Neutral Citation Number: [2021] EWHC 2631 (QB)

Case No: QB-2020-004148

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th December 2021

Before :

Master Stevens

Between :

Mr Sudir Shah	**Claimant**
- and -	
London Borough of Barnet	**Defendant**

Mr Pritesh Rathod (instructed by **Fieldfisher LLP**) for the **Claimant**
Ms Lisa Dobie(instructed by **Weightmans**) for the **Defendant**

Hearing dates: (remote) 13th July 2021 and decision handed down 22nd September 2021 with reasons to follow

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Introduction:

This is my judgment on:

(i) an application brought by the defendant to resile from admissions made prior to the commencement of proceedings and

(ii) An application brought by the claimant to enter judgement upon those admissions (which is contingent upon the outcome of the defendant's application)

The claim is for damages for serious injuries sustained by the (now) 68 year old claimant when he tripped and fell on an uneven pavement in a residential street maintained by the defendant highway authority. The pavement had become uneven because of raised tree roots which had grown through the surface pushing up the slabs.

In addressing these issues this judgment is divided into the following parts:

A Chronology

B The Legal Test

C Case authorities

D Submissions and my conclusions on each

E Overall determination

A CHRONOLOGY

Both parties prepared chronologies but the entries were rather different and the claimant's contained significantly more detail, much of which I considered to be material. I have recorded the events that I consider most pertinent from each below:

5 March 2018	Last pre-accident inspection by the defendant of the street where the accident occurred- 2 defects noted
19 August 2018	Accident
6 November 2018	Letter of claim received

It begins " I am writing to make a formal complaint against the Council in relation to life changing injuries I sustained tripping on the pavement of The Grove, Finchley central, N3 1QJ ….I understand the Council are responsible for the maintenance and upkeep of the road in question"

…" I was returning home from shopping from Tesco. "

… " I was taken by ambulance to Barnet hospital …I was advised that I needed surgery, which could involve a shoulder replacement …..I was shown images of my injuries, which had identified a dislocated shoulder and multiple fractures. I also had nerve damage …I believe I was in surgery for almost 5 hours …..I was advised I had sustained significant nerve damage as a result of the trauma "..

…"It has now been almost 12 weeks since the injury. I remained in a sling for longer than expected. I continue to have loss of functional use of my right arm, which is my dominant side. I continue to suffer from loss of sensation in my right hand, and am unable to bend my fingers to clench my hand to make a fist. I have been advised on numerous occasions that the nerve damage is significant, and have recently undergone nerve conduction studies, which confirm the seriousness of the injuries. I have been advised that although the nerves may make some recovery, I will not be able to go back to my normal activities of daily living. I am in a lot of pain and discomfort. I require assistance from my wife with all activities of daily living as it is my right hand that has been affected. I cannot shower or eat my food without it being cut up for me. I am forced to sleep on my back in one position which is uncomfortable and causes sleepless nights."

2 December 2018 Letter from claimant enclosing CRU certificate and stating:

"You also requested further details of the location of the accident. As will be seen from the photographs supplied previously, I sustained the fall near the tree located closest to Swift Court, 22 The Grove, N3 1QL, and house number 24. I would be happy to show you the exact location should your office perform a site visit."

7 January 2019 Site inspection by defendant where 22mm edge of paving slab measured (not on notice to the claimant and not attended by him)

25 February 2019 Email from claimant chasing response and reporting that another woman has tripped at the same location

27 February 2019 Letter denying liability

"As a result of past case law the courts have dictated that for a discrepancy or trip to be considered a defect, it must be 25mm (1 inch) or greater in depth. The Highways Officer inspected the location of

	your accident on 7th January 2019 and the maximum defect was 22mm which is well below the tolerances considered by the Courts as hazardous. Therefore, we consider that we have fulfilled our duties under S41 of the Highways Act 1980."
17 March 2019	Email from Claimant to Mr Gormley, at the insurance section of the defendant "You are aware that I have reported a second incident in the same spot just a few months after mine, so I again consider this area to be hazardous. For now, please provide all documentation you rely on as part of your Defence, including but not limited to: • all inspections of the area in the last 5 years (including that performed on 5 March 2018) • complaints from the last 5 years • photographs taken each time • all investigations performed as a result of my complaint."
26 March 2019	Email from Mr Gormley, stating that hard copies will be sent by post limited to 12 months
May 2019	Area resurfaced -paving slabs with tarmac. Claimant not notified in advance
June/July 2019	6 chasers by the claimant's daughter for a response
10 July 2019	Email from Mr Gormley attaching documents relied on in support of Defence
December 2019	Further chasing communications from the claimant's daughter
18 January 2020	Email from claimant's daughter attaching colour photographs highlighting that the defendant has inspected the wrong area and noting disclosed inspection documents refer to defects in the area 5 months before the fall, pressing for a liability admission
19 February 2020	Defendant insurance team review the claim noting amongst other things the wrong defect had been inspected as "22mm but no WO raised (which may still be considered dangerous"…the defect that was measured was close to intervention level….It was agreed that we will have to concede liability as No action taken when claimant reported that wrong defect was inspected. Highways unable to produce any WO details and the defect that was measured was close to intervention

