Neutral Citation Number: [2023] EWHC 112 (KB)

Case No: G80SE435

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**SHEFFIELD DISTRICT REGISTRY**

Sheffield Combined Court Centre
50 West Bar
Sheffield

Date: 25 January 2023

**Before** :

**HIS HONOUR JUDGE ROBINSON sitting as a Judge of the High Court**

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**Between :**

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| **Robert Lewin** | **Claimant** |
| **- and -** | |
| **Nicholas Gray** | **Defendant** |

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**Mathew Snarr** (instructed by **Irwin Mitchell LLP**) for **The Claimant**

**Martin Porter KC** (instructed by **DAC Beachcroft Claims Ltd**) for **the Defendant**

Hearing dates: 1 - 4 August 2022

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# Approved Judgment

This judgment was handed down remotely at 10.00am on 25 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**His Honour Judge Robinson:**

**Introduction**

1. The Claimant is a self-employed builder. His work includes the performance of roofing and guttering projects.

2. The Defendant is a self-employed farmer. He engaged the Claimant to install guttering to the roof of a barn which had previously housed cattle. The roof of the barn was fragile, which fact was known to both parties.

3. On 18 January 2018 the Claimant, whilst working at height upon the roof, lost his balance and fell through the roof. He landed on the floor of the barn. He sustained catastrophic injuries which have rendered him paraplegic from the L1 level.

4. The Claimant roofer, by his legal team, alleges that the Defendant farmer is at least partially to blame for this dreadful accident. The claim is pleaded in negligence but within the particulars of negligence are allegations of breaches of obligations imposed by statute. Liability was ordered to be tried as a preliminary issue. This is the judgment in that matter. I am grateful to Mr Matthew Snarr for the Claimant and Mr Martin Porter KC for their helpful written opening notes and closing submissions.

5. Reliance upon the provisions of the Occupiers Liability Act 1957 is unsurprising.

6. The applicability of the Work at Height Regulations 2005 is pleaded but no specific reference is made to them within the particulars of negligence.

7. Of greater significance is reliance upon alleged breaches of duty owed by the Defendant to the Claimant pursuant to the Construction (Design and Management) Regulations 2015 (hereafter “the Regulations”).

8. It was acknowledged in evidence that before this tragic accident neither the Claimant nor the Defendant were aware of the existence of the Regulations, but such ignorance does not, of course, provide an excuse much less a defence, to any breach of relevant obligation imposed by the Regulations. It is beyond doubt that both the Claimant and the Defendant did not comply with obligations imposed upon them by the Regulations. Whether the failure by the Defendant to comply with such obligations gives rise to any cause of action by the Claimant is the issue which takes centre stage in this case.

**The Relevant Statutory Materials**

9. Section 2 of the Occupiers Liability Act 1957 provides:

> **2.— Extent of occupier's ordinary duty**
> (1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is a duty 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.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
> (a) an occupier must be prepared for children to be less careful than adults; and
> (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.
>
> (4) 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; and
> (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

10. Regulations 4, 17 and 19 of the Construction (Design and Management) Regulations 2015 are relied upon and provide:

**4 Client duties in relation to managing projects**
(1) A client must make suitable arrangements for managing a project, including the allocation of sufficient time and other resources.

(2) Arrangements are suitable if they ensure that-
(a) the construction work can be carried out, so far as is reasonably practicable, without risks to the health or safety of any person affected by the project; and
(b) the facilities required by Schedule 2 are provided in respect of any person carrying out construction work.

(3) A client must ensure that these arrangements are maintained and reviewed throughout the project.

(4) A client must provide pre-construction information as soon as is practicable to every designer and contractor appointed, or being considered for appointment, to the project.

(5) A client must ensure that-
(a) before the construction phase begins, a construction phase plan is drawn up by the contractor if there is only one contractor, or by the principal contractor; and
(b) the principal designer prepares a health and safety file for the project, which-
(i) complies with the requirements of regulation 12(5);
(ii) is revised from time to time as appropriate to incorporate any relevant new information; and
(iii) is kept available for inspection by any person who may need it to comply with any relevant legal requirements.

(6) A client must take reasonable steps to ensure that-
(a) the principal designer complies with any other principal designer duties in regulations 11 and 12; and
(b) the principal contractor complies with any other principal contractor duties in regulations 12 to 14.

(7) If a client disposes of the client's interest in the structure, the client complies with the duty in paragraph (5)(b)(iii) by providing the health and safety file to the person who acquires the client's interest in the structure and ensuring that that person is aware of the nature and purpose of the file.

(8) Where there is more than one client in relation to a project-

(a) one or more of the clients may agree in writing to be treated for the purposes of these Regulations as the only client or clients; and

(b) except for the duties specified in sub-paragraph (c) only the client or clients agreed in paragraph (a) are subject to the duties owed by a client under these Regulations;

(c) the duties in the following provisions are owed by all clients-

(i) regulation 8(4); and

(ii) paragraph (4) and regulation 8(6) to the extent that those duties relate to information in the possession of the client.

**17 Safe places of construction work**

(1) There must, so far as is reasonably practicable, be suitable and sufficient safe access to and egress from-

(a) every construction site to every other place provided for the use of any person whilst at work; and

(b) every place construction work is being carried out to every other place to which workers have access within a construction site.

(2) A construction site must be, so far as is reasonably practicable, made and kept safe for, and without risks to, the health of a person at work there.

