Neutral Citation Number: [2020] EWHC 37 (QB)

Case No: QA-2019-00111

IN THE HIGH COURT OF JUSTICE
High Court Appeal Centre Royal Courts of Justice
On appeal from the Dartford County Court
Order of HHJ Simpkiss dated 5 March 2019
County Court Case number: C93YJ928

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2020

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

Mr Lee Walsh	**Appellant/ Claimant**
- and -	
CP Hart & Sons Ltd	**Respondent/ Defendant**

- -
- -

Mr Tom Restall (instructed by **Brachers**) for the **Appellant**
Mr Patrick Blakesley QC (instructed by **DAC (London)**) for the **Respondent**
Hearing dates: 13 December 2019

- -

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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MR JUSTICE MARTIN SPENCER

Mr Justice Martin Spencer :

Introduction

1. The Claimant appeals with leave of Mr Justice Johnson dated 31 October 2019 against the dismissal of his claim for damages pursuant to the order and judgment of HHJ Simpkiss sitting in the Dartford County Court dated 5 March 2019.

2. The Claimant was injured in an accident at work on 8 April 2013 when he fell off the back of a box van or lorry in the course of delivering goods on behalf of his employer, the Defendant, to an address at 18-30 St Leonard's Street, London EC2A 4BY. He sustained serious head injuries. By the order of Deputy District Judge Rahman on 8 June 2017 it was ordered that the issue of liability be determined by way of a preliminary issue. The trial was heard by Judge Simpkiss over two days starting on 29 October 2018 and by his order originally dated 5 March 2019 but amended on 22 March 2019 he dismissed the claim and gave judgment on behalf of the Defendant. In dismissing the claim, the learned Judge said:

> "63. This was a very unfortunate accident, the precise cause of which is not known, but I am satisfied that it was not caused by any breach of duty by the Defendant and that there were no reasonably practicable steps which should have been taken by the Defendant to prevent it or to mitigate its consequences.
>
> 64. I therefore dismiss the claim."

The Facts

3. The Claimant was born on 8 April 1971 and this accident therefore occurred on his 42nd birthday. He started to work for the Defendant as a driver's mate on 16 June 2008, his job involving the delivery and collection of loads using lorries or box vans fitted with tail lifts. The Defendant is the manufacturer of bathrooms and the delivery was to a building site where a development was being carried out by a company called London Square Developments.

4. On 17 June 2008 the Claimant received training in manual handling, the objective of the training being, "To provide employees with the necessary training in manual handling/lifting in accordance with health and safety regulations." The benefit was stated in the Training Completion Form to be to "ensure employees do not injure themselves whilst completing their tasks safely." He received further updating training on 19 July 2011 when he watched a manual handling DVD intended to provide employees with the necessary training in manual handling/lifting in accordance with health and safety regulations. Further manual handling training was given on 4 January 2013. The fact that manual handling was not just given but reinforced by updating sessions demonstrates that the Defendant was an employer that took the health and safety of its employees seriously and responsibly.

5. The fact that the Defendant took health and safety issues seriously is also demonstrated by the fact that the Defendant employed an external consultancy, Fire Link Ltd, to look after and advise the Defendant on health and safety issues, Fire Link being an organisation specialising in health and safety. In March 2013 a representative from Fire

Link, Mr Kenneth Williams, undertook a safety audit and prepared a risk assessment relating to the delivery/unloading of goods. On 8 March 2013 Mr Williams reported to the Defendant on safety sampling and his report noted a number of health and safety issues which had arisen during discussion with staff who were required to undertake work away from the Defendant's distribution centre, including delivery drivers and contract staff. This report included the following:

> "3.05 Access to Vehicle Load Beds:
>
> There is significant potential for drivers and their mates to fall from the load bed when accessing, working on or leaving the load bed itself. The height of the load bed from the ground is significant and a fall from this height has the ability to cause life-threatening injuries. When accessing the load bed all staff are to ensure that they access the load bed via a recognised method and not climb up via the vehicle's tyres or sidebars."

