Neutral Citation Number: [2024] EWHC 2830 (KB)

Case No: KA-2023-BRS-000030

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
ON APPEAL FROM THE TRURO COUNTY COURT (HIS HONOUR JUDGE CARR)
Claim number H23YJ582

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th November 2024

Before :

MR JUSTICE LINDEN

- -

Between :

DAVID ROBERTSON	**Appellant/ Claimant**
- and -	
CORNWALL COUNCIL	**Respondent/ Defendant**

- -
- -

John Platts Mills for the Claimants
Darren Lewis for the Defendants

Hearing date: 15 October 2024

- -

Mr Justice Linden:

Introduction

1. This is an appeal from an Order dated 4 October 2023 which was made by His Honour Judge Carr sitting in the Truro County Court. In short, the Judge dismissed the Claimant's claim for damages for personal injury sustained as a result of a bicycle accident which occurred on 20 May 2018.

2. Permission to appeal was granted on the papers on 7 May 2024 by Mrs Justice Collins Rice.

Outline of the circumstances of the accident

3. In outline, the accident occurred when the Claimant and his wife, who were both keen and experienced cyclists, were cycling along the A3037 which is a relatively busy road on the outskirts of Redruth in Cornwall. As the A3037 approaches the Tolgus roundabout from the Avers roundabout there is a cycleway off to the left. At the time of the accident the cycleway was not flush with the surface of the road and there was, instead, a kerb over which bicycles had to pass in order to join the cycleway from the road.

4. Mrs Robertson was ahead of the Claimant. She moved from the road to the cycleway and, as she went over the kerb, wobbled and almost lost control of her bicycle before managing to right herself. Her husband did not see the wobble. His last recollection of the incident is that he was lining his bicycle up to cross from the road onto the cycleway. Mrs Robertson heard the sound of him falling and looked back to see him unconscious on the cycleway having fallen and sustained a significant head injury.

The Claimant's case at trial

5. Damages were agreed in the sum of £50,000 subject to liability.

6. The Claimant's case at trial was ultimately based on misfeasance in that the raised kerb was a hazard or trap which had been created in breach of a non-delegable duty owed by the Defendant: see e.g. *Yetkin v Newham LBC* [2011] 2 WLR 1073 at [17], [25] and [33] and *Gorringe v Calderdale MBC* [2004] 1 WLR 1057 at [13] and [43]. There was no dispute as to the existence of this duty, nor as to it being non-delegable.

7. As far as the issue of dangerousness - whether the kerb was a hazard or trap - was concerned, it was not in dispute that the cycleway had previously been flush to the road surface. However, resurfacing works had been carried out on the road and the cycle path but by different contractors engaged by Cormac Solutions Limited ("Cormac"). This had resulted in the kerb stones, which had been present throughout, standing proud of the road surface. The works on the road had been completed in October 2017 and the works on the cycle path had been completed in December 2017, but the kerb had been left as it was.

8. Mr Platt-Mills relied on various sources of evidence that the kerb was considered to be dangerous. In particular, Mr Adrian Roberts, a Project Manager (Road Safety) at Cormac with responsibility for accident investigation and prevention, and the leader of the Road Safety Audit team, gave evidence that a Road Safety Audit had been carried out following the works *"with the sole purpose of identifying any features that may have had an adverse bearing on the safety of users of the highway"*. This included two visits to the relevant location on 13 February 2018 (in daylight and then in darkness) by Mr Roberts

and a colleague. They considered that the kerb posed a potential danger and they took photographs of the location. Mr Roberts also cycled the scheme on 22 February 2018 and this did not alter his view. Mr Roberts said this at [18]-[20] of his witness statement:

