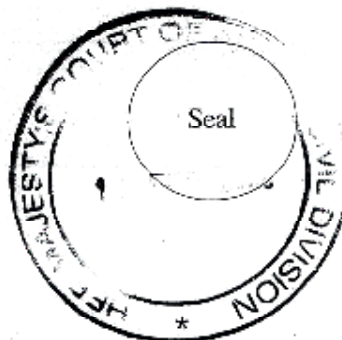


Appellant's Notice

In the ROYAL COURTS OF JUSTICE

Notes for guidance are available which will help you complete this form. Please read them carefully before you complete each section.

For Court use only	
Appeal Court Reference No.	2006/0270
Date filed	13-FEB-06



Section 1 Details of the claim or case

Name of court ROYAL COURTS OF JUSTICE

Case or claim number HQ 04X01648

Names of claimants/ applicants/ petitioner
DAVID ALAN WALKER

Names of defendants/ respondents
(1) CHARLES F. CHRUSZCZ Q.C.
(2) IRWIN MITCHELL (a firm)

In the case or claim, were you the
(tick appropriate box)

- claimant
 applicant
 petitioner
 defendant
 respondent
 other *(please specify)* _____

Section 2 Your (appellant's) name and address

Your (appellant's) name DAVID ALAN WALKER

Your solicitor's name BRYAN & ARMSTRONG *(if you are legally represented)*

Your (your solicitor's) address

THE OLD MEETING HOUSE
 STOCKWELL GATE
 MANSFIELD
 NOTTINGHAMSHIRE
 NG18 1LG

reference or contact name NCWAL182.1

contact telephone number 01623 626039

DX number 10346 MANSFIELD

Section 3 Respondent's name and address

Respondent's name (1) CHARLES F. CHRUSZCZ Q.C.

Solicitor's name ROBIN SIMON LLP (if the respondent is legally represented)

Respondent's (solicitor's) contact address

2 ST DAVID'S COURT DAVID STREET LEEDS LS11 5QA	reference or contact name	MJR/JT/BAR.175-17
	contact telephone number	01870 839 0891
	DX number	713115 PARK SQUARE LEEDS

Details of other respondents are attached Yes No

Section 4 Time estimate for appeal hearing

Do not complete if appealing to the Court of Appeal

	Days	Hours	Minutes
How long do you estimate it will take to put your appeal to the appeal court at the hearing?	1		

Who will represent you at the appeal hearing? Yourself Solicitor Counsel

Section 5 Details of the order(s) or part(s) of order(s) you want to appeal

Was the order you are appealing made as the result of a previous appeal? Yes No

Name of Judge	Date of order(s)
MR JUSTICE DAVIS	30TH JANUARY 2006

If only part of an order is appealed, write out that part (or those parts)

Was the case allocated to a track? Yes No

If Yes, which track was the case allocated to? small claims track fast track multi-track

Is the order you are appealing a case management order? Yes No

Section 3 Respondent's name and address

Respondent's name (2) IRWIN MITCHELL (a firm)

Solicitor's name MESSRS BEACHCROFT WANSBROUGHS (if the respondent is legally represented)

Respondent's (solicitor's) contact address

7 PARK SQUARE EAST
LEEDS
LS1 2LW

reference or contact name ROG-SIF001-0370742

contact telephone number 0113 251 4700

DX number 14099 PARK SQUARE LEEDS

Details of other respondents are attached Yes No

Section 4 Time estimate for appeal hearing

Do not complete if appealing to the Court of Appeal

How long do you estimate it will take to put your appeal to the appeal court at the hearing?

Days	Hours	Minutes
1		

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If only part of an order is appealed, write out that part (or those parts)

Was the case allocated to a track? Yes No

If Yes, which track was the case allocated to? small claims track fast track multi-track

Is the order you are appealing a case management order? Yes No

Section 6

Permission to Appeal

Has permission to appeal been granted?

Yes complete box **A**

No complete box **B**
if you are asking for permission or it is not required

A

Date of order granting permission _____

Name of judge _____

Name of court _____

B

I do not need permission

I **NEVIL CROSTON** of **Bryan & Armstrong** appellant('s solicitor) seek permission to appeal the order(s) at **section 5** above.

Are you making any other applications? Yes No
If Yes, complete section 10

Is the appellant in receipt of legal aid certificate or a community legal service fund (CLSF) certificate? Yes No

Does your appeal include any issues arising from the Human Rights Act 1998? Yes No

Section 7

Grounds for appeal

I (the appellant) appeal(s) the order(s) at **section 5** because:

Please see attached 'Grounds'

Section 6

Permission to Appeal

Has permission to appeal been granted?