6. At the same time, Mr Williams produced a number of Work Activity Assessment Forms which assessed the risk of certain activities by reference to the probability of an untoward event occurring (on a scale of 1 – 5) and the severity of the injury liable to ensue (again on a scale of 1 – 5). The activity would then be assessed in terms of risk by multiplying the probability of the untoward event by the severity and dividing the activities into low, medium and high risk. The band for low risk was 1 – 4, medium risk 5-9 and high risk 10-25. Thus an untoward event with a very likely probability (5) and a potential maximum severity of fatality or major incident (5) would give a score of 25 (5 x 5) and thus be high risk in terms of the risk assessment. Two of the Work Activity Assessment Forms, both dated 8 March 2013, were produced: in one ("WAF1") the work activity being assessed was "External working (deliveries/contract staff etc) and the other ("WAF2") was "Reception of and delivery vehicle loading/unloading operations". In WAF1, access to vehicle load beds was identified as a hazard, the problem or harm identified being slips and trips, falls from height and the people who could be harmed being identified as drivers/drivers' mates. The probability of an accident was assessed to be evens (3) and the severity (2) (minor injury) giving a score of 6 and putting the activity into the medium band of risk. The control measure required was, "Ensure load beds are accessed using a recognised access method and not via tyres or side bars", and when the risk was thus controlled its ongoing assessment was low.

7. By way of contrast, the WAF2 separately identified two hazards: working at height and operation of the tail lift both of which were associated with a potential problem or harm of fall injuries. Those identified at risk were staff/visiting drivers (for working at height) and delivery drivers/drivers' mates (for operation of tail lift). In relation to each of these, the probability was again evens (scoring 3) but the severity was assessed as (4) (serious injury or significant loss) thus giving a score of 12 and placing these activities in the high-risk band. The control measure for the working at height hazard was:

    - Ensure all persons accessing vehicle/trainer beds use correct access methods;
    - Ensure all staff adhere to SSOW [Safe System of Work] when working on vehicle beds.

With these control measures implemented, the risk was assessed as medium rather than high. So far as the operation of the tail lift is concerned, Mr Williams identified the following control measures required:

- Ensure all drivers/vehicle operators are familiarised with tail lift controls.
- Ensure safety plates are raised when moving items on to the tail lift.
- Only push pallets and cages towards the tail lift.

Again, with these control measures in place, the risk was reassessed as medium.

The Accident

8. The accident occurred when the Claimant, working as a driver's mate, delivered bathroom equipment to the site together with Mr Andy Urbaniak, who was not employed by the Defendant but was a contract driver. Having heard the evidence, the learned Judge's findings were as follows:

> "2. … On arrival at the site the delivery van pulled up in a site loading bay (the street was blocked off from the public). The rear of the van has a shuttered style rear door with a tail lift which when the shutter is raised is opened, folds out and can be raised or lowered so as to lift items into and out of the van.
>
> 3. The Claimant and Mr Urbaniak got out of the driver's compartment of the van and opened the rear shutter. The Claimant lowered the tail lift and both of them went up into the van compartment, the Claimant operating the tail lift using the internal switch sited just inside the rear of the nearside of the door. There was another switch outside the van.
>
> 4. The van was loaded with bathroom fittings (such as baths), and the Claimant and driver went into the rear of the van using the tail lift. Once inside the rear compartment the Claimant and the driver loaded the first pallet containing bathroom items onto the tail lift by using a pallet pump truck ("the ppt") which is carried inside the lorry but is moved onto the tail lift with the pallet. Everything carried in the lorry had to be moved with the ppt. This was the first of several pallets to be unloaded at the site.
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> 5. The pallet was then lowered to the ground and taken into the site to be unloaded from the ppt which was then to be returned to the rear of the van and raised back up to the loading bay of the van for the next item. Mr Urbaniak says in his statement that there were some straps lying around on the floor of the van and that he should hang them up so as not to be in the way.
>
> 6. The Claimant was standing inside the van near the rear door operating the inside control of the tail lift. While the driver and

