Neutral Citation Number: (2013) EWHC 479 (QB)

Case No: HQ12X01317

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th March 2013

Before :

HIS HONOUR JUDGE MCKENNA (Sitting as a Judge of the High Court)

- -

Between :

Jason Sharp (A protected party by his brother and litigation friend John Sharp)	**Claimant**
- and -	
Top Flight Scaffolding Ltd	**Defendant**

- -
- -

Nigel Cooksley QC (instructed by **Irwin Mitchell LLP of 40 Holborn Viaduct London EC1N 2BZ**) for the **Claimant**
Nicholas Baldock (instructed by **Hextalls Ltd. 33 Throgmorton Street London EC2N 2BR**) for the **Defendant**

Hearing dates: 4 and 5 March 2013

- -

Judgment

His Honour Judge McKenna :

Introduction

1. In this action, Jason Sharp, the claimant, seeks damages for injuries and losses sustained in a fall from scaffolding that he had erected in the course of his employment with Top Flight Scaffolding Ltd, the defendant, on 23 November 2009, at the rear of a domestic property at 6 Thanet Road, Erith ("the Property").

2. Liability and contributory negligence remain in issue and, by order of Master Eastman dated 9 August 2012, are to be tried in advance of the trial of quantum (1/5/21).

3. Unfortunately, due to the nature of his injuries sustained in the fall, the claimant has been unable to give evidence, and indeed is a protected party, and the claim has been pursued on the claimant's behalf by his brother, John Sharp, as his litigation friend. In the circumstances, it is perhaps fortunate that much of the factual background is non-controversial.

Background

4. The claimant, whose dated of birth is 13 May 1969 and who is therefore 43 years old, had worked as a scaffolder for many years, and indeed for a number of years he had worked for the defendant, and in fact, it is common ground that he had known Mr

Bolton, the sole director of the defendant, for very many years and had worked for another company owned by Mr Bolton before being employed by the defendant.

5. On 23 November 2009, the claimant and his nephew, Ray Eastmond, who, it is common ground, was employed, albeit on a self-employed basis, from time to time as an unqualified scaffolder's labourer, attended at the defendant's yard and, as was usual, were given a list of jobs for the day (3/14/238(a)). It was Mr Eastmond's evidence that the claimant was in charge and Mr Eastmond did what he was told by the claimant in all matters.

6. The list of jobs for that day involved a pick-up of equipment from an address in Purley, the dismantling of scaffolding at an address in Sanderstead, and the erection of a scaffold at the rear of the Property, which was a terraced property, which meant that the claimant and Mr Eastmond would have to transport the scaffolding equipment through the house and into the back garden.

7. It was intended that the scaffold was to be used by a regular customer of the defendant, a roofing company called Ray Jones Roofing.

8. The bundle of photographs at 1/15H/135 and following includes a number of photographs taken of the lorry which was used by the claimant and Mr Eastmond on the day of the accident, from which, it is common ground, it is plain that on the day of the accident, whether because they had been specifically loaded on the lorry at the defendant's yard by Mr Eastmond and the claimant under the claimant's supervision, or picked up by the claimant and Mr Eastmond from the other two jobs to which they had been directed that day, the claimant had available for his use in connection with the proposed scaffolding a number (four) of ladders of varying lengths. There was one ladder 7.07 metres in length, and three shorter ladders of 4.09 metres, 2.95 metres and 2.91 metres respectively, as measured by Peter Collingwood of the Health and Safety Executive during the course of his investigation into the accident, as can be seen from his investigation report with recommendations, a copy of which is at 1/15/84 at page 88.

9. It is common ground that no-one from the defendant had attended at the Property in advance, Mr Bolton's evidence being that the job had been phoned or faxed through late the previous week with him having been provided with a very basic design, a copy of which is at 3/12/237. He had also spoken to the householder about access, and been told that access could be effected through the house, a not unusual situation with such terraced houses.