> *"18. As part of the audit, we assessed the facilities for cyclists. It was noted that there were a number of locations where dropped kerbs, providing cyclists access from the carriageway to the cycle lane and vice versa, were not completely flush with the carriageway. In our view, this meant that there was a possibility that a cycle wheel could slip, and a cyclist fall off. We noted that this could particularly happen when a cyclist went from the carriageway to a shared-use facility.*
>
> *19. This risk would be affected by a number of factors such as the speed and angle of approach, the height of the kerb, the type of bicycle wheel and whether the surface was dry or wet, amongst others.*
>
> *20. ....The Tolgus Place example was listed first in the relevant paragraph of the audit report."*

9. The notes of the audit also identified the site as being one of *"several places [where] the dropped kerbs for cycle access to/from shared use are not flush and therefore hazardous"*. The formal audit report of 21 March 2018 was to like effect and it was recommended that steps were taken to ensure that *"all dropped kerbs for cycle access/egress were [made] suitable for cyclists using them at an angle"*.

10. On 30 April 2018 the Defendant agreed the need to undertake the work to make the entrance to the cycleway flush to the surface of the road. However, it was not carried out until mid-August 2018 and therefore approximately 3 months after the accident.

11. Mr Platts-Mills also relied on the evidence of a police officer, Sargeant Jessica Gallien, who attended shortly after the accident on 20 May 2018. She said that she did not take any measurements of the raised kerb but her view was that it represented a danger to cyclists *"especially due to the combination of cyclists having to mount the kerb onto the cycle path when travelling downhill"*.

12. And he relied on the evidence of Mr David Seville, a Principal Project Manager at Cormac who accepted in cross examination - when it was put to him that cycleways should be designed so that they were absolutely flush - that cycle ways need to be designed so that the person cycling has the easiest access.

13. However, no measurements of the gap or drop between the cycleway and the road had been carried out at any point on the kerb. Rather, the Judge was asked to examine photographs of the junction between the road and the cycleway. Nor was there any objective evidence – by way, for example, of a recognised standard - of what gap between road and cycleway (if any) would generally be regarded as amounting to a hazard for bicycles. It was also clear from the photographs that the extent to which the kerb stood proud of the road was not uniform. At each of the extremities it appeared that there was a significant gap but the gap gradually narrowed from both ends of the kerb towards the middle. The Judge found that, whilst not flush, the gap towards the middle was *"nowhere near"* as severe as it was at either end. In the course of submissions

the Judge observed that on the photographs the kerb looked *"fairly close to flush"* towards the middle of the junction.

14. The basis on which Mr Platts-Mills submitted that the Claimant had made out his case on causation was that, as the Judge found:

i) The kerb was raised and the Defendant's own evidence was that this could cause a bicycle wheel to slip if, as was likely given the traffic, the cyclist joined the cycleway at an acute angle rather than swinging out into the road so as to be able to cross the kerb at an angle closer to 90 degrees.

ii) When Mrs Robertson crossed the kerb it had caused her to wobble and almost lose control of her bicycle.

iii) The cycleway was approached down a hill and the Claimant was braking given that he was approaching a potentially dangerous roundabout. His speed was in the order of 10-12 miles per hour, so he was not speeding. And he was lining up his bike to cross onto the cycleway when the accident happened.

iv) According to a diagram which Mrs Robertson drew, the Claimant and his bike were on the cycleway when she turned around having heard him fall. His whole body was on the cycleway, and had therefore crossed the kerb, and the bike was further into the cycleway than he was.

v) There was *"not a shred of evidence of contributory negligence"* on the part of the Claimant.

15. Mr Platts-Mills contended that although there was no witness who saw the Claimant fall, the court could be satisfied to the requisite standard that the kerb had caused him to do so. These factors, and the absence of any other explanation, inevitably led to the conclusion that the probable cause of the accident was that, like his wife, the Claimant had hit the raised kerb. But he had been unseated as a result.

The Defendant's case at trial

16. The Defendant denied that the kerb was dangerous, and disputed causation. Mr Lewis submitted that the Claimant was speculating as to the cause of his fall. Moreover, he had produced no measurements as to the difference in height between the cycleway and the road surface. The photographs showed a relatively unremarkable kerb and a small height difference which was clearly capable of being traversed by a cyclist who was paying attention. The premise of the Claimant's case, that the transition from a road to a cycleway must always be entirely flush, was flawed and/or had not been proved by evidence.