> some workmen from the site took the pallet on the ppt into the site the Claimant remained on the van.
>
> 7. No-one who gave evidence actually witnessed the accident, but the evidence is that a very short time after the ppt had started to move into the site (accounts differ but it was between 2 metres and 20 to 30 feet). A loud bang was heard. When people looked round they saw the Claimant lying on the ground having fallen out of the back of the van. He hit his head on the ground and suffered a serious head injury.
>
> 8. As a result of his injuries the Claimant is unable to remember anything about the day of the accident and cannot tell the court how the accident happened. He remained in the back of the van solely to await the return of the ppt so that it could be raised up to the level of the van floor and loaded with another pallet. Mr Urbaniak's evidence suggests that he had been asked to hang up some security straps and Mr Turnbull, a plumber working on the site, says that as he moved away pushing the ppt he saw the Claimant at the back of the van near the tail lift switch with his back towards him "*doing something in the back of the truck but [I] could not see what exactly".*
>
> 9. The assumption that everyone has made during the trial is that the Claimant stepped backwards off the van and fell to the ground striking his head. This was a drop of about 1 metre, or waist height. There was no evidence of the actual height. Mr Urbaniak suggested in his statement that the Claimant had previously exhibited signs of *"going out like a light"* in the past – thereby suggesting that his fall might be explained by this. As Mr Urbaniak was not able to attend the trial (he is in Poland and although there was no formal evidence to explain his absence) it appeared that there was probably an innocent explanation. Nevertheless, the Claimant denies the allegation and absent Mr Urbaniak I cannot make any findings that this may have contributed or caused the fall. Mr Urbaniak also made allegations against the Claimant that he had told him things about his relationship with his family which he later found were made up. The Claimant denied this and said that he saw his family every week. There is therefore a doubt about Mr Urbaniak's ability to give reliable evidence.
>
> 10. Equally, there is no evidence as to how the accident happened."

9. In essence, therefore, the findings of the learned Judge were that, whilst the tail lift was in a lowered position, thus leaving a gap at the back of the van with a fall height of about 1 metre, the Claimant, left in the back of the van after Mr Urbaniak had removed the pallet from the tail lift and was wheeling it towards the building site, either stepped back from inside the van or otherwise lost his footing and fell out the back and onto the ground striking his head. The learned Judge did not refer to this in terms but I note that,

in the investigation immediately after the accident, a preliminary statement was taken from a John Lynskey who had said:

> "The driver's mate, Lee was assisting and unloading a closed-in box wagon. The tail lift was down but I did not see who had lowered the tail lift. Lee was standing inside the vehicle in the main load area at the edge of the truck body. I saw him step backwards towards the street and I saw him fall. His legs were on the lowered tail lift. I could not see any obstruction or hazard on the lorry that would have caused him to fall or trip over. I did not hear Lee shout. Lee did not try to grab hold of anything to prevent himself falling."

10. As well as investigating the accident, the Defendant asked Mr Williams of Fire Link Ltd to look at the circumstances of the accident from the point of view of health and safety. This led to Mr Williams producing in May 2013 a SSOW (Safe System of Work) document for the safe loading and unloading of delivery vehicles. In the introduction to this, it was stated:

> "Around 2,000 people fall from vehicles each year with many more being injured through being struck by moving vehicles. It is therefore essential that all delivery staff understand the safety issues that they can present to other road users, members of the public and to themselves when undertaking routine delivery operations."

The document then identified some seven measures to be taken in order for the system of work to be safe including as follows:

> "6. Only push cages and pallets towards the rear of the vehicle – do not pull them into position on the tail lift.
>
> 7. Keep the tail lift raised when persons are working in the rear of the vehicle unless parked in a recognised loading bay.
>
> REMEMBER – DO NOT STAND ON, OR WORK CLOSE TO AN UNPROTECTED EDGE"

In addition Mr Williams produced a "Toolbox talk" dealing with safe working with delivery vehicles which set out the same recommendations.