10. It is common ground that, because of the configuration of the downstairs of the Property, at least some of the scaffolding equipment, and specifically long poles, had to be brought through the Property via the small toilet window which can be seen at the rear of the single-storey building shown in the photographs at, for example, pages 129 and 130. These also demonstrate the very basic nature of the scaffold structure as erected by the claimant.

11. It also appears to be common ground that, for some reason, and this is certainly the uncontroverted evidence of Mr Eastmond, no attempt was made to take any ladders through the house at this stage, and specifically not the long ladder, which it appears

the claimant intended to use as the means of access and egress from the scaffold he was intending to erect.

12. It is common ground that, once the equipment necessary to erect the scaffolding, such as boards and pipework, but not any ladders, had been taken through the Property to the rear, the scaffold was constructed by the claimant with Mr Eastmond handing him the equipment as necessary, and that there came a time when the only item to be completed was the fixing of an external ladder access. At this point the claimant was at the top of the scaffolding structure with no safe means of descending whilst Mr Eastmond was, of course, at ground level and Mr Eastmond's evidence was to the effect that, whilst the claimant had been in the course of erecting the scaffolding structure, he (Mr Eastmond) had tried but failed to lift the long ladder through the toilet window, and indeed, it appears to be common ground that the long ladder could not be taken through the Property as appears from paragraph 5.4 of the Defence (1/4/11 at 13).

13. At this point, the claimant sent Mr Eastmond back to the lorry, which was parked nearby, to telephone Mr Bolton. There is some dispute as to the precise purposes of this telephone call, and slightly different accounts have been given by Mr Eastmond at different times, but to my mind nothing turns on this issue. What is certain is that, whilst Mr Eastmond was making the telephone call to Mr Bolton, the claimant fell from the scaffolding, landing in the neighbouring property. No-one saw him fall.

14. There are only two possible explanations for the fall: either the claimant fell through the gap where the external ladder was to be fitted, or he fell whilst attempting to climb down the outside of the scaffolding. Given that he fell into the neighbouring property, the only sensible conclusion is that the latter is the more likely explanation, and I so conclude.

15. Following the accident, the defendant instructed a Mr Warnes, an independent health and safety consultant, to investigate the causes of the accident. His report is at 3/17/247, with another copy being at 3/18/262. His conclusions as to why the accident happened are as follows, as appear at page 250:

> - *"Risks and methods not identified prior to commencement of the scaffolding operation.*
> - *Scaffolding erected with no adequate means of access/egress.*
> - *No protection against a fall from one end of the scaffolding.*
> - *No personal fall protection worn by the IP.*[1] *"*

16. Mr Warnes' recommendations are to be found at page 251, and are follows:

[1] In fact, there is no issue as to whether or not the wearing of personal fall protection would have made a difference on the facts of this case.

> "1. *Risk Assessments and Method Statements should be site-specific and prepared in advance.*
>
> *2. Review arrangements for working at height.*
>
> *3. Review experience and training of scaffolders.*
>
> *4. Review leading-edge protection arrangements and PPE requirements.*
>
> *5. Toolbox talks for key operatives involved in all scaffolding operations.*
>
> *6. Training to be given on SG4:05 and harness wearing/inspection."*

Chronology of relevant guidance

17. In 1995, the Health and Safety Executive published a booklet entitled "Health and Safety for Small Construction Sites". This advocated the use of a single external ladder to the working lift of scaffolding (2/1/3).

18. On 29 December 1999, the Management of Health and Safety at Work Regulations 1999 came into force, providing, among other things, a requirement that every employer should make a suitable and sufficient assessment of the risks of health and safety of his employees to which they are exposed whilst at work.

