COURT OF APPEAL FOR ONTARIO

CITATION: Campbell v. Bruce (County), 2016 ONCA 371
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Doherty, MacPherson and Miller JJ.A.

BETWEEN

Stephen Campbell, Patti Campbell, and Liam Campbell and Jordann Campbell,
by their Litigation Guardian, Patti Campbell

Plaintiffs (Respondents)

and

The Municipal Corporation of the County of Bruce

Defendant (Appellant)

T.R. Shillington and Jonathan de Vries, for the appellant

Peter W. Kryworuk and Alysia M. Christiaen, for the respondents

Heard: April 28, 2016

On appeal from the judgment of Justice M.A. Garson of the Superior Court of Justice, dated January 16, 2015, with reasons reported at 2015 ONSC 230.

MacPherson J.A.:

A. INTRODUCTION

[1] The appellant, the Municipal Corporation of the County of Bruce, constructed a public park for people to ride on various trails and obstacles with their mountain bikes. The respondent, Stephen Campbell, fell while attempting to

cross a constructed obstacle near the entrance of the park. He fractured his C6 vertebrae and was rendered quadriplegic.

[2] Following a seven-day trial with seven witnesses, the trial judge found the municipality liable for Mr. Campbell's injury. The trial judge also found that Mr. Campbell was not contributorily negligent with respect to the accident.

[3] The municipality appeals. The appeal requires consideration of the concept of negligence as defined in the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 (the "*OLA*"). The appeal also raises the issue of contributory negligence.

B. FACTS

(1) The parties and events

(a) The Park

[4] In 2005, the municipality opened the Bruce Peninsula Mountain Bike Adventure Park (the "Park"). The Park consisted of a series of bike trails, as well as a skills development area with various wooden obstacles (the "Trials Area") where riders could learn what to expect on the trails. The Park was open to the public with no admission fee and was unsupervised.

[5] In designing and constructing the Park, the municipality heavily relied on the International Mountain Bike Association (the "IMBA") for best practices and risk management. With respect to the construction of the Trials Area, the ground around each obstacle was solid limestone with a thin layer of soil on top. The

municipality considered and rejected using mulch to soften the ground, as it was concerned about creating a false expectation for riders.

[6] For the trails and obstacles in the Park, the municipality used a difficulty rating system similar to that of a ski hill (*i.e.* black diamond). Because this type of Park was new to Ontario, the municipality automatically increased the difficulty rating for each obstacle in the Trials Area by one (the easiest being black diamond).

[7] The municipality installed signs that cautioned riders: (1) to ride within their ability and at their own risk; (2) that helmets are mandatory; and (3) to yield to other groups.

[8] The municipality promoted the Park as a family venue. A promotional brochure for the Park contained a warning that mountain biking can be risky and that visitors should ride within their own abilities and at their own risk.

[9] The municipality's incident analysis and reporting system consisted of an email address and 1-800 number for people to self-report. There was no mechanism to collect and assess ambulance calls at the Park until after the respondent's accident. The evidence at trial revealed that there were at least seven ambulance calls before the respondent's accident, all for riders aged 40 plus. One of those calls was for Ian Ross, who suffered a broken neck on a

different, and more difficult, wooden obstacle three months before the respondent's accident.

[10] The Trials Area consisted of 10 wooden obstacles. The idea was that riders would try these obstacles to familiarize and test themselves for the terrain and obstacles they would encounter on the bicycle trails in the Park.

[11] Two of the wooden obstacles in the Trials Area were called "Pee Wee" and "Free Fall". Both were 'teeter-totter' type structures. Free Fall was located directly behind Pee Wee so that riders could, but did not have to, try them consecutively a few seconds apart.

[12] Pee Wee was a low teeter-totter structure with little elevation above the ground.

[13] Free Fall was a steeper and higher teeter-totter structure. The rider would pedal the bicycle to ascend the wooden plank structure to its pivot point, which was 26 inches above the ground. At the pivot point, the teeter-totter would dip down and the rider would descend the other side of the plank structure until reaching the ground.

