Appeal Ref: CA-2023-002207

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
ORDER OF VIKRAM SACHDEVA KC (SITTING AS A DEPUTY HIGH COURT JUDGE)
MADE ON 20th OCTOBER 2023
Claim No: QB-20210003247

B E T W E E N

MR DEMETRIOS KARPASITIS

Appellant

and

HERTFORDSHIRE COUNTY COUNCIL

Respondent

RESPONDENT'S SKELETON ARGUMENT

[References to the hearing bundle are in square brackets - prefixed by "p." or "pp." for the core bundle and by"A" or "B" for supplementary bundles. Authority references are in parentheses "(..)". "§" refers to paragraphs within the hearing bundle and the authorities]

1. This appeal concerns a cycling accident. On 22nd April 2020 the Appellant rode his bicycle into a hole in a grass verge. He fell from his bicycle and suffered an injury to his cervical spine. The verge was located between a footway and the A10 and so formed part of the highway. The Appellant claim involves 2 causes of action, a claim under section 41 of the Highways Act 1980 (HA 1980) against the Respondent in its capacity as the relevant highway authority and a claim in common law for breach of an alleged duty of care.

2. The evidence in this claim was heard on 14th, 15th and 16th March 2023. The parties provided written closing submissions [B321-B377] and made oral submissions on 23rd March [selected pages at B378-391]. At the judge's request, the parties provided further written submissions on 27th and 28th July [B392-B421]. Judgment was handed down on 20th October

[pp.84-144]. The Judge dismissed the claim. While he found that presence of the hole in the verge breached the statutory duty under section 41 to maintain the highway, he held that the Respondent had made out the statutory defence under section 58 of the HA 1980. He dismissed the common law claim on the basis that the Respondent had taken no positive act which gave rise to a duty of care.

3. The Appellant was given permission to appeal by Lord Justice Males on 28th February 2024 [pp.16-18]. There are 2 grounds: (i) that the judge was wrong to find that the section 58 defence was made out; and (ii) that he should have found that there was a common law duty of care. On 13th March 2024 the Respondent filed a Respondent's Notice in accordance with CPR 52.13(2)(b), inviting the Court of Appeal to uphold the order of the Judge for different and/or additional reasons [pp.19-30].

The Appellant's 1st ground of appeal: the section 58 defence

4. In determining that the Respondent had established its statutory defence under section 58 of the Highways Act 1980, the judge relied on the evidence of Mr Jeff Cooke, making a finding that he had carried out a competent inspection of the verge prior to the accident [judgment §136-139, p.111].

5. Mr Cooke was a highway inspector employed by Ringway. The Respondent had contracted with Ringway to carry out inspections, maintenance and repair of its highway network. Mr Cooke was responsible for the 6 monthly inspections of the footway and verge. The last inspection prior to the accident was on 13th February 2020 [A122]. There was an electronic record of that inspection in the trial bundle. It was in the same form as the previous inspection carried out 6 months earlier [A121], indicating that when Mr Cooke inspected on February 2020 there was no signficant change in the condition of the verge.

6. Mr Cooke did not give oral evidence. Prior to trial he had retired. The Respondent had taken a witness statement from him [A113-128], but he was unwilling to attend court to give evidence. A hearsay notice was served citing his retirement as the reason for his non-attendance [A129]. The Respondent chose not to rely on his statement. The Appellant then decided to put that statement into evidence under CPR 32.5(5). It is the consequence of that decision which the Appellant now seeks to appeal.

7. In his statement Mr Cooke gave evidence that he had examined the relevant section of the verge on 13th February 2020 and that the defect which caused the Appellant's injury was not present. He had been shown photographs of the hole taken after the accident and gave his opinion that, had he seen that defect during his February inspection, he would have reported it as a category 1 defect, a defect requiring urgent repair. Mr Cooke's evidence favoured and disadvantaged both parties; the phrase a 'curate's egg' was used. The evidence that he carried out the inspection in February 2020 helped establish the statutory defence under section 58, while his opinion that the hole was a category 1 defect supported the Appellant's case that the hole put the verge into a state of disrepair for the purposes of section 41.

8. At trial the Appellant's case was that GPS tracking data [A32] established that the Mr Cooke had not carried out the inspection and so this part of his evidence should be rejected as untrue. The same position is adopted in this appeal [Appellant's Skeleton (AS) §27, p.48]. The judge rejected that approach, applying the rule of evidence that a party cannot impugn its own witness. This is said to be an error of law. The judge also found that he was unable to place any weight on the GPS tracking data and so accepted Mr Cooke's evidence, that he had carried out the inspection, to be factually correct [judgment §136, p.111]. This factual finding is said to be made in error.