This action and the trial before Judge Simpkiss

11. In the Particulars of Claim, the Claimant asserted that there was a breach by the Defendant of regulations 4 and 6 of the Working at Height Regulations, regulations 3 and 5 of the Management of Health and Safety at Work Regulations 1999 and regulations 4, 8 and 9 of the Provision and Use of Work Equipment Regulations 1998. In breach of these Regulations, or in common law negligence, the following failings were alleged:

- To ensure that the operation was properly planned, supervised and carried out in a manner that was reasonably practicably safe;

- To conduct a suitable and sufficient risk assessment;

- To take suitable and sufficient measures to prevent any person falling a distance liable to cause injury and in particular to ensure that the tail lift was always raised when Claimant was moving within the lorry and to provide equipment such as a harness;

- To ensure that the lorry was constructed or adapted so as to be suitable;

- To train the Claimant adequately in safe method to be adopted in unloading pallets;

- To ensure the Claimant specifically understood the method to be adopted and the risk associated with the method he did adopt.

12. In the Defence, the Defendant denied all these breaches. It averred that the operation of delivering pallets to the site was carried out in a safe manner so far as was reasonably practicable this being a:

> "Wholly routine operation, carried out using standard equipment and a method widespread (or even universal) for this type of task among delivery operatives in the UK."

It was pleaded that the Claimant was experienced and entirely familiar with the operation, vehicle, tail lift, load and their respective configurations. He needed no supervision, nor was any individual planning reasonably required for the task given its routine and daily nature and the absence of any site- or load-specific features which needed particularly to be taken into account. The Defendant relied upon the fact there had been no previous similar accidents amongst its delivery operatives and asserted that the risk of falling from height had been appropriately risk assessed by Mr Williams on 8 March 2013 (see paragraph 6 above). The Defendant denied it was reasonable or reasonably practicable or necessary for the tail lift to remain raised while the Claimant was inside the vehicle, asserting that this would simply have extended the floor area available to the Claimant without materially reducing the risk of a fall from height. It denied that a harness would have been appropriate or practicable. The Defendant relied upon the fact that the Claimant had been properly trained in how to load and unload pallets from box vans and had been doing this job without incident for at least six years prior to the accident. It asserted there was no specific training required to assist the Claimant in identifying "the obvious danger associated with stepping backwards when at the rear of the box van". In addition, the Defendant alleged contributory negligence on the part of the Claimant.

13. At the trial, the Defendant did not call Mr Williams to give evidence. It did however call its Transport Manager, Mr Kevin Brooks. In a statement dated 30 August 2017, Mr Brooks had stated that the Claimant had received, "ad-hoc training through regular toolbox talks plus more formal training from time to time." However, in a supplemental

statement dated February 2018, Mr Brooks corrected this, stating that the introduction of toolbox talks was only after the Claimant's accident and not before. Mr Brooks disputed, in his statement, whether the provision of harnesses or lanyards would have been appropriate. He did not, however, address in terms the other matter specifically alleged in the Particulars of Claim, namely that the tail lift should have been left in a raised position whilst operatives were working in the rear of the van.

14. In giving evidence, Mr Brooks affirmed his statements and additionally reiterated that the use of fall arrest equipment would have been more of a hinderance in the kind of work carried out by the Claimant than of any use with regards to safety.

15. In cross-examination, Mr Brooks agreed that the May 2013 toolbox talk and safe system of work document were first put together after the accident. There was this exchange:

> "Mr Restall: So, before the accident, you hadn't actually sat down at some point, maybe with Ken Williams, and thought, we need to put together a safe way to do this with a series of steps for people. That hadn't happened before had it?
>
> Mr Brooks: No."

He agreed that Mr Walsh had not received any training in relation to working at height, only in respect of manual handling and that there were no measures in place to reduce the risk of falls from the back of the lorry. He agreed that paragraph 7 of the Safe System of Work and Toolbox talk from May 2013 ("Keep the tail lift raised when people are working in the rear unless parked in a recognised loading bay") was designed to avoid or minimise the risk of somebody falling out of the back. He further agreed that another improvement on the safe system of work would be for anyone in the van to go down on the tail lift with the driver (and the load) and not stay up in the back of the van whilst waiting for the driver to come back. He agreed this would be a way of minimising the time somebody is working at height as part of a sensible safe system of work. He also agreed that the Defendant could easily have done the toolbox talks prior to the accident.