(b) <u>The accident</u>

[14] Mr. Campbell, his wife Patti, and his two children, Liam (aged 12) and Jordann (aged 10), rented a cottage in the municipality for a family holiday in August 2008. They saw a tourism brochure about the Park. Mr. Campbell was an

active and athletic 43-year-old man with extensive mountain bike trail experience. He decided that the family would check out the Park.

[15] The family arrived at the Park on August 6, 2008. They started in the Trials Area. While there, Mrs. Campbell fell off Pee Wee but was able to stabilize herself on a nearby tree. The family also rode on the trails in the Park. Mr. Campbell gave his helmet to his son who had forgotten his helmet. That evening, Mr. Campbell drove 30 minutes to Owen Sound and purchased two new helmets.

[16] The next day, August 7, the Campbell family returned to the Park. Everyone wore a helmet. They went to the Trials Area again. Mr. Campbell went over Pee Wee successfully.

[17] Mr. Campbell continued onto Free Fall. He did not have enough speed to make it over the pivot point. He started to fall. He tried to control his fall by "popping a wheelie" (staying on the bike and attempting to land it on its back wheel) to the right of Free Fall. In doing so, he kept his hands on the handlebars. Mr. Campbell went over the handlebars and landed on his head on the ground. He broke his neck. Sadly, he became quadriplegic.

(2) The trial judgment

[18] The trial proceeded on the issue of liability only. The governing law in the case was s. 3 of the *OLA*:

> 3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

[19] The trial judge was satisfied that the municipality had breached the duty it owed to Mr. Campbell under s. 3 of the *OLA* to ensure that he was reasonably safe while in the Park. He found that the municipality had breached its duty in five ways: (1) its failure to post proper warning signs; (2) its negligent promotion of the Park; (3) its failure to adequately monitor risks and injuries at the Park; (4) its failure to provide an "adequate progression of qualifiers"; and (5) its failure to make the Trials Area a low-risk training area.

[20] The trial judge went on to find that each of the first four breaches of the duty were an independent cause of Mr. Campbell's injuries. However, for the fifth breach, the trial judge found causation was not made out.

[21] On four other issues, the trial judge found that the municipality did not breach its duty of care to Mr. Campbell: (1) its failure to post an instruction that a minimum speed was required; (2) its failure to employ an attendant at the Park; (3) its failure to obtain an engineering opinion on the design of Free Fall; and (4) by permitting the ground near Free Fall to be dangerously compacted.

[22] Finally, the trial judge found that Mr. Campbell was not contributorily negligent in deciding to ride on Free Fall or in the manner in which he attempted to extricate himself from the situation once he started to fall.

[23] The municipality appeals on all issues, including the duty and standard of care, causation and contributory negligence. The Campbells do not cross-appeal any of the conclusions of the trial judge that went against them.

C. ISSUES

[24] The appellant raises five issues:

(1) Did the trial judge impose an incorrect and overly onerous duty of care?

(2) Did the trial judge err in assessing the question of inherent risk?

(3) Did the trial judge err in his analysis of the standard of care?

(4) Did the trial judge err in his analysis of causation?

(5) Did the trial judge err in his assessment of contributory negligence?

D. ANALYSIS

(1) Duty of care

[25] The appellant contends that the trial judge was required to assess its conduct in light of its duty to take reasonable care as an occupier. According to the appellant, the trial judge did not do this; instead his description of the

appellant's duty practically rendered the appellant an insurer and improperly focused on the nature of the respondent's injury. The appellant points to the following passages in the trial judge's reasons:

> [216] … Given the role of the wooden features structures to allow riders to test and assess their level of skill, it is logically foreseeable that some riders, particularly novice and beginner, would pass the skills testing and others would fail (i.e. fall off the features). In my view, it is incumbent on the County to ensure that those who fail the test can do so safely.
>
> …
>
> [224] The County failed … to protect [Stephen Campbell] from catastrophic harm.