Yes complete box A

No complete box B
if you are asking for permission or it is not required

<p>A</p> <p>Date of order granting permission _____</p> <p>Name of judge _____</p> <p>Name of court _____</p>	<p>B</p> <p><input type="checkbox"/> I do not need permission</p> <p><input checked="" type="checkbox"/> I <u>NEVIL CROSTON</u> of <u>Bryan & Armstrong</u> appellant('s solicitor) seek permission to appeal the order(s) at section 5 above.</p>
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Are you making any other applications? Yes No
If Yes, complete section 10

Is the appellant in receipt of legal aid certificate or a community legal service fund (CLSF) certificate? Yes No

Does your appeal include any issues arising from the Human Rights Act 1998? Yes No

Section 7

Grounds for appeal

I (the appellant) appeal(s) the order(s) at **section 5** because:

Please see attached 'Grounds'

APPELLANT'S NOTICE

SECTION 7 - GROUNDS FOR APPEAL

Grounds

1. The learned Judge erred in law in holding that the assessment upon which the Defendants' advice to settle was based [and hence the advice itself] was not negligent.
2. The learned Judge erred in his assessment of the proper approach to the issue on primary liability in the original trial. The judge falls into error in defining or referring to the issue as :
 - whether the Claimant " was on the JCB sufficiently long for Mr Haynes [the driver] had he been paying proper attention, to see him"
 - whether the Claimant had "been on the JCB long enough for Mr Haynes – had he only been paying due care and attention – to see him before lowering the bucket" [both paragraph 95]
 - whether there would still have been long enough ... "for Mr. Haynes, had he been paying due attention, to avoid lowering the bucket" [paragraph 97]
 - and that the Claimant's case was "that he had been on the JCB sufficiently long to be seen by Mr. Haynes." [paragraph 100].
3. This approach to the issue of primary liability was wrong in law. It is incorrect in focusing primarily upon an examination of the actions of the Claimant [has he been there long enough to be seen]. The correct approach to the issue of primary liability in the original trial was to examine the actions of the driver of the JCB, Haynes.
4. Had the learned judge directed himself correctly in this regard he ought first to have considered whether Haynes had failed in his duty to look and check that

there was no-one on or near the JCB before he started to lower the bucket/ arm and whether, if he had so checked, the Claimant would have been there to be seen.

5. The learned Judge erred in law in failing properly to consider the questions for the original court on primary liability which were:
 - (i) Was there a duty on the driver to look and ensure that there was no-one in the vicinity of the JCB immediately before lowering the bucket / arm. The answer to this had to be "yes"
 - (ii) Did the driver so look immediately before lowering the bucket/ arm. The answer to this had to be "no"
 - (iii) If the driver had looked immediately before lowering the bucket/ arm would or should he have seen the Claimant. The answer to this had to be "yes" because it would have been impossible for the Claimant to move from a position away from the JCB into the position he was at the time his foot was crushed in less time than it took for the bucket/ arm to descend.

6. The learned Judge was wrong in law in failing to find that Haynes should so have looked **after** preparing to lower the bucket and **after** looking down to see the levers [if that is what he had done] but before he actually operated the bucket itself. [paragraph 95].

7. Having failed to properly to direct himself on the duty on Haynes, the Judge was wrong in law to consider as "unreal" that the burden of establishing that there was nothing Haynes could have done to avoid the accident was on the original Defendants [paragraphs 92 and 93].

8. The learned judge was wrong in law in holding the Defendants were justified in considering that evidence from Haynes [and Derbyshire] that they " did not

see [the Claimant] getting onto the JCB” positively supported the original defence. [paragraph 93]. Such evidence plainly showed that Haynes did not look around him before or at the time he lowered the arm.

9. The learned judge was wrong in law to find the argument “unreal” that the Claimant did not have time [in around 1 second] to get himself and his foot into the way of the arm “whilst” it was descending [paragraphs 94 and 95]. Because it was clear that Haynes did not look and did not see the Claimant before or whilst he lowered the bucket/ arm, the only defence open to Defendants in the original action was to prove that the Claimant moved from out of the vicinity of the JCB, onto the side and with his foot firmly established in a closing gap during the time it took for the bucket / arm to move 2 feet to the ground. The Claimant’s argument that this was not possible was entirely real.
10. Having misdirected himself as set out above, the learned Judge failed properly to weigh the impact of the evidence of the time it would take for the bucket of the JCB to descend a distance of two feet [and hence the time it would take to crush the Claimant’s foot]. Had the Judge correctly directed himself as to the proper approach to primary liability in the original trial, he would have been bound to find that on balance of probability the Claimant’s foot must have been in position before Haynes actually moved the arm and hence that a properly directed Court of first instance would find Haynes negligent for failing to ensure no-one was present before actually moving the arm itself.
11. The learned judge failed properly to direct himself that the overwhelming probability was that the original court, competently directed, would have been bound to find an employment relationship existed between the Claimant and Hather and hence failed properly to consider the positive impact this would have had on the Claimant’s case on both primary liability and contributory

