Neutral Citation Number: [2023] EWHC 2683 (KB)

Case No: QBD-2022-002097

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2023

Before :

SENIOR MASTER COOK

- -

Between :

MR MICHAEL JAMES	**Claimant**
- and -	
MR E A SHAW (T/A SHAWS LEASURE	**Defendant**

- -
- -

David White (instructed by **Harris Fowler**) for the **Claimant**
Lois Aldred (instructed by **Hextalls Law**) for the **Defendant**

Hearing date: 18 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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SENIOR MASTER COOK

SENIOR MASTER COOK:

1. This is the hearing of a preliminary issue of liability in this personal injury claim arising from an accident at work on Friday 29 September 2019.

The parties

2. The Claimant was employed by the Defendant as a general labourer and part of his role was to assist with erecting and dismantling fairground rides operated by the Defendant. He had been employed since around Easter 2019 and had been travelling with and working with the Defendant since then.

3. The Defendant was a fairground operator. The day to day operator of the Defendant's business and senior manager in charge was Asa Shaw, the owner's son.

The accident

4. On 29 September 2019 the Claimant fell from height whilst dismantling the "Freakout" fairground ride.

5. The Ride is an A-frame with pendulum, and the pendulum has four cars at the base, each of which can carry four seated passengers. When in operation, the pendulum swings from side to side and the cars rotate, giving the occupants a thrilling experience.

6. The Ride was not in operation at the time of the accident. It is agreed that it was wet and that the Claimant was standing on a yellow metal handrail when he fell. The Claimant's pleaded case is that it was "*raining heavily*" but the Defendant has denied this.

7. It would appear that there is no dispute as to how the Claimant came to suffer his injury (he slipped from the handrail whilst attempting to free a seized nut/bolt, but there is clear dispute as to (a) the background to the accident, specifically in terms of (i) the instruction given, if any, from Mr Asa Shaw, and (ii) whether the Claimant was working with Asa Shaw or alone when he fell, and (b) legal responsibility for the accident.

8. The Claimant suffered multiple injuries to his right foot and his case is that has ongoing symptoms in his right foot as detailed in the Particulars of Claim and that he has not returned to work because he has developed a chronic pain condition.

The parties respective cases

9. At the heart of this case is a stark factual dispute. Either the Claimant or the Defendant has given a false account of the accident.

10. The Claimant's case is that he and Asa Shaw were working alongside each other, standing on a wet metal handrail pushing on a scaffold pole that had been slipped over the handle of a conventional spanner (specifically, a 55mm open-ended non-adjustable spanner) to give extra leverage, when the nut freed itself and the sudden movement of the spanner when the nut freed caused the Claimant to fall from his position standing on the wet handrail.

11. The Defendant's case is that Asa Shaw had expressly told the Claimant not to attempt to free the bolt whilst he (Asa Shaw) went to his van to get another tool. The Defendant's case is that Mr Shaw had been using a ratchet spanner, rather than an open spanner. Mr Shaw says that when he came back from the van he saw the Claimant on the ground.

12. The resolution of the factual dispute is highly material to the issue of liability. It trite law that the Defendant owes the Claimant a duty of care as his employer to take such care as is reasonable for an employer to ensure the Claimant is reasonably safe in undertaking his work.

13. The claim is pleaded in negligence and/or breach of statutory duty under the Work at Height Regulations 2005. The regulations relied upon are, Regulations 4(1), 4(3), 6(1), 6(3), 6(4), 7 and 8.

14. This being an accident that post-dates the coming into force of s69 of the Enterprise and Regulatory Reform Act 2013, a proven breach of statutory duty does not give rise to a cause of action in itself, though the existence of the statutory duties may inform the common law duty of care, see ***Chadwick v Ovenden*** [2022] EWHC 1701 (QB) paragraphs 57-61.

15. The Claimant's central ground of negligence is that this was an unsafe system of work. The Claimant should not have been asked to perform this task standing on a metal handrail at height in the wet because it was foreseeably dangerous, alternatively, if he was going to be asked to free a seized nut when standing on a wet handrail in the rain, the Claimant should have been provided with a harness or other fall protection mechanism because the risk of a fall and serious injury should have been obvious.