[26] I do not accept this submission. The leading case dealing with duty of care under the *OLA* is *Waldick v. Malcolm*, [1991] 2 S.C.R. 456. In that case, Iacobucci J. articulated the purpose of the *OLA*, at 477:

> The goals of the Act are to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe.

[27] Iacobucci J. also discussed the contents of the duty of care under the *OLA*, at 472:

> [T]he statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation – thus the proviso "such

> care as in all circumstances of the case is reasonable".
> [Emphasis in original.]

[28] The trial judge specifically cited and applied *Waldick* in his reasons for judgment. He considered the knowledge, decisions and actions of the appellant with respect to the design, construction and operation of the Trials Area of the Park.

[29] In the context of an extensive discussion of these factors, I do not think that the trial judge's use of the word "ensure" in the above passage equates to him saying that the municipality became in effect an "insurer" for all activities in the Park. Rather, a fair reading of the passage, in conjunction with the rest of the reasons on duty of care, is that "ensure" means "take appropriate care".

[30] Nor do I think that the trial judge's use of the words "catastrophic harm" means the trial judge improperly inserted the nature of the potential harm to users of the Park into the analysis. In discussing duty of care under the *OLA* in *Kennedy v. Waterloo County Board of Education* (1999), 45 O.R. (3d) 1 (C.A.), Feldman J.A. said, at 11-12:

> In *Veinot v. Kerr-Addison Mines Ltd.*, [1975] 2 S.C.R. 311 at p. 317, 51 D.L.R. (3d) 533, Dickson J, speaking for the majority, quoted with approval several factors listed by Lord Denning on the issue of whether an occupier has taken reasonable care:
>
> > The following excerpt from Lord Denning's judgment [*Pannett v. McGuinness & Co. Ltd.*, [1972] 3 W.L.R. 387] aptly expresses in my opinion the more salient

> points a judge should have in mind when considering intrusions upon land:
>
> > The long and short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did. (1) You must apply your common sense. You must take into account the gravity and likelihood of the probable injury. Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take steps to see that no one is injured by it.

[31] In my view, the trial judge's reasons are consistent with this passage.

(2) Inherent risk

[32] The appellant submits that the trial judge was required to assess whether the risk that materialized in this case was within the inherent risks of the sport of mountain biking, both in general and in the particular use of Free Fall.

[33] According to the appellant, the trial judge correctly recognized the principle of inherent risk and the fact that the respondent knew and acknowledged an inherent risk. However, the appellant says that the trial judge fell into error by using the respondent's subjective inability to foresee the actual damage he sustained as somehow delineating the scope of inherent risk. The faulty reasoning, the appellant submits, is this:

> [209] Although [Stephen Campbell] foresaw risk of some injury, he did not foresee the severity of the potential injury.

[34] I am not persuaded by this submission. There is no doubt that the respondent, an experienced mountain biker, assumed the risk of riding on the bicycle trails in the Park.

[35] However, the trial judge drew a distinction between the bicycle trails and the Trials Area in the Park. He referred to the evidence of Chris La Forest, the municipality's Director of Planning and Economic Development and principal designer of the Park. The trial judge pointed out, at para. 133, that Mr. La Forest testified that he had attempted Free Fall more than 60 times and "fallen off many times".

[36] The trial judge described the respondent's experience in this fashion:

> [25] He had been trail riding since 1990. He had extensive road and trail experience, yet no experience with wooden technical features or apparatus (except perhaps riding over a bridge in a swampy trail area).

[37] The trial judge then concluded:

> [193] I was struck by the dual risks associated with Free Fall, namely riding too slow and losing momentum or riding too fast and being launched off the end of the feature. Balancing on the board was also critical to success.
>
> [194] [Chris La Forest] was insistent that users of the park needed to self-assess. Yet, I am troubled by how novice riders or riders with trail experience but not features experience, can self-assess when they may not

> be aware of all of the skills required to successfully manoeuver the feature.
>
> …
>
> [223] In all of the circumstances of this case, I am satisfied that the County has breached its duty to adequately warn [Stephen Campbell] of the dangers of Free Fall, that an ordinary person, exercising common sense, could not perceive or appreciate. [Emphasis added.]