16. Mr Brooks was also referred to the WAF2 where, in relation to the operation of the tail lift and the risk of fall injuries, the existing control measures had been stated to include, "SSOW for loading of vehicles introduced" and the new control measures required including, "Ensure all staff adhere to SSOW when working on vehicle beds". Mr Brooks agreed that, as at March 2013 there wasn't in fact a SSOW document in existence and that the creation of WAF2 had identified the need for such a SSOW document but that it had not been done prior to the accident. He agreed with the suggestion that, "It was something that you recognised you needed to do, even before the accident." Mr Brooks agreed that at the location where the accident took place, if the Claimant and Mr Urbaniak had been following the safe system of work which was created after the accident, the tail lift would have remained up.

17. In the course of cross-examination, Mr Restall also suggested other ways in which those working in the back of the lorry might be warned that they were nearing the edge, for example by painting yellow hatched marks on the floor for the last half metre to alert people to the fact they were close to the edge. This was a measure raised in evidence

for the first time in cross-examination and had not been presaged in the Pleadings or otherwise. Another suggestion was that a hard hat should be worn.

The judgment

18. Having cited the facts and set out the regulations and the authorities (to which I will come in paragraph 32 below), the learned Judge said this:

> "24. There can be no doubt that, overall, the burden of proving that steps were not reasonably practicable is firmly on the employer. Nevertheless, in cases where it is not obvious what steps might be taken to reduce or eliminate the risk then it should be incumbent on the Claimant to identify those steps that he says should have been taken. This must at least be the case where the Defendant has demonstrated that it has considered what steps might have been taken. If, as in this case, the Claimant produces only at trial a list of steps which might have been taken, without any evidence about those steps, then it is impracticable, unreasonable and unfair for the Defendant to be criticised for not having evidence in relation to them. It cannot be right, in those circumstances, that the court must find in favour of the Claimant solely because the Claimant raises a possible measure, with no evidence to explain how it would have reduced the risk, and then submits that the Defendant cannot discharge the burden, having not covered it in its evidence."

Mr Restall takes issue with this passage from the judgment and I deal with it at paragraph 49 below.

19. In his decision, Judge Simpkiss first dealt with the allegation of breach of regulation 4 of the Work at Height Regulations 2005 ("WHR") and he referred to Mr Brooks' evidence that the Defendant's system for unloading was "very much a standard system which is consistent with that adopted across the industry", evidence which was not challenged. He said:

> "36. I am not satisfied that the criticism of lack of planning or supervision has been made out. Mr Brooks' evidence was not challenged on this point, the system being an industry standard. The risk of a fall and of injury was identified and steps were taken to reduce it."

He pointed to the fact that the Claimant had not put forward any suggestions about how the operation should have been better planned or of a different industry standard.

20. The judge next dealt with the allegation of breach of regulation 6 (1) WHR relating to risk. Dealing with the claim that the risk assessment was inadequate, the judge said:

> "41. Mr Restall's submission that it was inadequate refers to the post-accident assessment and the further control introduced of raising the tail lift when someone was working inside the van bed. That, as I said earlier, is a hindsight judgment which is not,

> in my judgment, justified as a criticism of the pre-accident assessment."

21. In relation to the allegations of breach of regulations 6 (3) and 6 (5) the learned Judge referred to the fact that the Claimant was aware of the position of the rear of the van and his own position relative to the rear as he had just lowered the tail lift and he knew if he put his foot over the edge unwittingly or stepped back without looking he would fall. Thus the risk was obvious and no training would have changed that. He said:

> "46. I find that the Claimant was sufficiently trained to carry out this operation and was well aware of the risks of falling from the back of the lorry."

From paragraph 50 of the judgment, the learned Judge considered the allegation in relation to the tail lift, namely that the safe system of work implemented after the accident (paragraph 7 in respect of keeping the tail lift up when people are in the back of the van) should have been implemented before the accident. The learned Judge said this:

> "53. In my judgment, it would not have been proportionate to instruct employees carrying out delivery operations prior to the accident to raise the tail lift if someone was inside the van. There had been no incidents identifying the risk and the assessment identified the risk as 'low' if the controls were in place. The Claimant was waiting in the lorry for the pallets to return and if it had been raised, would have had to lower it again for that purpose. He was not carrying out any activity and could be expected to be aware of the edge of the lorry, next to which he was standing and which he had been looking at only moments before when the tail lift was lowered. …
>
> 54. I am therefore satisfied that there was no breach of duty under this head as it has not been proved that this step should have been taken to reduce risk, and, in the circumstances, it has been proved not reasonably practicable to take this measure, having regard to the degree of risk, proportionality and practicality."