16. The Defendant's case is that all reasonable steps were taken to minimise the risk of injury to its employees by limiting work at height to Asa Shaw, provision of appropriate equipment of a harness to the worker required to work at height to minimise the risk of falls and ratchets to allow bolts on The Ride to be undone mechanically. Since the Claimant was neither instructed nor authorised to work at height, he had no business trying to undo the bolt. The Defendant could not be aware that the Claimant would defy Asa Shaw's express instruction and try to stand on the handrails and undo the bolt.

17. In the event that the Court were to accept the Claimant's account of the accident the Defendant makes the allegations of contributory negligence set out at paragraph 8 of the Defence. In essence the Defendant alleges that the Claimant undertook a task which he knew or should have known posed a danger and failed to take sufficient care to ensure his own safely.

18. I remind myself that the Claimant must prove his case on the balance of probabilities.

The evidence

19. I heard oral evidence from the Claimant and Asa Shaw on behalf of the Defendant. The witness statement of Robert Moffart was served on behalf of the Defendant but he did not attend the trial. At the start of the trial I heard and rejected an application

made on behalf of the Claimant to adduce two short video clips on the grounds that they were served late and were of little evidential value.

20. The Claimant gave evidence in accordance with his witness statement. He was cross examined by Ms Aldred. He agreed that his duties were as a general labourer and that he had learned on the job. He had previously been a roofer and was a practical sort of person and handy with technical things. He was clear he did not receive any specific health and safety training. He confirmed there was one harness which was always worn by Asa Shaw who would undertake any work at height.

21. By height the Claimant meant the very top of the ride. He described undertaking some work by standing on the back of the cars and climbing on to the boom to remove a chain. He said that he had never undone this particular bolt at all although he had inserted it on occasions and hand tightened it for Asa to finish off with the spanner. He described a wooden box which was part of the ride where all the tools required to assemble and dismantle the ride. He confirmed that the reference to "makeshift spanner" in the particulars of claim was a reference to the combination of an open ended 55mm spanner and a short length of scaffolding pole which was kept next to the wooden box. He said he had prepared the drawing on page 146 of the trial bundle to show this.

22. The Claimant said that on the day of the accident he had been working with Robert Moffart starting to remove the cars from the beams when Asa asked him to help him. He said that Asa was wearing the harness whilst standing on the handrail but it was not clipped on. He could see what Asa was doing and assumed he wanted him to stand beside him to give extra leverage on the scaffolding pole. He was asked by Ms Aldred about the description of the accident in the particulars of claim where it was stated that he and Asa were pressing down on the makeshift spanner when it suddenly moved and his description in his witness statement where he stated that the spanner was horizontal and that they were pushing forward. She suggested that his account of the task was impossible and that the spanner could not have been used in the way suggested. His response was that he and Asa were pushing and that was how the accident happened. He then added that the open ended spanner had to be used because the nut was surrounded by some form of steel box which meant that a ratchet could not be used.

23. The Claimant was adamant that he would not have got onto the hand rail on his own accord and stated that he had never disobeyed an instruction. He said that he did not expect to fall because he was with Asa. He said once Asa saw he had broken his foot Asa drove off and Robert Moffart and another man took him to his trailer to wait for the ambulance. He maintained that he was not lying about his account of a conversation over the telephone with Asa concerning being paid a sum of money in return for signing a document stating that he would not sue in respect of his injury.

24. Mr Shaw gave evidence in accordance with his witness statement. He was cross examined by Mr White. He was asked about the configuration of the pin and nut. He said that the nut was at the bottom of the pin which threaded into the ride.

25. Mr Shaw confirmed that the Claimant was in effect destitute when he offered him work and accommodation. He said that he was the Claimant's boss on a day to day

basis and that he explained what to do as they went along. He said much of the work was just common sense.

26. Mr Shaw denied that the Claimant would ever have to move the chain or climb on top of the ride's cars. He accepted that the Claimant was a good worker and that he never had any problems with him until the day of the accident.