9. The Appellant asserts that he was required to put Mr Cooke's evidence in because of a change in the Respondent's case which placed him in an invidious position [SA §17-19, p.43]. This is not correct. It is necessary to set out the relevant circumstances in a little detail to rebut that assertion.

(a) Mr Cooke's statement is dated 10th June 2022. A hearsay notice was served on 24th February 2023 which gave his retirement as the reason for his non-attendance.

(b) In opening Counsel for the Appellant indicated to the judge that he objected to Mr Cooke's evidence being admitted as hearsay [Transcript (T) Day (D) 1 internal page 49, B33]. In light of that objection his evidence had not been included in the trial bundle. That objection was not withdrawn.

(c) On day 2 the Respondent called James Vine, Contract Manager at Ringway. His statement [A110-112] dealt primarily with the absence of any records showing that Ringway had filled the hole following the accident. He did not give an opinion about the status of the hole. Mr Vine was cross-examined on the basis that the hole was a category 1 defect. He rejected that suggestion, stating that in accordance with the Respondent's Defect Management Approach (DMA) it was a category 2 defect [TD 2 internal p.74-76, B73-B76].

(d) The Respondent then called Chris Allen-Smith, Head of Profession for Asset Management and Maintenance. He gave evidence about the maintenance regime. He had not considered the classification of the hole in his witness statement [A78-A109]. He was cross-examined on the basis that it was a category 1 defect, and that Mr Cooke would have recognised it as such. He rejected both propositions [TD 2 internal p.96-100, B90-B94].

(e) During a short adjournment Counsel for the Respondent indicated that he would not seek to rely on Mr Cooke's evidence. At this point the Appellant's position had not changed and the inclusion of that evidence was still opposed.

(f) The Appellant's Counsel then sought to cross-examine Mr Allen-Smith on Mr Cooke's witness statement to establish that he would have classified the hole as category 1 defect had he seen it [TD 2 internal p.146-147, B126-B127]. The Respondent objected, submitting that he could only do so if he put the statement in evidence pursuant to CPR 32.5(5) [TD 2 internal p.152-153, B132-B133]. The Appellant indicated that he would put only parts of the statement in. The Respondent made a further objection, submitting that if the Appellant wished to rely on Mr Cooke's statement, he had to rely on all of it. He could not cherry pick and seek to rely only on those parts favourable to his case. The Appellant then decided to put the whole of the statement in. The judge did not rule on the issue [TD 2 internal p.154-162, B134-B142].

(g) In his Skeleton the Appellant relies on the passage in the transcripts where his counsel submitted that when putting Mr Cooke's statement in evidence, he reserved the right to address the court on how much weight to attach to different parts of the statement. No ruling was sought on this issue, nor did the judge indicate that this was an appropriate

course. The Respondent did not agree to this approach. On the contrary, Counsel for the Respondent stated that while he could not object to the Appellant putting Mr Cooke's statement into evidence, he would make submissions on the effect of him choosing to rely upon it [TD 2 internal p.162, B142].

10. The transcript does not bear out the Appellant's procedural complaints.

(a) He had objected to the admission of Mr Cooke's evidence as hearsay. The Respondent's decision not to rely on that evidence acceded to that objection and put the Appellant in no different position than if the judge had ruled in favour of the objection.

(b) There was no change in the Respondent's evidential position. In chief, Mr Vine and Mr Allen-Smith did not give evidence about the correct classification of the hole. Their evidence that it was properly classified as a category 2 defect in accordance with the Respondent's DMA was elicited in cross-examination.

(c) Having put Mr Cooke's statement in the normal rules of evidence applied. There was no ruling or agreement otherwise. At all times the Respondent's position was that it is impermissible for the Appellant to rely on only those parts of the statement which favoured his case. Having adopted that approach it cannot now be suggested that there was any agreement to the Appellant putting the whole statement in but asking the court to disregard or find to be untrue those parts which did not support his case.

11. The Appellant chose to put Mr Cooke's statement in as hearsay evidence under CPR 32.5(5). As was made clear by the Court of Appel in *McPhilemy v Times Newspapers Ltd. and Others (No. 2)* 1 WLR 1732 and *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] WLR 3529, where a party puts a statement in under CPR 32.5(5) the maker of that statement becomes that party's witness and the normal evidential rules apply (*McPhilemy* §1736C).

12. It is a general evidential rule that a party cannot impugn its own witness. While it is entitled to call other evidence that may provide a different or inconsistent picture, it cannot generally go further and seek to show that the witness should not be believed on their oath (see *Ewer v Ambrose* (1825) 3 B. &C. 746 at p. 759 as cited in *McPhilemy* §1739 F). The

exception in common law was when a witness changed their evidence in the box to the surprise of the party calling them so that a previous inconsistent statement could be put to them. This common law exception was placed on a statutory footing by section 3 of the Criminal Procedure Act 1865, which was incorporated into the civil jurisdiction by section 6(3) of the Civil Evidence Act 1995.