[38] I do not see a problem with any of this reasoning. In my view, it properly delineated the meaning of inherent risk in this case.

(3) Standard of care

[39] The appellant contends that the trial judge did not articulate the standard of care to which the municipality was subject. The trial judge referred to Free Fall as a hidden or unexpected hazard, but did not spell out the actual nature of the hazard. Nor did the trial judge indicate what the municipality could have done to avoid liability.

[40] I disagree. The trial judge clearly identified the nature of the problems posed by Free Fall, including: (1) riding too slow and losing momentum; (2) riding too fast and being launched off the end of the structure; and (3) failing to appreciate that, in the case of a fall on Free Fall, the rider must, contrary to one's natural instincts, immediately release one's grip on the bike and jump clear of the falling bike.

[41] On the question of what the appellant could have done differently, the trial judge was clear and concise:

> [220] There were no instructional signs, no requirements to complete an easy trail or Pee Wee on multiple occasions prior to attempting Free Fall, no warning of serious injury, and no instruction on how to extricate oneself from the feature.

[42] The appellant also challenges the trial judge's four individual findings that it breached the reasonable standard of care of an occupier. These four breaches are in relation to the municipality's: (1) failure to post proper warning signs; (2) negligent promotion of the Park; (3) failure to adequately monitor risks and injuries in the Park; and (4) failure to provide an "adequate progression of qualifiers" in the Trials Area.

[43] On the warning sign issue, the appellant submits that the trial judge did not identify the actual signs the municipality should have posted to meet its standard of care.

[44] I disagree. The trial judge said:

> [242] The hazard that [Stephen Campbell] faced was unexpected and not readily apparent to [him]. The County could have and should have placed warning signs regarding risk of serious injury and the level and type of expertise required to ride this feature without serious injury.
>
> …
>
> [276] A single black diamond is insufficient to identify this risk. Unlike on many parts of the trail, a rider has no

> opportunity to place their feet down on the ground if they lose momentum or balance on Free Fall. There are no posted instructions on how to dismount, or on whether to maintain control of the bike.

[45] On the promotion of the Park issue, the appellant makes a similar complaint; it says that the trial judge did not specify what warning should have been in its brochure promoting the Park.

[46] Again, I disagree. The trial judge said:

> [289] The brochure should have contained more detailed warnings about the skill level required to use the features as well as the risks of injury from being off the ground.

[47] On the monitoring risks issue, the appellant points to the trial judge's statement at para. 296: "I am not sure what steps would have been taken had the County been aware of the Ian Ross accident on the day it occurred." The appellant asserts that if a trier of fact cannot ascertain what an appropriate standard of care would be, there can be no breach.

[48] I do not accept this submission. In my view, the appellant misapprehends the comment in paragraph 296 by suggesting that it speaks to an inability to articulate an appropriate standard of care.

[49] The reality is that several riders had been injured, including seriously injured, on the wooden obstacles in the Trials Area before the appellant's

accident. The trial judge described the appellant's knowledge of, and non-reaction to, these injuries in this fashion:

> [160] [Chris La Forest] agreed there was no formal manual or booklet or policy regarding the use or maintenance of the features. Rather, these were operational issues addressed on a daily basis.
>
> [161] He also agreed that the incident analysis and reporting system consisted of an email address and a 1-800 number for persons to report such incidents. There was no box at the park for forms.
>
> [162] There was also no mechanism to collect and assess ambulance calls at the park until after the accident.
>
> [163] In reviewing an Ambulance Incident Report for the park, he agreed that he was not aware of earlier incidents at the park before the accident.