19. In 2000, the National Access and Scaffolding Federation (NASC) produced Guidance Note SG4:00, which included the following:

> "*Ladder access*
>
> *(1) Ladders for use by scaffolders should be included as early as possible into the erection process and removed as late as possible during dismantling, reducing the need for scaffolders to climb the scaffold structure.*
>
> (2) *It is recommended that a ladder bay is constructed and that ladders are incorporated from top to bottom of the scaffolding structure.*" (2/2/6).

20. In January 2005 and in anticipation of the Work at Height Regulations 2005 coming into force, the NASC produced further technical guidance TG20:05, entitled "Guide to Good Practice: Scaffolding with Tubes and Fittings", which provided as follows (2/8/25):-

> "*16. Access to and in scaffolds.*
>
> *16.1 General*
>
> *The Work at Height Regulations require employers to use existing structures for access to work at height, where*

> *reasonably practicable. For example, if a permanent staircase or passenger lift could be utilised to access and egress a tall building at high level, thus avoiding the need to expose scaffolders to an unnecessary risk of a fall whilst erecting, altering and dismantling a temporary scaffolding access tower, then the permanent access should be used.*
>
> *Access and egress to and from scaffolding should be considered using the following hierarchy of access:*
>
> 1. *Staircases.*
> 2. *Ladder access bays with single lift ladders.*
> 3. *Ladder access bays with multiple lift ladders.*
> 4. *Internal ladder access with a protected ladder trap.*
> 5. *External ladder access using a safety gate.*
>
> *Work at Height Regulations require Risk Assessments to show that ladders can be used if more suitable access equipment is not justified because of the low risk and short duration of use.*"

21. The Work at Height Regulations 2005 came into force on 6 April 2005. These included the following:

> *4(1) Every employer shall ensure that work is—*
>
> *(a) properly planned;*
>
> *(b) appropriately supervised; and*
>
> *(c) carried out in a manner which is so far as is reasonably practicable safe, and that its planning includes the selection of work equipment in accordance with regulation 7.*
>
> *5 Every employer shall ensure that no person engages in any activity, including organisation, planning and supervision, in relation to work at height or work equipment for use in such work unless he is competent to do so or, if being trained, is being supervised by a competent person.*
>
> *6 (3) Where work is carried out at height, every employer shall take suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury.*

22. In July 2005, NASC published its Guidance Note SG4:05, which included the following:

> "*6. Before scaffolders undertake work at height, it is essential to consider the work to be performed, and take account of any foreseeable hazards arising from that work that will need to be dealt with. To ensure the safety of scaffolders and others that may be affected by scaffolding and such operations, it is necessary for a suitably competent person to carry out a Risk Assessment.*
>
> *16. When carrying out a Risk Assessment, it is recommended that, where possible, an inspection of the site is undertaken by a suitably competent person. The purpose of the Assessment is to take due account of all foreseeable hazards in the workplace, in addition to any commercial considerations for the job.*" (2/5/12-13).

23. In March 2006, the NASC Guidance Note SG4:05 was updated and provided as follows:

> "*Safe access for use by scaffolders (e.g. staircase or ladder) should be incorporated as early as possible in the erection process (and removed as late as possible during dismantling), avoiding the need for scaffolders to climb the scaffold structure.*" (2/3/8).

24. In November 2008, NASC Technical Guidance Note TG20:08 was published, updating TG20:05, but without altering the relevant text (2/4/10).

25. In 2009, the defendant produced its latest edition of its Health and Safety and Code of Conduct Booklet, which provided that site managers should:

> "*Ensure that all employees under their control receive sufficient and adequate training to enable them to undertake competently the work for which they are employed.*" (3/6/182).
>
> "*Ensure that a written Risk Assessment is carried out in each site in which he has responsibility.*" (3/6/183)
>
> "*The Director is responsible for Safety and the Health and Safety Consultants are responsible for recommending and arranging safety training and refresher courses for all employees as necessary.*" (3/6/192)
>
> "*…Scaffolding may only be used if erected by an approved contractor and inspected in accordance with best practices…the provisions of the Work at Height Regulations 2005 must be adhered to.*" (3/6/193)
>
> "*Never climb up or down the outside of a scaffold, use the access ladders provided.*" (3/6/196)