13. The previous position envisaged a situation where the witness was called to give oral evidence. The position here, where a party puts in the written statement of a witness as hearsay, is distinct. The difficulty created by such written evidence was first considered by the Court of Appeal in *Anonima Petroli Italiana SPA and Neste Oy v Marlucidez Armadora SA "Filiatra Legacy"* [1991] 2 Lloyd's Rep 337. The plaintiffs sought to recover the value of oil which went missing during a shipment from Turkey to Italy. They put in the written statement of a Captain Bellucci, who had carried out tests when the oil was disembarked at a port in Italy. Over the course of the trial they sought to distance themselves ever further from his evidence, so that by closing they were submitting that he had not carried out the tests he said he had, a submission which the trial judge accepted when finding for the plaintiffs.

15. When considering the approach to be taken to Captain Bellucci's evidence the Court of Appeal identified the general evidential rule; a party cannot impugn the evidence of its own witness unless that witness is deemed to be hostile, although by reference to other evidence in the case they might submit that he was mistaken (*"Filiatra Legacy",* p.361, col 2). The position of the party was to be distinguished from that of the judge who had a discretion to make a finding that the witness's evidence was untrue if otherwise the remainder of the evidence would make no sense. This discretion would have to be exercised with great care and without causing injustice to either the parties or the witness.

> "It may perhaps be the case that there is a distinction between what is permissible for a party and what is within the powers of the judge. As to the latter, we recognise that in principle an adversarial system of civil procedure requires the judge to decide the issues placed before him, on the evidence given at the trial, so far as such a decision is necessary for a resolution of the dispute. It is not in general for the judge to raise issues which the parties themselves have chosen not to raise. Nevertheless, the object of the procedure is to achieve justice and we should be slow to hold that, if the judge were to conclude that the remainder of the evidence made no sense unless an item of unchallenged evidence was untrue, he would have no power to satisfy himself of the position, subject of course to every precaution necessary to avoid unfairness to the

> parties and to the witness himself. Whether such a power ought in a given situation to be exercised is a different matter altogether and, no doubt, the occasions when this would be proper would be rare indeed." (p.361)

16. In *McPhilemy*, the Court of Appeal considered the position where a party sought to rely on written hearsay evidence pursuant to CPR 32.5(5), parts of which it submitted at the outset were untrue, as was the position here. Brooke LJ held,

> "However, I know of no principle of the law of evidence by which a party may put in evidence a written statement of a witness knowing that his evidence conflicts to a substantial degree with the case he is seeking to place before the jury, on the basis that he will say straight away in the witness's absence that the jury should disbelieve as untrue a substantial part of that evidence." (1740B)

17. The same approach was adopted by the Court of Appeal in *Property Alliance Group* (§171-173), another case where an application to rely on only parts of a statement under CPR 32.5(5) was rejected.

18. There is no case precisely on point. The Appellant chose to adduce Mr Cooke's statement under CPR 32.5(5) knowing (i) that all of the statement would be in evidence (ii) that his evidence about the inspection on 13th February substantially conflicted with his case and (iii) a submission would be made that the inspection had not been conducted which would mean that the record made at the time had been falsified and that part of his evidence was untrue. In these circumstances, and relying on the authorities, 2 propositions apply. First, having put Mr Cooke's witness statement into evidence the Appellant is not now in a position to impugn his credibility. Second, while the judge had a discretion to find that parts of that statement were untrue, he had to be very cautious about doing so, particularly in Mr Cooke's absence. The judge adopted this 2-stage approach.

19. First, relying on the judgment in *Property Alliance Group*, he held that the Appellant was not in a position to rely on the GPS evidence to impugn Mr Cooke's evidence [§136, p.111]. This was not an error of law but in accordance with the authorities.

20. Second, he made his own evaluation of Mr Cooke's evidence, giving different weight to various parts of his statement [§71, p.96]. When making his evaluation he took into

account (i) that Mr Cooke had not given oral evidence and had provided an unconvincing explanation for his decision not to attend [§72, p.96] (ii) that there was a contemporaneous note of the inspection on 13th February which did not identify the hole [§71, §73 & §138 - pp.96-97 & p.111] and (iii) that the Respondent had notified the Appellant that the GPS data was not reliable and so, in the absence of expert evidence, little weight could be attributed to it [§71 p.96 & §136 p.111].