17. Mr Lewis set out a checklist of the matters which, he said, the Judge should consider and who had the burden of proof in relation to them. These included, firstly, "Mechanism" and, secondly, "Dangerousness" in respect of both of which issues the Claimant had the burden. Mr Lewis submitted that the Judge had to determine the first of these issues before moving on to determine the second.

18. Mr Lewis submitted, by reference to *James & Thomas v Preseli Pembrokeshire District Council* (1993) PIQR P114 that *"C has to prove the specific index defect on a balance of probabilities rather than a general criticism of the whole*

kerb". He went on to submit that the court should not apply too high a standard, the danger must be such as the highway authority may reasonably be expected to guard against and there must be a reasonable balance between private and public interest in these matters. It was not appropriate to apply *"the standards of a bowling green"* (*Littler v Liverpool Corporation* [1968] 2 All ER 343). And he relied on *Walsh v Kirklees MBC* [2019] EWHC 492 (QB) in which Dingemans J (as he then was) upheld the first instance judge's finding that there was not enough reliable evidence of the dimensions or condition of a pothole to say that it was more likely than not that it presented a real source of danger.

The Judgment

19. The Judge noted that the Claimant's case was that he could be satisfied to the requisite standard that the raised curb stone caused him to fall, as there was no other explanation. However, at [10] he said that there was a number of problems with this argument.

> *"....First and most obvious can be seen at photograph at page 102. Although there is a drop along the length of the kerb stone, interpreting the photograph as best I can, it is not a consistent drop. Interpreting photographs can be affected by the angle of the camera and surrounding topography, and care has to be taken, but it is all we have in this case, as no measurements or further photographs were taken. It is apparent to me that whilst the kerb is quite high towards the left-hand side of the photograph, as we move along towards the end the height clearly varies. At one point towards the middle, whilst not flush, the drop is nowhere near as severe as it is at each end. The claimant's case is that it does not matter*

> *that Mr Robertson cannot say which kerb stone he has crossed as the whole line is dangerous, that is a difficult argument to advance when the potential hazard is not the same along its entire length. There are many reasons why a cyclist, even one of considerable experience, can fall. There can be momentary inattention. There can be an obstacle of substances on the roadway immediately before the kerbs. There can be a reaction to a car passing too close or at too greater speed. There can be a sudden noise that caused the cyclist to be startled. The court cannot simply say that as there was an area of raised kerb stones, some raised quite a bit and some by much less that on the balance of probabilities the accident was caused by the kerb stone. This is a consequence of Mr Robertson's traumatic amnesia, and the fact that there was no direct witness to the accident."*

20. The Judge went on, at [11], to say that none of the potentially supporting evidence filled what he described as *"the gap in the evidence".* The evidence of Mrs Robertson's wobble could have been the result of her crossing at a different and higher part of the curb than her husband. Moreover, there was no evidence of any other accidents involving cyclists at this point albeit there was no positive evidence that there had been no other accidents.

21. At [12] the Judge then said:

> *"It follows therefore that the claimant has failed on the balance of probabilities to establish the mechanics of the accident. That would in this case be sufficient to dismiss the claim. Even were I wrong about that, the lack of measurements and the fact the kerb is lower in some places than others would in itself present difficulties for the claimant."*

22. He went on, at [13], to accept that everyone who gave evidence described the kerb as originally left after the resurfacing as either dangerous, hazardous or unsafe. And he said that he had had the same reaction when he saw the photographs. At [14] he then said this:

> *"However, even were the claimant able to establish the accident was caused by the kerb stone, and for the reasons I have already indicated he cannot, the question of dangerousness is not as straight forward as it was advanced on behalf of the claimant. I could not find the kerb stones as a whole were dangerous, given the drop in height towards the middle. I would therefore need to make a finding as to where Mr Robertson crossed the kerb in order to decide whether the point was dangerous. This would not have been an easy task without proper measurements and plans. It is a task that cannot even be begun due to the gap in the evidence."*

23. He therefore dismissed the Claim, adding at [17] that there was not a shred of evidence of contributory negligence on the part of the Claimant.

