based on the alleged negligence of Miss Timms in failing to get to the checkpoint at Watern Tor.

#### Submissions on negligence

32. By way of background, Dr Powers referred to the conditions of entry to the Ten Tors Expedition which required participants to be sufficiently trained and physically prepared to complete the Expedition unaided, even in adverse conditions. The event demanded qualities including “navigational skills”. If that is required of participants, submitted Dr Powers, it is certainly required of trainers.
33. The movements of Miss Timms on 4 March are not seriously in issue and are described by the judge at paragraphs 100 to 105 of his judgment. The six kilometres from the car park to Watern Tor included three kilometres through Fernworthy Forest to the ruin of Teignhead Farm and then a climb of three kilometres to the Tor. She and Mr Hawksford had allowed ample time, even if the group arrived at Watern Tor earlier than the expected time of 1.30 pm. The “logical” route, as so described by Mr Jones whose evidence was accepted by the judge, was “to go up Manga Hill towards Walla Brook Head and then follow the ridge along to Watern Tor.” What Miss Timms and Mr Hawksford did was, as Mr Jones put it, to “contour around Watern Tor” rather than go up to the ridge and follow it to Watern Tor. They walked on the east, lee side, of the ridge because, they claimed, of weather conditions. They passed to the east side of Watern Tor, crossed Walla Brook and arrived at Hound Tor, two kilometres north of Watern Tor. They could not remember crossing Walla Brook. They did not realise their error until told by someone that the Tor they were approaching was Hound Tor and not Watern Tor.
34. Mr Jones found it surprising that they could not cope with the wind on the ridge when there were numerous groups out on the Moor on that day that did appear to be coping with it. Before realising their error, they had covered twice the distance required to reach Watern Tor from the Farm and had crossed Walla Brook, the only significant water course on the route shown on the map. On the route they were taking, Walla Brook was well to the north of and beyond Watern Tor.
35. The judge described subsequent events including their being told by the first respondent to return to their car. In the course of re-crossing Walla Brook, Miss Timms fell into Walla Brook but managed to pull herself out.
36. For the respondents, Mr Walker QC does not challenge those facts. He agrees that the judge did not adjudicate on Miss Timms’s negligence because he was concerned with the issue before him, which related to her general competence. However, Mr Walker submitted that, had the judge addressed the issue, it is clear from paragraph 105 that he would not have made a finding of negligence. That being so, it would not be fair, submitted Mr Walker, to make a finding against her in this court. While her conduct was fully explored in the course of her evidence, it was not on the basis that negligence on this occasion, by way of faulty navigation, was alleged against her.

37. There is force in the respondents' procedural objection. However, while the emphasis was upon Miss Timms' competence, Dr Powers did keep open at trial the issue of her negligence, claiming that it was covered by the pleadings and adding that, if there was doubt about that, he would apply to amend. There was no ruling against him and the offer was not taken up. I am prepared to consider the case now put.
38. I also bear in mind that map reading on landscapes such as Dartmoor is far from easy and it is a fortunate walker who has not made a map-reading error in such country. However, on the agreed facts, a high standard of navigational skills was to be expected of those training 14 year olds during an expedition on Dartmoor. By Dartmoor standards, the judge found nothing exceptional about conditions that day. The experts agreed that it was very important that checkpoints were manned (though, in evidence, the stress was on the importance of the opportunity it gave for assessing the fitness of participants to continue with the route).

#### Conclusions on negligence

39. Miss Timms was fully questioned about her errors and gave no justification or explanation for them, apart from saying how bad weather conditions were. She agreed that examination of the contours on the route they were taking would have revealed that they were north of Watern Tor. She said she knew they had "overshot":

"We knew we had gone wrong and we knew at that point that we were fairly sure we were heading for the Hound so we went there to confirm it, and then we were going to follow the path back and then across to Watern."

In these circumstances, given the high standard reasonably to be expected, and the seriousness of the elementary errors made, there must, in my judgment, be a finding of negligence against Miss Timms.