	level, the pavement has since been tarmac over replacing the paving stones"
21 February 2020	Admission – 18 months after the accident Ms Rebelo, Insurance Claims Handler at the defendant wrote: "Under the Highways Act (1980) the council must carry out regular inspections…and …repair any defects as a result. in this case the council accepts that there was a defect and that it was not repaired within a reasonable time frame"
February 2020	Fieldfisher instructed by the Claimant and steps taken to obtain medical records
21 May 2020	Ms Rebelo suggested that the matter be dealt with on the MOJ portal. Rejected the same day , on the basis that the value of the claim exceeded £25,000.
22 May 2020	Claimant examined by neurologist
22 June 2020	Claimant examined by orthopaedic surgeon
28 July 2020	Claimant's solicitors seek written confirmation that liability is admitted
3 August 2020	Admission repeated. Email from Ms Rebelo "I can confirm that liability will no longer be in issue"
7 August 2020	Medical records were electronically made available to Ms. Rebelo (658 pages) Those records were: • GP records to March 2020 • Barnet Hospital to December 2019 • Royal National to January 2020
8 August 2020	Claimant assessed by psychiatric expert
9 September 2020	Claimant requested interim payment of £25,000 on the basis that "liability is admitted, the extent of the injuries are set out in the medical records, and it is over 2 years' post index accident".
17 September 2020	Defendant requests medical evidence / report to support claim
23 September 2020	Matter referred to defendant's insurance manager
23 October 2020	Gallagher Bassett on behalf of defendant wrote to the claimant stating:

	"As to the medical records that have been provided, we do not believe a £25,000 IP is warranted. Whilst the injury was initially complicated, by December 2019 it appears to have been largely recovered and, from what I can see without the aid of any formal medical report, only rehabilitation was ongoing to build muscle…"
26 October 2020	Claimant's solicitors to Gallagher Bassett "I do not agree with your assessment of the injury based on the medical records alone, and no doubt this will become apparent from the reports when received. However, to avoid any further delays and the costs of issuing an application, the IP of £12,500 is agreed at this stage, and my secretary will send our account details across for payment shortly".
11 November 2020	Interim payment of £12,500 agreed by defendant
24 November 2020	In response to request for entry of judgment defendant claims team leader says there is no need for a consent order for a claim that has not yet litigated
25 November 2020	Claim form issued with a statement of value "in excess of £200,000".
7 December 2020	Defendant had instructed solicitors on 6 December and they were awaiting papers
21 December 2020	Defendant solicitor noting large volume of medical records and that they will go through them. Repeated request for medical evidence.
22 December 2020	Claimant confirmed that in the absence of a signed consent order they were going to serve proceedings and that as the claimant had reached the end of his recovery the matter could proceed by way of quantification of damage . Claimant served some updated medical records dated 24 June 2020 (discharge from orthopaedic clinic), a letter dated 3 July 2020 from the peripheral nerve unit and updated EMG investigation undertaken in September 2020. Those records were not in the medical records made available on 7 August 2020.
6 January 2021	Proceedings served with condition and prognosis reports from consultants in neurology, orthopaedics and psychiatry
12 February 2021	Defence indicating intention to resile from admission (just under 12 months after the admission)
12 March 2021	Defendant issued application
1 April 2021	Claimant's cross application to enter judgment

B THE LEGAL TEST

CPR 14.1A(3)(b) and CPR 14PD.7 set out the criteria that the court must consider when determining an application to resile from an admission.

The court has a wide discretion, but must have regard to all the circumstances, including the overriding objective at CPR 1.1(2).

The relevant Rules for making and withdrawing admissions made before the commencement of proceedings are set out below:

CPR 14.1A

(1) A person may, by giving notice in writing, admit the truth of the whole or any part of another party's case before commencement of proceedings (a 'pre-action admission').

(2) Paragraphs (3) to (5) of this rule apply to a pre-action admission made in the types of proceedings listed at paragraph 1.1(2) of Practice Direction 14 if one of the following conditions is met –

(a) it is made after the party making it has received a letter before claim in accordance with the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol; or

(b) it is made before such letter before claim has been received, but it is stated to be made under Part 14.

(3) a person may, by giving notice in writing, withdraw a pre action admission

(a) before the commencement of proceedings, if the person to whom the admission was made agrees;

(b) after commencement of proceedings, if all parties to the proceedings consent or with permission of the court.

4) After commencement of proceedings–

(a) any party may apply for judgment on the pre-action admission; and

(b) the party who made the pre-action admission may apply to withdraw it.

(5) An application to withdraw a pre-action admission or to enter judgment on such an admission –

(a) must be made in accordance with Part 23;

(b) may be made as a cross-application.

The Practice Direction states in respect of withdrawing an admission:

14PD 7.1 An admission made under Part 14 may be withdrawn with the court's permission.

14PD7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –

(a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;

(b) the conduct of the parties, including any conduct which led the party making the admission to do so;

(c) the prejudice that may be caused to any person if the admission is withdrawn;

(d) the prejudice that may be caused to any person if the application is refused;

(e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;

(f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and

(g) the interests of the administration of justice.

Pursuant to the overriding objective and dealing with the case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence ;

(b) saving expense ;

(c) dealing with the case in ways which are proportionate –

I. to the amount of money involved ;

II. to the importance of the case ;

III. to the complexity of the issues ;and

IV. to the financial position of each party ;

(d) ensuring that it is dealt with expeditiously and fairly ;

(e) allotting it and appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

C CASE AUTHORITIES

During the course of submissions I was referred to a number of case authorities. These illustrated the wide nature of the discretion afforded to the court and the fact sensitive nature of previous decisions. Principles of wider application, and therefore relevant to this determination, are summarised below, with the cases being listed in date order of when the judgments were given:

Woodland v Stopford [2011] EWCA Civ 266

On the correct approach to the factors to be taken into account in the Practice Direction Ward LJ held at [26] that:

"These factors are not listed in any hierarchical sense nor is it to be implied in the Practice Direction that any one factor has greater weight than another. A judge dealing with a case like this must have regard to each and every one of them, give each and every one of them due weight, take account of all the circumstances of the case and, balancing the weight given to those matters, strike the balance with a view to achieving the overriding objective. Cases will vary infinitely and the weight to be given to the relevant factors will inevitably vary from case to case."