The appeal

The Claimant's arguments

24. The Grounds of Appeal are pleaded as follows:

> *"1. The lower court erred in law and was wrong not to conclude that the accident was caused as alleged by a hazard on the highway.*
>
> *2. The lower court erred in law and was wrong not to conclude that the accident was caused by a trap on the highway created by the Respondent.*

3. To the extent that the lower court did not conclude that the kerb running across the entrance to the cycle path constituted a hazard it was wrong to do so."

25. Mr Platts-Mills' skeleton argument put the case on the basis that the Judge's reasons for his decision were inadequate. He referred to *English v Emery Reinbold and Strick Ltd* [2002] 1 WLR 2409 and submitted that this is a case in which the Claimant does not know why, on the facts as found, he lost. Further and in the alternative, the decision that the accident was not caused by the kerb was plainly wrong, essentially because the arguments which he advanced at trial could only lead to the conclusion that the kerb was the probable cause of the accident. The skeleton said that he was not challenging the Judge's assessment of the witness evidence nor the primary findings of fact. He referred to the photographs and said that the Defendant's evidence was entirely supportive of the Claimant's case.

26. As far as Grounds 1 and 2 are concerned, Mr Platt-Mills relied on *Drake v Harbour* [2008] EWCA Civ 25 for the proposition that where a claimant proves that a defendant was negligent and that the loss which ensued was of a kind which was likely to have resulted from such negligence, that would ordinarily be enough for the court to infer causation even if the claimant was unable positively to prove the precise mechanism. He also relied on the judgment of Foskett J in *Sobolewska v Threlfall* [2014] EWHC 4219 (QB) at [7]-[9] where the judge cited Clerk & Lindsell at paragraph 2-07 and Toulson LJ in *Drake* at [28] and said this:

> *"9. Essentially, the exercise is one of applying common sense to the totality of the evidential picture with which the court is confronted. It has been acknowledged by every expert called in this case that their own field of expertise cannot give the definitive answer to the question of precisely how the Claimant sustained her injuries and the mechanisms that gave rise to them. Ultimately, of course, as everyone recognises, it is a matter for the court to put all the evidence together to see if the Claimant has established the case on the balance of probabilities."*

27. Mr Platts-Mills' submission was that the application of common sense to the known facts of this case inevitably led to the conclusion that the raised kerb was the probable cause of the accident. There were facts which pointed to this conclusion – Mrs Robertson's wobble, the fact that the Claimant was cycling with care, the fact that he was lining up his bike to cross the kerb onto the cycleway lane when he fell and the fact that he and his bicycle had ended up on the cycleway – and there were no facts which pointed against it. The Judge had not accepted the Defendant's argument that the Claimant must have been going too fast and had found that there was not a shred of evidence of contributory negligence on his part. The Claimant was an experienced cyclist. The possible reasons why someone might fall off their bike posited by the Judge at [10] of his judgment – momentary inattention, an obstacle or substance on the road surface etc - were not suggestions which had been made by the Defendant and nor was there any evidence of any of them. It followed that the only conclusion open to the Judge was that the probable cause of the accident was the raised kerb.

28. As far as Ground 3 is concerned, Mr Platts-Mills relied on all of the evidence to which I have referred above. He said that no witness had been examined or cross examined on the basis that parts of the kerb constituted a hazard but other parts did not. The Judge was not entitled to reach his decision on this basis and, in any event, it was self-evident that the fact that the cycleway was not flush with the surface of the road constituted a hazard, as Mr Roberts had effectively accepted. In any event, the very fact that the Claimant lost control of his bicycle when crossing the kerb showed that the probable cause was a part of the kerb which did amount to a hazard.