(3) Action must be taken to ensure, so far as is reasonably practicable, that no person uses access to or egress from or gains access to any construction site which does not comply with the requirements of paragraph (1) or (2).

(4) A construction site must, so far as is reasonably practicable, have sufficient working space and be arranged so that it is suitable for any person who is working or who is likely to work there, taking account of any necessary work equipment likely to be used there.

**19 Stability of structures**

(1) All practicable steps must be taken, where necessary to prevent danger to any person, to ensure that any new or existing structure does not collapse if, due to the carrying out of construction work, it-

(a) may become unstable; or

(b) is in a temporary state of weakness or instability.

(2) Any buttress, temporary support or temporary structure must-

(a) be of such design and installed and maintained so as to withstand any foreseeable loads which may be imposed on it; and

(b) only be used for the purposes for which it was designed and installed and is maintained.

(3) A structure must not be so loaded as to render it unsafe to any person.

11. Section 69 of the Enterprise and Regulatory Reform Act 2013 amended Section 47 of the Health and Safety at Work etc Act 1974. Section 47(2) of the 1974 Act, as amended, provides:

> "(2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision health and safety regulations) shall not be actionable except to the extent that regulations under this section so provide.

Thus, on the face of it, breach of any of the Regulations does not give rise to a cause of action in damages.

**Witnesses**

12. I have had regard to the following witness evidence on behalf of the Claimant:
    (1) The Claimant, written and oral;
    (2) Neil Lewin, the Claimant's son, written and oral;
    (3) Dr Mike Webster, Chartered Engineer, written and oral.

13. I have had regard to the following witness evidence on behalf of the Defendant:
    (1) The Defendant, written and oral;
    (2) Christopher Stephens, Solicitor for the Defendant, written only;
    (3) Mr S A Rawden, Chartered Mechanical Engineer, written and oral.

**Core Allegations**

14. Much reliance is placed upon alleged breaches of statutory duty imposed by the Regulations. Despite the apparent clear wording of Section 47 of the Health and Safety at Work etc Act 1974 (as amended) to the effect that breach of duty imposed by the Regulations "shall not be actionable", Mr Snarr submits that the Defendant owed to the Claimant duties at common law, in tort, similar to those imposed by the Regulations.

15. The allegations reflecting alleged breaches of the Regulations are wide ranging. It seems to me, having heard and considered the evidence and submission of Counsel, that what I describe as the core allegations are fairly narrow in scope:
    (1) Selection of a suitable contractor;

(2) Supervision of the contractor;

(3) Ensuring that the contractor had completed a Construction Phase Plan.

**Evidence and Findings of Fact**

16. In making findings of fact I have had regard to the entirety of the evidence which includes materials relied upon which appear in the bundles.

17. The Claimant gave oral evidence from a wheelchair. He was clear and straightforward as a witness. He was undoubtedly doing his best to assist the court. His son was equally straightforward. Although the evidence of the Defendant was in some respects criticised on the basis of what Mr Porter KC described a "poor recall", I did not find this to be the case. I was entirely satisfied that the Defendant also was doing his best to assist the Court.

18. The written evidence of the Claimant was contained in two witness statements dated 15 September 2020 and 29 July 2021 respectively.

19. The Claimant was born on 7 November 1959. He was aged 58 when the accident occurred on 18 January 2018.

20. He described himself as a self-employed general builder with over 30 years' experience ranging from general maintenance to building new houses.

21. His experience in roofing work includes roof repair work on Council buildings, at one point being on their approved contractor list. He performed roof repairs on farm buildings, saying that he carried out a lot of work on barns, mainly roof repairs and general maintenance work. He describes having gained good experience in joinery and roofing. However, he closed recitation of his work history and experience by saying that "I am a general builder and not specialist roof contractor".

22. He is familiar with the Defendant's farm. He had done work there when it was owned and run by Rob Grey, the Defendant's father. After Rob Gray

passed away the Defendant took over the farm. The Claimant described working for the Defendant after Rob Gray had passed away:

> "If Nick ever needed or wanted anything doing he would just give me a ring and asked me to look at the job. I would go over to the farm, have a look at the job and measure up. Sometimes I would give him a written quote or sometimes I would tell him the price and he would tell me to just get on with it."

23. For the job which resulted in the accident, the Defendant telephoned the Claimant about a week before the accident:

> "… We had a discussion about some new deep flow guttering he wanted on the barn at Boundary Farm adjacent to the farmhouse because the guttering was old and needed replacing. He informed me that it was leaking and that the water was running onto his pantile roof. He also asked me to look at the asbestos roof sheets as they were also leaking. I always refer to this type of roof sheeting as asbestos, due to how long I have been doing the job; It is just a phrase I use for it."

24. The layout of the barn and the farmhouse is of some significance. The barn itself was of fairly standard layout; rectangular in footprint with a pitched roof comprising corrugated roofing sheets of with asbestos or cement fibre or a combination of the two. In any event, the roofing material on the barn is properly described as "fragile".

25. The juxtaposition of the farmhouse with the barn is important. Parts of the two buildings are very close to each other, but they are not joined. Looking at the barn running lengthways right to left, towards the right-hand side there is the gable end of the farmhouse. The gap between the bricked gable end and the edges of the fragile roof sheets, where the guttering was to be fixed, is very narrow. Beyond the left-hand edge of the gable end is the pitched pantile roof of the farmhouse running parallel to the pitched fragile roof. The edge of the pantiles is below that of the fragile roof sheets. Again, the gap between the edges of the two roofs is narrow, but not as narrow as that by the gable end.