The Court of Appeal noted that this was a case where the withdrawal of the admission was prompted, not by the emergence of new evidence, but by the defendants' realisation (after a careful reappraisal of what was known) that those acting on their behalf when the admission was made had acted in error. Such a situation did not preclude the court from permitting withdrawal when exercising its discretion but sometimes the lack of new evidence may be the important consideration.

Moore v Worcestershire NHS Trust [2015] EWHC 1209 (QB)

In this case Bidder J. held in determining an application to resile from an admission, at [31] and [50/51]) that the court "should be aware of and look at [the] case against the background of the revitalised robustness of approach enunciated by the Court of Appeal and the Master of the Rolls in *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537* and *Denton v TH White Ltd [2014] EWCA Civ 906* respectively, but I do not consider that an application to withdraw pre-action admissions necessarily imports the full factors that are relevant on an application to seek relief from sanctions under CPR3.9". The Judge drew a distinction between the types of case where a party has made a procedural error such as in Denton and Mitchell and found no true analogy with an application to resile from a pre-action admission.

Bidder J. also found that where there are errors in the initial assessment of liability, rather than new evidence, it is not a bar to a successful application to resile. The grant of permission to withdraw is discretionary, with regard to all the circumstances of the case and the overriding objective (at [28]). He held at [29] in appropriate cases a distinction was to be drawn between a pure mistake and a tactical change of an admission. In the case there was no new evidence coming to light but the defendant's representative was negligent in making an admission because they had misread expert opinion which had been provided to them. In fact

the judgment makes clear that there were inconsistencies in the defendant's admissions of causation and the Judge stated at [18] that due to those inconsistencies "if the learned master had not allowed the withdrawal of admissions, it would not just have resulted in a trial on quantum alone or an assessment of quantum alone, but inevitably the court would have had to have sorted out what the true position on medical causation actually was ".

Cavell v Transport for London [2015] EWHC 2283 (QB)

In this case William Davis J. dismissed an application to resile from an admission. He reminded himself that it was not for him to conduct a mini-trial. He gave weight to the fact that there was no explanation offered at all as to how the error in making an admission of liability had come about. He reflected further at [16] that so far as the interests of justice were concerned:-

"It cannot be in those interests to permit the withdrawal of an admission made after mature reflection of a claim by highly competent professional advisors when there is not a scintilla of evidence to suggest that the admission was not properly made. Were it to be otherwise civil litigation on any sensible basis would be impossible".

Wood v Days Healthcare UK Limited [2017] EWCA Civ 2097

This case concerned a product liability claim. Sharp LJ considered what was contended for as "new evidence", such as to bring it within scope for a party to be permitted to resile from their pre-action admission. The Judge concluded at [50] that an "entire "change in character and amount" of the claimant's claim in 2012 (to adopt the language of her own solicitors) should, given all the circumstances, have justified the grant of permission to withdraw the pre-action admission)". Such a significant increase in the value of the claim could be regarded as new evidence which could change the commercial decisions and perspective of the defendant, such that an admission could be withdrawn.

The Royal Automobile Club v Wright [2019] EWHC 913 (QB)

In this case liability was admitted and interim payments were made. The defendant's insurers had invited the claim to be submitted through the MOJ Portal but this was declined on the basis that the claim was clearly in excess of £25,000. A detailed Schedule of Loss was provided subsequently, valuing the claim at in excess of £1,000,000. The defendant expressed surprise at the scale of the loss, putting the claimant on notice that it considered withdrawing its admission, which it subsequently did. The Master declined permission to withdraw.

On appeal, the Judge, William Davis J, agreed both with the decision made by the Master and the way in which he had reached it (at [23]). William Davis J. held that:

(1) The correspondence indicated that it was plain that this was not going to be a modest claim (at [13]);

(2) The claimant's solicitors had done nothing to give any impression that the claim was of a modest size and indeed, had declined to enter the claim into the MOJ Portal (at [14]);

(3) There was prejudice to the claimant in that "she had had no cause to engage in any exercise of recollection as to how the accident happened. No investigation had been made as to the precise circumstances" (at [15]);

(4) There was delay in bringing the application to withdraw (at [16]) taking account of the overall timescales not just the time period after proceedings were issued;

(5) Also referring to his own decision in Cavell v Transport for London [2015] EWHC 2283 (QB) William Davis J held that so far as the administration of justice is concerned:

"If clear and unequivocal admissions which have led to a substantial investigation of quantum and to interim payments being made apparently without question can be withdrawn many months later, there will be real damage to the administration of justice. It undermines the basis on which parties to this type of litigation conduct themselves" (at [17])

(6) Furthermore it was held that when considering the prospects of success of the claim (or defence), and the strength that the claimant's case is required to have in order to justify dismissing an application to withdraw an admission, it was not necessary for a claimant to prove that his/her case was bound to succeed (at [21]).

