IN THE HIGH COURT OF JUSTICE **Claim No 4CF06278**

QUEEN'S BENCH DIVISION

CARDIFF DISTRICT REGISTRY

BEFORE HIS HONOUR JUDGE HICKINBOTTOM SITTING AS AN ADDITIONAL JUDGE OF THE HIGH COURT

STUART ADAM JONES

Claimant

-and-

(1) BRITISH BROADCASTING CORPORATION

First Defendant/First Part 20 Claim Claimant

(2) JC & EM ORBACH trading as BRITHDIR MAWR COMMUNITY FARM

Second Defendant

(3) BOB BAZALGETTE trading as SOLAR WHEEL

Third Defendant/First Part 20 Claim Defendant/

Second Part 20 Claim Claimant

(4) JONATHAN REES

Fourth Defendant

-and-

AXA INSURANCE (UK) LIMITED

Second Part 20 Claim Defendant

APPROVED JUDMENT

22 JUNE 2007

MATTHIAS KELLY QC and ANDREW ARENTSEN of Counsel
(instructed by Hugh James) appeared for the Claimant.
HOWARD PALMER QC (instructed by Beachcroft LLP)
appeared for the First Defendant/First Part 20 Claim Claimant.
ADRIAN PALMER QC and GLYN EDWARDS of Counsel
(instructed by Lyons Davidson) appeared for the Second Defendant.
CHRISTOPHER PURCHAS QC and BRYAN THOMAS of Counsel
(instructed by Ungoed-Thomas & King) appeared for the Third Defendant/
First Part 20 Claim Defendant/Second Part 20 Claim Claimant.
CHRISTOPHER RUSSELL of Counsel (instructed by Weightmans)
appeared for the Fourth Defendant.
JOHN SLATER QC and JAMED MEDD of Counsel
(instructed by Kennedys) appeared for the Second Part 20 Claim Defendant.

CARDIFF CIVIL JUSTICE CENTRE, 2 PARK STREET, CARDIFF CF10 1ET

I direct pursuant to CPR Part 39 PD 6.1 that no official shorthand note shall be taken of this judgment and that copies of this version, subject to editorial corrections, may be treated as authentic.

Introduction

1. This action arises out of an accident suffered by the Claimant Stuart Adam Jones on 3 October 2001 whilst he was working as a sound recordist during a recording for television of the lowering of a modern windmill mast. During the operation, and whilst he was passing under the inclined mast, the windmill rotor fell onto Mr Jones' back, causing a severe spinal injury rendering him paraplegic. Quantum has not yet been crystallised, but the claim is on any view a substantial one, currently valued at approximately £1.5-2m.

2. The filming was being done at Brithdir Mawr Community Farm in Pembrokeshire, owned by the Second Defendants ("Mr & Mrs Orbach"). At the time of the accident, Mr Jones was working in a freelance capacity for the First Defendant ("the BBC"): and his sound mixer was physically attached by a lead to a camera operated by the cameraman with whom he was recording (the Fourth Defendant, "Mr Rees"). Also present was the person through whom the windmill had originally been supplied, and who had lent a winch for the purpose of the lowering the mast that day (the Third Defendant, "Mr Bazalgette"). Mr Jones alleges that the accident was caused by the negligence of each of the defendants. They in their turn allege that the accident was caused by the negligence of other defendants, and/or that Mr Jones is wholly or partly to blame for his own injuries.

3. There are two allied Part 20 claims.

4. Mr Bazalgette was not initially a defendant in the main claim. However, in Paragraph 5 of their Defence, the BBC asserted that Mr & Mrs Orbach (or at least some members on behalf of the community farm) "engaged Bob Basslejet (sic) t/a Solarwheel to lower the turbine and carry out the necessary repairs [to it]": and instituted a Part 20 Claim seeking an indemnity or contribution from Mr Bazalgette on the basis that he was "the supplier of and repaired and maintained the turbine", and was negligent in a number of respects. That constitutes the First Part 20 claim. (As the result of the allegations in

that Part 20 claim, Mr Jones amended his Claim Form and Particulars of Claim to join Mr Bazalgette into the main claim, alleging negligence against him as "a specialist contractor who had been engaged by [Mr & Mrs Orbach] to undertake works of repair and maintenance to the wind turbine owned by them and operated at [Brithdir Community Farm]".)

5. In the Second Part 20 claim, Mr Bazalgette seeks an indemnity from his public liability insurers ("AXA").

6. The issues of liability in these claims came before me in a trial regrettably split in time, and heard on 22 to 30 January and 30 May to 4 June 2007. At the trial, in addition to Mr Jones and Mr Rees, I heard evidence from two members of the relevant production crew on site at the time of the accident (Miss Gloria Thomas (the director), and Miss Anwen Rosser (the production assistant)): members of the BBC's office staff involved in legal and contractual matters (Miss Moira Edwards, Miss Linda Turner, Miss Clare Perry and Miss Manon Davies): and two members of the Brithdir community who were involved with lowering the mast (Mr Brent Brown and Mr Anthony Wrench). Although Mr Bazalgette and Mr Orbach did not give oral evidence, the BBC relied upon a number of written statements that they had given. Finally, although again they did not give oral evidence, in addition to the lay evidence I had the benefit of written expert evidence from the following engineers/scientists, namely Mr John Brown of Strange Strange & Gardner (instructed on behalf of Mr Jones), Dr Patrick Barbour of Burgoynes (the BBC), Mr G Geary of Keith Borer (Mr & Mrs Orbach), Mr G R Watson (Mr Bazalgette) and Mr Paul van Lisehout of Sinclair Knight Merz (Mr Rees).

7. This is the reserved judgment from that trial.

The Parties

The BBC

8. The BBC not only broadcast television programmes: of course, they also produce them. Until the early 1990s, such productions were made by teams of directors, producers, cameramen, and sound recordists etc, all directly employed by the BBC. However, from about 1993 there were two changes in this market. First, in the industry as a whole, there were increased levels of commissioning to independent production companies, including commissioning by the BBC. Second, in respect of BBC in-house productions there was a change in philosophy towards crews that were a mixture of direct employees and freelances - over time the balance increasingly being in favour of the latter - with teams being put together for a particular production or series of productions by a producer/director who may himself or herself have been freelance (hence the term "producer's choice" for this movement). By 2001, relatively few cameramen and sound recordists were directly employed by the BBC. Most were freelance and, whilst many still relied upon the BBC - about 90% of Mr Rees's work was in respect of BBC productions (Defence, Paragraph 3(i)) - they were also able to work for other companies.

9. I shall return to the terms of engagement of such freelances in due course (see Paragraphs 87 and following below).

The Claimant and Mr Rees

10. Mr Jones was born on 8 June 1961. He was 40 at the time of the accident, and is now 46. He began working as a freelance sound recordist in 1993, being in sales before that. In 2001, as with Mr Rees, although most of Mr Jones's work was for BBC productions, he also worked for a number of other companies.

11. Although, to ensure a level of continuity, freelance producers/directors were usually given a contract for weeks or months - for example, Miss Thomas (the director on the

shoot at which the accident happened) was given a contract on 7 June 2001 for approximately 30 weeks - freelance cameramen and sound recordists were usually given contracts for a particular shoot, programme or series. Although sometimes cameraman and sound recordist were engaged individually, as they tended to work in pairs, often they were engaged under one contract for an aggregate daily fee. Frequently, a producer identified a cameraman for a project and he recommended a sound recordist. Mr Rees and Mr Jones - who have been friends since their schooldays - often worked together, either because a producer would know that they knew each others work and worked well together, or (as in this case) Mr Rees would be approached and would recommend Mr Jones.

Mr & Mrs Orbach, and the Brithdir Mawr Community Farm

12. Mr & Mrs Orbach own Brithdir Mawr, a 180 acre farm in the lee of Mynydd Carningli in West Wales. Since the mid-1990s, it has been run as a community farm, upon which 12-15 adult members live and work in a form of cooperative.

13. Mr & Mrs Orbach plead that the community has "no legal personality" (Amended Defence, Paragraph 1.2), and there was no evidence that it was a partnership (as suggested by Mr Matthias Kelly QC for the Claimant in closing: Closing Submissions, Paragraph 34). Nor was there any evidence that Mr & Mrs Orbach "traded as Brithdir Farm", which is the capacity in which they were sued according to the action heading. The evidence was that the members performed services for the community and shared some expenditure (e.g. on a power supply), according to willingness and ability to meet a need, but they also carried on their individual activities that enabled them to make a living. There was evidence of regular meetings between the members, and there were arrangements between members to enable property to be bought and held by the members. "The community" clearly had sufficient legal capacity to hold property - Mr & Mrs Orbach plead that the windmill was "owned by all the members of the community" (Amended Defence, Paragraph 2.2) - and this was common ground between all of the witnesses who gave relevant evidence. The structure, informal as it was, appears to have

been based upon some form of contractual relationship: and, although not relevant to any determinative issue in the claim, the community appears to have been an unincorporated association of members.

14. However, so far as the land itself was concerned, this was owned and occupied by Mr & Mrs Orbach. Mr & Mrs Orbach not only owned the farm, but also lived there at all material times. Despite the action heading, they are sued simply as "owners and occupiers" of the community farm (Amended Particulars of Claim, Paragraph 1) and not as a firm or in any representative capacity on behalf of all members of the community.

15. Two other members of the community were present at the time of the accident. Mr Brent Brown is an electrician by trade and, prior to joining the community with his wife in 1996, he had been involved in factory maintenance. One of his contributions to the community was therefore in relation to maintenance, particularly of the power supply. The community were committed to self-sufficiency in energy. As we shall see (Paragraphs 23 and 51 and following below), Mr Brown was responsible for the maintenance of the community windmill and, on the day of the accident, he was the person operating the winch that was being used to lower the mast. Also present was Mr Tony Wrench, a wood turner by trade. On the relevant day, he was assisting the lowering particularly by looking after the guy wires (see Paragraphs 22-24 below).

Mr Bazalgette

16. Mr Bazalgette lives about 30 miles away from the community farm. For most of his working life he has been involved in the renewable energy business, first with solar water heating systems and then (from the late 1980s) with wind speed measuring equipment for the wind energy supply industry. Although he has never been involved in the retail supply of wind energy generators, he has used such machines in gathering wind speed data and in doing so gained some technical knowledge about them.

17. He has known members of the Brithdir community since meeting Mr Orbach and Mr Wrench at an annual dance camp (Dance Camp Wales) in 1995. They were musicians attending the festival, and he had set up the energy supply for the event. Because the community were committed to self-sufficiency in energy, and Mr Bazalgette had an interest in renewable energy supply, they had something in common: and, in Mr Bazalgette's own words, he became involved "really as a sort of consultant on what types of renewable energy would be suitable given the location of the site and the availability of sources of power" (Statement 21 September 2005, Paragraph 6).

The Windmill

18. In giving this advice, Mr Bazalgette advised that the Brithdir Mawr location was not ideal for a wind turbine because of the existence of trees and the effects of Carningli on the local wind patterns. The community set up some solar panels and a water powered turbine but, this power being insufficient for their needs, they contacted Mr Bazalgette about the purchase of a wind turbine.

19. The first turbine purchased was manufactured in China. The part Mr Bazalgette played in the identification, purchase and erection of that generator was unclear from the evidence. However, according to Mr Brown the turbine "struggled in the wind" (Notes of Evidence 26 January 2007, page 4): and, in 1999, it was decided to purchase a new one. Mr Wrench was the only community member with access to the internet, and so he did some research into prices on the web. However, Mr Brown then contacted Mr Bazalgette for his advice (Transcript 29 January, page 62A), and they decided upon a Falcon 36 wind turbine generator manufactured by African Wind Power of Zimbabwe, supplied through an Isle of Man company but in fact imported and later supported by a Scottish company, Scoraig Wind Electric Limited. Mr Bazalgette bought the turbine, and sold it on to the community who had a collection to pay for it. It was delivered to Mr Bazalgette's address, and he delivered it and erected it with the assistance of community members in November 1999.

20. On this model, the rotor is three-bladed, the blades being 3.6m in diameter (hence, "Falcon 36"). The turbine is supported by an 88.9mm (3ins) diameter tubular mast, 12m (about 47ft) long from the pivot point at its base to the flange where the turbine is secured. The mast comprises three separate lengths secured by bolted flanges with the flange points providing anchorage points for the guy ropes which hold the mast in an upright position. There are two sets of four guy ropes, one set secured to the higher flange and the other to the lower flange connection, each set being in cruciform (at Brithdir Mawr at approximately north, south, east and west). The guys are secured to anchors driven into the ground. The experts' descriptions of the positioning of the anchors varied. Mr Browne indicated they are at distances of 5.5m and 7.5m from the base of the mast (Report 21 March 2006, Paragraph 5.1): Mr van Lisehout said that the anchors were "all at equal distances of approximately 9 meters away from the turbine tower" (Report 16 February 2006, Paragraph 23).

21. The mast was (and still is) situated in a field of coarse terrain to the west of the Brithdir Mawr farmhouse. To the north was a fence and ditch, and running diagonally from it to the north-west and north-east there were areas of gorse or other bushes, and (to the north-west) some disused farm equipment: so that the only sensible access was relatively narrow and from the south, the footpath from the farmhouse approaching the mast from the south-east. To the right of this path as one approached the mast (and to the east of the mast itself), there was a pile of wood and wood chippings. Carningli is to the west, about 1km away.

22. The mast is "tilt up" and "tilt down", i.e. it is attached to a hinged plate at its foot to enable it to be lowered in one direction using that hinge. The plate is, of course, attached to the ground. In this case, the hinge allowed the tower to be lowered to the north. To enable the mast to be lowered, a gin pole is fixed to the foot of the mast at an angle of about 70°, opposite to the direction of fall (i.e. in this case, the gin pole was to be fixed to the south of the mast): and the guy ropes on that side of the mast are attached to the gin pole. A winch fixed to a ground anchor is then attached to the other side of the gin pole. The mast is then lowered on to a trestle by gradually letting out the winch: or raised by

winching in. With regard to the relevant forces, Mr van Lisehout explained (Report 16 February 2006, Paragraph 31):

> "The two sets of side guys are to be held taut while the tower is lowered or raised. Also side wires are attached to the gin pole ensuring that the northern and southern anchor, the winch anchor, the tower and the gin pole all lie in the same vertical plane ensuring that the only "pure" pull out forces are exerted on the winch anchor, without any sideways forces (the anchor designed for pull forces). Too little tension in the side guy wires could result in the buckling and side swinging of the tower."

As this indicates:

(i) The side guy wires require constant attention during the lowering or raising of the mast: because, if they lose tension, then the mast might buckle and fall.

(ii) Subject to any such rogue sideway forces, the entire burden of the forces in erection or lowering of the mast is borne by the winch.

23. Mr Bazalgette assisted in erecting the mast when it was first delivered in late 1999. However, from then until October 2001, he had nothing further to do with the wind turbine. Mr Brown was not present when the mast was originally installed, but he said - and I accept - that he (Mr Brown) was responsible for maintaining the equipment thereafter, which necessitated regularly lowering the mast to check and if necessary repair the blades (for example, by re-taping them). He said that he had lowered the mast in order to maintain it at least twice before the day of the accident, on both occasions using a drum winch. Unfortunately, on the last occasion (in about March 2001), the winch failed during the lowering process when the turbine was 6-10ft from the ground. It was being lowered onto a trestle about 5ft high, and so it dropped suddenly 1-5ft, breaking one of the rotor blades. Mr Brown replaced all three blades as a result. That was the last time that the mast had been lowered before October 2001.