#### Causation

40. It next has to be considered whether the negligence of Miss Timms caused or contributed to the tragic death. The judge concluded, at paragraph 135, that the respondents were not in breach of their duty of care. He added that had he been persuaded there was a breach of duty, he "would nevertheless have found the intervention of Mr Wills at Watern Tor broke the chain of causation":

"136. . . . This tragic accident was the consequence of the well meant, but ill advised intervention of Mr Wills in advising the group that it was possible to cross the Walla Brook, and in guiding them to the crossing point where he oversaw the crossing. The experts were in agreement in their joint opinion that "it was a bad decision on the part of Mr Wills to advise and attempt to supervise the crossing of the Walla Brook". The effect of his intervention was to countermand the instructions that had been given by the first defendant.

137. Whilst I accept that it was foreseeable that the group might seek advice from other adults who were on the moor with groups of youngsters training for the event, I do not consider that it was reasonably foreseeable that such an adult would give bad advice thereby putting the group at risk. It follows that had I been persuaded that the defendants were in breach of their duty of care, I would not have held them liable for the consequences of Mr Wills' intervention. Secondly I am satisfied that the intervention by Mr Wills unquestionably amounted to an independent supervening cause for which it would not have been fair to hold the defendants liable."

41. The judge's finding, at paragraph 109, that Mr Wills would not have become involved but for Miss Timms' absence from Watern Tor, with respect a somewhat speculative finding on the evidence available, does not of itself establish a sufficient causative link between the absence and the accident. All the circumstances must be considered.
42. The situation to be considered is the group arriving at Watern Tor and not finding a teacher there. The judge described subsequent events and made findings of fact. The decision to stand down Miss Timms is not now criticised. What is submitted is that her absence from the checkpoint when the group arrived contributed to the drowning because it was foreseeable that the group would seek, and follow, advice from an apparently knowledgeable adult they met at the Tor. Had Miss Timms been present, it was unlikely, as the judge found at paragraph 109, that Mr Wills would have become involved. Miss Timms's presence would have been more influential and they would not have attempted to cross Walla Brook. It was more likely that advice not to cross the Brook, given by the first respondent over the telephone, would have been followed. The Brook crossing would not have been attempted but for her absence.
43. Dr Powers relied on the evidence of Mr Jones that the group "ideally . . . needed a leader on the spot." Mr Jones also stated, and I will need to return to this, that Miss Timms "may have come to the conclusion that for the next leg she needed to accompany them."
44. CK, who had assumed the role of leader of the group, telephoned the first respondent who first told them that the group should seek shelter and have something to eat while awaiting the arrival of Miss Timms. Members of the group were getting cold and set out to try to cross Walla Brook. One of the group slipped and had to be pulled out whereupon the group returned to Watern Tor. CK again spoke to the first respondent on the telephone and he instructed her not to attempt to cross Walla Brook but to make their way to Hangingstone Hill around the head of the Brook and to proceed to the next checkpoint. The judge found that advice to be entirely appropriate and his finding is not now challenged. In her evidence, CK agreed that, when they set off for Walla Brook on the first occasion, they were all perfectly fit and well to undertake the last leg of the journey. She agreed that the options were to walk around the Brook or to go over it. She agreed that from what they had found out from other teams and from walking it themselves, they were not likely to be able to cross Walla Brook.



45. In his written statement, Mr Jones accepted that retracing steps to walk around Walla Brook Head would have been hard on morale and a strong leader would have been required to convince the group it was the correct decision. It is common ground that only an additional one kilometre was involved in the detour involving an additional 17 to 20 minutes walking. Mr Waldock, the qualified mountain leader they met, also advised the group to return to Hangingstone Hill, to walk around the head of the Brook and to avoid any more rivers or streams. In the event, the group was persuaded by Mr Wills, who “seemed competent and in authority”, to attempt to cross the Brook.
46. For the respondents, Mr Walker submitted that whatever happened subsequently could not be attributed to Miss Timms’ failure to reach Watern Tor before the group. When she was stood down, an action not now criticised, Miss Timms was about 1½ kilometres from Watern Tor on her return from Hound Tor.
47. When considering the duties of a checkpoint, what was canvassed in evidence was the ability of the checkpoint to assess the fitness of the group. Given the decision, not now criticised, to permit the group to proceed independently, and not to withdraw them from the moor, the duties would not have included advice as to which way to go, it was submitted. Unlike the issue of her failure to reach Watern Tor, the issue of what, if any, advice as to route she would have given was not explored with Miss Timms, save that she said had there been any issues she would have telephoned the first respondent. She said she would have checked that the team members were fit to continue:

“Q. And then what would you have envisaged was going to happen?