Finally I was referred by the defendant to two authorities in respect of the correct test to be applied by the courts when considering actionable defects on the highway namely, *Joan Margaret Mills v Barnsley Metropolitan Borough Council [1992]EWCA Civ* and *Phyllis Ivy James v Preselli Pembrokeshire District Council & Hayley Thomas (now Rees) v Preselli Pembrokeshire District Council [1992] EWCA Civ.* I do not consider it necessary to summarise those cases but the tests are considered more fully within my summary under factor (f) considered below.

D SUBMISSIONS AND MY CONCLUSIONS ON EACH

At the outset counsel for the defendants submitted that the strongest grounds they were relying upon within the Practice Direction were sub-paragraphs a, b, f and g, although submissions covered other factors too, whilst counsel for the claimant was contending for a, b, c, e and g in the claimant's favour. In any event I turn now to consider each factor.

a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;

The defendant structured their submissions around three topics which they said had changed over time and subsequent to the admission. Two topics can be examined together, namely knowledge of the defects and direction of travel and I will deal with those first.

(i) Information that was said to be "new" about the pre-existing defects

The statement made in support of the application by an Associate, Ms Wallis, of Weightmans solicitors described information that was available at the time the admission was made and what was known subsequently.

Ms Wallis noted that defect reports had not been located to confirm the position of two defects on the street where the claimant's accident had occurred "and any relevance or otherwise to the location of the claimant's fall ". She explained that after she had been instructed on 6th December 2020 she asked the defendant to search again for documents to see whether any more could be found that would demonstrate the system of repair and maintenance in the locality. She said the defendant then tried some different searches in their systems. This led to the highways team finding the defect reports that the pre-accident, March 2018 inspection, had referred to. Those reports confirmed that the defects found did not relate to the area on the street where the accident was said to have occurred.

Ms Wallis then asked the defendant to widen their search further to encompass complaints and works undertaken in the area and none were found that related to the accident location. At some unspecified time the defendant also then located a works order referring to the subsequent resurfacing scheme at the place of the accident and those documents confirmed the resurfacing was unrelated to the index accident.

At paragraph 18 of her witness statement she said the defendant therefore now has new information by way of the defect reports which were not available when the admission was made. She stated "this evidence confirms that the area was not in a dangerous state at the time of the pre-accident inspection in March 2018 and there is therefore an argument that it was not dangerous at the time the claimant fell in August 2018 giving rise to a potential defence under section 58 of the Highways Act 1980".

Counsel also asked me to reflect on the contemporaneous file note recording the basis for the admission, such note being dated 19th February 2020, as she said it very clearly showed the reasons why the admission was made and why it was now being resiled from. The relevant extracts for my determination were, "Wrong defect inspected and this was pointed out by the claimant but no further action taken or a second ARD inspection was requested at the time …the defect location is now replaced with tarmac and claimant unable to send anymore images …Highways unable to trace any work orders for the defect …the defect (wrong defect) inspected by Highways officer is 22mm but no WO raised (which may still be considered as dangerous)and the defect in question is on the other side of the same paving stone- see images received from claimant marking the defect location and direction of travel. The paving stone is shown lifted up due to tree roots. It was agreed that we will have to concede liability as no action taken when claimant reported that wrong defect was inspected. Highways unable to provide any WO details and the defect that was measured was close to intervention level, the pavement has since been tarmac over replacing the paving stones."

(ii) Information that was said to be "new" about the direction of travel

Ms Wallis also pointed to what she described as new information about the direction of travel of the claimant supplied by the claimant on 5th and 8th January 2020. She said this was the first indication to the defendant that they had not measured the correct side of the

slab, said to be the tripping hazard, and that as that measurement had underpinned part of the liability decision making that was also material new evidence to support submissions under paragraph (a) of the Practice Direction.

She referred to a "policy" of the defendant, that if they were unsure about the point of trip, an inspector would measure the highest raised area. There was no evidence put forward by the inspector that this was indeed what had happened but Ms Wallis made some suppositions from the photographs produced by the inspector.

I am aware that the claimant's original letter of complaint had specified that at the time of the accident he was walking back from Tescos to his home. It is therefore unclear to me how his direction of travel could be said to be in doubt, and a witness statement from the claimant's solicitor, Mr Mc Neil, makes the point at paragraph 44 (a) (i) "the direction of travel , on a site inspection, would have been obvious-in order to reach the Claimant's home, the location of the accident had to be passed. This is not possible if he had been travelling in the opposite direction, as the house would come first". This point was not directly contradicted by the defendant in their submissions.

My determination of points (i) and (ii) above

It was put to me that the admission largely related to a lack of information and what were perceived to be unattractive features, namely measuring the wrong side of the paving stone and the resurfacing rather than an assessment of the legal issue under sections 41 and 58 of the Highways Act 1980.

It was accepted that the evidence is not "new" in that it could have been discoverable when the admission was made but that the solicitor's input had resulted in a careful reappraisal. It was submitted this brings my decision within the ambit of previous authorities where admissions have been resiled from with permission of the court. Reference was made to the fact that material documents were genuinely not available at the time of the liability decision and that was important for the balancing exercise that I have to undertake. It was said that there are now reasonable prospects of success for the defendant to make out a section 58 defence, although that falls to be considered separately below under factor (g) of the Practice Direction.