26. The Claimant described how he intended to perform the work of replacing the guttering. Removal of the old guttering does not appear to be an issue. Installation of the new guttering was a two-stage process.

27. First, what was described as a "line" was passed up from the inside the barn through the gap between the fragile roof and the gable end of the farmhouse and, further along, the pitched pantile roof of the farmhouse. The "line" is a line to which is attached the brackets into which the plastic guttering is snapped.

28. Second, the guttering is passed up through the same gap. It is the second stage which caused the problem because the gap was a little too narrow to enable the guttering to be passed through with ease; the gap was tight, and it was a struggle to get the guttering through.

29. I return to the written evidence of the Claimant. He said that although the Defendant asked whether the Claimant would be accessing the roof via crawler boards, he did not ask anything else. The Claimant said he confirmed he would be accessing the roof via crawler boards. The Defendant did not ask how the Claimant was going to do the job, or ask if the Claimant had any specific expertise for the job or working from heights. Given the history of the Claimant working at the farm, I do not find any of that in the least surprising. As the Claimant says later in his statement:

> "I had worked on the farm for many years without any issues. I have not had any other major accidents while working before. I have occasionally had a small injury but nothing big."

30. It is convenient at this point to discuss the Claimant's previous experience of working at the farm. In the main it is uncontentious, but there is a serious issue concerning the previous provision of a makeshift crash deck. Most of the written evidence is contained in the Claimant's second witness statement.

31. The Claimant had performed work at the farm for "many years". He had worked on the fragile roof before, but not in the vicinity of the gable end of the farmhouse. He had replaced guttering to the pantile roof but again, not in the vicinity of the gable end.

32. In his first statement he touched upon the provision of a "Mapro" machine. This is shown in various photographs. I would describe it as a piece of

vehicular machinery in the nature of an oversized "cherry picker". It has an arm which can be elevated. At the end of the arm a caged platform, a "man cage" or "man basket" can be attached. To the rear of the platform, where it is attached to the arm of the vehicle, there is wire mesh protective "fencing". The other three sides are enclosed by horizontal bars affixed to vertical uprights. The cage can clearly accommodate one or more persons who can work at height when the arm and cage are elevated. The photographs show a JCB machine and the terms "Mapro" and "JCB" seem to be used interchangeably in the evidence.

33. It is not suggested that the Mapro could have been used as a working platform to enable the Claimant to perform the guttering work. The Claimant's point is that in the past the Mapro and the cage have been positioned beneath the location where the Claimant was working on a roof, to act as a makeshift crash deck which would arrest an inadvertent fall thought the roof above the cage.

34. In his second statement, the Claimant provided more information concerning the previous use of the Mapro. He said that the Defendant's father would position the Mapro basket under the barn roof to act as a "safety" deck in the event the Claimant fell through the roof. In paragraph 12 of his second statement, he says that the Defendant's father used to drive the Mapro and position it for the Claimant. He goes on to say:

> The jobs where he did this involved when I was replacing sheets on the roof of the barn involved in the current accident, when I was doing the guttering on other barns, and also when I was doing a cladding sheeting on another barn. I have also used it when I have replaced the big six-sheets before on the barn in which this accident involved. … On one occasion, I recall either Nick or his father providing the Mapro to me so that I could use it to lift the big six-sheets onto the roof so that I could fix them to the roof."

35. In addition to the two formal witness statements made by the Claimant in connection with this claim, he also gave a written statement to the HSE dated 9 May 2018. In that statement, he said he had been working at Boundary Farm:

> " … for must be 20 years on and off doing General maintenance and other work including roof work, initially for Rob Grey … but most

> recently for Nick Grey …who took over the business a few years ago … Rob would sometimes bring his Mapro and basket to help us, by putting the large basket below where we were working as a safety precaution, but this wasn't always possible. Rob would happily [help?] us without issue but I often didn't want to disturb them unnecessarily. Nick would help me if I asked him to but I didn't like to trouble him. I liked to get on with the job."

36. In oral evidence the Claimant was asked about the history of Mapro use. He was referred to the extract from the HSE statement quoted above. He agreed that before the death of the Defendant's father, the Claimant's dealings were with him and not with the Defendant. He agreed that the fitting of the big six-sheets took place after his death. It was put to the Claimant that this was not one of the occasions when the Mapro was used. The Claimant said that the Mapro was left there by the Defendant, and that he had not mentioned this before because no-one had asked him. The Claimant was reminded that the Defendant said in his witness statement that what he described as "the man basket" was not "used by [the Claimant] as a safety platform in connection with the job…". The Claimant's response was that the Defendant had lifted the sheets up for the Claimant and that the Claimant had asked the Defendant to "leave the Mapro there for safety". It was suggested that if this was so, the Claimant would have mentioned it in his HSE statement. The Claimant said that he had and referred to the penultimate sentence in the passage quoted above: "Nick would help me if I asked him". The Claimant said of this extract "It [the Mapro] was left there when I worked for safety reasons". The Claimant was pressed on the involvement of the Defendant in the use of the Mapro, it being suggested that it was only the Defendant's father and not the Defendant. The Claimant said that the Defendant "let me use it several times. I said he would help if I asked him, which he did."