29. Mr Platts-Mills also suggested that the Judge's finding that it would not be an easy task to determine whether the kerb constituted a hazard *"without proper measurements and plans"* was the result of an erroneous importation of principles which were apposite in the context of a claim under section 41 of the Highways Act 1980, on which Mr Lewis had relied with reference to the *Walsh* case. By contrast, this was a misfeasance case. Mr Platts-Mills also relied on the fact that there was a sign to indicate that the path could be used by cyclists both before, at the time of, and after the accident. This created a trap and yet the Judge had not taken account of this aspect of the evidence.

The Defendant's arguments

30. Mr Lewis' argument was essentially that the Judge had made permissible findings of fact on both of the issues which were raised in the appeal. I should only interfere if his findings were *"plainly wrong"* (*McGraddie v McGraddie* [2013] UKSC 58), which they were not.

31. He reiterated the arguments which he had put before Judge Carr and he added that it was necessary for the court to determine the mechanism of the accident: see *Yetkin* (supra). It would only be in exceptional cases that the courts would accept, for reasons of policy and fairness to claimants, that conduct which increased the risk of injury to the claimant would be treated as equivalent to proof of the causal link: see Clerk & Lindsell (24th Edition) at 2-07.

32. Mr Lewis took me to the *James & Thomas v Preseli Pembrokeshire District Council* (supra) case to emphasise that the question was whether the particular part of the kerb which (on this hypothesis) the Claimant hit, and which caused him to fall, was dangerous or a hazard, rather than whether the kerb more generally was unsatisfactory or sub optimal. He also emphasised that the Claimant had said that although he could not remember what had actually happened, he would normally have aimed towards the middle of the entry to the cycleway; a cross had also been marked on the photo to show where it was believed, on the Claimant's side, that he had crossed the kerb. This was closer to the middle than to either end.

Jurisdiction

33. CPR Rule 52.21 (1) provides that every appeal will be limited to a review of the decision of the lower court unless it falls into specific categories of case in which a Practice Direction makes different provision, or the court considers that it would be in the interests of justice to hold a re-hearing. Neither of the parties suggested that I should do anything other than review the decision of the Judge in this case and nor would it have been appropriate or feasible to. This, then, is not a retrial and, as is well known, it is not my function as the appellate judge

to say whether I would or would not have come to the same conclusion as Judge Carr.

34. Rules 52.21 (3) and (4) provide:

> *"(3) The appeal court will allow an appeal where the decision of the lower court was—*
>
> *(a) wrong;…*
>
> *(4) The appeal court may draw any inference of fact which it considers justified on the evidence."*

35. The caselaw emphasises that an appellate court will only interfere with a finding of primary fact by the court of first instance where it concludes that the finding is not supported by the evidence or where the decision is one which no reasonable judge could have reached: see e.g. *Haringey LBC v Ahmed & Ahmed* [2017] EWCA Civ 1861 at [29]-[31]. It may be easier to satisfy this test where the nature of the evidence or issue is such that the appellate court is in as good a position as the first instance court to make a finding of fact on the point in issue. *Manning v Stylianou* [2006] EWCA Civ 1655 is an example. In that case the first instance judge was held to have misinterpreted photographs in concluding that the stump over which he found that the claimant had tripped was on the Defendant's land. The only evidence as to the location of the stump was the photographic evidence and it was clear from this evidence that it was not on the Defendant's land.