At this point I remind myself of the case authorities referred to me, notably *Woodland* and *Moore* and that information which is not "new" but which has not been properly appraised previously can be considered favourably to enable an admission to be withdrawn under 14 PD 7.2 (a). I am not persuaded that the reasoning on the facts of those cases assists the defendant in this case. In both the reported cases the re-appraisals revealed that the admissions which had been given would not have finally resolved all liability issues in any event. In *Woodland* the emerging evidence about the identity of the defendants and liability arguments against each would, it seems, not have been resolved purely on the basis of an admission by one party. There was reference to the future potential for satellite litigation.

Similarly, in *Moore* the judgment makes clear that the admission was not comprehensive; the court would have still needed to resolve the true position on medical causation before a liability finding could be recorded from which damages would have flowed.

In *Cavell* (which was only relied upon by the claimant) there was a reappraisal of the existing evidence but the Judge considered the integrity of the defendant's fresh review of their highway inspection system and the so-called innocuousness of the defect were undermined because the admission was only made after a period of mature reflection by highly competent professional advisers . He considered there had been a reasonable appraisal at the time of making the admission and after a lengthy investigation, such that the admission should not be withdrawn.

There are significant similarities between *Cavell* and the facts of this case. To re-cap on what is said to be "new" evidence before me , there is first the discovery of 2 pre-accident defects reports showing that they were not at precisely the spot where the claimant fell. The defendant's advisers had never asserted they believed these were at the same location -it was an unknown when they made their decision.

Secondly there is the "discovery" of an absence of other complaints of defects in the vicinity which is said to indicate that there is good evidence a court could be persuaded at trial the highway was not dangerous at the time of the accident. If there had been other evidence before me that the defendant's record-keeping was well-maintained and comprehensive this might have carried more weight. It was fairly put by the claimant that even their own accident did not appear on any disclosed records nor did that of an accident involving the claimant's neighbour which had been reported.

Thirdly, the discovery of works orders for the resurfacing of the accident location after the claimant's fall, which showed the works were not in response to the fall, is pretty weak as an argument for displacing the admission. Whilst Mr Pedro's witness statement for the defendant indicated he "had been led to believe that a reactive repair was carried out" he went on to explain how the repair works would in fact have been commissioned. He said an annual footways survey would identify "footways which are most in need of improvement e.g. worn -out condition etc this does not mean that the footways necessarily have intervention level defects". There are several problems with this evidence ; it suggests generally that the pavement was sufficiently unsatisfactory for a public body to schedule works to improve it. Indeed there is evidence about a general state of disrepair, with cracked and uneven paving due to tree roots. Whilst section 41 of the Highways Act requires attention to be focussed on specific defects not a "general state" the point remains that the section of the footway where the claimant fell was included within the scope of those public works where no doubt a prudent eye must be maintained on controlling expense. Also the highways inspection report from the 7th of January 2019 puts the cause of the raised paving where the fall occurred as tree roots pushing up which on any logical analysis would have occurred over a period of time, such that it could not be said with any authority the issue might not have been visible on the earlier inspection if it had been competently performed. And finally, the height of the actual trip as measured by the defendant was said to be "close to intervention levels" and they had also concluded it " may still be considered as dangerous" despite the height being 22 millimetres ". To my mind that rather undermines some of the reasoning put forward by them in their letter to the claimant on 27th February 2019 when denying the claim on the basis that the size of the maximum defect was well below the tolerances considered by the courts as hazardous. The arguments do not stop there- the claimant has objected to the positioning of the measuring tool used by the highways inspector in any event and contended in its Reply that the trip was likely to have been at least 25mm in height or was of such height as to be

reasonably conspicuous to a reasonably competent highway inspection and of such height as to constitute a danger to pedestrians.

The other piece of allegedly "new evidence relied upon by the defendant , namely the change in direction of travel of the claimant is hopeless in my view as an argument to justify resiling. The claimant had been at pains to assist with identification of the precise cause and location of his fall from his earliest communication with the defendant. In his initial letter of complaint he had described his route coming home from shopping at Tesco's. I have already referred to the claimant's solicitor's statement where it was said the route "would have been obvious" and the fact that this was not contradicted in later submissions by the defendant.

(iii) Information that was said to be "new" about value

The other type of new evidence which the defendant sought to rely upon was an increase in the quantum of the claim. Ms. Wallis in her witness statement at paragraph 25 identified that it was initially thought by the defendant that the value might be in the region of £30,000 to £40,000, and I quote "so it was accepted as a case to settle ". Subsequently she noted when the claim went to Gallagher Bassett insurers for review it was seen as "likely to exceed £50,000". It is asserted there was no indication of a large special damages claim. Mr Pedro Shaw also referred at paragraph 10 of his statement" to a reasonable commercial approach to avoid the costs of third party legal representation and or litigation " as one of the factors in making the admission.

Counsel for the defendant was at pains to point out that there was no suggestion the claimant had misled the defendant with regard to value but said the defendant genuinely had believed that it was a much lower value claim. They pointed to the initial letter of complaint 12 weeks' post-accident and its description of the injuries reported as well as their request for medical reports several times to help them assist with valuation of the claim and the fact that the medical records were not provided until after both admissions had been made. They contended that the first really clear confirmation of value was at the point of service of proceedings . They relied on the authority in *Wood* to say that as the value of the claim had increased significantly they should be permitted to withdraw their admission.

The claimant's submissions were forcefully made when describing the defendant's lack of awareness of the true value of the claim "as barely credible ". At no point did the claimant contend he had no special damages claim. Prior to the interim payment being received the defendant was provided with 658 pages of medical records and a clear rebuttal this case was not suitable for the MoJ portal i.e.as one valued at less than £25,000.

