Neutral Citation Number: [2020] EWHC 2759 (QB)

Case No: C23YJ649

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2020

Before:

THE HONOURABLE MRS JUSTICE LAMBERT

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Between:

Stephen Needle	**Claimant**
- and –	
Swallowfield Plc	**Defendant**

- -
- -

Mr Grice (instructed by **Harris Fowler**) for the **Claimant/Appellant**
Mr Macpherson (instructed by **Shoosmiths LLP**) for the **Defendant/Respondent**

Hearing dates: 22 July 2020

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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.

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THE HONOURABLE MRS JUSTICE LAMBERT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10am on Friday 16 October 2020.

MRS JUSTICE LAMBERT :

1. This is an appeal from the Order of HHJ Gore QC of 29 November 2019 dismissing the Appellant's claim for damages for personal injury arising from an accident in the course of his employment on 7 February 2013. The matter comes before me on the issue of permission and, if granted, the substantive appeal.

2. The claim was brought under the Manual Handling Operations Regulations 1992. It alleged a breach by the Respondent of Regulation 4(1)(a), that is, failing to avoid the need for the Appellant to undertake the manual handling operation in question; alternatively a breach of Regulation 4(1)(b), failing to make a suitable and sufficient assessment of manual handling operations. The Judge found that the manual handling operation in question did not involve a foreseeable risk of injury and that the Appellant had therefore failed the "gateway provision" in Regulation 4(1)(a) such that the duties prescribed in Regulations 4(1)(a) and (b) were not triggered. The Appellant challenges that finding. It is submitted that the Judge's finding was wrong in that it was, on the agreed facts presented to him, irrational and against the weight of the evidence; further that the Judge's approach to the question of foreseeable risk was unlawful having been confounded by his taking into account irrelevant factors.

3. At the hearing before me, the Appellant was represented by Mr Grice and the Respondent by Mr Macpherson. Both appeared below. I am grateful to them both for their careful and very comprehensive written and oral submissions.

Background

4. The relevant factual background to the Appellant's accident was uncontroversial. The evidence which the Judge heard was largely uncontentious and was completed within a day. As the Judge frequently remarked during questioning, the answers to the questions posed were in reality more a matter for submission. In the judgment he resolved a small number of factual issues which had arisen but none were central to his ruling on the key issue of reasonable foreseeability of injury. So far as this appeal is concerned therefore the Appellant's role, his training and experience and the events of the day of the accident were common ground. I set them out below.

a) Training and Experience

5. The Appellant was aged 38 at the date of the accident in February 2013 and had been employed by the Respondent almost continuously since 1999. The Respondent is a company manufacturing personal care and beauty products. The Appellant had initially been employed as a production line worker, later he was engaged as an engineering technician. As an engineering technician it was his job to repair production line equipment and machinery by identifying the problem and then fixing it. His role was, as he accepted in his evidence, a fault-finding and problem-solving role. His work was very varied. Although some tasks were planned, given that his job was to repair machinery which had broken down, or was faulty, a good deal of his work could not be planned. It was common ground between the Appellant and Respondent at trial that, given the very large number of tasks which the Appellant might be called upon to perform, it would have been impossible for each of those tasks to have been risk assessed in advance. As the Appellant accepted at trial, if instructions as to how to do a particular repair task had been provided by the

Respondent then those instructions would have run to "*literally thousands of pages because of the large variety of machinery and equipment and the equally large variety of tasks that might be undertaken on each of them*."

6. The Appellant therefore underwent training which included training in "dynamic risk assessment." Technicalities aside, dynamic risk assessment is an assessment by the person who is to perform the handling and repair of the machine in question and requires him to perform his own assessment of the risks associated with the task. The training in dynamic risk assessment emphasised that it was for the Appellant to assess the risks of each of the manual handling operations which he was to perform, then assess the task and consider whether it was within his capabilities; if so, then it was for the Appellant to adopt the safest way in which the handling might be undertaken. If, having performed his risk assessment, the Appellant had any doubts about how to do the job safely or whether help was needed to perform the task, then the Appellant agreed that he should seek help from a suitably trained colleague or inform the supervisor or, alternatively, approach the task in a different way by trying to break the load down if that was possible.