The learned Judge similarly rejected the suggestion that employees should not have been permitted to be inside the van loading bay unless the tail lift was up. He also rejected the suggestions that there should have been fall arrest equipment in place (harnesses or lanyards), that there should have been markings near the rear of the van or that hard hats should have been compulsory. In the circumstances, he dismissed the claim.

The Scope of this Appeal

22. Before considering the arguments of the parties on this appeal, it is appropriate to remind myself of my jurisdiction and the scope of an appeal of this nature. By CPR52.21, every appeal is limited to "a review of the decision of the lower court" and the appeal court will allow an appeal where the decision of the lower court was "wrong

or unjust because of a serious procedural or other irregularity in the proceedings in the lower court." There is no question here of any serious procedural or other irregularity in the proceedings below. The appeal court may draw any inference of fact which it considers justified on the evidence.

23. In approaching this review task, I am considerably assisted by the guidance of May LJ in *Dupont de Nemours & Co v ST Dupont* [2006] 1 WLR 2793 where he said that in r.52.21(1) "review" is not to be equated with judicial review.

> "It is closely akin to, although not conceptually identical with, the scope of an appeal to the Court of Appeal under the former Rules of the Supreme Court. The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision-making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material."

The Claimant's arguments on this appeal

24. The first ground of appeal is that Judge Simpkiss wrongly treated the test of reasonable practicability as involving a simple balancing exercise, rather than a balancing exercise in which a measure is only not reasonably practicable if there is *gross disproportion* between the quantum of risk and the sacrifice involved in taking that measure. This was a reference to paragraph 53 of the judgment, cited above in paragraph 21, which immediately followed the judge's citation of a dictum from Lord Mance in *Baker v Quantum Clothing Group Limited* [2011] UKSC 17 where he disagreed with what he referred to as the Court of Appeal's "gloss" on the section 29 of the Factories Act 1961 which provides that every workplace shall be made and kept safe for any person working there so far as is reasonably practicable. Smith LJ had suggested that "there must be at least a substantial disproportion" before the desirability of taking precautions can be outweighed by other considerations and there is a need for "substantial disproportion". Relying on Lord Mance, Judge Simpkiss ruled that all the court is required to do is a balancing exercise.

25. Secondly, it is argued that the learned Judge wrongly treated the burden of proof for establishing that all reasonably practical steps had been taken rested in part or at times on the Claimant. This was a reference to paragraph 24 of the judgment (cited above at paragraph 18 of this judgment) which had immediately followed a consideration of the decision in *Bhatt v Fontain Motors Ltd* [2010] EWCA Civ 836 and the judgment of Sedley LJ at paragraph 40 where he had said:

> "There will be some cases in which it is open to, and arguably incumbent on, the Claimant to say what ought to be done by the Defendant and why. There will be others in which the event itself calls for explanation by the Defendant of why it was not

> reasonably practicable to have guarded against it. In both the kinds of case it will then be for the Defendant to show why it is not reasonably practicable to take the step-in question. In many cases the burden will shift as the evidence unfolds."

The Claimant submits that these comments of Sedley LJ were obiter, per incuriam and wrong, being contrary to well established authority.

26. Thirdly it is submitted that the learned Judge failed to apply the Provision and Use of Work Equipment Regulations 1998. These three grounds of appeal were all identified as questions of law.

27. In addition, Mr Restall submitted that there were further grounds which are points of fact or mixed fact and law but where he said that the learned Judge had erred. Thus it is submitted he erred in treating the risk of the Claimant's accident as being low, in finding that it was not reasonably practicable to instruct employees to keep the tail lift raised whilst in the back of the lorry, in finding that it was not reasonably practicable to instruct employees not to wait in the back of the lorry when not working there and in rejecting the matters raised in cross-examination of Mr Brooks, namely the application of warning markings to the rear of the lorry and the wearing of hard hats.