I have struggled with all the defendant's submissions on value . I have read the claimant's letter of complaint and to my mind it should have been obvious to anyone responsible for claims valuation, that the claim had significant value; indeed the opening lines of the letter, which were not recited in any of the defendant's evidence in support of their application stated " I am writing to make a formal complaint against the council in relation to *life changing injuries* I sustained tripping on the pavement of The Grove" (emphasis added). The letter continues, explaining the need for surgery which might involve a shoulder replacement together with the existence of nerve damage, a note that he was almost five hours in the operating theatre, has loss of the functional use of his right and dominant arm together with a

loss of sensation in his right hand. Finally the letter records that he will *not be able to go back to normal activities of daily living* and that he required assistance from his wife *with all activities* (again emphasis added) . I agree from reading the records that the claimant at no time indicated his claim was limited to general damages and I consider it an unusual assumption that that was likely to be the case in any event given the description of those injuries . Moreover the level of quantum does not affect the question of who is liable.

The case law referred to me in *Wood v Days Healthcare* is plainly distinguishable where even the claimant's solicitors acknowledged there had been a change in character and amount in the value of the claimant's case. Greater assistance is to be found in the *RAC v Wright* case relied on by the claimant where the defendant erroneously assumed the claim was of low value when it was not and permission was not granted to resile .Similar to this case, the claimant's solicitors had done nothing to imply the claim was of modest value.

b) the conduct of the parties, including any conduct which led the party making the admission to do so;

The defendant made no allegations about the claimant's conduct.

The defendant said the inefficient interrogation of the defendant's highway system had been explained in the evidence of Pedro Shaw, employed by the defendant as an Insurance Claims Manager. At paragraph 8 of his statement he had spoken of the difficulties of his team in locating highways documents in the past and that from late 2017 through to early March 2018, the highways team was becoming used to different ways of titling and saving their documents. He said whilst the insurance section could undertake searches, they would often ask highways to produce them as they had a better knowledge of where specific documents might be located.

It was submitted by counsel for the defendant that the failures to locate material information pre-admission was not an error or fault, but rather a symptom of a changing system and the file moving from in house file handler ultimately to solicitors, where experience is brought to bear.

Whilst this may have provided me with an explanation of what had happened, none of it enlightened me as to why the highways department was not asked in this instance to help with the searches sooner and before the admission or before solicitors were instructed. The defendant had an in-house insurance claims team well used to dealing with claims that required highways searches to be performed.

It was also submitted that the defendant only had limited information about valuation so genuinely believed the claim was of lesser value. I was therefore asked not to make an adverse conduct finding on this point. I find this argument difficult to follow as valuation goes to issues of quantum not liability.

The claimant, in contrast, described the conduct of the defendant as unsatisfactory in a number of respects. They cited delays in providing a response under the protocol, including the absence of evidence in support of a denial for five months, and even then supplying incomplete documentation. Additionally they complained about the defendant not providing documentation in support of the defence until the accident area had been resurfaced. This

latter conduct deprived the claimant of the opportunity to properly challenge the evidence relied upon and encouraged him to proceed with quantum only investigations.

The claimant also took exception to the defendant conducting a site inspection without the claimant despite his offer to attend which would have avoided any subsequent difficulty on the precise accident location and hazard complained of. They also referred to delay both in terms of the withdrawal application being made a year after the admission, and in the defendant's solicitors giving any indication they were considering resiling following a review of all the paperwork, which they characterised as "misleading".

The claimant said none of the matters recited stand to the credit of the defendant and pointed to the seniority of the claims handling team which they said was significant given their lack of proficiency and candour. Without making a finding of lack of candour I nonetheless agree with the claimant that the defendant's conduct overall militates against granting permission to withdraw the admission. I do not accept the submission that the defendant's manner of investigation is simply a "red herring".

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(c) the prejudice that may be caused to any person if the admission is withdrawn;

The defendant acknowledges that, should the application to resile succeed, the claimant will lose the benefit of that admission.. They point to the fact that the claimant had the benefit of that admission for just under 12 months. They also say he had an opportunity from the accident date until February 2020 to investigate his claim and collate any evidence that he wished with regard to the accident circumstances.

Shortly before the hearing the defendant also said they would ensure there is no prejudice regarding the interim payment because:

a) If the claimant ultimately succeeds at trial it will be treated as an interim payment towards any damages that are ultimately awarded.
b) If the defendant succeeds at trial, they are agreeable to providing an undertaking not to seek repayment of that interim payment

Finally the defendant submitted there is no hard and/or irreparable prejudice caused but really what the claimant has lost if the defence is made out is "the loss of a windfall".

The claimant however contended that but they would suffer real and substantial prejudice if the admission was withdrawn. They characterised this in terms of having to re-investigate liability in circumstances where the real evidence of the defect has been destroyed by the defendant. The defendant itself had acknowledged the prejudice caused by that destruction in its February 2020 review "we will have to concede liability as no action taken when claimant when reported that wrong defect was inspected…the pavement has since been tarmac over replacing the paving stones."

The claimant also said they would have to rely on eye witness accounts from residents as to the existence and extent of the defect which went undetected by the defendant . They said

they would suffer real forensic prejudice as evidence had been destroyed (which they could otherwise have measured and photographed more fully) and they have yet to obtain witness statements with all the potential for evidenced to have degraded over time. They pointed to the fact that recollections would be needed for trial about an area which is now substantially different, and has been for some time. They also said they would have carried out their own independent inspection of the accident site before it was resurfaced, and performed their own measurements of the height of the defect, if they had known liability was being disputed or the defect was going to be covered over. Overall the claimant maintained that whilst they still have a reasonable prospect of success, the defendant's conduct has made their position more difficult . They have also incurred significant costs in investigating quantum which I recognise but a suitable costs order could address that particular issue.