24. Mr Wrench was not present at the time of this earlier incident: and said that, prior to October 2001, he had never been involved in lowering the mast, although he had assisted in raising it on one occasion (as I understand it, when it was first erected in November 1999: Transcript 30 January 2007, page 23D). There was no set community "team" for lowering and raising the mast. Mr Brown was responsible for the operation, and he just got any two people who happened to be around to help him with the guy wires (Transcript 29 January 2007, page 19C).

Events of 3 October 2001

25. A couple of days before 3 October 2001, the blades of the turbine stopped rotating. Mr Brown considered it would be necessary to lower the mast to investigate. However, he was reluctant to use the community's drum winch, given that it had proved inadequate for the job on the previous occasion. He therefore telephoned Mr Bazalgette because he thought he would have a more robust winch that could be borrowed. Mr Bazalgette initially suggested that Mr Brown waited to see whether, with stronger winds, it would begin working again.

26. However, it did not. Mr Brown therefore telephoned Mr Bazalgette again. Mr Brown said that the primary reason for telephoning Mr Bazalgette was to obtain a more robust winch. He said that he asked Mr Bazalgette to come and help out because his winch was better than the one they had at the community (Statement 12 March 2005, Paragraph 4): and, if he had been able to obtain a suitable winch more locally - Mr Bazalgette lived 30 miles away - he would have done (Notes of Evidence 26 January 2007, page 6). Mr Bazalgette's evidence was that "it was as much as anything a case of wanting to borrow [his] winch" (Statement 21 September 2005, Paragraph 13). I accept Mr Brown's evidence on this point, effectively corroborated as it was by Mr Bazalgette. Brithdir Mawr is in a fairly remote part of West Wales, where 30 miles is not very far: and Mr Brown thought (in the event, correctly) that Mr Bazalgette would not only have

an appropriate winch, but would also be prepared to bring it over to the community without any charge.

27. The winch Mr Bazalgette considered appropriate was not a drum winch, but a Tirfor winch with a ratchet or geared mechanism. It was more robust, and less likely to slip or fail under the considerable load imposed upon it during the lowering of the mast. Mr Bazalgette took the winch to the farm on the morning of 3 October.

28. That same morning, a television production crew were due at the farm to film for a series called "Made in Wales", aimed at 9-11 year old children. It was a production for the Education and Learning Department of the BBC, but all of the participants were in fact freelance. The team comprised Miss Gloria Thomas (producer/director), Miss Anwen Rosser (production assistant), Mr Jason Camilleri (presenter), Mr Rees and Mr Jones. Mr Rees and Mr Jones drove down to West Wales from Cardiff together, and met the rest of the team in a local town for coffee before heading towards the location.

29. The crew's contact at the farm was Mrs Orbach. When they arrived (at about 11am), Miss Thomas and Mr Camilleri met her and began talking about the first sequence, namely horse harnessing. However, Mr Wrench (who was to be assisting Mr Brown in lowering the mast) asked if they would be interested in filming the mast being lowered which by then had not started, and Miss Thomas indicated they would. Mrs Orbach knew that the crew were going to film the mast lowering, but the sum of her involvement was to agree to wait with the horses for a bit whilst this was done as the first sequence (Transcript 24 January 2007, page 45B-C). Mr Orbach said: "I was not present whilst the turbine was being taken down and I left this to members of the community who were more experienced than I in relation to wind turbines" (Statement 22 March 2005, Paragraph 8). Therefore, on this evidence it appears that both Mr & Mrs Orbach knew that the BBC crew were going to film the mast being lowered and were content that they should do so: but they played no active part. They left matters to those at the mast, and particularly Mr Brown who was responsible for its maintenance.

30. I will deal with what was said shortly. However, with regard to what happened, Mr Rees and Mr Jones went back to their vehicle and collected their kit. Mr Rees has his own equipment, but that day he was using a camera borrowed from the BBC, as the production was a relatively cheap one and the shoot required a particular type of camera. He also had a tripod. Mr Jones was using his own equipment, including a boom microphone. During shooting, the camera and sound mixer were linked together by a wire. Three wires emanated from the camera, which were then pulled together in a "tail": and an extendable lead connected this tail to the sound recording equipment. At the tail (camera) end, there was a "quick release" connector (which, Mr Rees said, was anything but quick or easy to disconnect). At the sound mixer end, there was a 13-pin connector. Because that connector was in a bag, Mr Rees did not consider it was realistic for a disconnection to be made there. He had never known it to be done.

31. Generally speaking, whilst shooting, it is the sound recordist's job to capture the sound with the view captured by the camera, Mr Jones explaining that, on an outdoor shoot, the important thing is to capture whatever sounds there are, rather than the quality of the sound which is of secondary importance. Mr Jones had a boom microphone for capturing, e.g., the spoken word of anyone being filmed: and it was his job to follow Mr Rees and capture the sound for any shots he took.

32. The film that Mr Rees took that day was available at trial, and helped in piecing together the movement of the cameraman and sound recordist. There is evidence (to which I shall return) that Mr Rees and Mr Jones had a conversation with Mr Brown before the lowering operation had commenced. With regard to filming, before the mast was moved from the vertical and the lowering started, they initially took shots of the general scene from the tripod which they set up close to the woodpile. This gave them a good view, with Carningli in the background. They then moved from that position, and walked round to the west and filmed Mr Brown to the south of the mast, by the winch, and then Mr Bazalgette and Mr Wrench, who had been assigned to look after the side stays. These shots were taken from the south of the mast, around the winch area, and involved virtually no movement for Mr Rees and Mr Jones (the main difference in the

shots being the amount of zoom). The next shot was from a very similar position, and was of Mr Brown, who has just begun the lowering process: he was working the winch.

33. The team then moved further clockwise round the mast, and took shots of Mr Bazalgette and Mr Wrench holding some guy wires, both close up and pulled back. Both men were to the west of the mast fall line, and the camera team were to the west of these men (i.e. the mast was in the background). The final shot is a close up of the two men, who appear to be in a similar position: and again Mr Rees and Mr Jones were to the west of the men (i.e. the men were still between Mr Rees and Mr Jones, and the mast). As I have indicated, it is not entirely clear as to how far from the mast foot and fall line were the guy rope anchors: but Mr Rees and Mr Jones were at this stage close to them.

34. The film is deceptive as to the angle of the mast at various stages: and there was some evidential dispute as to (i) the angle at which the mast was when filming stopped, and (ii) the time that elapsed between the end of the filming and the accident. With regard to the angle, Mr Jones said that he frankly did not know what this was at the time of the accident: he was concentrating upon his job and was not taking much notice of the actual lowering process itself. However, he thought that the filming was being done fairly quickly, and could not recall any significant delay between the end of the filming and the accident (Transcript 22 January 2007, page 26A). Mr Rees recollected that, when he crossed under the mast, it was "about ¼ of the way down and I suppose probably at about a 70° angle" (Statement 27 July 2005, Paragraph 19), i.e. 20° from the vertical: but in an earlier statement he referred to the pole being "about 10ft above our heads very approximately" (Paragraph 27), which might suggest it was somewhat lower (although in his oral evidence it was never entirely clear as to what part of the mast might have been 10ft above him). He said that there was no significant delay between the last shot and the movement under the mast: in his oral evidence, he said 30 secs and certainly no more than a minute. Likewise, Miss Thomas said that there was no gap in filming between the last shot taken and the accident (Transcript 25 January 2007, page 22E).

35. Mr Bazalgette said that the mast was at 45° when the accident happened (Part 20 Defence, Paragraph 3.3.6). Mr Wrench too said in his written evidence that it was at that angle (Statement 16 February, Paragraph 26): although in his oral evidence he said that it was more reclined than this, perhaps at 30° from the horizontal (60° from the vertical) when the accident happened. Mr Brown said that, having seen the video, he accepted that the mast was nearly vertical still on the last shot (Statement 23 January 2007, Paragraph 2.3: and Transcript 30 January 2007, page 13A-B): but he said that 10-15 mins elapsed between the last shot and the accident during which time the mast was winched down so that it was at 45-60° from the horizontal (i.e. it had been lowered by 30-45° from the vertical) (Statement 12 March 2005, Paragraph 12: and Statement 23 January 2007, Paragraph 2.4.2).

36. This evidence is impossible to reconcile. However:

(i) The lowering of the mast was a very slow process (see, e.g., Mr Brown Statement 23 January 2007, Paragraph 2.4).

(ii) Miss Thomas wanted "to quickly film the wind turbine being taken down for repair" (Statement 9 September 2005, Paragraph 10). All of the witnesses agreed that it was mundane filming: Mr Rees described it as "a boring event" (Statement 27 July 2005, Paragraph 19). Mr Rees and Mr Jones denied that they simply stood around, not filming, whilst very little was happening. They wanted to get on with the rest of the day's shoot: and Mr Rees said that, in crossing under the mast, he was "going back to the tripod as quickly as possible to carry on filming".

(iii) However, there was in my judgment clearly some time between the last shot and the accident. As I have indicated, it is difficult to assess the angle of the mast from the video film: but in all of the shots Mr Bazalgette and Mr Wrench are on the same side of the fall line, apparently pulling the northern stays to begin the fall process. That must have been at a very early stage of the process: Mr Bazalgette said that it is no longer necessary to pull the "rear guys" (i.e. in this case, the

northern stays) when the mast is 10-15° from the vertical. Thereafter, it is important to monitor the side guys. He said that, at the end of the video, "Tony Wrench and I are starting to walk back to take our positions at the side guys" (Statement 23 January 2007, Paragraphs 5-6). Mr Brown said that, after these shots, Mr Bazalgette left the west side of the fall line where he had been with Mr Wrench, Mr Rees and Mr Jones - to give attention to the guy wires on the east side of the fall line, leaving Mr Wrench to deal with those to the west (Statement 23 January 2007, Paragraph 2.4.1). None of the other witnesses gave clear evidence of this - Mr Bazalgette was silent on the point - but I accept it. It fits with the expert evidence (and the evidence of Mr Brown as to the process for lowering the mast) that assistants are required to ensure that the tension in the side guy wire is appropriately maintained to prevent the mast buckling. It is also consistent with the evidence of Mr Bazalgette to which I have referred. And, whatever the precise angle at which the accident happened, the overwhelming thrust of the evidence as a whole was that the mast was at some significant angle from the vertical when the rotor fell off, in which of course gravity played its part. There was no evidence as to the route Mr Bazalgette took it getting from one side of the fall line to the other.

(iv) With respect to Mr Rees and Mr Jones, they were concentrating on their filming and not the precise position of the mast (a matter to which I shall return). Those involved in the activity of lowering the mast are likely to have a better recollection of (e.g.) the angle of the mast at any particular time.

37. On the basis of all of this evidence, I find that (a) some minutes elapsed between the last shot taken by Mr Rees on the west of the mast fall line, and his movement to cross that line: (b) during those minutes the mast was further reclined, before Mr Brown stopped the process: and (c) when Mr Rees crossed under the mast, it was inclined at a significant angle to the vertical of perhaps 30-45°.

38. In any event, Mr Brown said that there came a point when he felt some vibration in the winch as he was ratcheting it, and he stopped moving the winch lever and called Mr

Bazalgette over. Mr Brown was concerned that the winch might be failing or that there might be something else untoward happening, and he wanted to talk to Mr Bazalgette about these possibilities as it was his winch (Notes of Evidence 26 January 2007, page 3). Mr Bazalgette did go over. During this hiatus, Mr Wrench said he also left his side stay, and went towards the mast to check to see whether its fall line was aligned with the trestle. He went within a metre of the fall line and, having done that check, he moved back out towards the stays again (Statement 16 February 2005, Paragraphs 26-28: Transcript 30 January 2007, page 23D-24G: and Mr Brown Notes of Evidence 26 January 2007, page 3).

39. Having taken the various shots to the west of the mast, Mr Rees decided that the next shot would best be taken from the east of the mast with Carningli in the background - and he decided to go back to the tripod which had been left by the woodpile. Before he moved to do so, Mr Wrench said that it seemed to him as if there was some conversation between Mr Rees and Mr Jones. Mr Jones denied that there was. In his statement for the purposes of these proceedings, Mr Rees said: "As I left the position that I was in to go back to the tripod, [Mr Jones] just followed me. No communication was needed between the two of us." (Statement 27 July 2005, Paragraph 22). However, in a handwritten statement he made shortly after the accident he said: "I have a feeling I said, 'Let's cross under'. I didn't hear him say anything. There was no other conversation between us." (Paragraphs 20-21). In cross-examination, Mr Rees said that he did say something to Mr Jones to that effect - he was aware he was going to go back to the tripod by passing under the inclined mast - but frankly accepted that Mr Jones may well not have heard him. He made no response, and did not acknowledge what had been said in any way. Mr Rees jogged off, and Mr Jones went right with him.

40. On this evidence, I am satisfied that Mr Rees did appreciate that he was leading Mr Jones under the inclined and suspended mast: but I am not satisfied that he said to Mr Jones that he intended to go back to the tripod by going under the mast. In any event, I am quite sure that Mr Jones did not hear anything which Mr Rees might have said to that effect. Mr Rees set off, and Mr Jones merely followed. This finding is supported to an

extent by the evidence of Mr Wrench, who said: "[T]he sound guy was taken by surprise and forced to run behind because of the cable… The soundman didn't appear to have tuned in to what was happening, he was in a world of sound. I didn't see him looking up or be aware of what was above him." (Statement 16 February 2005, Paragraphs 30 and 32). In my view, this evidence in all its particulars is not entirely reliable. For example, Mr Wrench says that Mr Jones had his headphones on (Paragraph 31): but they were not at that stage filming, and Mr Jones himself said he would have been wearing only one headphone and would have taken that off when they started to move. Mr Jones being described as being in "a world of sound" is not, in my judgment, an accurate or helpful description. However, I accept that, when Mr Rees started to cross under the mast to get back to the tripod by the woodpile, Mr Jones had not been made aware by Mr Rees of the proposal to cross under the mast and he appeared to Mr Wrench to be oblivious to his surroundings.

41. Mr Rees started to jog under the mast, with Mr Jones following behind him, their respective pieces of equipment being attached by a lead as I have described. As they were passing under the mast, the rotor fell. Mr Brown said that he saw them moving as the rotor fell, and he shouted out to them (Statement 12 March 2005, Paragraph 12) - but by then it was too late. The rotor hit Mr Jones on the back, causing the injuries in respect of which he claims in this action.

Warnings in relation to the Hazard

42. Three parts of the evidence were faintly suggestive that, whilst being lowered, the mast presented no hazard or foreseeable risk of harm.