37. In re-examination the Claimant said of the big six-sheets job that the Defendant had lifted the sheets up on the JCB [Mapro] and then left it for the Claimant "directly below". The Defendant, in his witness statement dated 9 July 2021 had said of the big six-sheets job that:

> "33. [The Claimant] does not use any of my farm equipment to do his work. On one occasion in April 2016, when [the Claimant] replaced roof sheets on the barn where the incident occurred, I operated my JCB

> Loadall to lift the roof sheets up to him. The job involved removing two damaged 'big-six' sheets and supplying and fitting 2 new ones. He also repaired two small areas of roof with flash band patches. [The Claimant] asked me to assist him because of the size of the roof sheets. I have a man-basket that can fit onto the JCB for such work. I placed the sheets in the basket and lifted them up to him. The basket is fitted with a safety lock-out which prevents the basket being tipped when it is attached. [The Claimant] was working from a roof ladder (which hook over the ridge of the roof) and crawling boards on the roof itself. He removed the sheets from the man basket after I'd lifted them to the required height. I did not help him with any other aspect of the job; all I did was operate the JCB to lift the roof sheets up to roof height.
>
> "34. The man basket was not used by [the Claimant] as a safety platform in connection with the job, nor any other job as far as I'm aware. At that time, we had straw stacked inside the barn, which was under the area where the roof sheets were to be replaced. The stack would have prevented JCB access under the roof section being repaired. The stack was underneath the roof to within 4 to 5 feet of the top of the roof, so there was a de-facto platform if [the Claimant] had fallen through the roof on this occasion, albeit there was no discussion about this being a safety feature at the time. [The Claimant] was using crawling boards on the roof, which from my limited knowledge, I had no reason to expect to be unsuitable for the job. This job in April 2016 is the only time I can remember [the Claimant] working at high level between 2016 (when I took over dealing with [the Claimant] following my father's death) and the 2018 when the accident occurred. At no time did [the Claimant] ask me to move the man basket under his work area, but if he'd ever asked me, I would have done so."

38. The Claimant was asked about this account given by the Defendant. The Claimant agreed that there were some straw bales in the barn, but disagreed that they were in the way of the JCB. He said that the bales only covered the first five feet along the side of the barn. Asked about other occasions when the Defendant had assisted the Claimant by the use of the JCB, the Claimant said that some years ago he had been doing some work at the "lean-to" at the back of the farm and the man basket had been used to gain access to the work place and was used as a working platform. He also said that the Defendant had used the man basket, again as a working platform, to enable the Claimant to work on some free-standing barn gutters when there was nowhere to lean the ladders. The Claimant said that on occasions when the man basket had been used to gain access, it was also used as a safety basket.

39. Neil Lewin, in his second statement, says: "In previous times, the Defendant and his late father have allowed us to use their Mapro machine when working on the barn roof. It is usually really tricky getting a machine like that into position, but it acts like a crash deck, just as the scaffolding tower which I erected following Dad's fall did". He was not cross-examined on that evidence and no further evidence on that point was elicited from Neil.[1]

40. I have already recited the Defendant's relevant written evidence on the issue of use of the man basket as a safety platform.

41. In cross examination the Defendant said that he had never provided the JCB for use as a crash deck. He agreed he was qualified to drive the JCB equipped with the man basket, but went on to say that his father very much regarded the JCB as his "toy". He said the only time he had used the man basket was in 2016 when he used it to lift the big six panels to the roof. He said he did not leave the man basket as a crash deck. He explained that there were hay bales in the way and that he "couldn't get in". He was reminded that the Claimant had said that the hay bales were only along the side of the barn. The Defendant said that they were underneath where the Claimant was working. Of the suggestion that there had been other occasions when the JCB had been used as a crash deck he said "not that I recall".

42. In re-examination the Defendant was asked about the big six sheet job. He explained that the JCB had been positioned between the trees and the side of the barn when the sheets were passed up. He said that he could have used the man basket as a crash pad had he been asked to do so. This would have required hm to move some of the bales and then move the JCB into position inside the barn. He gave details of the dimensions of the bales. They measured one metre by one metre by two metres. They were stacked three bales high. There were 27 bales. Moving them would have required him to fit

[1] As originally written, this paragraph inadvertently omitted reference to para 11 of Neil's 2nd statement. I am grateful to Mr Snarr for alerting me to this at the editorial correction stage.

the "straw spike" on the JCB. He would have had to move six of the bales and then position the JCB with the man basket "appropriately".

43. I find the evidence of the Defendant more compelling and logical on the issue of the use of the man basket as a crash deck during the performance of the big six sheet job. The Claimant's evidence is that having been used to lift the big six sheets to roof level the man basket was "left in place" (or words to that effect). This does not make sense. I accept that the man basket was used to lift the sheets up to roof height, but the evidence of the Defendant that this took place outside the barn, between the trees and the side of the barn, makes perfect sense. That being so, the JCB and the man basket could not simply have been "left in place". It would have had to be moved into the barn and, as the Defendant said, appropriately positioned. I accept the evidence of the Defendant that this would have required the movement of some of the bales using a straw spike. On this issue, I was impressed by the Defendant's candour. He said he could have used the man basket as a crash deck upon movement of only six bales, and that he could have done this if he had been asked. I am sure that the Defendant would have remembered doing this if it had happened. I am satisfied on the preponderance of the evidence that it did not and that the man basket was not used as a crash deck during this job in 2016.