36. In *Prescott v Sprintroom Limited* [2019] EWCA Civ 932; [2019] BCC 1031 at [76]-[78(vi)] the Court of Appeal dealt with the position where an appellate

court is asked to interfere with an evaluative judgement such as the question whether, on the evidence, a decision or a step was or was not reasonable. The following points are particularly important in the present case:

i) *"On a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency or a failure to take into account some material factor, which undermines the cogency of the conclusion'"* [76].

ii) The appellate judge should also bear in mind that the factual findings of even the most meticulous judge will still represent a distillation of the evidence and will not reveal all of the nuances, the precise emphasis or degree of weight which was given to the various factors in the mind of the judge. It would be wrong to take the view that an appellate court is authorised to undertake a fresh evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as reasonableness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation [77].

iii) The reasons for the principle that the appellate court should not interfere with the findings of fact of the trial judge – whether primary facts or evaluative findings - unless compelled to do so include (per Lewison LJ in *Fage UK Ltd. & anor. v Chobani UK Ltd* [2014] EWCA Civ 5,[114]),

the expertise of the trial judge, the efficient use of resources on the basis that the trial *"is not a dress rehearsal. It is the first and last night of the show"* and that:

> *"iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."*

37. In relation to his complaint about the adequacy of the Judge's reasons Mr Platts-Mills referred me to *English v Emery Reinbold and Strick Ltd* (supra) as I have said. I note that in *Harris v CDMR Purfleet Ltd* [2009] EWCA Civ 1645 at [21] Lady Justice Smith said:

> *"a judgment should not be upset on the ground of inadequacy of reasons, unless, despite the advantage of considering the judgment with knowledge of the evidence and submissions made at the trial, the losing party is still unable to understand why it is that the judge reached his conclusion… It is always desirable that a judgment should be comprehensible for the first-time reader… However, that is not the test of the adequacy of the judge's reasons. The adequacy of the reasons must be tested in the context of the knowledge and understanding of those who were present at the trial. In the*

> *present case, once one reads the pleadings, the relevant extracts of the transcript and the submissions of counsel, the judge's reasons can be understood."*

Discussion and conclusions

38. I do not accept that the Judge's reasons for his decision were inadequate. It seems to me that a fair reading of the Judgment is that he found that it had not been shown on the balance of probabilities that the raised kerb was the cause of the accident at all but, even if it had, the kerb was not a hazard throughout the whole of its length and it had not been shown, on the balance of probabilities, that the cause of the Claimant's fall was a part of the kerb which was sufficiently raised to constitute a hazard. Despite the way in which his judgment is framed, the second point appears to have been at the heart of his dismissal of the claim as is apparent from the fact that [10] of his judgment includes considerations which are relevant to the second point.

39. As far as causation is concerned, I respectfully agree with the way in which Foskett J put it at [9] of *Sobolewska*. I also agree with the following passage from Clerk & Lindsell at 2-07:

> *"The claimant must adduce evidence that it is more likely than not that the wrongful conduct of the defendant in fact resulted in the damage of which he complains. On the other hand, there are occasions when the court is permitted to draw an inference that there must have been a causal link, taking a common-sense and pragmatic approach to the evidence, in circumstances where the indications are somewhat equivocal."*

40. It is not the position, as Mr Lewis appeared to suggest, that there is a general rule that the precise mechanism of the accident must be proved in every case and that a court would only exceptionally draw an inference as to probable cause in circumstances where the precise sequence of events cannot be fully demonstrated by the claimant. The approach is more flexible than that. The passage in 2-07 of Clerk & Lindsell referring to an exceptional group of cases does not establish Mr Lewis' proposition. This passage is referring to certain types of case where policy based exceptions have been made to the requirement to prove a causal link between the wrong and the damage on the balance of probabilities. These have nothing to do with the present type of case where the Claimant invites the court to draw a common sense inference as to probable cause, from primary facts which he has established on the evidence.

41. I therefore agree with Mr Platt-Mills that the Judge's finding that the kerb was not the cause of the Claimant's fall is very surprising. If this were the only issue, I would have given serious consideration to allowing the appeal on the basis that, as a matter of common sense, the only inference open to the Judge on the evidence was that the kerb was the cause. All of the evidence pointed to this being the cause and there was no evidence of any other cause. The task of the Judge was merely to decide whether it was more likely than not that the kerb was the cause and it is not easy to see how he could answer this question other than in the affirmative. It appears that he may have been distracted by Mr Lewis' argument as to the need to prove "mechanism" when the need was to prove "cause", and the separation into two questions of what was in fact one question in relation to causation: whether, on the balance of probabilities, the Claimant's fall was caused by a part of the kerb which amounted to a hazard.