43. First, in his report Mr Geary concluded that he believed "the accident was unforeseeable in the circumstances" (Report 12 April 2006, Summary). However, it is clear from the context that he meant the precise mechanism of the accident (i.e. the failure of the rotor shaft) was "not foreseeable" - or at least very unlikely - rather than that it was unforeseeable that, if someone strayed under this suspended load, something

might occur to cause the load or part of it to fall. Mr Geary of course signed the Joint Memorandum of experts to which I refer below, and that accepted that the inclined mast presented a hazard and there was a foreseeable risk to anyone who ventured underneath it.

44. Second, Miss Thomas's evidence on its face was ambivalent about her perception of risk from the inclined, suspended mast. In her statement she said: "If I considered that the filming of the wind turbine was a dangerous activity I would not have filmed it… On the basis of the information given to the crew by the men from the farm [i.e. the proposed direction of mast fall] I considered that the task was not dangerous" (Statement 9 September 2005, Paragraphs 13 and 14). In her oral evidence, she said:

> "When we went to film the mast being taken down I was not aware of any safety hazards there…" (Transcript 24 January 2007, page 42E):

and, in response to me when I put to her that she had looked at the job that was going to happen and concluded there was simply no risk, she said:

> "I looked at the area, everything looked fine from ground level, the structure looked sound, nothing alerted me to the fact that it would be dangerous."

45. However, these passages too have to be viewed in context. The tenor of Miss Thomas' evidence as a whole was that she very well recognised the hazard of the suspended mast to anyone who moved beneath it. Indeed, she regarded the hazard posed as a very obvious one such that, having ensured that Mr Rees and Mr Jones knew in which direction the mast was to be lowered, Miss Thomas did not consider there was any risk that they would pass under it (see, especially, Transcript 24 January 2007, page 62D-E).

46. Third and finally, in his cross-examination Mr Rees, even with the benefit of hindsight, was reluctant to accept that the inclined mast was a hazard at all. However, I

consider the substance of his evidence was summed up when he said, "There didn't seem to be any danger from the mast. If I had perceived the danger, I wouldn't have gone near the mast." In other words, whatever the actual hazard posed by the inclined mast and the danger he ought to have perceived, Mr Rees did not at the time in fact appreciate any danger or risk in passing under it.

47. In their Joint Memorandum (dated 21 April 2006), the experts agree that, when the mast was lowered, the area under it was a hazardous area and there was a foreseeable risk of injury to anyone entering this area beneath. The lowering of the mast involved suspending a very considerable load, that load being effectively borne by the winch. As Mr Browne said, "… [I]t is a fundamental safety practice throughout industry that one never trusts a suspended load" (Report 21 March 2006, Paragraph 9.2). In respect of the activity of lowering this mast, the following specific risks were identified by Dr Barbour (Report 11 April 2006, Paragraph 2.9): (i) the mast could buckle, (ii) the guy wires could fail, (iii) the winch could fail, (iv) the mast could fall to one side if the tension in the side wires was not maintained and (v) "something could fall from the top of the mast as the actual state of the generator unit and brackets could not be assessed in detail from ground level." Although there could be more extravagant failures which could cause the mast or part of it to buckle or whip, the clearest hazard of a suspended load is that some failure will cause the load or part of it to fall by the force of gravity, as happened in this case.

48. Despite some possible ambivalence on the part of Miss Thomas and Mr Rees, at the time Mr Rees and Mr Jones passed under the mast - inclined as it was at 30-45° from the vertical, and suspended with the entire load being borne by the winch - it clearly amounted to a hazard, and there was clearly a foreseeable risk of injury to anyone who passed beneath it. This is reflected in the BBC Report of the accident which refers to "an activity change *into a high risk area*" (emphasis added).

49. In the light of this, what perception of that risk did the various people on site have? And, in the light of those perceptions, what was said about that risk on site, and by and to whom?

50. On the evidence, there is no doubt that (i) generally, Mr Brown was responsible for the maintenance of the windmill, and (ii) on the day of the accident, Mr Brown was in charge of the mast lowering activity.

51. I have already touched upon the general responsibility for the maintenance of the windmill (see Paragraph 23 above). It was the common evidence of Mr Brown and Mr Bazalgette that Mr Bazalgette had had nothing to do with the windmill since he helped install it in 1999: and Mr Brown accepted that within the community he had been responsible for the maintenance of the windmill (Notes of Evidence 26 January 2007, page 4). There was no contrary suggestion in any of the evidence.

52. As for the day of the accident, the pleaded case of Mr & Mrs Orbach was that Mr Brown was in charge (Amended Defence, Paragraph 2.2): and in his evidence Mr Brown readily agreed that he was in charge (Statement 12 March 2005, Paragraph 9: Notes of Evidence 26 January 2007, pages 13 and 20: and Transcript 29 January 2007, page 2E). Mr Bazalgette was there simply because he had come to lend his winch as a "neighbourly act" (Mr Brown Statement 12 March 2005, Paragraph 4) and, whilst he was there, he agreed to be one of "the assistors in place of one of the community" (Mr Brown Notes of Evidence 26 January 2007, page 9). There was no evidence to the contrary: and I accept this evidence. On the evidence, Mr Bazalgette attended Brithdir Mawr that day simply to lend his winch, which he did because he was friends with members of the community. It was not a commercial transaction - Mr Bazalgette was not paid, and there was no potential commercial advantage to him for attending. Whilst there, he was asked by Mr Brown to assist by attending the guy wires, whilst he (Mr Brown) used the winch to bring down the windmill. Mr Brown was in charge of this operation. Mr Bazalgette, despite his greater experience, had only two minor roles: to lend his winch, and to attend the guy wires to ensure the tension in them remained acceptable. He was not there because he had supplied the windmill in the first instance, or because he was responsible for or had been involved in the maintenance of the windmill (he had not), or indeed because he might help in diagnosing or rectifying the problem which had occurred. There was no

compelling evidence that he was present as part of or in connection with any business. This was Mr Bazalgette's case - although contrary to his interests in relation to his insurance cover with AXA, which was restricted to business activities - and, on the evidence, I unhesitatingly accept it.

53. To Mr Brown, the risk of injury to someone passing under the mast when it was inclined during the lowering or raising procedure was clear and obvious at the time of the accident (Notes of Evidence 26 January 2007, pages 7 and 15). He was well aware of the possibility that the winch or the gin pole or a cable or an anchor might fail. He had of course been involved in the previous lowering, when the mast did fall onto the trestle causing £300-worth of damage to the rotor. The risk of injury was obvious to him: and he thought it would have been obvious to anyone who brought their mind to bear upon it:

> "All these risks were matters which I'd have appreciated. [Mr Bazalgette] would have appreciated it if he'd put his mind to it. But even the postman could have appreciated the risk." (Notes of Evidence 26 January 2007, page 15).

54. Given that he was in charge of the lowering operation and sensitive to the risks, Mr Brown said that he "was not content for [the BBC crew] to be in the field": he did not want any distractions (Notes of Evidence 26 January 2007, page 7): he did not want the crew in the field at all (Transcript 29 January 2007, page 2F). However, he said that the only way in which he made these concerns known to any of the crew was that he told them the operation was stressful and he did not want any distractions:

> "It would have been, from memory, something along the lines of: look, it is a really stressful thing and it is really important I focus on the winch, I do not want any distractions. That is my memory of what I said." (Transcript 29 January 2007, page 2H: and also pages 8H-9G).

55. This was in a conversation with Mr Jones and Mr Rees before filming began. In his written evidence (Statement 12 March 2005, Paragraph 8), he said of this conversation:

> "I explained to them that winching one of these turbines down was a stressful job because it was an expensive piece of equipment and if anything went wrong, the turbine head could fall to the ground and be badly damaged or ruined. I told them that if the mast was not kept under strain, it could fold in the middle if the assembly was subjected to jarring as it was being lowered. I told them of a case happening in America that heard about. I told them that because it was a stressful job, which required care, I needed to be totally focussed on what I was doing, and I did not want any distractions. I also explained that the winch might fail."

This conversation is also briefly referred to in Mr Brown's initial statement, although without detail:

> "I had told the cameraman and sound engineer that it was a tricky job and that I was concerned about the equipment and I told them to keep clear" (Statement 17 October 2001, page 1).

56. Mr Jones could not recall this conversation, but in any event denied that Mr Rees or he were told of any dangers (Transcript 22 January 2007, page 25D). Similarly, Mr Rees said that Mr Brown did not explain why the exercise was "nerve-wracking" - a phrase used by Mr Brown on the video - or signify it was a dangerous (as opposed to stressful) exercise.

57. I was unconvinced by Mr Brown's evidence with regard to the detail of this conversation, and specifically with regard to him spelling out the dangers posed by the inclined mast as it was being lowered (including his reference to the previous accident)

> (i) There were some internal inconsistencies. For example, in his 2001 statement he recorded that he told the two men "to keep clear": but in his later statement and oral evidence he did not suggest that he gave this instruction.

(ii) In cross-examination, although he did briefly confirm the details of his statement (Transcript 29 January 2007, page 9B), he appeared to suggest that the main thrust of the conversation was that the activity was stressful and he did not want any distractions (Transcript 29 January 2007, pages 3G-4A and 9D-G). That was how he sought to convey that he did not want the men in the field. That fits with Mr Rees' unchallenged evidence that he had said to Mr Brown that, if he was in the way, Mr Brown should move him - something which is again in part on the video itself - to which he received no response. Mr Brown's evidence as to the specifics of the conversation - and the details of what could go wrong - was particularly unconvincing.

(iii) Mr Jones and Mr Rees denied that Mr Brown had any conversation with them as to the various things that might go wrong. Certainly neither recalled such a conversation. This was a mundane filming task: but, had such dramatic details been given (e.g. as to the mast crashing to the ground on a previous occasion), one might have expected Mr Jones or Mr Rees to have remembered it.

58. On the basis of the evidence, I find that Mr Brown did indicate to Mr Rees and Mr Jones that he found the exercise stressful or nerve-wracking, but I am not satisfied that he indicated to them any danger that might be associated with the task (e.g. that the mast might fold or the winch fail or the mast or part of it fall), or that he referred to the previous incident of the mast falling because of winch failure. Other than the brief reference in his 2001 statement to him telling the men to keep clear - which was repeated neither in his later statement nor in his oral evidence, and which I do not accept - despite his position of responsibility and his concerns, Mr Brown did not suggest that at any time he expressly told Mr Rees and Mr Jones to leave the field, or that they should stay in a restricted area of it, or that there was anywhere they must not go and stay. On the basis of the findings I have made (and the evidence of Mr Rees and Mr Jones), I am quite satisfied that on Mr Brown's evidence nothing he said to Mr Rees and Mr Jones alerted them to any specific or general dangers in the activity.

59. The other evidence as to warnings given to Mr Rees and Mr Jones was as follows (Paragraphs 60-67 below).

60. Mr Wrench's evidence was that he said nothing of significance to Mr Rees or Mr Jones, as he did not consider it was his place to do so (because he was not in charge, and had less experience in lowering such masts than either Mr Brown or Mr Bazalgette) (Transcript 30 January 2007, page 20E). However:

(i) In his oral evidence, Mr Wrench said that he told the crew (at a time when Mr Rees and Mr Jones were not present) that "they had to keep out of the way". This appears to have been on the occasion referred to in his written evidence, where he said:

> "I would say [Mr Bazalgette] and [Mr Brown] both warned the team to give the whole structure a wide berth and keep clear of the stays and poles" (Statement 16 February 2005, Paragraph 15).

He was clear that Mr Rees and Mr Jones were not parties to this conversation (Transcript 30 January 2007, page 44C-E).

(ii) He said that Mr Brown and Mr Bazalgette made it clear to the whole crew (including Mr Rees and Mr Jones) that they should stay back by the wood chippings: and (although he did not say anything at the time) he was frankly amazed when the two men moved from there ((Statement 16 February 2005, Paragraphs 13-14: and Transcript 30 January 2007, page 44F-G). Mr Wrench said that, so far as he was concerned, that was the limit of the warnings given to the two men (Transcript 30 January 2007, page 20D-E).

61. Mr Bazalgette did not give evidence at the trial: but the BBC introduced two statements he had given during the course of the proceedings. In these he said:

"The TV crew came over and I spoke to them. I can recall that I suggested that they stood near the woodpile where they would get a clear view of the process and that they would be OK. I gestured with my hands to stay at a distance." (Statement 29 September 2004, Paragraph 28).

"The cameraman initially set up a tripod close to the woodpile, which is in the direction the crew had walked from to get to the site of the turbine. It was at that point on seeing them setting up their equipment that I spoke to them. They were together. I did not notice whether the soundman was wearing headphones but the cameramen was not and I recall saying to them that where they were setting up was a good vantage point and I explained the way in which the turbine was going to be lowered. They did not ask me any questions and it would have been self-evident that having explained the direction in which the turbine was going to be lowered, that it was going to encroach upon the area of the land in front of where they were standing, had they moved forward from the position they were in." (Statement 29 September 2005, Paragraph 23).

62. Mr Brown said:

"I remember [Mr Bazalgette] told them to stay behind the hawsers (that is behind the positions [Mr Bazalgette] and [Mr Wrench] had taken up). [Mr Bazalgette] told them to go and stand by the woodpile, which was well out of the way. Two or three of them stayed by the woodpile in a huddle. The soundman and cameraman set up a tripod to one side of the woodpile."

63. Miss Thomas was an important witness in relation to this evidence: because she accepted that, on the site, she was responsible for health and safety issues so far as the BBC crew were concerned. Therefore, she had a special interest. She said that she was told which way the mast was going to be lowered, the crucial passage of evidence being during her cross-examination by Mr Adrian Palmer QC, as follows (Transcript 24 January 2007, page 50E-52D):

Q. … You were told which way it was being lowered?

A. Yes.

Q. That was information which you wanted to know anyway?

A. Yes.

Q. You wanted to know it, you yourself wanted to know it for safety reasons?

A. Yes.

Q. The safety reason in question being you do not go under a mast which is being lowered like that?

A. Yes.

Q. The risk being that the mast might fall or part of the mast or something might fall off the mast?

A. Yes.

Q. That is common sense?

A. Yes.

Q. No one needed to spell that out to you. It was obvious to you?

A. I knew that it was being lowered, but again could I just add that we were not warned that anything could fall off.

Q. To complete the story, you wanted to convey, to instruct the two men, the cameraman and the soundman, not to go under the mast?

A. No, I only said it was being lowered… I did not tell them not to go under the mast…. I felt that I didn't need to spell out any more further than that really…

…

Q. It looks as tough you actually took a deliberate decision, "I don't need to spell it out to them. I have done all that is necessary."?

A. Yes.

Q. It is common safety procedure not to walk under anything that is being lowered?

A. Yes.

64. Having taken the decision that the risk was such that she need not "spell it out" to Mr Rees and Mr Jones, she also decided not to have any discussion with the team concerning the safety aspects of this unexpected windmill lowering shoot: although she accepted, at least with hindsight, she should have had such a discussion (Transcript 24 January 2007, page 77F). All she did was to convey to the two men the direction the mast was going to fall, by an arm movement. She accepted that, by making such an indication, it was not suggested that this was in any form a briefing on health and safety (Transcript 25 January 2007, page 10B-C). Miss Thomas did not suggest she did or said anything else to either Mr Rees or to Mr Jones in respect of the hazard posed by the suspended mast.