Evidence

26. The court has heard evidence from the claimant's nephew, Ray Eastmond, who, in fact, gave witness statements to both the claimant's and the defendant's solicitors and on behalf of the defendant from Martin Bolton, its sole director, Ian Hardy, a fellow scaffolder of the claimant employed by the defendant, and Austin Warnes, who runs an independent health and safety consultancy. In addition the claimant's brother gave a short statement on which he was not cross-examined as to the unsuccessful attempts he made to locate relevant health and safety documents.

27. In the light of the fact that, as I have already recorded, the circumstances leading to the accident are largely uncontroversial, I do not propose to summarise their evidence in any detail, but will refer to relevant aspects of the evidence as and when appropriate.

The claimant's training

28. Although it is conceded that the claimant was an experienced scaffolder in the sense that he had worked in the industry for a number of years, there is little or no evidence of any formal training of the claimant. The only document evidencing any qualification on the part of the claimant is at 3/9/233, which suggests that the claimant, whilst employed by Georgian Scaffolding Ltd and over the period 7 – 11 September 1998, completed a course entitled "Assessed Route of Entry (Basic Scaffold)". In fact, that course did not actually involve any instruction or training, the description at 3/10/234 making it clear that the course merely comprised an assessment over five days of the skills of those who were taking part. The audience being aimed at was scaffolders with a minimum of five years experience; a fact of which Mr Bolton expressed ignorance during the course of his cross-examination which might be said to speak volumes as to his commitment to ensuring that his employees were properly trained for the tasks expected of them.

29. In his oral evidence, Mr Bolton said that he had been told by the claimant that the claimant had also passed his Part 2 qualification whilst working for Georgian Scaffolding Ltd, but Mr Bolton was not provided with any documentary evidence to support that assertion, and the claimant's brother was unable to locate any relevant documents when he looked for them among the claimant's papers. He also conceded that he was aware that, shortly before his accident, on 29 October 2009, the claimant had in fact failed a basic touch-screen test of health and safety on construction sites, because the claimant told him the computer equipment was faulty. Mr Bolton said he took the claimant's explanation at face value which might be said to be a further example of his laissez- faire attitude to training.

30. The defendant has been singularly unable to provide any documentation in connection with any training for the claimant, or indeed any other employee, prior to the accident, although Mr Bolton did say that the claimant was given a copy of SG4:YOU, "a users guide to SG4:05, preventing falls in scaffolding and falsework", which he says was placed in every employee's kitbag with their safety harness. There is no credible evidence that any attempt was made to ensure that or even to encourage employees such as the claimant actually to read this booklet. It is also said that training was also given in the form of so-called "toolbox talks" carried out by an external consultant (who has since retired to Spain), lasting two to three hours each. There were, he said, at least two such talks attended by the claimant, one in 2006 and one in 2008. Again, there is no documentary evidence to support that assertion and no documents

evidencing what was supposedly taught, although Mr Hardy, in his evidence, recalled a handful of such talks, perhaps three or four, which he said included working at height.

31. The defendant also relied on the existence of its Health and Safety Code of Conduct Booklet (3/6/176), which Mr Bolton said was reviewed each year at the same time as the defendant's employer's liability insurance fell due for renewal, as well as a substantial volume of health and safety material which Mr Bolton kept on his desk, and which was available for employees to read at will.

The parties' respective positions

32. In essence, it is the claimant's case (paragraph 10 of the Particulars of Claim) (1/2/4) that, had a proper risk assessment been carried out and the guidance provided by NASC been heeded, in particular SG4:00, TG20:08 and SG4:05, a Method Statement should have been provided to the claimant providing for the incorporation of internal ladder access, which should have taken precedence over external ladder access so as to avoid the need for one long ladder externally from ground to the working platform at eaves height, such that the accident would not have happened. In this regard, a number of allegations of negligence and breach of various statutory duties are alleged. In the alternative, it is said on behalf of the claimant that any finding of contributory negligence should be very low, particularly in the light of the alleged failings on the part of the defendant.