21. The Appellant seeks to appeal that factual finding. To do so he needs to pass two thresholds. First, he must show that either it was unsupported by the evidence or was a finding which no reasonable judge could have reached (*Haringey LBC v Ahmed & Ahmed* [2017] EWCA Civ 1861 §31). Second, he must show that despite Mr Cooke being his witness and the rule against impugning his testimony, a finding against him is justified and will not give rise to unfairness, including to Mr Cooke, because this is one of the rare cases where the circumstances are such that this kind of judicial intervention is required; the test identified in *The Filiatra Legacy* as set out above. As Brooke LJ observed in *McPhilimey*, citing the speech of Lord Wilberforce in *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, it is not for the trial judge to embark on an independent inquiry, but rather to apply the rules of evidence to the parties' respective cases (§1740E-G).

22. The Appellant relies on the GPS tracking data [A32] to pass these thresholds. The Respondent does not accept the accuracy of this evidence, indicating this to be the position when it disclosed the document [A209]. It is a questionable document unsupported by any witness or expert evidence. The judge properly rejected the cogency of that evidence. His decision to do so was within the ambit of his reasonable discretion and recognised the care he had to take if he were to find Mr Cooke's evidence to be untrue. There was no error in his approach.

23. In his Skeleton the Appellant raises a number of specific criticisms. These are addressed in turn:

(a) Reliance is placed on *Chapman v Mid and South Sussex NHS Foundation Trust* [2023] EWHC 1290 (KB) [SA§19, p.43]. This does not assist. It would appear from that judgment that the whole statement was put in evidence but only parts were relied upon.

This was done by agreement and there was no attempt by the party relying on the witness statement to impeach the credibility of the maker.

(b) Reliance is placed on *Towry EJ Ltd v Bennett and others* [2012] EWHC 224 (QB) [SA §27(2), p.49]. This authority deals with the status of oral evidence given following a successful application under CPR 33.4, not the admission of written evidence under 32.5(5). The effect of the two provisions is quite distinct. As recognised by Cox J., it was the party cross-examining the hearsay witnesses who was in effect calling them. She held that in those circumstances the party who had put in the hearsay statements was not bound by the evidence adduced in cross-examination (§24-25). This is very different to the position in this case.

(c) The Appellant cites *A Local Authority v K, D and L* [2005] EWHC 144 (Fam) at paragraph 28 [SA §27(3), p.50]. This deals with a very different proposition, in the criminal jurisdiction what would be referred to as the Lucas direction; that because a party has lied about one aspect of her evidence does not mean that it is all untrue. It is not relevant to the issues in this appeal.

(d) Similarly, *Carmarthenshire County Council v Y and another (A and another intervening)* [2017] 4 WLR 126 does not assist [SA §27(5), p.50]. This was a family case where serious allegations were found to be unproven when the complainant did not give oral evidence. It is not possible to translate the comments in that case about the importance of oral evidence to the circumstances that exist here.

(e) There is no inconsistency between paragraphs 109 and 133 of the judgment [SA §27(5), p.50]. Paragraph 109 forms part of the judge's reasoning that no hole was present on 13th February. He finds that he cannot rely on Mr Cooke's evidence to support a finding that the hole was not present. To make that finding he instead relied on the expert evidence and the chronology [§108, p.106]. Having made that finding, he then went on to consider whether an inspection had been performed. Paragraph 133 [p.110] does no more than state that his finding that there was no hole in the verge on 13th February is consistent with Mr Cooke's evidence that there was no hole.

(f) There is criticism of the judge's findings about the evidence of Mr Allen-Smith [SA §27(8), p.52]. This is irrelevant to the section 58 issues. Mr Allen-Smith did not give evidence as to whether inspection on 13th February took place or not.

24. The Appellant also relies on the delay in handing down judgment in support of his challenge to the judge's findings on section 58 [SA §25, p.47]. The trial ended on 23rd March and judgment was handed down on 20th October, just under 7 months later. Judgment should have been provided within 3 months. There was a 4-month delay. Nonetheless, it did not affect or undermine the judge's factual findings in any meaningful way. Mr Cooke did not give oral evidence. His witness statement was admitted into evidence. The Judge's assessment of his evidence will not have been prejudiced by the passage of time.

25. The authorities make plain that while delay is always to be deprecated it will not result in the trial judge's findings being set aside unless the judgment contains errors which are or may be attributable to the delay. In *Cobham v Frett* [2001] 1 WLR 1775 Lord Scott held that, "*if excessive delay is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay*" [§1783H-1784A]. The expectation was that an appellant would be able to identify such errors. None are identified here.