65. Miss Rosser was the production assistant. She had been working in this capacity for 6 weeks at the time of the accident. On 10 October 2001 (only a week after the accident), she made a statement saying:

> "Before we started filming I heard Gloria [Thomas] ask both men from the commune who were in control of the winches, which way the windmill was descending and how close could [Mr Rees] and [Mr Jones] go within safety precautions. The men stated that the windmill would be falling towards the right and under no reason at all should [Mr Rees] and [Mr Jones] go beneath the path of the windmill. [Mr Rees] and [Mr Jones] were present when they were insisting on this."

This was substantially repeated in her statement for the proceedings (20 August 2005, Paragraph 4):

> "Everyone was present in the field by the wind turbine, including [Mr Rees] and [Mr Jones]. Who were to our right away from the windmill. Gloria asked one of the members of the commune which way the windmill would be lowered, he said a little to the right of where we were all standing. He definitely said not to go

underneath the path of the falling windmill for any reason. [Mr Rees] and [Mr Jones] were present when the two men were insisting on this…."

In her oral evidence, she said that was her best recollection just one week after the event.

66. Mr Rees recalled Miss Thomas showing him the direction in which the mast was to fall, with an arm movement. In any event, he said the direction of fall was obvious. However, he denied anything else being said to him about the hazard posed by the inclined and suspended mast. He denied that anyone told him to stand by the woodpile, or to stay clear or stay back, or to stand behind the guy wires. As I have already indicated, he denied that anything Mr Brown said to him alerted him to any hazard: and he said that prior to the accident no one had indicated to him that he was encroaching too close, or had gone into an area which he ought not to have done, or should not go into any specific area (including under the mast).

67. Mr Jones' evidence was to similar effect. Although he could not recall being told the direction of fall for the mast, he said that was obvious (Transcript 22 January 2007, page 22C). He denied being told anything else, and particularly denied each of the matters also put to Mr Rees (see Paragraph 66 above).

68. On the basis of this evidence, I make the following findings (Paragraphs 69-78 below).

69. Miss Thomas knew the proposed direction of fall for the mast: and she well appreciated the risk of injury to anyone passing under the inclined and suspended mast. She understood the direction of proposed fall, and she understood that no one ought to pass under the fall line under any circumstances because of the risk of injury. That was her evidence, and I accept it.

70. Although Mr Jones could not recollect it, I find that Miss Thomas confirmed to Mr Rees and Mr Jones the direction of fall of the mast, with a movement of her arm. That

was the evidence of both Miss Thomas herself, and Mr Rees. In any event, Mr Rees and Mr Jones appreciated the direction of fall from the mechanical set up of the lowering mechanics and the inclination of the mast once lowering had commenced. Miss Thomas did not give any other instruction or warning to Mr Rees or Mr Jones.

71. On the balance of probabilities, Mr Bazalgette did not instruct Mr Rees and Mr Jones to remain by the woodpile, or otherwise to "stay back". In making this finding, I have particularly taken into account the following:

(i) Mr Bazalgette himself was not called to give evidence, and therefore his written statements were not subject to the scrutiny of cross-examination.

(ii) In any event, the statement he made for these proceedings (Statement 21 September 2005: see Paragraph 61 above) does not suggest that he instructed the two men to stay by the woodpile: but merely that by the woodpile was a "good vantage point", which it was. Neither is the earlier statement at all strongly suggestive of an instruction, or overt warning.

(iii) There is no evidence that, when Mr Rees and Mr Jones moved from the woodpile, Mr Bazalgette made any protest, or indeed said anything to them at all to suggest that they moved to an area where they ought not to be.

(iv) Mr Wrench's evidence in relation to this issue is weak. He suggests that both Mr Brown and Mr Bazalgette instructed the two men to stay by the woodpile. Mr Brown did not suggest that he gave any such indication. I have dealt with Mr Bazalgette's evidence above. Again, when Mr Rees and Mr Jones moved from the woodpile, Mr Wrench made no protest. Although he said that he regarded Mr Brown as in charge and Mr Bazalgette as more experienced than he with regard to mast lowering, there is no evidence that he even suggested to one of these two other men that Mr Rees and Mr Jones had moved from where (on his version of events) they had been instructed to stay.

(v) The instruction to stay by the woodpile was allegedly given to the entire production team: but it was not recalled by Miss Thomas, who certainly did nothing to enforce such an instruction. She said that she would have enforced any such safety instruction which had been expressly given to her. Miss Thomas was in charge of health and safety so far as the crew were concerned, and I am satisfied that, had such a specific instruction been given to her, she would have enforced it.

(vi) Mr Rees and Mr Jones denied that any such instruction was given. Bearing in mind the above, I accept their evidence.

72. No instruction was given to either Mr Rees or to Mr Jones not to pass under the inclined mast. The only evidence as to such an instruction comes from Miss Rosser. She could not recall which man (of Messrs Brown, Wrench and Bazalgette) gave (and, indeed, "insisted" upon) such an instruction. However, none of the men suggested in their evidence that he gave such an instruction, or heard anyone else do so. Importantly, Miss Rosser said that the instruction had been given as the result of a question from Miss Thomas. Despite her specific health and safety role in relation to the crew (and, perhaps, her own self-interest), Miss Thomas denied that any such conversation had taken place. Of course, Mr Rees and Mr Jones denied hearing any such conversation. Miss Rosser's evidence on this issue was supported by her almost contemporaneous account: but, nevertheless, her evidence was lone and (in my view) unconvincing. I do not accept it.

73. Neither were Mr Rees or Mr Jones instructed to stay outside the area of the guy wires. The only evidence of this came from Mr Wrench, but again it was unconvincing. He said that Mr Brown and Mr Bazalgette gave the instruction: but neither Mr Brown nor Mr Bazalgette's evidence (nor any other evidence, including that of Miss Thomas) supported this. I do not accept Mr Wrench's evidence in relation to this.

74. Therefore, in summary, I accept the evidence of Mr Rees and Mr Jones that the only thing said to them about the mast lowering was in relation to the direction of fall. At the

time of the accident, they both appreciated the direction in which the mast was to be lowered: but had not been given any other warning or instruction in relation to the potential hazard of the inclined and suspended mast.

75. As Mr Rees and Mr Jones moved from the tripod by the woodpile to the winch and then round to the west side of the mast fall line (where they spoke to Mr Bazalgette and Mr Wrench), no one told them that they should not be in any particular part of the field, or give them any instruction of warning, as they went about their business.

76. Mr Rees accepted that, when he moved from the west of the mast fall line to go back to his tripod on the east, he was well aware that he was passing under the inclined mast. He said:

> "I knew that I was crossing under the pole and at that stage the turbine was a quarter of the way down…. I do not know why I crossed underneath. I needed to get to the other side and it was the obvious and shortest route to take. No one had given us any warnings not to go underneath and there were no barriers or tape to stop or warn us not to pass underneath, I therefore did not see it as a risk.…" (Statement 15 March 2004, Paragraphs 12-13).

Mr Rees was therefore anxious to get on with the shoot. However, he was well aware that, leading Mr Jones, he was going to pass under the inclined and suspended mast, and took a quite deliberate decision to go there.

77. Mr Jones was in a different state of mind. When they moved, Mr Rees and Mr Jones were not filming. Mr Jones had taken both earphones off. Although Mr Rees may have said to Mr Jones, "Let's go under", I have found this was not heard or registered by Mr Jones (Paragraph 39 above). Mr Rees accepted that he moved in a jog, wishing quickly to get to the other side to recommence filming from the tripod. Mr Jones said that Mr Rees suddenly "shot off" without telling him where he was going, as he often did (Transcript 22 January 2007, page 56G). Although I have found that, contrary to the

recollection of Mr Rees and Mr Jones, there was some break in filming between the last shot and the movement under the mast that led to the accident, I accept Mr Jones' evidence that when Mr Rees moved he did so quickly and without any warning. Consequently, Mr Jones was concentrating on his equipment and maintaining the lead between them and was relatively oblivious to where they were going or under what they might be passing. I have already found that Mr Jones appeared to Mr Wrench to be oblivious to his surroundings (Paragraph 40 above). Mr Wrench said that, when the two men moved to go under the mast, "The sound guy was taken by surprise and forced to run behind because of the cable…He didn't seem to have tuned in to what was happening around him… I didn't see him looking up or be aware of what was above him… He wasn't actually being dragged along but appeared to have no choice."(Statement 16 February 2005, Paragraph 30). Mr Rees moved, and Mr Jones simply followed in the "instinctive" way that he often worked with Mr Rees. There was no time for him to think about where he was going - particularly whether they would pass under the mast - and certainly no sensible opportunity to assess the position and disconnect the lead passing between the equipment of the two men or even realise that he was going to pass under the mast and stop Mr Rees from leading them that way and into that dangerous area beneath the mast.

78. As they passed quickly under the mast, the rotor began to fall. Mr Brown saw it - and then saw where Mr Jones was - and shouted out. But that warning was too late to stop the rotor falling on Mr Jones' back.

The Claims

79. The claims were initially brought in negligence and, as against some of the defendants, also for breach of statutory duty in the form of various health and safety at work regulations. However, at the beginning of the trial, Mr Jones abandoned reliance on statutory provisions, and the claim proceeded on the basis of negligence alone.

80. In relation to each defendant:

(i) The BBC: The Claimant alleges that, for health and safety purposes, the BBC owed him a duty of care effectively as his employer. Within that ambit, he alleges that the BBC were vicariously liable for the negligence of both Miss Thomas and Mr Rees, both of whom (it was submitted on the Claimant's behalf) were fellow employees of the BBC for health and safety purposes. On the third day of the trial, Mr Howard Palmer QC for the BBC conceded that the BBC were vicariously responsible for the acts and omissions of Miss Thomas who (they accepted) was responsible on their behalf for health and safety on location: and, further, the BBC agreed that they would indemnify Miss Thomas against personal liability for such acts and omissions (Transcript 24 January 2007, pages 11-13: and the BBC's Amended Defence, Paragraph 8(3)). They of course continued to deny that any such acts or omissions were negligent. Subject to this, the BBC maintained to the end of the trial that they were not in the position of employer/employee with regard to Mr Jones, Miss Thomas or Mr Rees: and, whilst accepting vicarious liability for Miss Thomas for the purposes of this case only, they denied vicariously liability for the acts and omissions of Mr Rees: and they specifically asserted that, if they were vicariously liable for Mr Rees, they were entitled to an indemnity from him in respect of such negligence. These are important issues for this claim, and I deal with them below.

(ii) Mr Rees: Mr Rees is sued as owing a duty of care to Mr Jones as a fellow employee, in circumstances in which the two men were linked by a cable and Mr

Jones was to an extent dependent upon Mr Rees as to where he was taken. Mr Rees denies that he was negligent.

(iii) Mr & Mrs Orbach: As I indicate above, the Claimant claims against Mr & Mrs Orbach as owners and occupiers of the Brithdir Mawr Farm upon which property this accident occurred. No separate claim is made under the Occupiers Liability Act, on the basis that duties under the Act are co-extensive with the common law duty. In any event, the Claimant does not seek to bring a claim wider in scope than under common law. Mr & Mrs Orbach defend the claim on the basis that in the circumstances of this case (i) they owed Mr Jones no relevant duty of care: (ii) if a duty of care was owed then that duty was adequately satisfied in this case by the warnings given to Mr Jones: and (iii) in any event if a duty was owed and no warnings were given then the Defendants' breach of duty was not causative.

(iv) Mr Bazalgette: As I have indicated (Paragraph 4 above), in the First Part 20 Claim Mr Bazalgette is sued by the BBC, on the basis that he was the person who supplied and "repaired and maintained the turbine" (First Part 20 Claim Particulars of Claim, Paragraph 1). In the BBC's Defence in the main claim (Paragraph 5), they pleaded that, on 3 October 2001, Mr Bazalgette had been engaged by the community "to lower the turbine and carry out the necessary repairs". On the back of these assertions, the Claimant sued Mr Bazalgette as "a specialist contractor who had been engaged by [Mr & Mrs Orbach] to undertake works of repair and maintenance to the wind turbine owned by them and operated at the said premises" (Amended Particulars of Claim, Paragraph 1). Mr Bazalgette denies that he was so engaged: and that his role on the day of the accident was restricted to one of lending a winch and then lending a hand as an assistant to Mr Brown in lowering the mast as an unpaid friend of the community. As such, he submits, he owed the Claimant no duty of care. Any liability of AXA in the Second Part 20 Claim is of course conditional upon Mr Bazalgette being found liable to the Claimant.

81. I shall deal with these claims in turn.

The Claim against the BBC

Introduction

82. In his Closing Submissions (at page 20), Mr Russell for Mr Rees described the BBC's approach to their responsibilities for injuries to freelances resulting from alleged negligence of other freelances as "inconsistent and reprehensible". Mr Adrian Palmer for Mr & Mrs Orbach described it as having "not been attractive" (Closing Submissions, Paragraph 2.2). The BBC have certainly been coy in clearly setting out their position with regard to their health and safety at work obligations to freelances.

83. In their original Defence (not settled by Mr Howard Palmer), although not expressly stated, the BBC's position appeared to be that they did not owe Mr Jones any duty of care because he was not employed by the BBC. Various clauses of the contract between the BBC and Mr Jones were quoted, stressing that Mr Jones was not "an employee of the BBC": and that the BBC were not liable for any injury sustained by Mr Jones in the course of the performance of the contract "unless caused by the negligence or default of the BBC". The BBC of course were at that stage denying that they were vicariously liable for the negligence or defaults of any of the freelances working for them, such as Miss Thomas and Mr Rees.

84. However, the BBC were drawn further by the Claimant's Reply, which starkly alleged that Mr Jones was an employee for health and safety purposes, and the BBC owed him "an employers' duty of care by reason of the parties' relationship": that the BBC were responsible for "issues of health and safety during the course of the filming operation…" and Miss Thomas was in overall charge on behalf of the BBC (Paragraph 3).

85. A limited duty of care was conceded in the Rejoinder (Paragraphs 7-8), i.e. a common law duty "informed by the contractual requirement [on the BBC] to notify the freelance of risks which are reasonably foreseeable". It was specifically denied that the

contract between the BBC and freelances "created the relationship of employer/employee which is recognised as imposing certain specific duties in tort upon an employer" (Paragraph 8). As I have indicated, later (on day 3 of the trial) and for the purposes of this claim only, the BBC accepted vicarious liability for the acts and omissions of Miss Thomas, and also accepted that they would indemnify her in respect of any liability.

86. Therefore, throughout these lengthy proceedings, the BBC's attitude towards its responsibilities towards freelances for health and safety at work has been both ambivalent and grudging.

Terms of the BBC Freelance Contracts

87. In terms of health and safety, what were the BBC's responsibilities towards Mr Jones and the other freelances on site at the time of the accident?

88. The starting point is the form of contract upon which the BBC engaged freelances at the relevant time. I have already briefly referred to this (see Paragraph 8 above).