33. The defendant, by contrast, relies on the fact that the claimant was an experienced scaffolder who, it was said, was perfectly capable both of assessing the work for himself and of erecting a safe scaffold, for which he had sufficient training and for which he had the necessary equipment available to him to undertake its construction safely with internal ladder access and egress, there being no time pressure. Reliance is also placed on a generic Risk Assessment (3/15/239) and on the toolbox training said to have been given by the external provider. It is also said that the decision to climb down the scaffold was the claimant's and the claimant's alone, and that he knew that to climb down was dangerous; in short, what is alleged is that the overriding cause of the accident was the fact that the claimant had failed to use short ladders in breach of his training and instructions, and that when the problem manifested itself, by climbing over the side. It must have been obvious to the claimant that there would have been a problem bringing the long ladder through the Property, and he must have known that he had short ladders available on the lorry because he would have been involved in the loading of them, either at the defendant's yard or when the scaffold at Sanderstead was dismantled earlier in the day. In the alternative, the defendant asserts that the accident was caused in substantial part by the claimant's own negligence.

Discussion

Primary liability

34. It is common ground that the approach in law to breach of duty is as set out in Bhatt v Fontaine Motors [2010] EWCA Civ 863, where Richards LJ, with whom Sedley and Sullivan LJJ agreed, set out the position at [28] at follows:

> "*I agree that one needs to start with the Regulations rather than with the claimant's conduct. The Regulations are directed at avoiding or minimising the risks inherent in working at height. The point is well made in the simple hierarchy set out in the Health and Safety Executive's guide (see [15] above), that is, work at height must be avoided altogether if is reasonably practicable to carry out the work otherwise than at height: that is the focus of Regulation 6(2). If work at height cannot be avoided, the risk must be minimised by, inter alia, the selection of work equipment which is appropriate and meets the other requirements in Regulation 7(2)…*"

35. It follows that, in respect of primary liability, the claimant has to establish a causative breach of duty. In my judgment, on the facts of this case, this is established on the balance of probabilities beyond peradventure. At best, the claimant had had no formal training since the 1990s, assuming that he did in fact pass the Part 2 scaffolding basic test (of which there is no documentary evidence), and at worst he had had no training, as opposed to undergoing an assessment in 1998, when what was acceptable was very different, as is apparent from a perusal of the changing guidance issued, to which I have referred earlier in this judgment, since when, at best, he has had a couple of toolbox talks in 2006 and 2008 in respect of the content of which again there is no documentary evidence. Whilst the claimant may have been competent in 1998, when he successfully passed the assessment, best practice has moved on substantially since then and, in my judgment, the training facilities provided by the defendant can best be characterised as lamentable and the defendant has plainly failed in its common law duty to provide the claimant with adequate training and has failed in its duty to ensure that the claimant remained competent to engage in the organisation, planning and erection of scaffolding.

36. The lack of training and the level of ignorance on the part of Mr Bolton of the defendant and its employee, Mr Hardy is, in my judgment, aptly demonstrated in their respective witness statements, since nowhere in either statement does either Mr Bolton or Mr Hardy criticise the claimant for not having utilised internal access ladders. Still worse, they do not criticise him for apparently intending to use an external ladder notwithstanding the clear hierarchy set out in the January 2005 guidance (NASC Technical Guidance TG20:05), nor the decision to proceed with the construction of the scaffold without any safe means of access or egress; no attempt having been made even to try and bring the long ladder through the Property. It is difficult to imagine clearer examples of the level of ignorance of both Mr Hardy and Mr Bolton and, of course, in this regard it is also pertinent to recall the evidence of Mr Bolton that he regarded the claimant as being better trained than he himself was, he not having attended any relevant courses himself.