26. The Appellant relies on the appellate court's comments in both *Goose v Wilson Sandford and Co (No. 1)* [1998] T.L.R. 85, CA (§113) and *Bank St. Petersburg PJSC and another v Arkhangelsky and others* [2020] 4 WLR 55 (§82) that delay handicaps a judge when considering the totality of the evidence [SA §26, pp.47-8]. The position in this appeal is distinguishable. In those cases, the court was referring to factual findings in respect of complex and interdependent evidence from witnesses who had given oral testimony. Here the factual focus of the appeal is narrow, did Mr Cooke carry out the inspection of the relevant part of the highway as he said he did on 13th February 2020. The judge's finding which is appealed depended on his assessment of Mr Cooke's written evidence, not on any interrelated oral testimony. The manner in which he approached that assessment, and his findings, cannot be shown to be affected by the delay. The importance of identifying a material effect of the delay, which will only normally arise in cases where oral evidence was called, was emphasised by Arden LJ in *Bond v Dunster Properties* [2011] EWCA Civ 455 [§7].

27. It is also suggested that in accepting Mr Cooke's evidence the judge erred because consequent upon the delay he forgot the basis on which it was admitted [SA §26, pp.47-8]. This is not correct. For the reasons set out above, the judge correctly identified the status of Mr Cooke's evidence.

The Appellant's 2nd ground of appeal: common law negligence

28. The judge's summary of the legal position by which a highway authority could owe a common law duty of care was correct [§140, p.111]. Non-feasance, or an omission, will not give rise to a common law duty, only a positive act, misfeasance, which creates the risk that materialises. He found that the absence of an 'End' sign was an omission, not a positive act [§145, p.112]. The Appellant appeals that decision and argues in the alternative the absence of an 'End' sign created a trap and so gave rise to a duty of care [SA §37, p.56]. This is a misstatement of the law.

29. The legal position is clearly set out in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, principally in the speech of Lord Hoffman. While a highway authority has a statutory duty to repair the highway (as currently enacted by the HA 1980) it is not under a common law duty to act to protect road users and so is not liable for an omission or non-feasance. Its statutory position does not give a highway authority any special status. Like any other person, it would be liable for positive acts which created a danger, misfeasance, even where those positive steps were taken pursuant to a statutory power [§13 & §38]. The facts of *Gorringe* involved an allegation that the defendant had failed to paint a 'Slow' sign on the road. Lord Hoffman held that a failure to paint a sign was on the road was an omission or non-feasance which did not give rise to a liability, even if such steps might protect and so confer a benefit upon road users [§17 & §35].

30. This legal approach was confirmed by the Court of Appeal in *Yetkin v London Borough of Newham* [2010] EWCA Civ 776 (§17 & §25). Smith LJ held that on the facts of that case the danger that had caused the claimant's accident, the planting of shrubs which obscured the view of a pedestrian using the crossing, was a positive act by the highway authority. Once a positive act was established there was no need to go further and consider whether the danger created by the bushes amounted to a trap or enticement (§33).

31. Relying on paragraph 102 of the speech of Lord Browne in *Gorringe*, the Appellant seeks to distinguish a positive act and a trap and submits that the judge failed to consider whether the absence of an 'End' sign had created a trap [SA §36&37, p56]. There is no such distinction in the authorities. When the appellate courts refer to a trap, they are simply identifying a positive act that creates a danger for a road user. The Appellant cites only part of the relevant passage of Lord Browne's judgment in *Gorringe* [SA §36, p.56]. In the same paragraph he went onto describe the examples of a trap he had given as "*misfeasance of the kind traditionally attracting tortious liability*" (§102).

32. The only question for the judge was whether a positive act by the Respondent created the danger which caused the Appellant's accident. It is accepted that the Respondent was responsible for the construction of the shared facility to the south of the Paul Cully bridge. The Appellant's case was that to construct this shared facility, which ended in a footway, without that change being marked by an 'End' sign, constituted a positive act. The factual basis of his complaint is the failure to erect a sign.

33. The judge was right to reject the proposition that this failure could be construed as a positive act. As in *Gorringe*, where the complaint was a failure to paint 'Slow' on the road, the decision not to erect a sign is an omission. It is a failure to act and to confer a benefit to the road user, but this does not give rise to a private law duty (see Lord Hoffmann in *Gorringe* §35c). The factual circumstances here are clearly different to those contemplated by Lord Browne (i) the creation of a one-way scheme without erecting 'No-entry' signs and (ii) the painting of road markers which indicate it is safe to overtake when it is not (§102). These are positive acts which of themselves create a danger. Similarly, in *Yetkin*, the requirement that pedestrians use a crossing which obscured their view of oncoming traffic involved a positive act, the planting of a hedge, which created a danger.