89. A number of the BBC witnesses who dealt with contracts gave similar evidence as to how freelances are (and were in 2001) engaged. Insofar as cameramen or sound recordists are concerned, they are sent a separate standard form contract for each shoot, programme or series as the case may be. This comprises a front sheet signed by both parties and incorporating the "BBC Terms of Trade", and a schedule with particulars setting out the BBC representative, to where invoices should be sent, the title of the programme, the contract period (usually specific dates), the fee and expenses. The "terms of trade" are in standard form, and are revised from time to time. They are sent out to regular freelances with their next contract.

90. Contracts are frequently not sent out until after the commencement of work. For example, the contract for the relevant Made in Wales programme was for the services of Mr Rees and Mr Jones for a fee of £350 per day plus expenses, for three weeks from 24

September: but it was in fact not sent out by the BBC until 4 October 2001, i.e. the day after Mr Jones' accident.

91. It so happened that until that contract the October 2000 standard terms of engagement had applied: but these were revised by the BBC in September 2001 and the new terms were sent out for the first time to either Mr Rees or Mr Jones with the contract dated 4 October. Miss Manon Davies of the BBC considered that, in these circumstances, the September 2000 terms would have applied to this particular contract, at least until the new terms were received by Messrs Rees and Jones. That seems to me to be the appropriate legal analysis: although nothing turns on whether the September 2000 or October 2001 terms in fact applied, there being no significant difference between the two.

92. The September 2000 terms provided:

> "6. The Freelance undertakes warrants and represents that:
>
> …
>
> 6.3 they are a self-employed individual and as such are not an employee of the BBC. It acknowledges that the BBC shall have no liability to them as employer or otherwise in respect of any health or medical insurance or expenses nor in respect of any loss of income or other loss or expense arising due to illness injury or damage sustained by the BBC in the course of performing the Contract unless caused by the negligence or default of the BBC.
>
> 6.4 they are registered with the Inland Revenue as self employed, and are taxable under Schedule D of the Income and Taxes Act 1988 as amended, and agrees to indemnify the BBC against any claims by the Inland Revenue resulting from a breach of this warranty.

….

9.1 The Freelance shall comply with all current relevant Safety Requirements including but not limited to those issued by the Health & Safety Commission and Executive, the Home Office and those BBC Safety Requirements notified in writing to the Freelance.

9.2 The BBC and the Freelance may agree Safety Requirements in addition to, or different from, those specified in Clause 9.1.

9.3 The BBC shall notify the freelance of risks to health and safety (including fire) which are reasonably foreseeable to the BBC and which may affect the Freelance or the BBC arising out of or in any way connected with the activities of the BBC in connection with the Contract, and the freelance shall have due regard to these.

9.4 Without prejudice to its obligations under Clause 9.1 the Freelance shall:

9.4.1 upon request at any time of the BBC, submit to and fully cooperate with, any safety vetting process required by the BBC and provide a written statement of the freelance's own Safety Requirements;

9.4.2 assess all reasonably foreseeable risks to health and safety (including fire) that may affect the BBC or any third party arising out of or in any way connected with the performance of the Contract, and provide a copy of such assessment to the BBC upon request, and (including without limitation compliance with the requirements of any fire certificate that may affect the supply of the Services hereunder) promptly take all reasonable steps to eliminate or adequately control such risks and shall notify and cooperate with the BBC accordingly;

9.4.3 fully cooperate with the BBC and any others as necessary to ensure that all reasonably foreseeable risks to health and safety (including fire) are eliminated or adequately controlled;

9.4.4 consult with the BBC, comply with the procedures to be followed and take all reasonable steps in the event of a serious and imminent danger to any person(s) arising out of or in any way connected with the performance of the contract.

…

13.1 Nothing in the Contract excludes either party's liability for death or personal injury caused by that party's negligence or wilful default.

…

13.6 The Freelance shall be responsible for insuring against loss, damage and liabilities to third parties…

13.7 The Freelance shall indemnify the BBC against all costs and expenses (including legal costs), losses and liabilities which the BBC may incur as a result of the Freelance's:

….

13.7.2 negligence or wilful default…

….

26.3 Nothing in the Contract shall be deemed to constitute an employment relationship, or either party as the agent of the other or create a partnership or joint venture between the parties and the freelance shall have no power to bind the BBC

or to contract in the name of or create a liability against the BBC in any matter whatsoever."

Health and Safety Obligations to Freelances

93. In the light of these terms, the BBC submit (in Paragraphs 7-8 of their Rejoinder: and Paragraph 6 of their Closing Submissions) that their health and safety obligations to Mr Jones were restricted to (i) the contractual duty to notify a freelance of risks reasonably foreseeable to the BBC, and (ii) a duty of care in tort "informed by" that contractual duty. With regard to obligations for health and safety matters, they stress (i) the responsibilities the terms impose upon the freelance (Clause 9.4), and (ii) a denial of the "specific duties in tort upon an employer" in respect of such matters.

94. Of course, the duties owed by the BBC to Mr Jones in respect of health and safety at work for the shoot at Brithdir Mawr on 3 October 2001 turn on the specific circumstances of the particular case. On the facts of this case, it seems to me that those specific duties are very clear. However, given the BBC's dogged defence of this case on the basis of a general restriction of their responsibilities to freelances - and some fairly harsh descriptions of that defence by some of the defendants - I will also make some comments on the issue of principle.

95. Until 1993, as I have indicated above (Paragraph 8), the BBC directly employed producers, directors, cameramen, sound recordists etc. The relevant contracts were undoubtedly contracts of service, and the BBC was responsible for the usual panoply of employers' obligations towards employees, including obligations in respect of health and safety at work.

96. That changed with the introduction of "producer's choice", and the increasingly heavy use of freelances. The relevant contracts (the relevant provisions of which are set out above) make clear that, at least for tax purposes, the relationship between the BBC and freelances is one of an employer and self-employed contractor. Freelances pay tax

under Schedule D, and the evidence before me was that HM Revenue & Customs have long since accepted this from a tax point of view. No doubt, for fiscal purposes, there are advantages to this arrangement.

97. However, it is clear that tax status is not determinative of the question whether a person is an employee for all purposes: and the approach to that question is coloured by the context in which it posed. Many of the early cases that considered the issue involved the tax or benefits status of the person engaged, and in such cases control was regarded as important if not paramount.

98. In Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173, Cooke J considered the issue of who is an employee in the context of workmen's compensation legislation. He said (at page 173):

> "The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, not can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determinative factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of the task."

99. This passage was expressly endorsed by the Privy Council in Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374 at page 382D-G: and the thinking of it was

developed by Henry LJ in Lane v Shire Roofing Co Ltd [1995] IRLR 493, a case in which (as before me) it was being contended by a Schedule D tax payer that his employer owed him duty of care in respect of health and safety at work as an employee. The defendant submitted that no duty of care was owed, because the claimant was an independent contractor. Henry LJ said:

> "We were taken through the standard authorities on this matter [including Market Investigations]…. Two general remarks should be made. The overall employment background is very different today (and was, though less so, in 1986) than it had been at the time when these cases were decided. First, for a variety of reasons there are more self-employed and fewer in employment. There is a greater flexibility in employment, with more temporary and shared employment. Second, there are perceived advantages for both workmen and employer in the relationship between them being that of an independent contractor. From the workman's point of view, being self-employed brings him into a more benevolent and less prompt tax regime. From the employer's point of view, the protection of employee's rights contained in the employment protection legislation of the 1970s brought certain perceived disincentives to the employer to take on full-time long-term employees. So even in 1986 there were reasons on both sides to avoid the employee label. But, as I have already said, there were, and are, good policy reasons in the safety at work field to ensure that the law properly categorises between employees and independent contractors.
>
> That line of authority shows that there are many factors to be taken into account in answering this question, and, with different priority being given to those factors in different cases, all depends on the facts of each individual case. Certain principles relevant to this case, however, emerge.
>
> First, the element of control will be important: who lays down what is to be done, the way in which it is to be done, the means by which it is done, and the time when

it is done? Who provides (i.e. hires and fires) the team by which it is done, and who provides the material, plant and machinery and tools used?

But it is recognised that the control test may not be decisive - for instance, in the case of skilled employees, with discretion to decide how their work should be done. In such cases the question is broadened to whose business was it? Was the workman carrying on his own business, or was he carrying on that of his employers? The American Supreme Court, in United States of America v Silk [1946] 331 US 704, asks the question whether the men were employees 'as a matter of economic reality'. The answer to this question may cover much of the same ground as the control test (such as whether he provides his own equipment and hires his own helpers) but may involve looking to see where the financial risk lies, and whether and how far he has an opportunity of profiting from sound management in the performance of his task (see Market Investigations…at page 185).

And these questions must be asked in the context of who is responsible for the overall safety of the men doing the work in question. Mr Whittaker, of the respondents, was cross-examined on these lines and he agreed that he was so responsible. Such an answer is not decisive (though it may be indicative) because ultimately the question is one of law and he could be wrong as to where the legal responsibility lies…."

100. If I might respectfully say so, I have found this passage of particular help with the issues before me. However, in the final paragraph Henry LJ cannot have meant that the question (of whether a person is or is not an employee) is a question of law as opposed to a question of fact. It is primarily a question of fact (Carmichael v National Power plc [1999] ICR 1226): although of course a question of fact to which a specific individual within an employer may not know the correct answer. However, if an employer considers that it is responsible for the health and safety of a workman as if he were an employee, that may be strongly indicative that that workman is indeed an employee for health and safety purposes.

101. On the basis of this guidance, was Mr Jones an employee of the BBC for the purposes of health and safety at work? Was the duty of care owed to him in negligence by the BBC any different from that which it would have owed to him had he been more directly employed? For the reasons set out in Paragraphs 102-107 below, in my judgment the duty of care owed to him was in substance the same as if he had been a direct employee: and, on the shoot at Brithdir Mawr, Mr Jones, Mr Rees and Miss Thomas were all effectively employees of the BBC for health and safety purposes.

102. The contract of course described Mr Jones (and the other freelances) in terms of independent contractors, and not employees. Labels may be indicative of substance. However, as Henry LJ indicated in Lane v Shire Roofing, there are incentives to both employer and workman to describe the relationship between them in terms other than employer/employee. On the evidence, the BBC's use of freelances was a decision they made in the early 1990s in pursuit of the programme for "producer's choice": and now most work is contracted for on this basis. Labels have less weight where the worker has effectively little choice as to the form of contract entered into (Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 1 WLR 1213).

103. In terms of "control", the BBC had control over the shooting schedule. For example, when Miss Thomas on the BBC's behalf decided that the Brithdir Mawr visit would include footage of the mast being taken down, that was a decision she took without consultation with others of the crew. Although Mr Rees and Mr Jones of course had their own considerable skills, Miss Thomas was ultimately responsible for the shots taken: and she might even tell Mr Rees "which buttons to press". She was, of course, "the director", and as such she directed. None of the crew employed staff: and none was free to substitute another to do his or her work. Furthermore, no one in the crew - including Mr Jones, Mr Rees, Miss Thomas - had any share in the profits or losses in the production, or interest in its success, except to the extent that they wished to do a good job, not only because of understandable professional pride, but also to ensure that they would get repeat work from the BBC and other production companies.

104. All of the witnesses who gave evidence on the point - including all called by the BBC - were very clear that the production on which Mr Jones was involved when his accident occurred was a BBC in-house production and it would be marketed as such. In answer to the question, "Whose business was it?", the resounding answer was "that of the BBC". Had anyone asked, that would have been Miss Thomas' response. It was a BBC crew and, subject to the relationship between cameramen and sound recordist to which I have referred, members other than the producer/director (Miss Thomas) had no say in who would be on the team.

105. Miss Thomas said that, when she was working as a freelance producer/director, she regarded herself as working for and representing the BBC: in particular, she said that she considered she had responsibility for health and safety of the team on behalf of the BBC. In her statement to the Health & Safety Executive (9 March 2002), she said:

> "As part of my contract with the BBC I am responsible for health and safety on site…. There is no express term in the contract as to [any] responsibility for safety. However, the BBC Rules on Health and Safety [indicate] that I have a responsibility for the safety of the production."

(See also Statement 9 September 2005, Paragraph 14: and Transcript 24 January 2007, pages 38F, 43D and 58D). She was also very clear that, in her mind, when she was undertaking this responsibility on behalf of the BBC, she owed the same duty to freelances as to directly employed personnel. Indeed, she was dismissive of any suggestion that there might be any issue in relation to this (Transcript 25 January 2007, page 21C). Although not determinative, this view of the person whom the BBC belatedly accepted was acting on their behalf in relation to ensuring their health and safety obligations were satisfied on location was indicative and telling. Furthermore, for each specific production a Health & Safety Officer from the BBC's Health & Safety Department was assigned: in the case of Made in Wales, this was Ann Goddard (a direct

employee). Miss Manon Davies confirmed that Miss Goddard was responsible for the health and safety of all participants, including freelances.

106. The BBC very clearly assumed responsibility for the health and safety of freelances when they were working on BBC productions.

(i) Even after 1993, the BBC maintained a large and important health and safety at work structure, about which there was considerable evidence. They produced extensive health and safety guidance which clearly indicates that the BBC not only consider that they have a duty in relation to the health and safety of their freelances but that it is an obligation which they take seriously. For example, the BBC Manager's Guidelines are clear about that role:

> "Freelance engagements are made on 'contracts for services' which do not give employee status…
>
> Those engaged in staff category jobs under the modus operandi are, however, covered by certain employment legislation including that on health and safety… *Freelances should be managed in a similar way to staff*." (emphasis added).

This guidance is repeated in the BBC Health and Safety Advice on the Selection and Management of Freelances, which has a section on "Producer's Responsibilities towards Freelances", under which it is stated:

> "It is the Producer's responsibility to carry out an overall programme risk assessment and to make the findings known to the freelances involved…"

Later it is said:

> "Relevant information needs to flow between freelances and staff. The risk assessment findings should be made known and wherever possible there should be

safety briefings for all concerned. For any last minute changes a written note should be made, these should be discussed with the people concerned, the changes must be reassessed and all involved must be notified."

On the BBC Guidance Health & Safety Net, there is a document produced by the Joint Advisory Board for Broadcasting and the Performing Arts, "Facts for Freelances", with a similar focus:

"Work in the industry today is likely to take place in an environment where freelances would do much of the work. If planning, coordination and communications are poor, the chances of serious accidents happening may be significantly increased…

- Someone needs to be placed in charge. This may be the 'producer' in broadcasting or the 'director' in the theatre;

- This person is key to controlling the work and, therefore, the risks that might arise;

- He/she needs to be sufficiently senior to have the necessary authority."

Specific responsibilities of the "person in charge" are set out, including:

"Assess your risks - Risk assessment is the essential first step. This is a careful examination of what could cause harm to people which enables you to weigh up whether you have taken enough precautions….

Pass information on - Who needs to know what? Have the health and safety arrangements been properly explained, especially to those who are to implement them? Is there someone working for you who needs information about safety?...

Are you going to make changes that could affect safety?

Think again - Work in the industry is constantly changing:… whenever there is a change, consider its effects on safety and tell others who need to know

…and re-think health and safety as the work progresses." (emphasis in the original)

Consistently - although in more general terms - the guidance issued to producers/directors indicates that:

"As the person with overall responsibility for the production, the Producer also carries overall responsibility for safety on the production. This responsibility covers all BBC staff, artists, contributors, invited audiences, and any other person who might reasonably be affected by the production activity….The Producer must ensure that a risk assessment of the production has been made and there is satisfactory communication such as the findings of the risk assessment between the various parties in the production, and that good chains of communication are established…" (pages 1 and 2).