44. I am also satisfied that the Defendant was not involved on any other occasion when the man basket was used as a crash deck. I am satisfied that so far as the Claimant is concerned, only the Defendant's father was involved in any such exercise. To the extent that Neil suggests in his second witness statement (see paragraph 39 above) that the Defendant was involved in the use of the Mapro as a crash deck, I reject that evidence. I am satisfied that it was only the Defendant's late father who was so involved.

**The Mechanics of the Accident**

45. The written expert evidence in this case covers many hundreds of pages, including materials forming part of the reports. With all due respect to the experts, I did not find the expert evidence of much, if any, assistance in

determining the mechanics of the accident. Indeed, it was only during the course of the oral evidence that the mechanics of the accident became clear.

46. I shall begin by considering the evidence of the Claimant and his son, because they were the only ones present at the time.

47. The focus of enquiry is how the guttering was to be transferred to locations suitable for it to be installed. Again, looking at the barn from right to left with the farmhouse and gable end behind, the guttering to the right hand side of the gable end was installed comparatively easily because access could be obtained by ladders to the exterior.

48. It was decided by the Claimant that to get the guttering into position so that it could be installed by the gable end, it should be passed up from inside the barn through a narrow gap between the fragile roof and the gable end and/or the pantile roof.

49. There was much debate about whether it was or was not envisaged that the Claimant would perform any of his tasks from the pantile roof rather than from the fragile roof. Although the Claimant disputed whether he had seen a "fragile roof" warning sign on the side of the barn, he agreed that he knew the roof of the barn was fragile.

50. The Claimant explained why, in his view, it was not possible to be on the pantile roof to assist in the process of passing the guttering through the gap. The evidence of Mr Rawden, instructed on behalf of the Defendant, was to the effect that the task of passing the guttering through the gap could have been accomplished with the Claimant positioned on the pantile roof. But that is not the same as saying that it was wrong of the Claimant to do it from the fragile roof.

51. The Claimant and his son had fixed what I will describe as crawling boards to the fragile roof. The purpose of the boards was to spread his weight on the roof. Whilst ever the Claimant was positioned on a board, he would not fall

through the roof, and the roof would not collapse underneath the board. The crawling boards were fixed in place by drilling holes through the boards and the roofing sheets above the roof joists and screwing the boards to the joists. As Neil says in his statement: "This was typically how any builder would have worked".

52. The process of passing the guttering through the gap proved to be difficult. The gap was too small to enable this task to be accomplished easily. Neil, who admitted he knew that the roof was fragile, raised himself up onto a makeshift platform comprising, in part, an old door. Neil knelt on this platform. He passed the guttering from inside the barn to the Claimant who was on the fragile roof.

53. The Claimant gave a brief description of the accident in his first witness statement. He says:

> "I recall reaching for the guttering from Neil, my foot slipped on the board, I remember falling back and then falling through the roof. I recall hearing the sheets crack behind me and before I could do anything . I fell through the roof onto the barn floor."

54. In his second statement he gave further details. He confirmed he was standing when he fell, correcting an impression given by Neil that the Claimant was "shuffling" on his knees at one stage. The Claimant was "stood on baton boards to spread my weight". He was bent over to reach the guttering from his son. At paragraph 23 he says:

> "My foot slipped and I fell backwards. I fell through the fragile roof. I heard the sheet crack and I stuck my arms out to try and save myself but I couldn't as there was nothing there. I landed on the floor in the barn on my back."

55. Exploration in oral evidence produced more details. The Claimant said he could not perform the work by sitting on the pantile roof because he could not get close enough. Neil said that at the time of the accident he was pushing the guttering through the gap (he called it a "hole") at a point almost directly above the platform from which he was working. He described having to "see-saw" the length of guttering through the hole into position. He was pushing

the guttering at an angle of 45 degrees because that was the only angle he had to work with. He said of the Claimant that the guttering was squashed and pressed in so tight that the Claimant had to stand to get sufficient "pull".

56. This account fitted well with the Claimant's earlier account under cross examination. He was asked when it was that he decided to stand on the board on the fragile roof. He said: "when Neil was struggling".

57. In oral evidence Dr Webster said that in his opinion the Claimant needed to be on the roof to generate the force necessary to pull the guttering. The Claimant could be stood up or kneeling to pull and stood up in order to shove. Dr Webster also thought it was necessary for the Claimant to be on the fragile roof because from the pantile roof the gap through which the guttering was being passed was "very low down" and it was difficult to accomplish the pulling action.

58. Having regard to the explanation given by the Claimant, I accept that deciding to work from the fragile roof to accomplish the task of receiving the guttering was a reasonable decision for an experienced builder with roofing experience to make in the circumstances of this case. It was also reasonable to decide to pass the guttering from inside the barn through the gap.

59. Criticism was levelled at the Defendant for not being aware that the Claimant had begun work. In my judgment such criticism is unjustified. The Defendant had engaged his usual builder and roofer to perform what, so far as the Defendant was concerned, was straightforward guttering work, albeit guttering to a fragile roof. He was aware that the Claimant and his son had arrived. But the Defendant had pressing problems of his own. He was engaged in his office or study, which was located two feet below ground level. He was engaged in what he described as "difficult phone calls". He explained that his father had died leaving £200,000 of debt. The Defendant was trying to negotiate the renewal of this debt in his name.