34. The Appellant's position is that, as with the one-way street, the change of use in combination with the absence of a sign created a danger. The situation is not comparable. When designating a road as one-way the highway authority requires traffic to drive in only one direction. By controlling the direction in which traffic flows an obvious danger is created for a motorist driving in the opposite direction, so that no entry signs are mandatory

and part of the one-way system. By comparison signs to mark the end of a cycle way are not mandatory nor do they form an integral part of the layout.

35. The judge identified (i) that pursuant to rule 13 of the Highway Code [A33] all routes shared by cyclists and pedestrians must be signed so that the absence of signage established that footway, as opposed to the shared facility, was for pedestrian use only, and (ii) that the relevant guidance, Department of Transport Local Transport Note 02/08 [A4-A8], indicated that the use of 'End' signs was discretionary and that they were rarely required [§144, p.112]. If 'End' signs were not mandatory or integral to the layout of the shared facility their absence is properly characterised as an omission rather than a positive act which created a danger on the highway. The judge did not err when finding that the there was no common law duty of care.

36. Dr Davis's evidence was that the signage should have been clearer, but he accepted that the use of 'End' signs was discretionary [TD3 internal p.202, B307]. Given the guidance discouraged the use of such signs the decision not to erect one was reasonable. Were the Court to find that there was a positive act which gave rise to a duty the judge was correct to find that the decision not to erect an 'End' sign was not negligent [§143, p.112].

Respondent's 1st ground: expert evidence

37. The parties were given permission to rely upon opinion evidence from cycling experts, Dr Davis for the Appellant and Mr Franklin for the Respondent. In its Skeleton Argument the Respondent identified concerns about the admissibility of such opinion evidence [§7.11, B26-7]. In evidence Dr Davis expressed an opinion on the Appellant's actions [TD3 internal p.192-193, B297-B298]. The Respondent did not call Mr Franklin, submitting that it was for the court to determine what the normal cyclist would do. The judge rejected that argument. He held that Dr Davis did have specialised knowledge and adopted his view that the Appellant was behaving "*as a proficient and law-abiding cyclist"* in the lead up to this accident, particularly when riding on the grass verge to overtake the jogger [§90&91, p.104]. This underpinned the judge's subsequent findings (i) that riding on the verge constituted a normal use of the highway for the purposes of section 41 of the HA 1980 [§121, p.108] and (ii) that it was not unreasonable for the Appellant to ride on the verge when considering the allegations of contributory negligence [§148, p.113].

38. In response to questions in cross-examination, Dr Davis confirmed that his evidence was given on the basis of his experience as a cyclist [TD3 internal p.194-196, B299-B301]. While he may be a very experienced cyclist, this does not give him more specialised knowledge or expertise than any other adult cyclist.

39. In *Kennedy v Cordia (Services) LLP* [2016] 1 WLR 597, when considering the admissibility of expert opinion evidence, Lord Reed and Lord Hodge cited with approval part of the judgment of King CJ in *R v Bonython (1984) 38 SASR 45*, which identifies the requirement that the subject matter of such evidence is (i) outside the normal experience of the tribunal and (ii) based on a reliable body of knowledge.

> "This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court." (§41)

40. The judge did not require expert opinion about what constitutes reasonable behaviour by a cyclist. Cycling is an everyday occurrence, part of normal experience. A judge can determine for him or herself what the reasonable cyclist would do without recourse to third party opinion. In *Liddell v Middleton* [1996] PIQR P36 the Court of Appeal held that expert opinion evidence about what the reasonable motorist ought to have done was inadmissible (§P42-43). This applies equally to cyclists.

<u>Respondent's 2nd ground of appeal: section 41</u>

41. The judge was wrong to find that the presence of the hole meant that the relevant part of the grass verge was in a state of disrepair for the purposes of section 41 of the HA 1980.

42. The correct statutory test for repair of the highway is that set out by Diplock LJ in *Burnside v Emmerson* [1968] 1 WLR 140, "*to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year*

without danger caused by its physical condition" (§1497A), as affirmed by Lord Hoffmann in *Goodes v East Sussex County Council* [2000] 1 WLR 1490 (§1366B), who identified that this was a question for the tribunal.

43. The judge initially correctly directed himself [§17, p.88 & §22-29, pp.88-9], but when it came to considering section 41, he applied a different test to determine whether the verge was dangerous. Rather than identifying whether cycling on the verge constituted the ordinary traffic of the neighbourhood he instead asked whether it was foreseeable that this might occur, "*I find that riding on the grass verge is capable of constituting a normal use of the grass verge. Although not common, and not the primary purpose of the grass verge, it is foreseeable that pedestrians and cyclists may use grass verges for passage*" [§121, p.108]. He also held (i) that it was foreseeable that pedestrians and/or cyclists might chose to go on to the verge, "*even though the spot involves riding up a small bank of 300mm and that the particular spot was proximate to a traffic sign*" [§123(ii), p.108]; and (ii) there was a "*real risk*" that a pedestrian using the footway might step into the hole or that cyclist might cycle into it from the footway [§123(v), p.109]. A 'real risk' is another way of identifying foreseeability. By applying a test of foreseeability, the judge made an error of law.