Some of these documents were sent to Miss Thomas (see, e.g., Miss Manon Davies Statement 13 October 2005, Paragraph 5): but in any event Miss Thomas accepted that, as producer/director, she understood that on behalf of the BBC she was responsible for the health and safety of freelances on a shoot to exactly the same extent as she was responsible for any "direct employees".

(ii) The BBC required producers/directors to attend various health and safety training sessions which they put on, even if the producers/directors were freelance. Miss Thomas attended some of these sessions (Statement 9 September 2005, Paragraph 1 and Exhibit "GT1": and Transcript 24 January 2007, page 33).

(iii) After the accident, the BBC continued to indicate that they were treating Mr Jones as an employee for the purposes of the accident. For example, in the Report of an Injury or Dangerous Occurrence to the Health & Safety Executive, Mr Jones is described as "one of [the BBC's] employees", and not as "self employed". Further, neither the BBC Report into the accident (referred to in Paragraph 48 above) nor the BBC Safety Briefing Note dated 11 December 2001 (published following that investigation) suggests that, in relation to Mr Jones's health and safety whilst on a production, the duty owed to him as a freelance was any different to that which would have been owed to him as a direct employee. Indeed, quite the contrary.

Therefore, not only did the BBC appear generally to have assumed responsibility for the health and safety of freelances whilst they were on a production shoot, it is clear beyond any doubt that they assumed such responsibility for Mr Jones in respect of the work at Brithdir Mawr.

107. As Henry LJ stressed in Lane v Shire Roofing, "there… are, good policy reasons in the safety at work field to ensure that the law properly categorises between employees and independent contractors" (see Paragraph 99 above). In relation to the BBC and production freelances, as the BBC itself recognises, there are strong policy reasons why the BBC should bear responsibility for freelances as an employer. As the Facts for Freelances document (see Paragraph 106(i) above) says:

> "Work in the industry today is likely to take place in an environment where freelances would do much of the work. If planning, coordination and communications are poor, the chances of serous accidents happening may be significantly increased."

That document stresses the need for someone "to be placed in charge" of health and safety: "This person is key to controlling the work and, therefore, the risks that might arise." In short, in respect of health and safety in the media production industry, coordination is essential. In relation to this industry, there are therefore strong policy

reasons for having someone in overall charge of health and safety on production shoots. The BBC have (with respect, understandably) assumed that coordinating responsibility, which it exercises through the producer/director. This assumption of coordinating responsibility itself very strongly points to the BBC assuming an "employer's" duty in relation to health and safety in respect of the activities of separate workmen: McArdle v Andmac [1967] 1 WLR 356.

108. For these reasons, the BBC's concession - three days into the trial and 2½ years from the issue of proceedings - that they had a responsibility for the health and safety of freelances on location, which they sought to satisfy through the producer/director Miss Thomas - was quite inevitable on the evidence.

109. Equally inevitable on the evidence is my finding that the responsibility for freelances in the field of health and safety is a responsibility equivalent to that of an employer to a direct employee. That was certainly the case with regard to Mr Jones in respect of his work at Brithdir Mawr. Miss Thomas considered that that was the extent of the duty which she bore on behalf of the BBC - and the other evidence was at least entirely consistent with her view, some positively indicating that this was indeed the scope of the duty (e.g. the Report of Accident to the Health & Safety Executive). Whichever of the legal tests suggested by the authorities is taken, the conclusion on the facts is the same. There is no doubt that the business at Brithdir Mawr on 3 October 2001 was that of the BBC. In terms of "control", the burden of this lay clearly with the BBC. If one looks at all of the factors to which I have referred in the round, then this is clearly a case in which Mr Jones was an employee of the BBC for health and safety purposes.

110. Mr Howard Palmer submitted that Clause 9.3 of the standard for freelance contact "informed" the scope of the duty of care owed by the BBC to Mr Jones. This provision (quoted in Paragraph 92 above) requires the BBC to notify a freelance of reasonably foreseeable risks, and requires the freelance to have due regard to these risks. I shall return to this provision, because it makes clear beyond any doubt that the BBC had an obligation to notify to Mr Jones reasonably foreseeable risks from filming in the vicinity

of the lowering mast: although I would consider that that was an obligation which fell within the BBC's duty to its employee at common law in any event. I accept that, in considering the scope of the duty of care owed by the BBC to freelances, the terms of the contract between them may be relevant. But Clause 9.3 patently does not limit the scope of the duty of care to such an obligation. The contract makes clear that nothing in the contractual terms excludes liability for death or negligence caused by a party's negligence (see Clauses 6.3 and 13.1). Indeed, Mr Howard Palmer did not suggest that Clause 9.3 did exclude such liability or even expressly restrict the scope of the duty of care, but merely that it "informed" the duty of care. On the facts and circumstances of this case, Clause 9.3 had no material effect on the scope of the duty of care owed by the BBC to Mr Jones, nor upon the steps which the BBC were obliged to make in performance of its obligation to Mr Jones under that duty of care.

112. The BBC's case - that, after 1993, they had divested themselves of responsibility for the health and safety of freelances - is inconsistent with the overwhelming weight of evidence: which was to the effect that, contrary to that case, the BBC continued to assume that responsibility which it continued to take very seriously. The contractual provisions upon which the BBC rely simply do not and, in my judgment, cannot affect the application of the principles found in Lane v Shire Roofing.

113. Just as Mr Jones was an employee of the BBC for the purposes of health and safety obligations, so were Miss Thomas and Mr Rees. The BBC eventually conceded that they were vicariously liable for the acts and omissions of Miss Thomas "for the purposes of this action only" (Amended Defence, Paragraph 8(3)). On the basis of the evidence, that concession was inevitable. However, in respect of his relationship with the BBC, Mr Rees was in the same position as Mr Jones. He was an employee: and the BBC were consequently vicariously liable for his acts and omissions.

114. In respect of Miss Thomas, in addition to accepting vicarious liability, the BBC also indicated that they would not seek any indemnity against her. However, that concession

was not made in respect of any liability of Mr Rees. I deal with that issue below (Paragraphs 139-142).

Steps that ought to have been taken by the BBC in the light of the Duty of Care Owed.

115. Given that the BBC owed Mr Jones such a duty of care, what ought they to have done to satisfy their obligations under it? It is the BBC's case that there was nothing further they (in effect, Miss Thomas on their behalf) could or should have done. With respect, again this is entirely contrary to the evidence.

116. Because the possibility of filming of the mast lowering was not raised until the crew arrived at the location, nothing that occurred or did not occur before the crew's arrival has any relevance to this issue. However, as Mr Howard Palmer indicated in his Closing Submissions (Paragraph 8), once the decision had been taken to carry out the filming, it was necessary for (i) an assessment to be made by Miss Thomas of the risks involved, and (ii) reasonable steps to be taken or instigated by Miss Thomas to avoid or reduce the risks identified including (a) giving all reasonably necessary instructions or warnings to Mr Rees and Mr Jones, and (b) taking any other measures reasonably needed beyond such instructions and warnings.

117. Miss Thomas said that she "informally" conducted a risk assessment, and decided that "the appropriate controls were in place, namely that all of the crew were aware of the direction in which the mast would be lowered", and that, had she done a formal risk assessment, then she "would have considered that the risks involved in filming the procedure had been minimised by the crew being aware of the direction in which the mast was being lowered. This is in fact what happened." (Statement 9 September 2005, Paragraph 14). I have found that, at the time of the accident, both Mr Jones and Mr Rees were indeed aware of the direction of lowering of the mast.

118. The risk of the inclined and suspended mast falling - or something falling off it - was therefore readily identified by Miss Thomas, but she considered that ensuring that

Mr Rees and Mr Jones were aware of the direction of proposed lowering was sufficient to minimise the risk of either being injured by passing beneath the mast. Mr Howard Palmer's submission was that the risk was so obvious that that was indeed the case.

119. For the following reasons (Paragraphs 120-8), I disagree.

120. In their Joint Memorandum dated 21 April 2006, the experts identified three specific steps which might have been taken, namely:

(i) a "toolbox talk" could have been given to everyone on site, specifying the lowering methodology and associated risks, i.e. a talk in which Mr Jones and Mr Rees would specifically have been made aware and warned of the risks associated with the mast lowering;

(ii) the installation of a demarcation line, in the form of (e.g.) tape to rope off the hazardous area preventing people not associated with the lowering of the turbine to move into the area where the turbine was being lowered; and

(iii) a person could have been appointed to ensure that nobody not associated with the lowering of the turbine could enter the hazardous area.

121. The experts agreed that a toolbox talk ought to have been carried out. In the BBC Safety Briefing Note dated 11 December 2001 (which followed the BBC internal investigation into this accident), Managers were asked to remind producers and staff that

"• risk assessments must be reviewed when there is a change to plans, new hazards must be addressed, the controls agreed and communicated to those involved

• a copy of the programme risk assessments should be taken to the location, communicated to all involved and any amendments agreed these should be recorded."

Miss Thomas said that these reminders were not new, and she was or ought to have been aware of the substance of them on 3 October 2001 (Transcript 24 January 2007, page 79B-D). With the benefit of hindsight, Miss Thomas herself also accepted that (i) she ought to have asked more questions of those involved with the mast lowering, e.g. with regard to what was broken that required maintenance (Transcript 25 January 2007, page 22): and (ii) in the light of the very clear obligations upon a producer/director as to what to do when there is a change in the filming schedule, there ought to have been a toolbox talk, i.e. more discussion with the crew (Mr Jones and Mr Rees) about safety before the filming of the mast lowering started (Transcript 24 January 2007, page 77E-F).

122. On this evidence, it is quite clear that, prior to filming the mast lowering, there ought to have been a discussion between Miss Thomas, Mr Rees and Mr Jones at which the risk of the mast or part of it falling would (or, if properly conducted) should have been specifically identified - and Mr Rees and Mr Jones warned in unequivocal terms that they must not go beneath the suspended mast. Of course, under Clause 9.3 of the freelance contract, the BBC were obliged to notify freelances such as Mr Rees or Mr Jones of "risks to health and safety… which [were] reasonably foreseeable to the BBC and which may affect the freelance…". The risk of the suspended mast was reasonably foreseeable to Miss Thomas and who took a deliberate decision not to tell the men specifically of the hazard (see Paragraphs 63-64 above). Even if the hazard was "obvious" to her, the purpose of such warnings and instruction is to reinforce the message so far as such hazards are concerned. Such reinforcement is an important part of the obligations of an employer, particularly when employees are working in an environment which requires considerable concentration on the job in hand. In failing to instigate this discussion, the BBC (through Miss Thomas) were negligent.

123. It was the evidence of all who gave evidence on the point that the filming of the mast lowering was mundane, and to capture it was not worth any additional risk: i.e. that, in respect of any identified risk, steps ought to have been taken to eliminate (rather than simply reduce) the risk.

124. Without the benefit of evidence, I might have been tempted to assume that cordoning off the area and keeping the crew at a distance from the operation would not have been practical, because (i) some of the filming needed to be close up both in terms of pictures and sound (notably the conversation of the participants in the exercise, Messrs Brown, Wrench and Bazalgette), and therefore it was necessary for Mr Rees and Mr Jones to go quite close to those participants: and (ii) if a cordon of tape had been erected, that would have ruined the filming, which was intended to be in a "natural" environment. However, there was no evidential basis for these assumptions: indeed, quite the opposite.

(i) In their Joint Memorandum, the experts agreed that everyone not involved in lowering the turbine should have been excluded from not only the immediate area under the inclined mast but also an ellipsoid-shaped area round the mast into which guy wires or the mast itself might spring in the event of a failure.

(ii) Miss Thomas accepted that, with hindsight, an area could have been cordoned off, and the filming still progressed satisfactorily from behind a cordon (Transcript 24 January 207, page 74D).

(iii) The BBC Accident Report said:

> "The fact that no barriers prevented access to the danger area and access was gained demonstrates that the risk assessment activity was inadequate."

(iv) The BBC Safety Briefing Note dated 11 December 2001 (which followed the report) asked managers to remind producers and staff that "where there is a hazard of falling objects the area where the object may fall should be cordoned off to prevent access". As I have already indicated, Miss Thomas said that these reminders were not new, and she was or ought to have been aware of the substance of them on 3 October 2001 (Transcript 24 January 2007, page 79B-D).

125. In practice, the hazardous area could easily be cordoned off. The only access was from the south, and tape could simply have been put across this entrance.

126. In the circumstances, I am quite satisfied that the BBC (through Miss Thomas) could and reasonably should have cordoned off the hazardous area, and filmed the entire lowering exercise from a distance from behind the tape cordon. That would easily and most effectively have eliminated the risk identified by Miss Thomas of something falling and causing injury.

127. In the circumstances, it is not necessary for me to consider the possibility of someone being assigned to ensure no one went into the hazardous area. Mr Rees and Mr Jones described Miss Thomas, the director, as an additional pair of eyes and ears for them. However, the risk would most appropriately have been eliminated by the use of a cordon tape.

128. Therefore, in summary, (i) Miss Thomas ought to have instigated a toolbox talk or discussion at which the risks from the suspended mast ought to have been considered: (ii) at that talk, she ought to have (a) told Mr Rees and Mr Jones not to go under the suspended mast under any circumstances, and (b) come to the view that the appropriate step to eliminate the risk would have been to have cordoned off the hazardous area, and ought to have arranged for the area to be cordoned off before filming began.

129. In failing to give this warning and take these steps, the BBC (through Miss Thomas) were negligent.

130. That negligence was clearly causative. Had a cordon been put up (as I have found it ought to have been), then I am quite satisfied that neither Mr Rees nor Mr Jones would have ventured beyond it. Indeed, even if they had been told in unequivocal terms that they must not go beneath the suspended mast, I would have found that they would not have done so. Both men said that they were experienced and would have obeyed all such instructions. Of course, this evidence is potentially self-serving: but I accept it. This

shoot was mundane, and Mr Rees was adamant that no shot in it was worth any increased risk. When he moved to pass the mast fall line, he was aware that he was passing under the inclined mast. Had he been told that he must not under any circumstances pass under the mast, I am satisfied that he would not deliberately have done so, as he did. If Mr Rees had not led Mr Jones under the suspended mast, he would not have gone to that hazardous place.

131. Therefore, but for Miss Thomas's failure (i) to tell Mr Rees and Mr Jones not to go under the suspended mast and (ii) to cordon off the hazardous area, I am satisfied that Mr Jones' accident would not have happened.

132. For these reasons, I find the BBC liable for Mr Jones injuries. I deal with apportionment below (Paragraph 190-4).

The Claim against Mr Rees

133. Mr Rees and Mr Jones worked as a team. Their respective equipment was linked together by a lead (see Paragraph 30 above), such that to a great extent Mr Jones was obliged to follow Mr Rees. Mr Jones said:

> "… I simply had to follow Jon [Rees] around and deal with the sound issues" (Statement 1 August 2003, Paragraph 17).