[50] In my view, all of these points are responsive to the standard of care issue and support the conclusion the trial judge reached at paragraph 297:

> [297] It is hard to conceive that in a sport where injury is very common and falling is almost a certainty at some point in time, that a system would not be in place to monitor serious injuries.

[51] Finally, the appellant asserts that the trial judge did not specify what would constitute an "adequate progression" of obstacles in the Trials Area.

[52] I am not persuaded by this submission. Pee Wee and Free Fall were very close to each other. There was a natural progression from one to the other. In his testimony, Mr. La Forest said that Pee Wee and Free Fall were the two obstacles

most likely to be ridden in tandem. The respondent "felt like this was the next thing to do as he had done Pee Wee just fine and Free Fall lined up behind it and it seemed like the next thing to try" (para. 38). The trial judge accepted this evidence and concluded:

> [307] Suggestions were made by the County that you could turn around and ride Pee Wee again and simply by-pass Free Fall by taking the alternate paths on either side.
>
> [308] Although these options were available, after carefully reviewing the photos of these features, I conclude that they were built in such a way that Free Fall was the next logical progression after Pee Wee and that coming off of Pee Wee delivered the rider to the start of Free Fall.

(4) Causation

[53] The test for causation in a negligence action is the 'but for' test – the plaintiff must show on a balance of probabilities that 'but for' the defendant's negligent act, the injury would not have occurred": *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98, at para. 28; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8, 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22.

[54] The trial judge applied this test and found that the appellant caused the respondent's injury with respect to the four breaches of the standard of care addressed above.

[55] The appellant challenges all four of these conclusions on causation. The appellant submits that the trial judge: (1) assessed causation based on a reasonableness standard and not the ‘but-for’ test; and (2) failed to make actual findings of causation. I will consider these challenges but, importantly, I must do so under the umbrella of the standard of review enunciated by Rothstein and Moldaver JJ. in *Ediger*, at para. 29:

> Causation is a factual inquiry (*Clements*, at paras. 8 and 13). Accordingly, the trial judge’s causation finding is reviewed for palpable and overriding error (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 53-56).

I also observe, as the appellant acknowledged at the hearing, that the appellant can succeed on the appeal only if he demonstrates that none of the causation conclusions can stand.

[56] On the warning sign issue, the appellant submits that the respondent had to prove that a specific and different outcome would have transpired had different signs been posted. However, because the necessary signs were not specified by the trial judge and the respondent was not asked about how he would have reacted to such additional signage, the appellant submits this could not be established.

[57] I disagree. The trial judge clearly found that the respondent’s injury would not have occurred if more detailed signage had been posted:

> [250] … I have little doubt had more detailed signage been in place … the decisions made by [Stephen Campbell] would have been different and the injuries would not have occurred.
>
> …
>
> [253] A sign instructing how to reduce or minimize injuries when falling would have allowed [Stephen Campbell] to abandon the feature in a different manner.
>
> …
>
> [265] Given that [Stephen Campbell] was at the park primarily for the trails, I am satisfied that a more detailed warning sign would have impacted [him] and his decision to attempt Free Fall.

[58] I see no palpable and overriding error in the trial judge's findings that would warrant appellate intervention.

[59] On the promotion of the Park issue, the appellant submits that the trial judge did not specify how a different warning would have affected the behaviour of the respondent. As such, causation was not made out.

[60] Again, I disagree. The trial judge highlighted the care that the respondent and his family took to determine whether to attend the Park:

> [173] He and his wife were experienced mountain bikers and relied on the promotional brochure, the 1-800 number and conversations with tourist representatives in deciding to visit the park.
>
> …
>
> [287] [Stephen Campbell] and his wife carefully reviewed the brochure and even called the 1-800 number.

> [288] I am satisfied that like Ian Ross earlier, [Stephen Campbell] believed the park was a safe and fun venue for families.