The claimant's solicitor, Mr McNeil, spoke of the significant distress caused to the claimant by the defendant's about turn on liability some 2.7 years down the line when he had been expecting to resolve the quantum issues shortly, the quantum evidence being in the final stages of completion .

I accept the defendant's assertion that the fact of the claimant losing the benefit of the admission is sadly true of any application to resile and is not enough to base my decision upon. I however agree with the claimant's submissions that the characterisation of the admission as a "windfall" Is offensive. I do not find it helpful to consider that the claimant could have obtained better liability evidence whilst awaiting a decision from the defendant on liability. The whole thrust of modern litigation is to work proportionately and co-operatively to try to resolve disputes, not to try and double-up on evidence gathering where that can be avoided. The claimant was in regular communication with the defendant trying to tease out their response and evidence, asking for missing documents and make themselves generally available to assist in narrowing and resolving issues; much many of those interactions were not recorded in the defendant's chronology for this application but were contained within the material put forward by the claimant. I also accept that the value of the evidence which can now be obtained is reasonably likely to be diminished by the passage of time, and the destruction of the physical location where the accident occurred through re-surfacing.

Whilst the defendant has helpfully agreed to negate any prejudice regarding the interim payment, and the costs of gathering quantum evidence can be addressed by the court in other ways, overall I accept that there will be some prejudice to the claimant if the admission is withdrawn. This could have been avoided but for inefficiencies in the operation of the experienced claims handling team of the defendant .

(d) the prejudice that may be caused to any person if the application is refused;

The defendant submits if the application is refused their prejudice will be the loss of a bona fides defence. Ms Wallis of Weightmans solicitors stated at paragraph 20 of her witness statement that the receipt of the defects reports means the defendant now has a "possible section 58 defence and a section 41 argument on whether the defect was at a dangerous level when he fell ".

Counsel for the defence submitted that with the combination of this evidence and that of no previous complaints and/or reported accidents, there is good evidence that the defendant did

not know and could not reasonably have known, of the existence of the defect so as to have it repaired prior to the claimant's accident. This would be a section 58 defence.

She continued that in addition the claimant still has to prove the accident circumstances and establish that the defect was dangerous as at the time of his accident. For the reasons set out in the Defence, she said this is not straightforward for the claimant.

If the application to resile is not permitted, the defendant will have to meet a potential liability of over £200,000 or at least £160k more than anticipated and they are publicly funded .

The claimant submitted that the defendant does not have a definitive defence and bearing in mind that the defendant had originally denied liability before admitting it, there is no prejudice to the defendant in requiring them to maintain their considered position .

I cannot find that there is absolutely no prejudice to the defendant if the admission is maintained but it is just one of the factors I have to consider . Whilst I have accepted the fact that there is a prejudice/ downside for any claimant in losing the benefit of an admission if it is permitted to be withdrawn, the converse is true for any defendant who seeks permission to withdraw which is refused. Therefore something more material is required for it to be reflected in my overall decision. I do not consider the additional compensation for which they may be liable beyond their original risk assessments should weigh materially in my overall determination given the experience of those who were assessing the claim and the information they had to hand. Equally, I do not consider the fact the defendant is a publicly funded body is relevant as they had resourced a sizeable claims handling team and I note they have insurers, albeit I do not have any specific detail on that beyond the identity of their claims assessors. Much of the prejudice alleged is dependent on my view of the prospects of success and how they may be impeded. The relative prejudice to the parties in this regard is finely balanced.

e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial:

The defendant submits the application was made as early in the proceedings as possible. It was identified in the Defence and an application followed swiftly thereafter. The application was heard well in advance of the CCMC where the claim could properly be case managed and cost budgeted for the remainder of the case.

The claimant submits whilst the application was made early on in proceedings it is still late coming a year after the admission was made . They take account of one of the reported cases referred to above, (*The Royal Automobile Club v Wright [2019] EWHC 913 (QB))* where the period of time pre-proceedings was also considered and rely on the fact that no notice was given to the claimant promptly, that the application was being considered by solicitors.

Overall I do not believe this factor weighs heavily in the balancing exercise that I need to conduct as the wording of the Practice Direction draws particular attention to the time fixed for trial . There is no prospect of a trial date being imperilled. Whilst I have heard what the claimant has to say about the quantum only aspects having a relatively short shelf life to

resolution, experience tells me that whilst theoretically that may be the case, matters may nonetheless become protracted when both parties produce evidence on quantum.

(g) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made:

The defendant points to clear issues of fact to be determined with regard to the circumstances of the accident and, in particular, the precise location/precise defect that is said to have caused his accident. They recited the principles in the case of *Mills v Barnsley [1192] PIQR 291* and *James v Preseli District Council [1993] PIQR 11*. The principles are now trite, but the cases set out what would have to be proven by the claimant and defendant at trial should permission to withdraw be granted and primary liability be in dispute.

a) The claimant will have to prove the happening of the accident and its circumstances;

b) The claimant will have to prove that the particular defect which caused his accident was (as at the time of his accident) a real source of danger to ordinary users of the highway and that such a danger arose from a failure to maintain the highway (s.41 of the Highways Act 1980);

c) If the claimant proves these matters, the defendant must prove that it has taken such care as was reasonable in the circumstances to secure the part of the highway to which the action relates (Special Defence contained in section 58 of the Highways Act 1980)

The defendant asserted it now has documentation which supports a section 58 Defence and that their prospects of success "must be regarded as reasonable".