37. The evidence of Mr Bolton and Mr Hardy on these issues also casts considerable doubt on other evidence of Mr Bolton to the effect that, from what he saw of the claimant's work, it was consistent with his having passed the Part 2 scaffolding basic, although quite how he could say that when he himself had never taken that test is perhaps surprising, still less because he seemed completely unaware of the hierarchy of access set out in the 2005 guidance. Equally, his evidence that he had seen the claimant work on a regular basis and had not had cause to reprimand him in the

circumstances sounded equally hollow given his clear lack of knowledge of up to date guidance.

38. In all the circumstances, given that that was the evidence of the prevailing attitude of the sole director, being the director responsible for safety, and a fellow scaffolding worker, it is perhaps not surprising that the claimant should have constructed the scaffold at the Property without any internal ladders, and indeed without any ready and safe means of access or egress. There was, to my mind, also a systematic disregard by the defendant of its own health and safety policy, since it plainly failed to ensure that all employees under its control received sufficient and adequate training to enable them to undertake competently the work for which they were employed, and since it plainly failed to ensure that a written risk assessment was carried out on each site. Reliance on the claimant's suggested ability to assess the job for himself without the need of a risk assessment or method statement, given as I find his lack of relevant training, simply will not do.

39. In this regard, it is perhaps noteworthy that in his report, Mr Warnes, as I have already recorded, identified management failings and a lack of pre-planning as reasons for the accident. When confronted by these findings of such failings, Mr Bolton initially sought to deny them and only reluctantly, when pressed, did he accept that there were failings, although even then he sought to characterise them as "small" failings. In this regard, it is important to recall that the whole purpose of the Regulations is to protect employees against the dangers inherent in working at height. They are to guard against carelessness and lapses in concentration, and in that context Mr Bolton's characterisation of failings as being "small" failings is perhaps a further indication of his generally lax approach to issues of safety.

40. Had the claimant been properly trained and, had there been a site-specific Risk Assessment undertaken, and an up-to-date Method Statement supplied, the claimant would, in all probability, have incorporated the use of internal ladders, which he plainly knew he had available to him, in the construction of the scaffold, and this tragic accident could have been avoided. In my judgment, primary liability is plainly made out. On the facts of this case the defendant simply cannot rely on the claimant's on site assessment.

Contributory negligence

41. I have been referred to a number of authorities by counsel in their very helpful closing submissions, the most relevant of which is Sherlock v Chester City Council [2004] EWCA Civ 201. In that case, the claimant operated a portable bench saw and the defendant did not provide a risk assessment or training since it considered that the claimant had sufficient experience. Problems were caused by the length of facias which were to be cut, and which had a habit of bowing, but no run-off bench was provided to prevent bowing. The defendant admitted breach of Regulation 20 of the Provision and Use of Work Equipment Regulations 1998.

42. On the issue of primary liability, Latham LJ, with whom Auld and Arden LJJ agreed, concluded as follows:

> "*30. I entirely accept that this is not a case of mere inattention, which was the mischief referred to by Lord Tucker. But*

> *requirements of both common law and the regulations which I have identified have, as part of their purpose, the objective of ensuring that both employer and employee have taken stock of the situation where an appropriate work practice has to be identified so as to ensure that each has in mind the relevant risk and the necessary measures to obviate or reduce it. For the reasons that I have given, that was an obligation on the respondents, going beyond the actions and the decisions of the appellant, and which was causative of the accident. It cannot therefore be said here that the fault of the appellant was co-extensive with the fault of the respondent. The respondent's negligence and breaches of statutory duty were, accordingly, a cause of the accident.*"