60. The collective view of the experts was to the effect that in the hierarchy of roof based risk amelioration measures: first, avoid working so far as is possible on a fragile roof; second, if working on a fragile roof use precautions such as crawling boards; third, take measures to minimise injury in the event of a fall.

61. There was again agreement between the experts that safety harnesses and netting were unsuitable for this job. The Claimant had no experience of netting and it appears that such is usually installed by specialists. The Claimant himself said that he was not qualified or competent to install nets. There was nowhere obvious to fix harnesses. A continuous length of scaffold erected in the barn would provide some protection, as would a mobile scaffold tower, although this would have to be moved as the job progressed. A make shift crash deck such as the JCB man basket would also provide protection, although as the Defendant himself observed, precise placement would be essential if injury by falling onto the railings of the man basket was to be avoided.

62. There was some debate about whether the Claimant had lost his balance as a result of standing and pulling the guttering, or whether the board that he had fixed to the roof became loose which caused the Claimant to slip. In my judgment it does not much matter which of these scenarios is more likely. In my judgment the act of standing on a board on the fragile roof whilst pulling guttering through a tight hole or gap was obviously potentially dangerous.

63. Following the Claimant's accident, it was Neil who completed the task of fixing the guttering. He used a mobile scaffold tower belonging to his father as a crash deck.

**Construction Phase Plan**

64. It is common ground that the Defendant was a commercial client for the purposes of the Regulations. As such it was his obligation under Regulation 4(5) to ensure that: "before the construction phase begins, a construction phase plan is drawn up by the contractor", that is by the Claimant. Because this was

a small project, the scope of the Construction Phase Plan would have been limited. Mr Rawden said, and I accept, that such a plan for a major job would typically run to hundreds of pages. An example of a "basic" plan is at pages 784 and 785 of the bundle. There is a section headed "Falls from height" which mentions guardrails, midrails and toeboards but not crash decks.

65. It is agreed that, save for some minor enquiries which are irrelevant in the context of this case, the Defendant did not ask the Claimant anything about the means by which he proposed to perform the job of relacing the guttering.

66. The Claimant's case is that had the Defendant requested him to provide a written plan, this would have caused him to ask the Defendant to make available the Mapro or JCB to be positioned and used as a safety crash deck.

67. The Claimant described his usual method of job planning and risk assessment. In his first statement, having said that the Defendant had asked him before the job whether he would be accessing the roof via crawling boards, he said (paragraph 24):

> "I always do a risk assessment in my head and I know how to work safely . I have worked with Neil before so that we both know how we work and how to work safely. I have never been asked for a risk assessment or method statement. I have been asked about how I may carry out the work and I have listed this but not provided a formal risk assessment. I have always worked for myself. It has been my responsibility to make sure I know what is required to work safely and to ensure others are safe.

68. Neil confirmed in his witness statement that his was his understanding of how the Claimant worked:

> "10. My dad's method of risk assessing was to go out to the job and give an estimate cost of the job required. He would complete a visual risk assessment. He would not write anything down but he would assess whether it was safe and whether any equipment would be needed including scaffolding.
>
> "11. I was not aware what health and safety training dad did before the accident but all jobs were always assessed on estimates and correct safety equipment and scaffolding where used when needed.

> "12. When I went and helped my dad on jobs, I would trust his risk assessment. We would not need to discuss it as such he would just tell me what he was going to do and what I would need to do. I always had confidence he would not put me in any danger.
>
> "13. Dad and I had previously worked on fragile roofs before; some were on the Gray's farm where the accident happened. I always felt safe and worked in a safe way for the environment we were working in."

69. In his written evidence the Claimant said in his second witness statement at paragraphs 14 and 24:

> "14. … In hindsight, if I was required to set out in writing how I was going to reduce the risks of falling and the safety measures in case of a fall, or had the Defendant had asked me some specific questions about health and safety, I believe this would have prompted me to properly consider the matter of working from height in a more detailed way and to address more thoroughly the potential hazard of working on a fragile roof. Had I done so, I think I would have asked the Defendant to place his Mapro basket below the area I was working on, the only area where I had to be on the fragile roof, and used it as a crash deck, and this would have prevented the accident.
>
> "24. I have now had time to consider the report of Dr Mike Webster dated April 2021. In hindsight, I should have asked [the Defendant] to use his Mapro to act as a crash deck. If I was required to set out in writing or the Defendant had asked me about health and safety as I noted above, this would have prompted me to fully consider the matter, the risks involved in particular around falls, and address more thoroughly the potential hazard of working on a fragile roof. Had I done so I think I would have thought about the risk of falling and protection measures in case I did fall and use the crash deck, this would have prevented the accident. …"

70. The reference to the benefit of hindsight in those passages is, in my judgment, telling.

71. In oral evidence the Claimant spoke more about the likely effect of him having been asked to put something in writing. He repeated that hitherto he had thought it through in his head. Asked if that was good enough for him, the Claimant said that he always thought it through but that if he had his time again he would have asked for the Mapro. He was asked whether, having done the risk assessment in his head, he took it from his head and put it onto paper. He said he had never been asked to do one. He was asked about work

he had done for the Council. He had last worked for the Council in 2003. He said he had never been asked for a risk assessment or method statement, save for one Council which had asked for a risk assessment when he was going to work on an adjacent roof. However, the purpose of that risk assessment was to protect residents.