134. Mr Rees himself said of the actual incident:

> "I then decided to take a shot back on the right hand side so I jogged across closely followed by Adam [i.e. Mr Jones]. Adam would have had to follow me closely as his equipment was connected to the camera by a cable. He would therefore simply have to follow wherever I went, so as to record the sounds for the material I was filming." (Statement 15 March 2005, Paragraph 12)

135. Given this close working relationship between two men who were (for health and safety purposes) employees of the BBC, there is in my judgment no doubt that Mr Rees owed a duty of care to Mr Jones, particularly in respect of where he led him.

136. In assessing whether Mr Rees breached that duty of care in the circumstances of this case, I have particularly taken into account the following:

(i) The two men were connected by a lead, and Mr Jones was to an extent bound to follow Mr Rees where he went. Mr Jones of course had some obligation to look after his own safety - he accepted that he would not have followed Mr Rees into an obvious hazard of which he was aware, such as over a cliff - but he had considerable professional trust in Mr Rees with whom he had worked closely for a number of years. He described how he followed Mr Rees almost instinctively, concentrating on keeping up with him and ensuring the lead did not become overextended.

(ii) The evidence was that it was impractical for Mr Jones to disconnect from Mr Rees, certainly quickly (see Paragraph 30 above).

(iii) In this instance, Mr Rees moved off without warning to Mr Jones, and at pace.

(iv) At the relevant time, Mr Rees and Mr Jones were not filming. Therefore, Mr Jones was not engaged in actively capturing sound to accompany film that Mr Rees was taking. However, because of the close working relationship between the men - and the fact that they were connected together in the manner I have described - even if not entirely oblivious to his surroundings, Mr Jones was not concentrating on where he was going. He was concentrating on following Mr Rees, and ensuring that, with all of his equipment, he kept up with Mr Rees who was moving at pace (see Paragraphs 40 and 77 above).

(v) Because of this concentration on Mr Jones part, he did not appreciate that Mr Rees and he were in fact passing under the suspended mast. Mr Rees was well aware that he was leading Mr Jones under that mast (see Paragraph 76 above). Although I have found that he did not in fact appreciate that walking under a suspended mast was hazardous, he ought to have done. Walking under a suspended load is patently hazardous: and, on Mr Rees' own account, this was not a momentary lapse of concentration in which he failed to remember that the mast was there. Knowing that the suspended mast was there, he took a deliberate decision to pass beneath it, leading Mr Jones the same route and into the same hazardous area.

137. In all of these circumstances, I find that Mr Rees did breach the duty of care that he owed to Mr Jones. He was aware that he was leading him under the suspended mast, and ought to have been aware that this was a significant hazard. Mr Rees made clear that he (properly) considered that this filming was not worth any increase in risk. He ought not to have led Mr Jones under the mast, and was negligent in doing so.

138. I deal with apportionment below (Paragraphs 190-4).

139. I have found that the BBC are vicariously liable for the negligent acts of Mr Rees (see Paragraph 113 above). Consequently, in respect of the liability for Mr Rees's acts and omissions, Mr Rees himself and the BBC are joint tortfeasors. In respect of which of the two joint tortfeasors should bear this liability inter se:

(i) As between employer and employee, there is no implied term that the employee is entitled to be indemnified by the employer in respect of liability incurred as the result of that employee's negligence (Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555).

(ii) The negligence being the negligence of the employee (the employer being liable only by operation of law), then under the Civil Liability (Contribution) Act 1978 (formerly the provisions of the Law Reform (Married Women and

Tortfeasors) Act 1935) the employer is entitled to a 100% contribution from the employee (see, e.g., Lister at page 579 per Viscount Simonds and page 584-5 per Lord Morton: Lord Tucker appears to agree (page 592), but in any event, with respect, this appears to be correct in principle).

(iii) Therefore, as a matter of law, where liability has been incurred as a result of an employee's negligence during the course of his employment, as between employer and employee inter se such liability falls upon the employee.

(iv) However, this has been substantially mitigated in practice. As is explained by the learned authors of Clerk & Lindsell on Torts, 19th Edition (2006) (at Paragraphs 4-33 and 4-34):

> "The implications of [Lister] for industrial relations led, ultimately, to employers' liability insurers entering into an agreement whereby they would not institute claims against employees of insured companies in respect of death or injury of fellow employees unless the weight of evidence indicated either collusion or wilful misconduct. The agreement seems to have operated satisfactorily….
>
> … In practice… Lister is virtually a dead letter as a result of the agreement between insurers and, in refusing to extend that case to a situation not actually covered by the agreement [in Morris v Ford Motor Co Ltd [1973] QB 792], the Court of Appeal has done little more than recognise the realities of accident litigation in an industrial setting."

140. Whatever the realities of accident litigation in an industrial setting might be, the BBC have made it clear in this litigation that, insofar as Mr Rees is found liable to Mr Jones, they intend to seek an indemnity from him in respect of any liability borne by them vicariously. In this, they seek to enforce Clause 13.6 of the freelance contract (set out at Paragraph 92 above).

141. Given the clarity and firmness of the BBC's approach to liability for the negligent acts and omissions of Mr Rees in this case, one can only assume that before adopting this approach the BBC very carefully considered these issues and the potential consequences of the stance they have taken.

142. So far as the law is concerned, following Lister, it is clear. The BBC are entitled to an indemnity from Mr Rees in respect of damages that flow to them vicariously, but arising from his negligent acts and omissions

The Claim against Mr & Mrs Orbach

143. As it has developed, the claim against Mr & Mrs Orbach is not entirely straightforward.

144. As I have already pointed out, the Claimant's claim (based upon the BBC's averment in their Defence and Part 20 Claim against Mr Bazalgette) asserts that Mr Bazalgette had been engaged by Mr & Mrs Orbach to undertake the windmill repair works, including the lowering of the mast (Amended Particulars of Claim, Paragraph 1). The claim against Mr & Mrs Orbach proceeded only on the basis that they were owners and occupiers of the farm, and as such owed Mr Jones a duty as a visitor.

145. In fact, of course, Mr Bazalgette was not engaged to take down the mast: although he lent his winch and assisted with the guy ropes, Mr Brown was responsible generally for the maintenance of the mast and particularly for lowering of the mast on the day of the accident. In these circumstances, Mr Kelly submitted that as owner/occupiers Mr & Mrs Orbach owed a duty of care to the BBC crew (including Mr Jones), and as such they were vicariously liable for any negligent failings on Mr Brown's part. For these purposes (he submitted), Mr Brown was Mr & Mrs Orbach's agent.

146. The claim consequently gave rise to a number of issues (Paragraphs 147-169 below).

147. There was no issue concerning Mr & Mrs Orbach's status in that it was common ground that, at the relevant time, they owned and occupied Brithdir Mawr. Other members of the community (e.g. Mr Brown and Mr Wrench) also occupied the land, but of course they are not sued either directly or through Mr & Mrs Orbach as their representatives.

148. Mr Adrian Palmer submitted that the claim failed properly to draw the distinction made at common law between an occupancy duty and an activity duty. The common law of occupier's liability was restricted in application to dangers due to the state of the premises. Where the danger arose from activities on the land, such as shooting or driving vehicles, rather than from the state of the land itself, any duty arising was governed by the general rules of negligence, in which issues such as the status of the claimant (i.e. licensee, invitee, trespasser etc) were largely irrelevant. However, "where the claimant's status is not in issue [as in the case before me] there is often little difference between his remedy under the Act and that at common law. The issue in many cases will be one of fact: was the claimant foreseeable, and has the duty to take reasonable care been broken?" (Clerk & Lindsell on Torts, 19th Edition (2006), Paragraph 12-04).

149. However, I do find that Mr & Mrs Orbach owed an occupancy duty to the BBC crew. Section 1(3) of the Occupiers Liability Act 1957 (reflecting the position at common law) provides that:

> "The rules so enacted in relation to the occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier and his invitees or licensees would apply, to regulate:
>
> (a) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft;…."

It was such a structure, attached to the ground as it was. The fact that it was moveable - and indeed being moved by lowering - did not take the windmill out of realms of occupancy duty. As occupiers, Mr & Mrs Orbach were responsible for its state.

150. I am bound to say that I find the concept of agency (Mr & Mrs Orbach being principals, and Mr Brown being the agent) not entirely easy or helpful in the context of occupiers' liability. However, insofar as there was a duty of care on Mr & Mrs Orbach as occupiers, I accept that, to a significant extent, that duty was left by them to be performed (if at all) by Mr Brown at the site of the mast. They took no active steps themselves. As Mr Orbach said: "I was not present whilst the lowering of the turbine was being taken down and I left this to members of the community who were more experienced than I was in relation to wind turbines. These were Brent Brown and Tony Wrench." (Statement 22 March 2005, Paragraph 8). To that extent, I accept that there was an agency: and certainly that what Mr Brown did or did not do is important to whether Mr & Mrs Orbach satisfied the duty falling upon them.

151. I also accept Mr Kelly's submission that, although had Mr Bazalgette been the person engaged to take down the mast as the Claimant pleads then the Orbachs may have had the benefit of the independent contractor's defence in Section 2(4)(b), Mr Brown was not an independent contractor and that defence is of no moment in this case. The evidence was that Mr Brown had relatively little experience in lowering the windmill, having done so perhaps twice before, on one occasion of which there had been an accident when the turbine fell (see Paragraph 23 above).

152. The BBC crew (including Mr Jones) were of course lawful visitors to Brithdir Mawr. They had been invited to film by Mrs Orbach: and it appears that Mr Orbach at least knew that were going to film (Statement 22 March 2005, Paragraph 8). Mrs Orbach was their point of contact, and both Mr & Mrs Orbach at least knew that they were going to film the mast lowering (see Paragraph 29 above).

153. The duty owed by Mr & Mrs Orbach as occupiers of Brithdir Mawr to the BBC crew as visitors was "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there", i.e. to film the mast lowering (Section 2(2) of the Occupiers' Liability Act 1957, again reflecting the common law). Under the Act (Sections 2(3) and (4)) and at common law:

> "The circumstances relevant for the present purpose [as referred to in Section 2(2)] include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that for example;
>
> ….
>
> (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
>
> In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example):
>
> (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe…"

It is important to stress that the ambit of the duty of care falling upon an occupier towards a visitor is not the same as that falling on an employer towards an employee. The steps that it might be reasonable for an employer to take may not be the same as the steps which it would be reasonable for an occupier to take, in similar circumstances.

154. The evidence was that Mr Bazalgette, when he supplied the windmill, provided the community with some safety information, which included the following:

"• No person must be underneath any part of the mast during the erection process.

• One person must be in control of the lifting operation at all times. All personnel on site must be given clear instructions detailing their part in the operation, and must know who is in charge.

• No person, apart from the crew, are allowed onto the site while the erection is proceeding. For this purpose, the site is defined as an area at least as great as two full mast height in radius, in all directions. Precautions must be taken to prevent any casual visitor from straying within this area. This may require warning tape, signs, or additional crew members whose responsibility it is to prevent access by anyone not involved."

Mr Wrench said that this safety guidance had been the subject of a talk by Mr Bazalgette to the community (Transcript 29 January 2007, pages 70-71). This guidance is in line with the agreed position of the experts that "everyone not involved in lowering the turbine should have been excluded from [an ellipsoid area around the mast]", which included the entire area under the fall line (Joint Memorandum, 21 April 2006, page 2).

155. Mr Brown could not recall whether he had actually seen this guidance note from Mr Bazalgette: but he accepted that the advice made sense, and that it is what he would operate on except that "2 mast lengths is longer than I would use" (Notes of Evidence 26 January 2007, page 20). Mr Brown's acceptance that, as the man in charge of the mast lowering on 3 October 2001, he ought to have been following this safety guidance was important.

156. Mr Brown said he was not content for the BBC crew to be in the field as he did not want any distractions during the operation: and, although he did not demarcate the hazardous area by tape or even by description, he gave the crew instructions what might happen and (he said) he heard the instruction for them to stay by the woodpile. After that, "it was their decision" (Notes of Evidence 26 January 2007, page 7). Mr Brown

said: “If it had been me solely there in charge of the job, as I say I did express the fact that I did not want them anyone there, but it was not just my decision for them to be there. I could have pushed the point and I wish I had” (Transcript 29 January 2007, page 2A). The other persons implicitly referred to are presumably Mrs Orbach who had arranged the film crew visit, and Miss Thomas.

157. However, I have of course now made findings as to exactly what was said and heard. I have found that Miss Thomas, who was in charge of the health and safety of the crew, was well aware of the hazard of the suspended mast and the risk of injury to anyone who might go under it. She believed she had done sufficient in her health and safety role to ensure that her crew were not injured, by telling them the direction of fall. However, neither Mr Rees nor Mr Jones was told anything else. They were not told “what might happen”: nor were they instructed to stand by the woodpile. Of course, no area was identified as being “out of bounds” at all, whether by a tape cordon or otherwise.

158. Miss Thomas was responsible for the health and safety of the BBC crew on site. There was no indication from the BBC in writing before the shoot that the members of the community, or owners and occupiers of the farm, could be liable for injury to the crew. On the day, Miss Thomas did not indicate that they would have such liability: indeed, to the contrary, in response to a question from Mr Adrian Palmer, she made it clear that she considered the health and safety of the crew remained her responsibility:

> Q. But did you at any stage say to anyone, ‘By the way will you take responsibility for the safety of the film crew’?
> A. No, *it is my responsibility*. (emphasis added).

159. In contradistinction to the BBC, the community was engaged in the lowering of the windmill as a domestic project, undertaken by (in the phrase used by Mr Adrian Palmer) “home occupiers”. Unlike the duties owed by an employer to an employee, Parliament has not placed specific obligations upon such a category of person, and the common law has been considerably more reticent in imposing duties. Mr Brown, although he had had

some limited experience of lowering the mast, was not a professional. He had had no health and safety training.

160. In all of these circumstances, what did the duty of care owed by Mr & Mrs Orbach as occupiers to the BBC crew as visitors require them to do? Were there any steps which they ought to have taken that they did not take?

161. Mr Brown, by one means or another, conveyed to Miss Thomas (i) the direction it was proposed to lower the mast, and (ii) that no one should under any circumstances go beneath the mast whilst it was suspended and in the process of being lowered (see Paragraph 69). He did nothing else in respect of the safety of these visitors. In all the circumstances of this case, was this sufficient to discharge the burden of the duty of care upon the occupiers?

162. Given the obviously heavy burden falling upon the BBC (Miss Thomas) for the health and safety of the crew, and given that she was aware of the hazard to which the suspended mast gave rise, I have found this question difficult. However, having considered it with particular care, in my judgment it was incumbent upon Mr & Mrs Orbach as occupiers of the relevant land to take further steps to those they did take to ensure the BBC crew did not pass under the mast during lowering.

163. In coming to this view, I have particularly taken into account the guidance for erection and lowering of the mast given to the community by Mr Bazalgette which Mr Brown said he was working to. That guidance required not only that no person must be underneath any part of the mast during the erection process, but also that, "No person, apart from the crew, are allowed onto the site [which clearly includes under the mast whilst it is suspended] while the erection is proceeding… Precautions must be taken to prevent any casual visitor from straying within this area. This may require warning tape, signs, or additional crew members whose responsibility it is to prevent access by anyone not involved." There was no sensible chance of visitors other than invitees from being near the site - which is remote - during the course of the operation, but "casual visitors"

must include all persons not actually assisting in the operation itself: hence the reference to only the lowering crew being allowed on the site at all.