42. However, I part company with Mr Platts-Mills in relation to what might be called the *Preseli* point. Firstly, I do not accept his submission that the only conclusion open to the Judge was that the whole length of the kerb constituted a hazard, trap or danger simply because it was not flush to the road. The question whether the kerb, in whole or in part, was a hazard, was put in issue and it was disputed by the Defendant that any state of affairs other than the cycleway being flush necessarily amounted to a hazard, as I have noted. No evidence of a relevant universally applicable standard or scientific or other expert evidence was put before the Judge to assist him in making a judgment. I consider that he was entitled to conclude, in the context of the evidence as a whole, that the Claimant had not shown that this was the case.

43. The Judge was also entitled to take the view that the overall effect of Mr Roberts' evidence and the findings of the audit was that if the cycleway was flush to the surface of the road, this would entirely eliminate the risk which Mr Roberts identified and so this was what he recommended. The 'gold standard' was applied as Mr Lewis put it. But that is not the same as saying or accepting that any other state of affairs was necessarily a hazard in law. As Mr Roberts said at [19] of his witness statement (cited at [8] above), the degree of risk posed by the kerb depended on a number of factors including the speed and angle of approach, the height of the kerb, the type of bicycle wheel and whether the surface was dry or wet.

44. Moreover, even if the only interpretation of Mr Roberts' evidence was that he considered that anything other than a smooth transition onto the cycleway was necessarily a hazard in law, the Judge was not bound to accept this view. It was

for him to make a finding based on his assessment of the evidence. The photographs on which the Claimant relied are not of the highest quality for the purposes of making an assessment and, having considered them myself, I can see why the Judge was not prepared to accept the Claimant's argument that the kerb constituted a hazard or trap for the whole of its length for the purposes of a claim in negligence. As he found, it appears that the kerb is very nearly flush towards to the middle. I consider that he was entitled to take the view that he would have been assisted by measurements which demonstrated the height of the kerb at different points, particularly given the quality of the photographs. Moreover, the Judge acted fairly by putting these concerns to Mr Platts-Mills in the course of the trial.

45. I also do not accept that the nature of the evidence, even on the issue as to the extent of the hazard, is such that it would be appropriate for me to reach my own conclusion based on the photographs alone. This is in part because of the quality of the photographs but also because there was, or might be, other evidence which shed light on this question such as evidence about the factors identified by Mr Roberts as affecting the degree of risk.

46. Second, I see the force of the argument that the Judge might have been prepared to draw an inference that the very fact that the Claimant fell off his bicycle on crossing the kerb must indicate that he probably crossed at a point which was sufficiently raised to constitute a hazard or danger. But I do not accept that this was a conclusion which he was bound to reach, for the reasons which I have given. Just as in *Preseli* the fact that the pavement was generally in an indifferent condition did not mean that it had been shown that the claimant

tripped over the raised flagstone which constituted the hazard, the fact of the Claimant's fall itself did not necessarily prove that he had crossed at a hazardous point in the kerb. Nor did any of the other evidential features on which he relied to prove that the kerb was the cause of his fall demonstrate where he crossed the kerb. Obviously, the causation aspect of this issue is one on which the Judge had the advantage of hearing all of the evidence.

47. Taking these two points together, in my view the Judge was entitled to find on the evidence that the Claimant had not proved that his accident was caused by a part of the kerb which amounted to a hazard or danger. That being so, it seems to me that Mr Platts-Mills' argument that the sign which indicated that there was a cycleway created a trap for the Claimant who was entitled to assume that it was safe to join it, does not arise.

48. For all of these reasons, and with some regret given the Claimant's unfortunate injuries, I therefore dismiss the appeal.