72. It emerged in evidence that there was an App accessible via a smart phone with a form of Construction Phase Plan which could be utilised by a small builder. The Claimant said he did not have a smart phone at the time of the accident.

73. It was suggested to the Claimant that it is better not to fall through a roof than to take steps to ameliorate the consequences. He said that he thought he had taken enough steps.

**Discussion**

74. Criticism of the Defendant concerning his selection of the Claimant as a competent contractor and the failure by the Defendant to supervise the Claimant were, rightly in my judgment, not pursued. They were not tenable.

75. The Claimant was very experienced, knew the farm, and had performed roof work without incident in the past. He was the ideal choice of contractor for this job. Similarly, it would, I am sure, have been considered an impertinence by the Claimant for the Defendant to have purported to supervise the work of the Claimant.

76. The duty owed by the Defendant to the Claimant under section 2(2) of the Occupiers Liability Act 1957 is:

> "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."

77. In this regard Section 2(3)(b) of the Act is highly relevant:

> "(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
> …
> (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."

78. It was obviously reasonable for the Defendant to expect that the Claimant, for the purposes of the 1957 Act, would appreciate and guard against risks inherent in performing the guttering work.

79. In reality that leaves the allegation arising from the failure on the part of the Defendant to request a Construction Phase Plan from the Claimant.

80. In my judgment the critical issues for discussion are:

(1) Did the Defendant owe a duty of care in tort to ensure that the Claimant produce a Construction Phase Plan? If so

(2) Did failure to discharge that duty cause or materially contribute to the Claimant's accident?

81. In support of the proposition that such a duty was owed, Mr Snarr submitted in his opening skeleton that: "Pursuant to s. 11 of the Civil Evidence Act 1968 in any civil proceedings the fact that a party has been convicted of an offence before a court is admissible as evidence for the purposes of proving negligence." In fact, that is not quite what section 11 says. Sections 11(1) & (2) provide that:

> (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom … shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; …
>
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom … —
> (a) he shall be taken to have committed that offence unless the contrary is proved; and

> (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

82. In short, any relevant conviction can be used to prove the underlying facts upon which the offence is based. Here, had the Defendant been prosecuted to conviction for failure to ensure that, pursuant to Regulation 4(5) of the Regulations the Claimant produced a Construction Phase Plan, drawn up before the construction phase began, that conviction could have been adduced to prove that fact. But in this case, that fact is admitted and there was no prosecution. Mr Snarr submits that "if the Court is satisfied that the D has not complied with the duties he owed under the CDM 2015 regulations, then the starting point is that he has not met the standard of care which the criminal law expects."

83. The Court was provided (by Mr Porter KC) with a copy of S38 of the 1974 Act which provides:

> Proceedings for an offence under any of the relevant statutory provisions shall not, in England and Wales, be instituted except by an inspector, the Environment Agency or the Natural Resources Body for Wales by or with the consent of the Director of Public Prosecutions.

84. Accordingly, the decision to prosecute is a discretionary one. Despite the clear breach of Regulation 4(5) of the 2015 Regulations in this case, no prosecution resulted. It is idle to speculate why. However, despite the provisions of Section 47 of 1974 Act (as amended) Mr Snarr submits that civil liability arises from a breach of Regulation 4(5). He relies upon the well known three stage test in *Caparo Industries Ltd v Dickman* [1990] 2 AC 605, namely the tests of foreseeability, proximity, and that to impose liability would be fair, just and reasonable.

85. Whilst each case must be fact specific, in my judgment there is no justification in this case for overriding the clear words of Section 47 of the 1974 Act (as

amended). Absent the obligation placed upon a "client" in the position of the Defendant to ensure that a competent contractor produced a Phase Construction Plan, there could be no justification, in my judgment, for imposing any such obligation at common law upon a person such as the Defendant. It is only because of the existence of the duty under the Regulations that an argument such as that advanced by Mr Snarr gets off the ground. But in this case, the Claimant is a "one man band" and so is the Defendant. The Claimant had worked for the Defendant's father on and at the farm for many years. The Defendant had only recently taken over the farm following the death of his father. The Claimant was the older and far more experienced man. The relevant authorities saw no reason (so it appears) to institute criminal proceedings against the Defendant. In such circumstances I simply do not accept that it is fair just and reasonable to override the express provision in Section 47 of the 1974 Act (as amended) that breach of the Regulations "shall not be actionable". In my judgment, absent other authority to the contrary, that means that there is no civil liability in this case in respect of the facts giving rise to the breach of the Regulations.

86. Mr Snarr relied upon a number of cases to seek to establish the contrary.

87. *Roberts v Dorman Long & Co Ltd* [1953] 1 WLR 942 (CA) is a case concerning breach of the Building (Safety, Health and Welfare) Regulations 1948. The Plaintiff was the widow of a workman who died following a fall of between 70 and 80 feet. The broad issue was whether safety belts had been provided in accordance with Regulation 97 of the 1948 Regulations. My attention was directed to page 950 of the report where Hodson LJ essentially said that the provision of safety belts, as provided for in the 1948 Regulations, was in any event part of providing the safe system of work at common law.

88. That is undoubtedly correct and a provision that breach of Regulation 97 of the 1948 Regulations "was not actionable" would not prevent an action at common law being brought.