7. The Judge recorded the evidence of training in dynamic risk assessment as follows: "*engineers were trained and instructed to undertake what was described in the oral and written evidence and in documentary evidence to which I was taken as "dynamic risk assessment". What is meant by that phrase was that experienced and skilled engineers were expected to assess the risks of tasks in hand and make their own decisions, bearing in mind that maintenance, servicing and repair of machines and machine parts involved so many different sizes, shapes and weights of equipment that it was wholly impracticable to undertake a specific risk assessment or provide a specific method statement for each one*." The Judge went on to record elsewhere in his judgment the unchallenged evidence that the culture within the factory extended to: "*asking for help if help were needed*."

8. The Appellant was an experienced engineer who had been appropriately trained in dynamic risk assessment. He acted as a mentor to more junior co-workers. He was highly regarded by those who had appraised him. As the judgment records: "*he was accepted in the witness statements of all supervisory and managerial staff who gave evidence on behalf of the defendant to have been technically adept and able to work things out for himself, competent and experienced, a good problem solver, self-reliant and able to complete tasks to a high standard, bringing to the job a high degree of engineering knowledge… He was a high quality, professional member of staff*."

b) The Accident

9. The Appellant sustained a fracture, a hyperextension injury, to his left fourth metacarpal bone (situated in the palm of the hand) during the course of his handling a disused dispensing pump. The pump was described by the Judge as an unwieldy piece of plant measuring 90 cms by 36 cms by 50 cms and weighing approximately 48 kilograms. When standing upright it rested upon four short metal legs, one at each corner. The machine was of irregular shape and its weight not evenly distributed, the right side of the pump being much heavier than the left (when viewed from the front). It comprised of hoses, valves and pipework.

10. The pump had been out of service for some time. It needed to be serviced and mended so that it could be used to fulfil an order which had come in. It was not suggested that the order (and therefore the mending of the pump) was time-critical. The pump was collected from the factory by the Appellant and his supervisor, Mr Lang, and between them was lifted it on to an adjustable tool trolley and then wheeled to the Appellant's workbench in the workshop. It was moved from the trolley to the workbench by Mr Lang. Having worked on those parts of the machine which were accessible, the Appellant needed to move the machine on to its back in order to gain access to the underside of the machine. He therefore took hold of the back left leg with his left hand and lifted the machine up on the left, the lighter, side whilst grasping pipework on the right side with his right hand using the back right leg as a pivot. During the course of his manoeuvring the machine in this way, he suffered the hyperextension fracture to the left hand. The Appellant was confident that his hand had not been crushed or trapped, nor did he feel his left hand come into contact with the work bench; although he was asked a number of questions on the topic at trial, the exact mechanism of the injury remains unclear. Unfortunately, the injury proved to be more significant than might have been predicted as the Appellant's recovery was complicated by the development of regional pain syndrome which has left him unfit to continue his former employment.

The Judgment

11. Although the Particulars of Claim allege negligence and breach of the Management of Health and Safety at Work Regulations 1999, by the time of closing submissions the focus of the action was alleged breaches of the Manual Handling Operation Regulations 1992 4(1)(a) or 4(1)(b).

12. Regulation 4 of the 1992 Regulations sets out the "Duties of Employers" as follow:

> *"4(1) Each employer shall –*
>
> *(a) so far as reasonably practicable avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or*
>
> *(b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured –*
>
> *(i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry to column 2 of that Schedule,*
>
> *(ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable…..*

(2)…

(3) In determining for the purposes of this regulation whether manual handling operations at work involve a risk of injury and in determining the appropriate steps to reduce that risk regard shall be had in particular to –

…

(c) his knowledge and training"

13. Not unusually in cases of this nature, the Particulars of Claim added little flesh to the bones of the claim. Likewise, the Defence was sparse, although the Appellant's experience and training were pleaded as material facts and it was asserted that the pump could have been safely pushed or manoeuvred on to its side without the need to lift it.