43. Having so concluded, Latham LJ then turned to the question of contributory negligence in the following passage:

> "*31. The question then arises as to the apportionment of liability. In Toole v Bolton Metropolitan Borough Council [2002] EWCA Civ 588, Buxton LJ said:*
>
> *'It is not usual for there to be marked findings of contributory negligence in a breach of statutory duty case'.*
>
> *32. There may well be some justification for that view in cases of momentary inattention by an employee. But where a risk has been consciously accepted by an employee, it seems to me that different considerations may arise. That is particularly where the employee is skilled and the precaution in question is neither esoteric nor one which he could not take himself. In the present case, he could have made himself a run-off bench, or ensured that Mr Webb was there when he cut the relevant facia board. In those circumstances, it seems to me that the appellant can properly be required to bear the greater responsibility. I would assess his responsibility for the accident at 60%. Accordingly, he is entitled to 40% of whatever damages are ultimately considered to be appropriate for the dreadful injury he suffered to his hand.*"

44. Whilst accepting that issues as the extent of contributory negligence are very fact-specific, I find the guidance in this case of considerable assistance. On any view, the instant case is not one which can properly be characterised as one of momentary inattention.

45. To my mind, it is plain that the decision to climb down the outside of the scaffold was taken deliberately by the claimant, in the face of the fact that, only a matter of moments before, he had sent Mr Eastmond to speak to Mr Bolton, and before even waiting for any response from Mr Bolton, and in the knowledge that it was an inherently dangerous manoeuvre. I must balance that decision, and indeed the earlier decision to go ahead and build a scaffold without any ready means of safe

access/egress against the breaches of duty which I have found on the part of the defendant.

46. Counsel for the claimant prays in aid the fact that the claimant was not criticised by Mr Warnes in his accident report, albeit that it must be remembered that Mr Warnes had been unable to speak to the claimant; that the claimant had recently failed a health and safety test, and a very basic one at that, which it was said showed that he should not have been left unsupervised, and the evidence of Mr Hardy that he would not have ruled out making a decision to climb down the scaffold in the circumstances which presented themselves to the claimant, albeit that he would not necessarily have gone down the outside, but would rather have climbed down the inside of the scaffold, in support of his contention that any finding of contributory negligence should be low.

47. Counsel for the defendant, by contrast, submits that the requirement to work at height could not be avoided, that the claimant was experienced and had designed the scaffold himself, a scaffold which was about as basic a form of such construction as there could be, and that the need for access/egress must have been obvious. In addition, the claimant had been provided with all the necessary equipment, and in particular appropriate ladders to enable him to incorporate internal access arrangements, and moreover the decision to climb down the outside of the scaffold was taken deliberately and in the face of knowledge that it was a dangerous manoeuvre, such that the level of contribution must be high.

48. For my part, I do not find the absence of any criticism of the claimant by Mr Warnes in his report as being in any way significant. Whatever may or may not be said in the report, the fact of the matter is, in my judgment, that the decision to climb down the outside of the scaffold was taken deliberately and in the knowledge that it was dangerous. Equally, the decision to construct scaffolding without any ready means of access/egress was a deliberate decision on the part of the claimant, which he must have realised exposed him to a risk of danger if in fact, as turned out to be the case, he had to climb down without the benefit of any ladders. These are matters of legitimate and serious criticism of the claimant's conduct. Whatever the failings of the defendant in terms of negligence and breach of statutory duty, in this case, to adopt the words of Latham LJ in Sherlock , the claimant consciously accepted the risk and the precaution was neither esoteric nor one which he could not take himself. In the circumstances, it seems to me that the claimant can properly be required to bear the greater responsibility, and I would assess his responsibility for the accident in this case at 60%.

Conclusion

49. I trust that counsel will be able to agree the form of an order which reflects the substance of this judgment, and which could usefully include directions for the future conduct of the claim.

50. Finally, I would like to take this opportunity to express my gratitude to both counsel for the way in which they have conducted the case and for their very helpful skeleton arguments and focused closing submissions.