44. In determining that it was foreseeable that a cyclist might ride on the verge the judge noted the proximity of the footway and the accepted evidence that cyclists used the footway, albeit infrequently [§123((i) & (iii), pp.108-9]. This illustrates the error in the judge's approach. The proximity of the footway to the verge does not establish that a cyclist riding on it constitutes normal use. On the contrary, first instance authorities make it clear that the verge, although part of the highway, is of a different character and so what would constitute ordinary use of the verge is very different. He also appears to have relied on Dr Davis's inadmissible opinion evidence that when riding on the verge the Appellant was behaving as a proficient and law-abiding cyclist.

45. In *Kind v Newcastle-Upon-Tyne Council* [2001] EWHC Admin 616 Scott Baker J. rejected that submission that the verge should be suitable for pedestrians, cyclists and horse riders which would put a gloss on the words of Diplock LJ so that this test included the words, "*passable across the length and breadth of the highway or ordinary traffic*". Distinguishing between the road and verge he held,

> "There is in my judgment no inconsistency between the finding that Prestwick Carr is in a reasonable state of repair to serve the ordinary traffic using it, and the finding that the verges are not suitable for all traffic to pass along. The mere presence of verges, because they form part of the highway, does not require the highway authority as part of its maintenance obligation to extend the metal carriageway over them."

Similarly, in *King Lifting v Oxfordshire County Council* [2016] EWHC 1767 (QB) HHJ Reddihough, sitting as a Judge of the High Court held, "*... it is clear that very different standards apply to a verge which is part of a highway as opposed to the carriageway itself*" (§67).

46. The evidence from Mr Allen-Smith was that the verge's function was to separate the A10 from the footway and so fast moving traffic from pedestrians and cyclists [TD2 internal p.140, B120]. It was not intended to be used as a method of passage along the highway. As can be seen from the photographs, there were signs located in it and trees planted along its length [A49]. The use of the verge by the Appellant, when he left the footway to overtake a jogger, while foreseeable, cannot be properly characterised as either normal use or ordinary traffic.

47. A requirement to repair verges such so as to make them safe for use by pedestrians and cyclists would involve a change in their character and place a disproportionate burden on highway authorities. Citing the judgment of Steyn LJ in *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR the judge recognised that the test of dangerousness should not be applied so that unreasonably high standards were imposed on highway authorities [judgment §25, p.89]. He did not take this requirement into account when determining that the hole was dangerous. This was a second error in his application of the legal test.

48. The judge appears to have recognised the difficulty that would be imposed upon the Respondent by requiring it to repair verges so that they were safe for pedestrians and cyclists by making a finding that while the hole constituted a danger, it did not require urgent repair [§123 & §123(v), pp.108-9]. This is a further legal error. If there is a defect in the highway which constitutes a danger for the purposes of section 41, it will require urgent repair. If this were not the case a highway authority would be able to delay repairing dangerous defects exposing members of the public to risk without legal liability.

49. This error appears to have arisen because the judge equated a decision to repair with the defect being dangerous [§115, p.107]. This is again a misstatement of the test. Simply because a highway authority determines that it will carry out repairs does not mean that the defect presents a danger to ordinary users of the highway. Highway authorities carry out maintenance work for a number of reasons other than to repair dangerous defects. That a repair has taken place is not evidence that the defect was dangerous (per Steyn LJ in *Mills v Barnsley* §P294).

50. The judge appears to have fallen into this error because he misunderstood the evidence in relation to the Respondent's DMA [A9-A28]. Evidence was given on this topic by Mr Allen-Smith [statement at A78-A109] and the Respondent's highway expert, Mr Hopwood [report at A168-A171; second joint statement at A200-A203; oral evidence B234-B254]. The DMA accords with national standards and distinguishes between category 1 defects, which require prompt repair because they present an immediate or imminent risk and category 2 defects which will require repair as part of a rolling programme of works. The Respondent does not classify defects in the verge to be category 1 because it does not consider they present an immediate or imminent risk as it is not expected that verges will be used as a thoroughfare or subject to any regular use. This is in accordance with national standards.

51. In making this classification the Respondent took into account the usage to which the verge would be put. This is because it applies the test identified by Diplock LJ in *Burnside v Emmerson* when determining what is dangerous and how best to use its resources. It was the failure to consider that factor which led the judge into error.