[61] The trial judge clearly found that the respondent's decision to attend the park was influenced by the promotion of the park as a family venue. Accordingly, it was open to the trial judge to conclude that the respondent's injuries would not have occurred if the park was promoted more accurately:

> [290] In all of the circumstances, I am satisfied that the promotion of the park breached the duty of care owed by the County to [Stephen Campbell], and but for that breach, the accident and the resultant injury would not have occurred.

[62] On the monitoring risks issue, the appellant submits that the trial judge inappropriately associated the Ian Ross incident with the incident involving the respondent. The appellant submits there is no basis for finding that the municipality would have changed Free Fall in response to an accident on a different obstacle.

[63] In my view, the trial judge was entitled to find that had the municipality adequately monitored previous accidents, and been aware of the number of accidents at the Park and on Free Fall in particular, actions would have been taken that would have prevented the respondent's injuries. Given the factual nature of the causation inquiry, deference is owed to the trial judge's conclusion that:

> [300] If the County had maintained an effective and complete history of injuries and accidents at the park, they would have been in a better position to determine whether the wooden features posed a danger, and could have taken steps to identify and define the risks of injury or accident by users of the park.
>
> …
>
> [303] I am satisfied that the failure to adequately monitor risks at the park breached the duty of care owed by the County to [Stephen Campbell], and but for that breach, the accident and the resultant injury would not have occurred.

[64] Finally, on the adequate progression of obstacles issue, the appellant submits that there was no basis on which to conclude that moving Free Fall farther away from Pee Wee would have prevented the respondent from attempting it.

[65] I do not accept this submission. The trial judge considered the impact of having the two obstacles so close together:

> [259] They were in tandem. When I examined the photo, it struck me that they were built to ride one after the other.
>
> …
>
> [308] Although the [alternate paths] were available, after carefully reviewing the photos of these features, I conclude that they were built in such a way that Free Fall was the next logical progression after Pee Wee and that coming off of Pee Wee delivered the rider to the start of Free Fall.

[66] Given these findings, I defer to the trial judge's conclusion that:

> [312] In all of the circumstances, I am satisfied that the County has breached its duty of care in failing to have an adequate progression of qualifiers, and but for that failure, [Stephen Campbell] would not have attempted the feature or sustained the resultant injury.

[67] In summary, on all four causation points the trial judge's analysis is far removed from attracting the label 'palpable and overriding error'. The trial judge clearly applied the 'but-for' test, and not a standard of reasonableness as alleged by the appellant.

(5) Contributory negligence

[68] The trial judge held that the respondent was not contributorily negligent for the injury he sustained:

> [336] In accepting that the risks of Free Fall were not readily apparent, I am unable to find fault with [Stephen Campbell] for failing to be more capable in his attempts to extricate himself from the emergency situation he faced.
>
> [337] I am satisfied that it was the County who created the emergency situation which led to the accident and that [Stephen Campbell] cannot be expected in the "agony of the moment" to make a perfect manoeuvre, in this case a "wheelie", to avoid the accident. The suggestion by the County that [he] had ample time to both make an assessment of the situation and decide on a course of action is simply not supported by the evidence before me. [Stephen Campbell] cannot be criticized or found liable for failing to be more capable in his attempt to extricate himself from the emergency situation he faced as a result of the actions of the County.

[69] The trial judge's decision on contributory negligence is one of mixed fact and law and is entitled to deference, absent a palpable and overriding error: see *Waldick*, at 480.

[70] The appellant challenges the trial judge's assessment of contributory negligence on three bases.

[71] First, the appellant asserts that in this passage the trial judge focused his inquiry exclusively on the respondent's actions in attempting to exit Free Fall. The appellant submits that this is too narrow an approach. The duty to take reasonable care for one's own safety does not materialize only when a situation of peril arises. Rather, the duty extends to the respondent's decision to try to ride Free Fall.

[72] I do not accept this submission. Earlier in his reasons relating to contributory negligence, the trial judge said:

> [334] In finding that the County breached its duty under s. 3(1) of the *OLA*, I have already concluded that the risks of Free Fall were a hazard and not readily apparent. As such, [Stephen Campbell] would have lacked foresight of the severe consequences of his behaviour.