The arguments on behalf of the Respondent

28. For the Respondent, Mr Blakesley QC submitted that grounds 4 – 8, although described as points of fact or mixed fact and law are in fact points of fact with which the court should be particularly slow to interfere. He submitted that the learned Judge correctly directed himself on, and applied, the law on the burden and standard of proof and that his factual findings were not merely within the reasonable ambit of judicial discretion but in fact were correct.

29. In relation to ground 1, Mr Blakesley submitted that there is no test of "gross disproportion" in assessing reasonable practicability and therefore the learned Judge did not misdirect himself. In relation to ground 2, Mr Blakesley submitted that the learned Judge demonstrated, at paragraph 24 of his judgment (see paragraph 18 above of this judgment) that he correctly understood where the central burden of proof lay and he demonstrated this when he considered the pleaded allegations. He submitted that in relation to the key findings, the learned Judge made positive findings that there had been no breach (whether of the regulations or of the common law) on the part of the Defendant, applying the conventional burden of proof. Mr Blakesley went on to address and refute each of the other grounds of appeal.

30. Mr Restall and Mr Blakesley QC developed further, in oral submissions, the arguments set out in their skeleton arguments and I deal with their submissions below. In addition, at my invitation, counsel made submissions in relation to contributory negligence, an issue which the learned Judge did not deal with as, given his findings on breach, it was unnecessary for him so to do. Counsel agreed that if I should allow the Claimant's appeal on breach of duty, then they would be content for me to make my own assessment of contributory negligence rather than remit the matter to the learned Judge. Mr Restall submitted that, in cases of breach of statutory duty involving momentary inadvertence on the part of the Claimant, contributory negligence, where found at all, is conventionally not put at higher than 25-30% although he did not support this

submission with any authority. For his part, Mr Blakesley QC submitted that the majority of the fault for this accident lay with the Claimant himself who, having just lowered the tail gate, was well aware that the tail gate was down leaving a risk of fall and was also well aware of where the edge of the van was. He submitted that the Claimant had failed to take care for his own safety and should bear the majority of the blame.

The statutory provisions

31. It is appropriate, for the purposes of this judgment, to set out the terms of the regulations relied upon by the Claimant which I consider to be most relevant to this appeal.

32. Regulation 4 of the Work at Height Regulations 2005 provides:

> 4.— **Organisation and planning**
>
> (1) Every employer shall ensure that work at height is–
>
> (a) properly planned;
>
> (b) appropriately supervised; and
>
> (c) carried out in a manner which is so far as is reasonably practicable safe,
>
> and that its planning includes the selection of work equipment in accordance with regulation 7.

33. Regulation 6 (3) of the Work at Height Regulations 2005 provides:

> "Where work is carried out at height every employer shall take suitable and sufficient measures to prevent, so far as reasonably practicable, any person falling a distance liable to cause personal injury."

For the purposes of this appeal, the parties were agreed that this regulation is engaged because working in the back of the van should be designated as carrying out work at height and to fall from the back of the van would be liable to cause personal injury (as in fact happened).

34. Regulation 6 (5) then provides:

> "Where the measures taken under paragraph (4) do not eliminate the risk of a fall occurring every employer shall –
>
> (i) So far as is reasonably practicable, provide sufficient work equipment to minimise –
>
> (a) the distance and consequences; or

> (b) Where it is not reasonably practicable to minimise the distance, the consequences of a fall."

35. Paragraph 4 of the Provision and Use of Work Equipment Regulations 1998 provides:

> "(1) every employer shall ensure that work equipment is so constructed or adopted as to be suitable for the purpose for which it is used or provided.
>
> …
>
> (3) every employer shall ensure that work equipment is used only for operations for which, and under conditions for which, it is suitable."