52. If the judge had applied the correct test, he would have found that the hole did not constitute disrepair of the purposes of section 41 because the verge, while part of the highway, is distinct from a road, pavement, shared facility and footway. Its purpose was to separate those using the footway from traffic on the A10, not to be used as a pathway. There is no expectation that it will be the subject of ordinary traffic, either by pedestrians or cyclists. If highway authorities were to repair verges so that they did not present a danger to pedestrians and cyclists, this would place a disproportionate burden on their scarce resources. Such a requirement would require the highway authority to avoid the same hazards which it is required to guard against when maintaining the road or pavement. If not, a new set of

criteria would have to be devised to identify when a defect in the verge became dangerous as opposed to a defect in a pavement or footway.

Respondent's 3rd ground of appeal: scope of any common law duty of care

53. If the appeal against the judge's finding that that no common law duty of care was owed succeeds, the scope of the duty will not have encompassed protecting the Appellant against dangers in the verge.

54. The positive act complained of was the absence of an 'End' sign so that the Appellant continued to cycle on the footway, although it was only for pedestrian use and was much narrower than the shared facility. If this is a positive act, the duty which it engenders is limited to the danger created by that act. It cannot be a duty in respect of a different danger. The motorist who drives the wrong way down a one-way street runs the risk of a collision with an oncoming vehicle, as does the motorist who overtakes when it is not safe to do so, while the claimant in *Yetkin* ran the risk of being hit while crossing by a vehicle she could not see. In each case the risk that materialised arose directly from a danger created by a positive act.

55. Here the Appellant was injured because he chose to ride on the verge and cycled into a hole. He was not at risk because he was cycling on a narrow footway. If his injury had occurred in a collision on that footway, it would be a danger which arose from the Respondent's positive act, and so within the scope of any resultant duty. It did not. The risk he ran was of an injury because the verge was not in the same condition as the footway. This potential danger was distinct and did not arise from the failure to erect an 'End' sign but from the Appellant's choice.

56. Alternatively, in common law there is no duty to take measures to protect individuals against activities which involve an obvious risk as explained by Lord Hoffmann in *Tomlinson v Congleton Borough Council and another* [2004] 1 AC 46 (§44-46). By deciding to ride on the verge the Appellant accepted the risk that he would have to negotiate undulations, roots, holes and other hazards in the ground ahead of him. In evidence he acknowledged the risk by emphasising that he was riding a mountain bike rather than a normal bike and so was capable of negotiating difficult terrain [A64-A65]. The situation is no different to one where a cyclist

decides that he will ride along the verge because he finds it more fun or challenging than keeping to the path. In those circumstances the cyclist would not be able to complain if injured when riding into a hole. By cycling up onto the verge the Appellant exposed himself to a self-evident risk against which the Respondent was not required to protect him.

Respondent's 4th ground of appeal: contributory negligence

57. The judge made a finding of 33% contributory negligence [judgment §153-154, pp.113-114]. In making this apportionment he held that, "*I have already found in this case that it was foreseeable that cyclists might try to cycle on the grass verge in this case, and I further hold that it might not be unreasonable to do so, and indeed it was reasonable to do so in this case*" [§149, p.113]. This finding appears to be based on Dr Davis' evidence. If the Court holds that this evidence is inadmissible it will have to revisit this question before making an apportionment.

58. It was not reasonable for the Appellant to cycle on the verge. This was not the purpose of the verge. He was only a short distance from the shared facility, on Dr Davis's estimation in evidence some 30 seconds [TD3 internal p.205, B310], and could then have overtaken the jogger without riding on the verge. He could not, on his evidence, because of the grass, see hazards ahead of him in the verge.

59. If the decision to ride on the verge was unreasonable this is a relevant factor which the judge did not take into account when arriving at his apportionment. He made a finding of 33% on the basis that the Appellant did not take enough care while riding on the verge. A higher apportionment is merited if he was also unreasonable in choosing to do so. The Respondent's submission at trial was that 50:50 was appropriate.

Adam Weitzman KC
James Weston

7BR
7 Bedford Row, London WC1R 4BS
9th April 2024

Appeal Ref: CA-2023-002207

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE KING'S BENCH DIVISION

ORDER OF VIKRAM SACHDEVA KC (SITTING AS A DEPUTY HIGH COURT JUDGE)

MADE ON 20th OCTOBER 2023

Claim No: QB-20210003247

B E T W E E N

MR DEMETRIOS KARPASITIS

Appellant

and

HERTFORDSHIRE COUNTY COUNCIL

Respondent

RESPONDENT'S SKELETON ARGUMENT