A. Well as they were making good time I would very much encourage them, I would have been very pleased with their progress and told them so. Just made sure that there were no issues with boots or anything, general practical stuff, making sure they were all right, and encourage them to make sure they had had their lunch and move on to see Mr. Fuller.”

For Miss Timms to have accompanied them, would have been against the plan, not now criticised, to allow the group to operate unaccompanied. Unsurprisingly, the judge did not make findings as to what advice should have been given at the checkpoint.

48. Mr Walker submitted that what happened would have happened even had Miss Timms been at the checkpoint. Having sent the group on, Miss Timms would have been stood down. Even if her absence provided the occasion for the group meeting Mr Wills, it could not have been anticipated that the group would ignore the instructions given by the first respondent, it was submitted. Mr Wills’s intervention was a clear *novus actus*, it was submitted.
49. I summarise the judge’s findings on causation, already cited. The judge would have found that the intervention of Mr Wills at Watern Tor broke the chain of causation. The accident was the consequence of the well meant but ill-advised intervention of Mr Wills in relation to crossing Walla Brook. While it was foreseeable that the group

might seek advice from other adults, it was not reasonably foreseeable that bad advice would be given.

50. I have reservations about the materiality of the last of those findings and so, it appears, do the parties because neither party sought to make negligence by Mr Wills a part of its case. The appellant alleges that a sequence of events followed Miss Timms' absence from Watern Tor and can fairly be attributed to it; the respondents allege that given the first respondent's instructions, and the good sense of them, they cannot be responsible, even to 14 year olds, for actions taken contrary to those instructions upon the advice of a third party, whether good advice or bad advice. The case should not turn on how good or bad was the advice given by the intervener.

#### Conclusions on causation

51. It is very speculative as to what course events would have taken had Miss Timms been present at the checkpoint. It has to be accepted that the members of the group were fit to continue from Watern Tor. On the evidence, it would have been a proper discharge of her duties to send the group on its way, having checked the fitness of members. What advice she would or should have given them is not clear and was not put to her in evidence. Any questions as to route, she said, would have been put to the first respondent by telephone and his advice would have been the same as that given in her absence. It cannot be concluded, on the evidence, that she probably would have accompanied the team on the next leg.
52. I am not able, on the evidence, to conclude that Miss Timms' presence at the Tor when the group first arrived would have led to a different outcome or was causative of the second attempt to cross Walla Brook. It may well be that she would have sent the group on its way and then stood down so that on their return to Watern Tor, having failed to cross Walla Brook the first time, she would not have been there. They would have telephoned the first respondent and events were likely to have taken the course they did.
53. Even had she stayed, the intervention of a third party, anxious to help and apparently authoritative, would have broken the chain of causation. It could not have been foreseen that they would have disobeyed instructions from the project leader, the first respondent, the good sense of which was confirmed by the advice given by Mr Waldock, whom they met en route. They had been alerted by Mr Hodges, an experienced trainer, to the risks to which water crossings gave rise.
54. Subsequent events could not fairly be attributed to the absence of Miss Timms from the Tor. A finding that her presence there when the group first arrived would have prevented the second attempt to cross the Brook, with its tragic consequences, involves too much speculation to be tenable. I agree with the conclusion of the judge.
55. For completeness, I add that it has not been argued that Charlotte's loss of control having occurred when attempting to throw a rucksack across Walla Brook, rather than when attempting to cross it, would itself have broken the chain of causation.

#### Result

56. For those reasons, I would dismiss this appeal.

**Lord Justice Moore-Bick :**

57. I agree.

**Lady Justice Black :**

58. I also agree.