27. As to the circumstances of the accident, Mr Shaw denied that he hadn't been clipped on. He said he couldn't remember what the Claimant and Mr Moffart were doing but he was having difficulty undoing a nut. He said he had the wrong tool and decided to go to the cab to get the right tool, a rachet spanner. He kept the rachet spanner in the cab because it was an expensive item. He accepted the rest of the ride tools were kept in the box under the ride. He then said that he had told the Claimant he was struggling and that the Claimant had asked "*Do you want a hand*? He replied "*No leave it I will sort it out when I get back*" He said he didn't want anyone touching it. It was put to him by Mr White that this was not in his witness statement. He responded that he didn't know why this wasn't in his statement. He denied he asked for assistance and said he would never ask for help.

28. Mr Shaw said when he came back from the cab it was obvious what had happened. He said he was cross at the stupidity of the Claimant and drove off leaving him with Mr Moffart. He denied making any phone call to the claimant. He stated that he had now sold the ride.

29. Mr White then took Mr Shaw through the health and safety paperwork which had been disclosed. Firstly, the accident report form. He accepted he completed this document the next day and maintained it was an accurate account. Secondly the Funfair Method Statement. He accepted that this document referred to M & L Pleasure Fairs which was his sister's company. Thirdly the Risk Assessment Fairground rides document. He accepted this was a standard document produced for his annual ADIPS test. He said he was familiar with the last item which required harnesses to worn when working above two meters.

Assessment and Findings

30. I approach the assessment of the credibility of the witnesses in accordance with well established principles. It is a complex and multifaceted task as explained by Mr Justice Cotter in ***Muyepa v Ministry of Defence*** [2022] EWHC 2648 at [11 to 20]. Some people can lie extremely convincingly and fluently. Some people who are unsure and hesitant can also be telling the truth. Memory can be affected by the legal process. An account which is supported by independent or contemporary evidence may be more reliable.

31. The Court's task has not been made particularly easy because there is a lack of important evidence which would assist in resolving some of the issues in this case and which with reasonable diligence one would expect to be available. For example, I have no proper pictures or drawings of the part of the ride where the bolt was located which would enable me to make a clear assessment as to whether the 55mm spanner or the ratchet would be the correct tool for the job. It is partially relevant that such evidence could have easily been obtained and presented by the Defendant.

32. Overall I accept the account given by the Claimant. It has been consistent from the start. I do not think the reference to pushing down on the spanner in the particulars of claim detracts from this conclusion. The claimant's account was consistent with what was recorded in the ambulance record;

> "HPC:
>
> - Was taking fairground ride down
>
>   Was standing on framework, with colleague, both pushing against bolt
>
> - Bolt moved, pt knew he was going to fall, tried to jump onto framework or thinks he would have hit his face), then landed on floor
>
> - -severe pain R/Foot++
>
> - Pt removed boot off straight away, obvious swelling through sock immediately visible
>
> - Friend carried pt away from ride over to their trailer (caravan)
>
> - Called 999"

33. The account given by Mr Shaw suffered from a number of problems. Firstly, as set out in his witness statement there was no reason for the Claimant to suddenly stop what he was doing and attempt to remove the nut on his own. Nor would there be any logical reason to tell the Claimant and Mr Moffart to wait and leave everything alone when they were already engaged on a task. Perhaps realising this his evidence changed in the witness box where he stated for the first time that the Claimant asked him if he wanted help. I find it inherently unlikely that a good worker like the Claimant who usually did as he was told and followed directions would take it upon himself to attempt to remove the nut.

34. If Mr Shaw was seriously going to maintain that the 55mm spanner could not be used on the nut because of its position on the structure of the ride it would have been easy for him to produce evidence to that effect as I have already observed.

35. There was inherent credibility in the Claimant's evidence that the tools for the ride were kept in the box. His evidence that it was a 55mm spanner was particularly detailed. The use of a scaffolding pole as a lever makes sense and I am satisfied that it was a physically possible arrangement.

36. I accept the claimant was standing to the left of Mr Shaw when the bolt moved. In this position there would have been a larger movement of the lever at the Claimant's position which may explain why he lost his footing and Mr Shaw did not.