negligence. The Defendants reservations in this regard were unreasonable and contributed to the negligent advice that there were serious risks of failing altogether.

12. In approaching the issue of primary liability in this way, the Judge fell into the error of concluding that the issue of primary liability turned on a conflict of evidence when it did not.

My skeleton argument is:-

set out below

attached

will follow within 14 days of filing this notice

I (the appellant) will rely on the following arguments at the hearing of the appeal:-

Section 9

What decision are you asking the appeal court to make?

I (the appellant) am (is) asking that:-

(tick appropriate box)

- the order(s) at **section 5** be set aside
- the order(s) at **section 5** be varied and the following order(s) substituted :-

- a new trial be ordered
- the appeal court makes the following additional orders :-

Permission to Appeal
Judgment to be entered for the Claimant for damages to be assessed, together with the costs of the action and the Appeal.

Section 10 Other applications

I wish to make an application for additional orders

in this section

in the Part 23 application form (N244) attached

Part A

I apply (the appellant applies) for an order (a draft of which is attached) that :-

because :-

Part B

I (we) wish to rely on :

- evidence in Part C
- witness statement (affidavit)

Part C

I (we) wish to rely on the following evidence in support of this application:-

Statement of Truth

I believe (the appellant believes) that the facts stated in Section 10 are true.

Full name NEVIL EDWARD GROSTON

Name of appellant's solicitor's firm BRYAN & ARMSTRONG

signed 

position or office held PARTNER

Appellant ('s solicitor)

(if signing on behalf of firm or company)

Section 11**Supporting documents**

If you do not yet have a document that you intend to use to support your appeal, identify it, give the date when you expect it to be available and give the reasons why it is not currently available in the box below.

Please tick the papers you are filing with this notice and any you will be filing later.

- Your skeleton argument (*if separate*)
- A copy of the order being appealed
- A copy of any order giving or refusing permission to appeal together with a copy of the reasons for that decision
- Any witness statements or affidavits in support of any application included in this appellant's notice
- A copy of the legal aid or CLSIF certificate (*if legally represented*)
- A bundle of documents for the appeal hearing containing copies of your appellant's notice and all the papers listed

above and the following:-

- a suitable record of the reasons for the judgment of the lower court;
- any statements of case;
- any other affidavit or witness statement filed in support of your appeal;
- any relevant transcript or note of evidence;
- any relevant application notices or case management documents;
- any skeleton arguments relied on by the lower court;
relevant affidavits, witness statements, summaries, experts' reports and exhibits;
- any other documents ordered by the court; (give details)

- in a second appeal, the original order appealed, the reasons given for making that order and the appellant's notice appealing that original (first) order
- if the appeal is from a decision of a Tribunal, the Tribunal's reasons for that decision, the original decision reviewed by the Tribunal and the reasons for that original decision

Reasons why you have not supplied a document and date when you expect it to be available:-

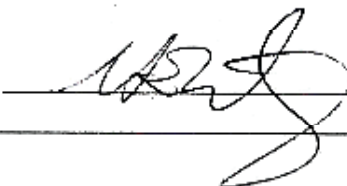
Judgment (unsigned) attached. The part of the Judgment relating to the reasons for refusing permission to Appeal is not enclosed. A request for a note of the reasons for refusing permission has been sent to the Court on 09.02.06, estimate of time to response 2-4 weeks.

Skeleton Argument for section 8. On the grounds that it is impracticable for the Appellant's Skeleton to accompany the Appellant's Notice. To be filed and served within 14-days.

Transcript of evidence - not necessary at permission stage under CPR PD52.5.15 but applied for. Estimate approximately 6-8 weeks.

The reason for not supplying is that this is a matter subject to public funding and via the High Costs Case Unit. Public Funding Certificate extended to cover application for permission to Appeal at 6.30pm on 08.02.2006. Counsel notified could proceed on 09.02.2006. Not possible in timescale available to complete all documentation.

Signed



Appellant ('s Solicitor)