The claimant maintains that whilst they will have to rely on eyewitness evidence in relation to the nature and extent of the undetected defect , and that the potency of that evidence will have been degraded absent their ability to investigate the defect, nonetheless they still have sufficient prospects of success and the proposed defence is not of such strength that the admission inevitably must be permitted to be withdrawn.

I was not drawn to any material suggesting a significant contest on point (a) above, just the general position that the defendant would like to cross-examine the claimant on the precise circumstances of the accident.

The submissions for the claimant concerning point (b) drew me back to the material attendance note of the defendant dated 19th February 2020, as described above, which clearly accepts there was a defect, albeit not measured on the side of the raised paving stone which the claimant alleges he tripped on. That defect according to the defendant's written notes might still be considered as "dangerous". Neither party it seems has a measurement for the other side of the slab but both seem to accept it was raised.

Given the exposed inadequacy of recordkeeping in the defendant's highways department, and lack of contemporaneous recording of all defects, the improved prospects of mounting a successful defence are, to my mind, still highly questionable regarding proof of a competent system of inspection such that it could be fairly said the defendant had taken such care as was reasonable (point (c) above refers).

I am mindful from the case authorities that it is not for me to conduct a mini trial on the prospects of success. And the test is not whether or not either party's case is bound to succeed. I note that during the course of submissions the defendant's own assessment of their prospects has changed from "possible" to "reasonable" but it matters not as I cannot say that the position is so hopeless for either party that this factor weighs heavily in my balancing exercise.

(h) the interests of the administration of justice.

The defendant accepts there is no doubt that the making of admissions is important in the structure of civil litigation. However, they say it is important in the interests of the administration of justice that where the defendant has a defence (and where the value of the claim is so much higher than the defendant genuinely and reasonably anticipated) that it is able to advance its defence.

The claimant refers to the fact that CPR Part 14.1A was changed to give force to pre-issue admissions in personal injury cases and confidence to claimants to be able to rely upon them. They say it was clear that this was a multi-track case from the outset and the defendant utilised three case handlers to investigate liability and review the file before making an admission. They say if parties were able to withdraw admissions easily post-issue clients would not be able to trust them and unnecessary liability costs and delays would be incurred in every case, just in case a defendant or its insured changed their mind at a later stage .

The point is further developed to say that it would bring the justice system into disrepute to allow defendants to withdraw admissions of liability after a long delay and when quantum investigations are almost complete. They rely on the judgment in the case of *The Royal Automobile Club v Wright [2019] EWHC 913 (QB)* where it was held:- "If clear and unequivocal admissions which have led to a substantial investigation of quantum and to interim payments being made apparently without question can be withdrawn many months later, there will be real damage to the administration justice. It undermines the basis on which the parties to this type of litigation conduct themselves."

I did not find the defendant's submissions on this point persuasive . There will always be situations where the overall interests of the administration of justice weigh heavily in the determination of allowing a defence to proceed. This is not one of those cases for the reasons articulated by the claimant . Once again in arguing the point the defendant has alluded to the change in value of the claim as being a significant reason but I have already held against them on that point in this case.

All the circumstances of the case and the overriding objective

And now I must consider all the circumstances of the case and the overriding objective to deal with cases justly and at proportionate cost. Costs will inevitably increase if the admission is withdrawn and the claimant is put to further proof on liability.

In terms of overall justice I note that a significant part of the new information which the defendant now seeks to rely upon had been requested by the claimant, pre-admission, in an

email of 8th of January 2020 concerning the two earlier defects identified on the 5th of March 2018 inspection. The defendant still failed to conduct a search in such a way as to locate the documents which were subsequently made available after the admission when seeking to resile. I find this remarkable given that the "new" system of ordering highways documents, cited by the defendants as an explanation, had been introduced in late 2017 so over two years before the admission. The investigation of accidents on the highway is not so complex or unusual, or one that the defendant did not have an experienced team available to consult, such that when considering the overriding objective, I am influenced to count any of those factors in their favour when considering their application to resile.

It is also hard to imagine what else the claimant could have offered to do to assist with a decision as to what happened on the highway when he fell. The fact that he was largely ignored cannot stand to the defendant's credit. Now that the accident scene has been covered over by the defendant with tarmac, before full measurements or photographic evidence were taken by either party, both parties are compromised in their evidence so a trial judge would face a more difficult and time-consuming job in reaching a conclusion which cannot be a good use of court's resource.

On the particular facts of this case, I believe it would reflect poorly on the justice system to allow the defendant another last "bite at the cherry" in respect of liability arguments when so many experienced claims handlers have reviewed the matter already, and over a considerable period of time. An important component of the overriding objective is compliance with rules and practice directions and therefore with protocols. The purpose of the pre-action protocols is to narrow issues and resolve disputes, or parts of them, wherever possible without having to engage expensive court resource. If issues are to be re-opened at a later stage there need to be very good reasons as the overriding objective makes clear. There are likely to always be some cases where there is a reappraisal of liability risk assessments and it is appropriate, for a combination of reasons, to allow an admission to be resiled from, but this should not be commonplace.

E Determination

For all the reasons above my determination is that the defendant should not be granted permission to resile from their admission. Judgement is to be entered for the claimant.