37. I could not understand why, as a supposedly conscientious employer, Mr Shaw would just drive away from the scene of the accident. At the very least I would have expected him to deal with the necessary accident there and then rather than the next

day. If Mr Shaw did not telephone the Claimant in hospital it would have been an easy matter for him to produce his telephone records to support his contention.

38. I place no reliance on the witness statement of Mr Moffart. He did not attend court and no satisfactory explanation was proffered for his absence. In any event the statement appears to be drafted in a rather short and perfunctory manner and many of the statements of fact are prefaced by rather leading statements such "I am asked if I recall", "I confirm that", "I understand that" and I would confirm that". Finally given that the statement was exchanged in June 2023 it does not contain the statement of truth now required by CPR 22 PD 2.1.

39. So having considered the entirety of the evidence in context I conclude that the Claimant's account of the accident is correct and that Mr Shaw has made up his account to minimise the Defendant's liability.

40. In the circumstances I make the following findings relevant to liability;

    i) On 29 September 2019 the Claimant was working dismantling the Freakout ride and working at low level.

    ii) By this time the Claimant had gained experience of erecting and dismantling the ride under the direction of Asa Shaw gained over a period of 5 months. The Claimant had not received any formal health and safety training.

    iii) All work at significant height was undertaken by Asa Shaw. However on occasions both the Claimant and Mr Moffart had previously worked at lower heights in excess of 2 meters without adverse comment.

    iv) The weather was damp and windy on 29 September.

    v) At some point Asa Shaw undertook the task of loosening the bolt on the A frame support nearest to the stairs. He was using a 55mm open ended spanner and a length of scaffolding pole which acted as a lever.

    vi) Asa Shaw was wearing a harness but not clipped on. He was standing on the rear handrail. This was potentially dangerous and in breach of the Work at Height Regulations 4 (1), 4(3) and 6(3).

    vii) Asa Shaw requested the Claimant's assistance in undoing the bolt. The Claimant responded by joining him on the handrail and pushing the pole. This was a task to which the Work at Height Regulations 2005 applied. The method adopted was clearly in breach of Regulations 4 (1) 4(3) and 6(3).

    viii) The nut unexpectedly loosened against the pressure causing the pole to move forwards and the Claimant to lose his footing. This in turn resulted in the Claimant's fall from height approximately 15 to 20 feet.

    ix) Asa Shaw left the scene of the accident without completing an accident report.

    x) Asa Shaw later rang the Claimant in hospital and offered to pay him his bonus if he would sign a document stating he would not sue his employer.

41. In the circumstances I have no hesitation in concluding that this was an unsafe system of work. The Claimant should not have been asked to perform this task because it was foreseeably dangerous. Alternatively, if the Claimant was to be asked to perform such a task, he should have been provided with a harness or some other fall protection because the risk of a fall and serious injury should have been obvious. Primary liability is established.

Contributory negligence.

42. Ms Aldred submitted that there should be a deduction for contributory negligence if I arrived at the conclusions I have on the basis that even if the Claimant followed an express instruction from his employer it was such an obviously dangerous situation for him to be in that he was not taking care of his own safety.

43. Pursuant to s1(1) of the Law Reform (Contributory Negligence) Act 1945, the Claimant's damages have to be "*reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage*".

44. Mr White referred to ***Boyle v Kodak Ltd*** [1969] 2 All ER 439. In this case the House of Lords held that a defendant company could not exonerate itself from liability for a breach of statutory duty unless the acts that constituted the entirety of the breach of duty were wholly brought about by the claimant employee.

45. I must bear in mind the fact that the Working at Height Regulations place specific duties on an employer for a good reason. I accept Ms Aldred's submission that there is a general duty on an employee to take reasonable care for their own safety, however one must have regard to specific facts of the case. In this case the Claimant had received no formal health and safety training. He had learned on the job in the presence of his employer. In relation to the task that led to his accident, he responded to a positive request from his employer who was actively carrying out a task in breach of the Working at Height Regulations.

46. In the circumstances I decline to make any deduction for contributory negligence. There will be judgment for the Claimant for damages to be assessed.