14. In the judgment, the Judge recorded a number of background facts, none of which were contentious. They included that:

i) the task of rolling the pump on to its back had not been the subject of a specific risk assessment;

ii) the manoeuvring or rolling of the pump could be undertaken in a number of different ways. He recorded that he had watched a video depicting Mr Lang rolling the pump on to its back using a different method than that adopted by the Appellant;

iii) the Appellant had been trained and instructed to undertake a dynamic risk assessment;

iv) the Appellant had accepted that he had to assess the risk of manual handling of each job which he undertook because each job was different: this reflected that, in the engineering workshop, every task and most pieces of equipment were different, so that the challenge to the engineer was to assess each unique task;

v) the Appellant had agreed that it was his job to assess whether the manual handling in question was within his capabilities and for him to then assess how to do it in the safest way. He accepted that he had to think about these things and then do the job.

vi) the Appellant had accepted that the task in hand had not been "*significantly more heavy, awkward or unusual than many other tasks he had to undertake as a trouble shooter*"; that he had never intended (nor did he) lift the pump completely off the workbench; that it was a task which he thought was within his capabilities and that he could do safely.

15. The Judge directed himself to the first question which he had to consider, namely, whether the Appellant had established that the handling carried a foreseeable risk of injury. He referred to the observations of Hale LJ in *Koonjul v Thameslink Healthcare Services* [2000] PIQR where the level of risk of personal injury required to engage the employers' duties was said to be a "*real risk of foreseeable possibility*

of injury, certainly nothing approaching a probability." He recorded the further observation at [11] that: "*in making such assessments there has to be an element of realism. As the guidance to the regulation points out in appendix 1 at paragraph 3 a full assessment of every manual handling operation could be a major undertaking and might involve wasted effort.*" Further that "*the question of what does involve a risk of injury must be context based. One is therefore looking at this particular operation in the context of this particular place of employment and also the particular employees involved*." I pause to note that, for some reason, the Judge did not make reference to Regulation 3(c) which, Mr Macpherson informs me, was introduced in 2002. This Regulation simply confirms the need to take into account (as one of the factors) the training and experience of the employee when considering foreseeability of injury.

16. The core of the Judge's reasoning on the critical issue was set out in three paragraphs. The Judge concluded at:

    i) [55] that: "*there was no real or sufficient possibility of risk of injury of some sort to hands or wrists when turning or pushing this piece of equipment as long as employees are warned of the need to apply their experience and skill dynamically to assessing the risk and then to take appropriate care when undertaking an ordinary everyday task by keeping fingers out of the way*."

    ii) At [56] he found that: "*this was a unique task being undertaken by an experienced skilled employee, trained in the need to undertake an assessment of what was or was not within his capability and what could or could not be undertaken by him safely, and that in the context where he had been serially trained to undertake such assessment each time he undertook a task.*"

    iii) At [57] he found that there was "*nothing inherently or uniquely dangerous to the degree that such an employee either required further warning or the benefit of a risk assessment of the specific task.*"

17. Having reached this conclusion, the Judge dismissed the claim on the basis that the duties imposed in Regulations 3 and 4 were not engaged.

The Appeal

18. Mr Grice advances a number of grounds of appeal. Without wishing to undermine his conscientious approach to this appeal, his grounds really boil down however to two points.

    i) First, he submits that, on the facts, the conclusion that the handling did not carry a risk of personal injury was irrational and wrong. Although put in various ways, both in his grounds and skeleton argument, Mr Grice's submission amounts to a challenge to the common sense of the ruling made by the Judge given the accepted size, weight and unwieldy nature of the pump and the fact that the handling was being performed on a work bench at waist height.

    ii) Second, that the Judge was wrong to bring into his analysis of the assessment of risk the fact that the Appellant was trained and experienced in dynamic risk assessment and that by doing so he conflated proof by the Appellant of

risk with proof by the Respondent of the fact and sufficiency of the steps taken under Regulation 4(1)(a) and (b). Mr Grice submits that by including in his analysis of risk of injury the Appellant's training and experience in dynamic risk assessment and that the risk assessment was to be undertaken by the Appellant himself, the Judge failed to ensure that he followed the sequence of decisions required under the Regulation. Under Regulation 4 there is, submits Mr Grice, a clear hierarchy or sequence of questions which the Court should consider. First, whether the handling involves a foreseeable risk of injury; second, if so, whether the Respondent had established that the handling could not be avoided; third, if so, whether a suitable and sufficient assessment of the handling operation had been performed. Mr Grice's point is that consideration of the dynamic risk assessment and training in response to question one (the existence of risk) conflated risk of injury with the later assessment of how the risk might be reduced or eliminated.