89. But a regulatory requirement for the client of building works to require the contractor to provide a document which is itself a creature of a specific Regulation cannot, in my judgment, be equated with a duty at common law.

90. *Cockerill v CXK Ltd* [2018] EWHC 1155 (QB) is a decision of Rowena Collins Rice sitting as a Deputy High Court Judge. The Claimant suffered injury when she tripped over a seven inch doorstep at premises which to her were unfamiliar and which she was visiting in the course of her employment. She sued her employer and the occupier of the premises. The amendment to the 1974 Act brought about by the 2013 Act was relevant. However, the Judge held that removal of the Claimant's cause of action for breach of statutory duty "did not repeal the duties themselves" (see paragraph 18).

91. However, the claim was determined on the basis of negligence based itself upon existing common law duties. This again is very different from the brand new and some would say onerous regulatory obligation on a client to demand from the contractor something which the contractor would not, but for the Regulation, be obliged to produce. As the Judge said at paragraph 18: "Not all breaches of the statutory regime will be negligent".

92. *Tonkins v Tapp* [7 December 2018, unreported] is a decision of HHJ Allan Gore QC sitting as a Judge of the High Court. He considered the judgment in *Cockerill* and at paragraph 106 of his judgment said:

> "Accordingly, I would not have been prepared to find, without much more analysis and argument, that the effect of section 69 [of the 2013 Act] was to deprive an accident victim of entitlement to rely upon a finding that breach of statutory duty constituted ipso facto negligence as constituting breach of the scope and standard of care reasonably required of the alleged tortfeasor by the statutory duty even if no civil right of action was available for its breach."

93. In that case, the Claimant's claim failed on the facts. It may well be that a particular breach of statutory duty constitutes "ipso facto" negligence, but it does not seem to me that breach of Regulation 4(5) does in this case.

94. Mr Porter KC relied upon *Moreira v Moran* [2021] EWHC 1800 (QB), a decision of Mr David Allan QC sitting as a Deputy High Court Judge. The Claimant was represented by Mr Darryl Allen QC and the third Defendant by Mr James Rowley QC. The Claimant sustained injury when he fell from height in the course of performing building work. He was a labourer working for the first and second Defendants, who were themselves self-employed builders. They appeared in person at the trial.

95. The third Defendant was the occupier of the premises where the building work was being performed. The third Defendant had engaged the first Defendant to perform the building work. The second Defendant was assisting.

96. The Director of the third Defendant had no knowledge of the 2015 Regulations. Nor did the first Defendant. Breach of Regulation 4(5) was alleged against the third Defendant by the Claimant.

97. At paragraph 39 of the judgment, Mr David Allan QC said of Regulation 4:

> "The client should ensure that a plan is drawn up before the work begins. It is accepted that breach of the 2015 regulations does not provide a basis for civil liability. Mr. Allen QC submits it should inform what constitutes a breach of the common duty of care under the 1957 Act and the common law duty."

98. No liability was found to exist as against the third Defendant "client". That is consistent with the view that I have formed.

99. But even if I am wrong about that, I do not accept the Claimant's evidence that requiring him to produce a written plan would have prompted him to ask for the man basket to be placed in the barn to act as a crash deck. In his evidence he spoke about the benefit of hindsight and thinking that he would have asked for a crash deck if he had been asked to put his risk assessment in writing. In fact, the breach of duty relied upon is a failure to ask the Claimant to produce a Construction Phase Plan. On the hypothetical basis that the Claimant would have found out what a Construction Phase Plan was and perhaps looked at the brief model plan produced by the HSE (at pages 784 and 785 in Bundle 2),

there is nothing obvious in that plan to alert the Claimant to the desirability of requesting a crash deck. Under the heading "Falls from height" there follows the narrative:

> "Make sure the ladders are in good condition, at the correct angle and secured.
> Prevent people and materials falling from roofs, gable ends, working platforms and other open edges using guardrails, midrails and toeboards."

100. To observe that the Claimant was fixed in his ways is not intended to be a criticism. He had 30 or so years of experience in compiling risk assessments in his head. Nothing said to me by the Claimant and nothing that I have read comes close to persuading me that it is "probable" that the exercise of writing down what was in the Claimant's head would have led to the addition of a request for a crash deck. Benefit of hindsight does not, in this case, translate into probability of a different outcome.

101. It follows that the Claimant fails to establish that the Defendant is liable for the consequences of the dreadful accident which has led to such catastrophic consequences for the Claimant.

102. If I am wrong about the issue of liability, it will be necessary to determine the apportionment of liability. It is rightly conceded that the greater share of responsibility rests with the Claimant.

103. Apportionment is more of an art than a science. Each case is exquisitely fact sensitive. In this case, the Claimant was the man with experience and skill. He had used crash decks before. I have found as a fact that the Defendant had never been involved in the provision of a crash deck for use by the Claimant, but that is not the breach of duty alleged. The breach alleged is a failure to ask the Claimant to produce a document that the Claimant was also under a duty to produce. I would apportion contributory fault to the extent of 75% against the Claimant, meaning that if there is any liability against the Defendant, it is limited to 25% of the value of the claim.

**Conclusion**

104. The claim fails. However, like HHJ Gore QC, I find it impossible to leave this case without expressing my admiration for the manner in which the Claimant has conducted himself in the face of terrible adversity, and my regret that after so many essentially injury free years of devoted service to countless clients his career has to end in this manner.