164. Furthermore, these guidelines make it clear that there must be one person in charge of the lifting or lowering operation - Mr Brown accepted that that was him - and that person was responsible for giving "clear instructions" to "all personnel on site" who "must know who is in charge". As this guidance made clear, it was not open to Mr Brown to take the view that he was not solely in charge, and therefore brook responsibility for personnel on site during the erection or lowering of the mast.

165. Mr Brown's evidence was that Mr Rees and Mr Jones were given clear instructions, i.e. (i) an instruction from him, not to pass under the mast under any circumstances, and (ii) an instruction by Mr Bazalgette that they should stand by the woodpile. I have rejected that evidence. Mr Rees and Mr Jones were only told the direction that the mast was to fall. That was not a "clear instruction" not to go under the inclined mast under any circumstances.

166. Mr Brown allowed Mr Rees and Mr Jones to move from the woodpile, and go towards the mast. When they were speaking to Mr Brown they were quite close to the mast (or at least the gin pole), although in the opposite direction from the fall line. When they were speaking to Mr Wrench and Mr Bazalgette, they were by the guy wire anchors, and close to the edge of the ellipsoid area identified by the experts as hazardous (see Paragraph 154 above).

167. In any event, Mr Brown was - with good reason, if I might respectfully say - concerned about the BBC crew being on the site at all. This reflects the guidance from Mr Bazalgette which he was effectively following that those not involved with the lowering operations ought to be excluded from the site. He did not raise these concerns in any cogent way with anyone, not even with Miss Thomas. Had he done so, and clearly indicated that he required that the crew should not get near the fall line of the mast and indeed they should stay within a cordoned area, then she could have excluded the crew

from the hazardous part of the site. As I have indicated, there was in fact no problem for the filming to be done at distance: and Miss Thomas would have obeyed any instructions that Mr Brown might have given her (see Paragraph 71(v) above). If, contrary to my finding, Mr Rees and Mr Jones had been told to stay near the woodpile, then Mr Brown ought to have ensured that they did. On the balance of probabilities, it is likely that, had Mr Brown raised the exclusion of the crew from the site as an issue with Miss Thomas (or Mr Rees or Mr Jones) then the men would have been quite prepared to film from a distance, and certainly would not have strayed under the mast.

168. As occupiers of Brithdir Mawr, Mr & Mrs Orbach had a duty to take such care as in all the circumstances of the case is reasonable to see that Mr Jones as a visitor would be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there, namely filming the lowering of the windmill. In all of the circumstances, even bearing in mind the difference in the scope of duty between that falling on an occupier and that falling on an employer, I am satisfied that Mr & Mrs Orbach breached that duty by failing either by themselves or through Mr Brown (i) to instruct Mr Rees or Mr Jones in clear and unambiguous terms that they must not pass under the inclined mast, (ii) to discuss with the BBC crew the exclusion of the crew from the hazardous area and (iii) in effectively excluding Mr Jones from that hazardous area. Again, that breach of duty was clearly causative. Had any of these steps been taken as they ought to have been, the accident would not have occurred.

169. For these reasons, I find Mr & Mrs Orbach liable for the Claimant's injuries. I deal with apportionment below (Paragraphs 190-4).

The Claim against Mr Bazalgette

170. The claims of Mr Jones and the BBC as against Mr Bazalgette suffer from two fatal flaws.

171. First, it is trite law that liability in negligence only flows if there is in law a situation in which a duty of care is owed by the defendant to the claimant. A duty only exists where injury is reasonably foreseeable, but such foreseeability is necessary not sufficient. There is in addition a proximity requirement, i.e. a duty of care is limited to "persons so closely and directly affected" by the defendant's act that they should have been in his contemplation (Donoghue v Stevenson [1932] AC 562 at page 580).

172. Whether there is sufficient "proximity" or closeness of relation for the law to recognise a duty of care, is in part policy driven:

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any given situation giving rise to a duty of care are that there should exists between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other." (Caparo Industries Ltd v Dickman [1990] 2 AC 605 at pages 617-8)

173. In deciding whether a relationship in a particular case is sufficiently proximate for there to be a duty of care, the court will first look for a precedent category into which the case falls:

> "Whilst recognising, of course, the importance of the underlying principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law now imposes." (Caparo at page 618, per Lord Bridge)

174. Where the situation is novel, Phillips LJ (as he then was) explained the correct approach in Reenan v Department of Transport [1997] PNLR 618 at page 625):

> "When confronted with a novel situation the court does not… consider these matters [foreseeability, proximity and fairness] in isolation. It does so by comparison with established categories of negligence to see whether the facts amount to no more than a small extension of a situation already covered by authority, or whether a finding of the existence of a duty of care would effect a significant extension to the law of negligence. Only in exceptional circumstances will the court accept that the interests of justice justify such an extension."

175. In this case, the basis of the duty of care owed by Mr Bazalgette pleaded was that he was engaged by the community to undertake the works on the windmill (Amended Particulars of Claim, Paragraph 1). The BBC's case against Mr Bazalgette has a similar basis: see Amended Defence, Paragraph 5 and Part 20 Particulars of Claim, Paragraph 1. Mr Jones' case against Mr Bazalgette was of course only brought on the back of the BBC's claim: see Paragraph 4 above). I have found that this was simply not the case: the activity of lowering the windmill was one upon which Mr Brown engaged, Mr Bazalgette merely (i) lent his winch, and (ii) assisted Mr Brown in a minor way by attending the side guys (see Paragraph 52 above). There was no evidence before me to support the factual basis upon which the allegations of breach of duty are pleaded: nor any supported factual basis for any of the particulars of negligence relied upon by the Claimant (in the Amended Particulars of Claim, Paragraph 6). Mr Bazalgette had some knowledge of wind turbines, and the erection and lowering of windmills. However, on 3 October 2001 he was at Brithdir Mawr simply to lend his winch, without payment, as a friendly or charitable act towards the community. In respect of the lowering of the mast, subject to the two minor aspects to which I have referred, he was not in control of that operation and was effectively a by-stander.

176. In relation to the aspects with which Mr Bazalgette was engaged:

(i) The winch loaned was of sufficient strength and otherwise appropriate for the task: there is no suggestion that any inadequacy of the winch resulted in the accident to Mr Jones. It patently did not.

(ii) In terms of the guy wires, which Mr Bazalgette was attending, again there is nothing to suggest that any negligence in relation to that attention was causative of the accident in any way.

177. In these circumstances, there was no legal relationship between Mr Bazalgette and Mr Jones such as to impose a legal duty of care on the former in respect of the health and safety of the latter whilst he was at Brithdir Mawr. Nor is there anything to suggest either that any category of relationships could or should be extended to include the relationship between Mr Bazalgette and Mr Jones: or that there is any other basis for a duty of care between them.

178. The second crucial defect in the claim is that it seeks to make Mr Bazalgette liable for omissions only, namely failing to warn Mr Jones of the hazard and to mark an exclusion zone into which Mr Jones was forbidden to go.

179. The common law does not impose a duty of care in respect of omissions, for the reasons given by Lord Goff in Smith v Littlewoods Organisation Ltd [1987] 1 AC 241 at pages 270F-271E:

"The fundamental reason is that common law does not impose liability for what are called pure omissions. If authority is needed for this proposition, it is found in the speech of Lord Diplock in Dorset Yacht Co Ltd v Home Office [1970] AC 1004, where he said:

"The very parable of the good Samaritan (Luke 10, v 30) which was evoked by Lord Atkin in Donoghue v Stevenson [1932] AC 562 illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an

> omission which was likely to have as the reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and the Levite would have incurred no civil liability in English law."

180. Again, this is an example of foreseeability of harm being a necessary but not sufficient ingredient in the creation of a duty of care. It is the reason why there is no liability in negligence "on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning" (Yuen Kun Yeu v Attorney General of Hong Kong [1987] 3 WLR 777 at page 783). Unless there are special reasons for imposing a duty (see below), there is no duty of care positively to act, irrespective of expertise or experience. Therefore, a duty to act to prevent further harm to someone in a lake who appears to be in difficulties is not imposed on a by-stander, whether he is a non-swimmer or an Olympic swimmer.

181. Further, there are no special circumstances in this case in which a duty would unusually be imposed on Mr Bazalgette in respect of omissions: no special relationship exists between him and Mr Jones, he did not specifically assume the responsibility for positive action and it is not a situation in which he ought to bear specific responsibility for protecting Mr Jones from harm.

182. For these reasons, Mr Bazalgette did not owe Mr Jones any duty of care in respect of his safety whilst Mr Jones was at Brithdir Mawr on 3 October 2001.

183. The liability of AXA in the Second Part 20 Claim is of course dependent upon liability falling upon Mr Bazalgette in the main claim. There is no such liability to which it attaches.

Contributory Negligence

184. Each of the Defendants, in addition to denying liability themselves and blaming other defendants for this accident, blame Mr Jones for being the author of his own

misfortune. Although put in different formulations, each claims that, by walking under the suspended mast, he was exposing himself to an obvious risk. For example, the BBC plead that: "The danger of positioning himself under the partially lowered mast ought to have been obvious to him" (Amended Particulars of Claim, Paragraph 9(i)). The act of walking under the mast was described as "an act of gross recklessness" by Mr Bazalgette in his Defence (Paragraph 7(vi)).

185. In the evidence, the witnesses generally accepted that, knowingly to walk under a suspended load, was to expose yourself to an obvious hazard (the exception being Mr Rees who was reluctant to accept this as a proposition: see Paragraph 46 above). Of course, in the cold light of the courtroom (and particularly with the benefit of hindsight following what happened to Mr Jones in this case), it may appear quite obvious that to walk under such a load is extremely unwise. When it was put to him in cross examination, Mr Jones himself accepted that it is obvious that one should not go under a mast that is suspended on a winch (Transcript 22 January 2007, page 39F): and that for Mr Rees and he to walk under the mast as they did was "a reckless thing to do" (page 40A).

186. But this accident did not happen in a courtroom. It happened on a farm in West Wales, at a time when Mr Jones was engaged upon his work of a sound recordist. As he said, at the time of the accident he was "focussed" (page 40A). I have found that, although Mr Rees was aware that he was leading Mr Jones under the mast, Mr Jones was unaware that he was being led there. Although they were not filming at that moment, Mr Rees moved quickly and Mr Jones followed him as he instinctively often did. He was concentrating on following Mr Rees, carrying his equipment and maintaining the lead between them: he was not concentrating on what was around or above them. Had he been given any instructions not to go under the mast, then he said he would have followed such instructions (page 65A). However, no instructions were given by his employer or by anyone else - and no steps were taken by that employer or anyone else to exclude him from the hazardous area - as they should have been.

187. In an employment context, it is easy with the benefit of hindsight to see that a particular hazard should have been "obvious" to the employee. The courts have always examined such pleas with particular care. It is well known that workers are frequently careless about the risks which their work may involve. That is precisely why the common law considered it reasonable for employers to put into place and operate properly a safe system of work: in part to protect employees from their own careless acts, committed in the course of the often busy work.

> "Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of the board room with the advice of experts. They have to make decisions on narrow window sills and other paces of danger and in circumstances in which the dangers are obscured by repetition" (General Cleaning Contractors Ltd v Christmas [1953] 1 AC 180 at pages 190, per Lord Oaksey)

Dangers may also of course be obscured by the concentration required by an employee during the course of his employment.

188. At the time he was led under the mast by Mr Rees at some speed, Mr Jones was concentrating on his work. Unlike Mr Rees, he did not know that he was passing under the inclined mast. In a moment of inadvertence, he forgot about the risk that the inclined mast posed - with hindsight, he accepted a risk the inclined mast "obviously posed". In these circumstances, I am satisfied that Mr Jones' conduct amounted to no more than a moment of blameless inadvertence, lacking the essential carelessness necessary for any finding of contributory negligence.

189. For these reasons, I do not find Mr Jones liable for contributory negligence.

Apportionment

190. I therefore find the BBC, Mr Rees and Mr & Mrs Orbach liable to the Claimant in negligence.

191. In relation to apportionment between these defendants inter se, the proportions have to be just and equitable taking into account blameworthiness and causative potency (Downs v Chappell [1997] 1 WLR 426 at page 445).

192. In respect of these defendants, I have taken into account all of the matters to which I have referred above in relation to the claims against them, but of particular note are the following:

(i) In his Closing Submissions, Mr Adrian Palmer submitted that this was essentially a case of an accident at work, for which responsibility rested primarily with the employer, the BBC. I agree.

At the time of the accident, Mr Jones was at work for the BBC engaged upon their production, and Miss Thomas on behalf of the BBC was responsible for his safety as an employee. In failing properly to warn him as to the hazard posed by the mast and instruct him under no circumstances to go beneath it, and in failing properly to exclude him from the hazardous area, the BBC substantially failed in its duty as an employer to Mr Jones. It failed to warn him of, and protect him from, a very significant hazard of which it was aware. In so doing, the BBC were also, incidentally, in breach of contract: their own standard terms (Clause 9.3) impose upon the BBC an obligation to notify a freelance of risks of which are reasonably foreseeable to the BBC. Given their position as employer, those failures were gross: and causatively of the greatest potency.

(ii) Of course, one can only have sympathy for Mr Rees - a long standing friend of Mr Jones. They remain close. However, Mr Rees's action in leading Mr Jones under the mast amounted to more than momentary inadvertence at work - because Mr Rees (unlike Mr Jones) well knew that he was going under the mast. Mr Rees said that he did not appreciate the hazard caused by the suspended mast, which may

be so - but he ought to have done. He was, however, engaged upon the BBC's work, and was trying to do that work as quickly and efficiently as possible.

In the circumstances, the fault of Mr Rees is my judgment very small compared with that of the BBC - and indeed smaller than that of Mr & Mrs Orbach as occupiers.

(iii) With regard to Mr & Mrs Orbach, I have taken into account particularly that they were working in a "domestic" context, unlike the BBC. Nevertheless, they entrusted the lowering exercise to Mr Brown who failed to comply with the safety guidance he was purporting to follow and should have followed. The accident occurred, not because of any inherent negligence in the lowering operation, but on Mr & Mrs Orbach's part he was responsible for ensuring the reasonable safety of the BBC visitors which he failed to do. He was "in charge". It is relevant that Miss Thomas would have obeyed any instructions that Mr Brown might have given her, for example in respect of areas where the crew ought not go and even cordoning off.

In the circumstances, whilst not sharing the same burden as the BBC as employers, Mr & Mrs Orbach must bear a significant proportion of the liability.

193. In all of the circumstances, I consider the appropriate apportionment as between the defendants as follows:

BBC	65%
Mr & Mrs Orbach	25%
Mr Rees	10%

194. With regard to the proportion for Mr Rees, I find that the BBC are vicariously liable for this proportion: but that, for the reasons I have given in Paragraphs 139-142 above, the BBC are entitled to an indemnity from Mr Rees with regard to this liability.

His Honour Judge Gary Hickinbottom

22 June 2007