19. The starting point for any consideration of this appeal is to record that the Court must, when assessing the risk of personal injury, take into account the relevant occupational context. This much is clear from the judgment of Hale LJ in *Koonjul*. As she put it at [11] there must be an element of realism to the analysis of risk, otherwise a full assessment of every manual handling operation could be a major effort. At [13] she continued, "*one is therefore looking at this particular operation in the context of this particular place of employment and also the particular employees involved*." This approach has subsequently been incorporated into the Regulations themselves at 4(3) which requires the court to consider the "knowledge and training" of the employee when determining whether a handling operation includes a risk of injury and in determining steps to reduce that risk.

20. The relevant context of this particular employee, and this particular operation, required the Judge therefore to take into account the following features: that the Appellant had been trained in dynamic risk assessment; that dynamic risk assessment required him to appraise the handling and consider whether it could be undertaken safety on his own; if so, that he should devise and adopt a safe method of handling; that, although this was a unique handling (in the sense that the Appellant could not remember ever having handled the pump on the work bench before) his undertaking "unique" tasks was a routine part of his work. For the reasons given in the judgment, undertaking "one-off" repairs was all part and parcel of the Appellant's day to day work as a fixer or problem-solver.

21. The Judge took into account the factors which I have outlined above as he was not only entitled, but required, to do. I see no flaw, either of fact or law, in the approach which he took. Of course, it follows from the (correct) analysis adopted by the Judge that the question of whether the handling carried a foreseeable risk of injury may be answered differently in a different operational context. As Mr Macpherson puts it, if an inexperienced and untrained employee had been tasked on a one-off basis with carrying out the kind of operation which was routine to the Appellant, the range of considerations involved would be very different and the risk of injury might then be foreseeable. However, this was not the relevant context against which the Judge was required to undertake the analysis. There was no dispute but that the Appellant had been trained and that he had implemented the dynamic risk assessment effectively over the course of his time repairing machines. Further, again as the Appellant

accepted, the task of rolling the pump was not significantly more difficult, heavy awkward or unusual than many other tasks which he had to perform.

22. Nor am I persuaded on the evidence which was before the Judge that he was wrong to conclude that "*there was nothing inherently or uniquely dangerous to the degree that such an employee either required further warning or the benefit of risk assessment*.." Mr Grice submits that the handling of the machine on the workbench was intrinsically risky and that the size and weight of the machine combined with the imbalance in weight distribution meant that, however it was manipulated with outstretched arms and hands, the handling involved substantial weight and force being transmitted through the Appellant's outstretched arms. He further submits that the Appellant had to guide and control a substantial weight through his arms in order to guard against the pump tipping and losing control and that the effect of the manoeuvre was that the handling exceeded the recommended safe lifting limits by some considerable margin.

23. Mr Grice may or may not be correct in these statements. His difficulty however is that the Judge found "*with nothing to guide me in this regard*" that the physics of the manoeuvre did not speak for themselves. What is clear is that the Appellant did not handle the full weight of the pump as he was using the right foot as a pivot. Beyond this, the nature of the forces which were applied to his arms and hands are not known. As the Judge frequently noted, both in his judgment and during the course of the evidence, neither party had deployed expert evidence on the topic (or on any other topic). It seems to me that, in the absence of expert evidence to guide him, the Judge was entitled to conclude that the handling manoeuvre was not one which carried intrinsically a risk of injury. Even though the Court is aware that expert evidence should be deployed sparingly, this is an occasion when expert evidence on the risks associated with handling the pump would have been appropriate. The Judge was I find entitled to reach the view that unwieldy and imbalanced as the pump undoubtedly was, its handling, in context, did not involve a foreseeable risk of personal injury.

24. Mr Grice acknowledges the very considerable difficulty which his challenge to factual conclusions of the Judge presents on appeal. The case law is replete with cautionary advice as to the approach which should be taken by appellate courts to challenges to primary findings of fact or inferences which have been drawn from primary facts (see, for example, *Assicurazioni Generali v Arab Insurance Group* [2002] EWCA Civ 1642). Unless it can be clearly demonstrated that the judge has failed to take into account a key piece of evidence in reaching his conclusions or that the finding is irrational, the appellate court will not interfere.