[73] I see no basis for interfering with this factual finding. It explains why the trial judge then focused on the respondent's thinking and actions once he was in peril on Free Fall and not on his prior decision to attempt to ride Free Fall.

[74] Second, the appellant contends that the trial judge's conclusion that the respondent was not contributorily negligent is inconsistent with his trial counsel's admission during closing submissions:

> THE COURT: So, are you going to give me a percentage breakdown? Like, is your breakdown 100/0?
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> MR. MURRAY: No. I probably should give a range of breakdowns.
>
> THE COURT: Right.
>
> MR. MURRAY: I would suggest pending on the way Your Honour find the facts, that at the low end it would be 50 percent; so a 50/50 split.
>
> …
>
> THE COURT: All right.
>
> MR. MURRAY: And you know, at the higher end I would say – because there are some elements with respect to Mr. Campbell, you know, always be sure under all circumstances that he knew what he was doing and knew how to do it – that it would be comparable to the finding in the water slide case; it would be an 80/20 split.
>
> …
>
> THE COURT: So, I guess the issue is – is, you know, how long or how – at what point along the risk continuum is he prepared to place himself.
>
> MR. MURRAY: Mm-hmm.
>
> THE COURT: So, clearly it's – it's not perhaps zero because he – he's prepared to accept certain risks and…
>
> MR. MURRAY: I would concede that.

> THE COURT: …he – he wouldn't mountain bike if he wasn't prepared…
>
> MR. MURRAY: Exactly.
>
> THE COURT: …to accept certain risks…
>
> …
>
> MR. MURRAY: Yes. Well, that's why I – I guess I put it at, you know, from 50/50 to 80/20 as…
>
> THE COURT: Right.
>
> MR. MURRAY: …the spectrum.

[75] The appellant contends that in these passages the respondent's trial counsel explicitly conceded that, at best, his client should obtain an 80/20 liability split. The respondent's position is that the subject matter of this discussion is not the apportionment of liability; the discussion relates to a different subject, namely, the respondent's own thinking, converted to percentages, about how much risk he was willing to assume in engaging in mountain biking at the Park.

[76] I think that both interpretations are possible. In the end, I am not prepared to say that trial counsel's portion of the discussion with the trial judge amounts to a formal admission of some liability. I note that in his closing submission, the appellant's trial counsel did not claim that the respondent's trial counsel's preceding submission amounted to an admission that his client was at least 20 per cent responsible for the accident.

[77] As well, I observe that trial counsel prefaced his remarks with “pending on the way Your Honour finds the facts”. On the findings of fact as ultimately made by the trial judge, the respondent did not contribute to the accident. There was no carelessness on his part, either in his decision to try to ride Free Fall or in his actions to try to prevent a fall once he was in peril on Free Fall.

[78] Third, the appellant submits that the trial judge’s conclusion on contributory negligence is inconsistent with an observation he made very early in the judgment:

> [4] [Stephen Campbell] overestimated his ability and underestimated his skill required to successfully ride this teeter-totter feature known as Free Fall. The consequences arising from his fall were catastrophic.

[79] I do not read this passage in the manner suggested by the appellant. In my view, the trial judge was simply observing that, as it turned out, the respondent did not have the skill to successfully navigate Free Fall. The legal analysis relating to the consequences of the accident emerge in the following 339 paragraphs.

[80] In summary, I see no palpable and overriding error in the trial judge’s appreciation of the evidence and conclusion on the issue of contributory negligence.

E. DISPOSITION

[81] I would dismiss the appeal. I would award the respondents their costs of the appeal fixed at $25,000, inclusive of disbursements and HST.

Released: May 17, 2016 (“D.D.”)

“J.C. MacPherson J.A.”
“I agree. Doherty J.A.”
“I agree. B.W. Miller J.A.”