25. I see no reason to interfere with the Judge's factual conclusion in this case that the handling of the pump did not involve a foreseeable risk of personal injury. The conclusion is not one which I find to be irrational or contrary to common sense.. The central difficulties with Mr Grice's submission on this point are that (a) it fails to take into account that in approaching the question of risk, the Court must take into account the relevant context and (b) absent expert evidence, the Judge was entitled to find that the handling was not intrinsically risky. In short, I do not find that the Judge's conclusion on the facts can be fairly criticised.

26. Against that background I turn to deal with some of the smaller points raised by Mr Grice in support of his first ground of appeal. I can do so succinctly.

i) The Judge did not fail to take into account the evidence of the Respondent's witnesses that there were risks of injury if the handling had been done incorrectly. He made clear that given that neither Mr Portt nor Mr Lang were experts, albeit that both had a background in engineering, he was proposing to place little weight on their evidence. This approach cannot be criticised.

ii) Nor am I persuaded that the Judge was wrong to place little or no weight on the modest changes and emphasis in working instructions in the light of the accident. The question for the Court was whether, taking into account the occupational context of this handling, the risk was such as to engage the manual handling requirements. As the Judge concluded "*the fact that with the benefit of hindsight steps were taken to, in effect, reaffirm the requirements of dynamic risk assessment are nothing more than confirmation of the need for realism.*" I see no merit in this submission.

iii) I do not accept that the Judge placed weight upon the Appellant's own assessment that he could perform the handling safely. As Mr MacPherson submits, that evidence does not feature in the part of the judgment whether the Judge sets out his analysis and conclusions. However, even if he had placed some weight on that evidence, I have difficulty in accepting that it would be wholly irrelevant given the Appellant's training and undoubted skill, particularly in circumstances in which the mechanics of the injury remain in doubt.

iv) Finally, I note in passing that Mr Grice submits that the Judge failed to appreciate that, in *Koonjul*, Hale LJ had found that the moving of the bed did give rise to a foreseeable risk of injury. Nothing turns on the point, but I should record that it is not clear whether the Judge was indeed wrong in reading the judgment of the Court of Appeal as he did and I note that Staughton LJ (with whom Hale LJ sat) considered that she had "*left that point open*."

27. I move on then to consider Mr Grice's second ground of appeal and the submission that, by taking into account the Appellant's training in dynamic risk assessment and his occupational background, he "*conflated proof of the existence of a foreseeable risk of injury with a purported assessment of the simplicity of the steps which he presumed necessary and sufficient to avoid that possibility and the practicability of taking those steps*." Given my approach and response to the first ground of appeal and the considerable overlap between the two main grounds of appeal, I find that I am able to deal with this challenge shortly.

28. The difficulty with this submission is that the Court is required when considering the existence (or not) of a foreseeable risk of injury to assess that risk within the occupational context. By stating as he did at [55] that no relevant risk existed provided that employees were warned of the need to apply their experience and skill to risk assessment, the Judge was doing no more than identifying the relevant context, that is, the skill and training of the Appellant. This is not, as suggested by Mr Grice, to conflate the steps which would or should be taken under Regulation 4(1)(b), assuming that a risk exists, and the manual handling could not be avoided. It is simply to, correctly as I find, analyse the risk of injury in the context of this employee, this place of employment and this particular operation.

29. The fact that the Judge incidentally commented that, had a task-specific assessment been undertaken under Regulation 4(1)(b) it would have yielded no further advice, warning or other action over and above a dynamic risk assessment, does not signal to me that the Judge was approaching the questions posed by the Regulations out of the appropriate sequence or somehow unlawfully involving considerations which belonged elsewhere into his fact-finding on the first question. He did not consider the contents and results of a task-specific assessment in detail in his judgment as he was not required to do so given his findings. But he was entitled to forecast his incidental conclusion on Regulation 4(b) as he did. I do not conclude however that the comment in some way demonstrates a wrong and unlawful approach to the question which he resolved and which proved determinative of the action.

30. For these reasons and notwithstanding Mr Grice's careful submissions, although I grant permission, I dismiss this appeal. In the circumstances, I do not address the Respondent's Notice.