Discussion

36. In my judgment, regulations 6 (3) and 6 (5) WHR are the ones which lie at the heart of this case and are most pertinent to this appeal. Furthermore, in my judgment, it is the allegation that a suitable risk assessment should have been carried out which identified the raising of the tail lift as a safety measure to prevent falls for anyone working in the back of the van, which falls principally to be considered. This was identified by the Defendant post-accident and was incorporated into the SSOW and the toolbox talk. In those circumstances, it is perhaps surprising that the learned Judge found that it would not have been reasonably practicable for the Defendant to have taken this measure pre-accident, when they had done so post-accident. Furthermore, if the Defendant should have taken this measure, then the other allegations fall away, namely the suggestion that harnesses should have been provided and worn, or there should have been warning lines painted on the floor of the van or that hard hats should have been compulsory.

37. As submitted by Mr Restall, a careful examination of the pre-accident documentation identifies a critical lacuna in the assessment of the risk of falling from the back of the van or lorry. WAF1 of 8 March 2013 (see paragraph 6 above) identified the access to the vehicle load beds as a hazard for drivers and drivers' mates, hence the control measure laid down of ensuring that, "load beds are accessed using a recognised access method and not via tyres or side bars." This risk assessment did not identify the risk of falling from the load bed once it had been accessed. Had it done so, the severity assessment would surely not have been minor injury only as the severity of a fall from the load bed itself would certainly be potentially at least of serious injury. In contrast, the WAF2 of the same date did identify the risk of fall injuries from working at height and operation of the tail lift. However, this risk assessment assumed that there was a SSOW for the loading of vehicles when in fact there was not. Thus, the new or modified control measure required which was identified, namely to ensure that all staff adhere to SSOW when working on vehicle beds, was nugatory when no SSOW had been introduced. Equally, the risk assessment identified, as an existing control measure, the toolbox talk for safe working with delivery vehicles but, as Mr Brooks accepted, the toolbox talk was only devised in May 2013, after the accident, along with the SSOW. The lacuna in WAF1 is highlighted by the fact that, in the revised version dated 15 May 2013, an additional problem is identified, namely the risk of falling when working at height. The existing control measure only referred to the training of staff on the operation of the tail lift and the revised risk assessment recommended instigating the

use of the SSOW for loading/unloading vehicles ensuring that no member of staff is left unprotected when working at height, conducting regular toolbox talks on the hazards of working at height and investigating the suitability of fall arrest equipment. The SSOW and the toolbox talk both referred to leaving the tail-lift in the raised position when someone was working in the back of the van or lorry: see paragraph 10 above. The investigation of suitable fall arrest equipment did not result in any such equipment being provided and Mr Brooks was clear that his conclusion, in consultation with Mr Williams, that this was not reasonably practicable. But he fully acknowledged that the new SSOW and toolbox talk introduced the safety measure of leaving the tail lift in the raised position when anyone was working in the van, and he understandably did not assert that this was not reasonably practicable, having introduced it post-accident.

38. The learned Judge rejected the allegation of breach of the Regulations in relation the safety measure of leaving the tail gate in the raised position when operatives were in the back of the van on two bases, as it seems to me: first because, on his finding, the Claimant had failed to prove that that step should have been taken to reduce risk (thereby deciding, in effect, that it was not a suitable and sufficient measure within the meaning of regulation 6 (3)); and secondly because the Defendant had proved that it was not reasonably practicable to take that measure having regard to the degree of risk, proportionality and practicality. In so finding, the learned Judge relied upon the assessment having identified the risk as "low" if the controls were in place: see paragraphs 53 and 54 of the judgment, cited in paragraph 21 above.

39. In my judgment, the learned Judge erred in two important respects in relation to this finding. First, he was wrong to refer to the risk assessment as having identified the risk as low if controls were in place. This was a reference to the WAF1 of 8 March 2013, but this risk assessment had not addressed the risk of falling from the vehicle load bed at all, only the risk arising from *access* to vehicle load beds, hence the control measure required referring to not using the tyres or side bars to access the load bed; hence also the severity assessment being of minor injury only. The fact is that this risk assessment did not address the risk of falling from the load bed and this was a point which, in my judgment, the learned Judge simply overlooked or misunderstood. Given that a proper assessment of the risk would have identified the risk as high, as the Defendant's own documents themselves show, it seems to me to follow that this is a risk which ought to have been addressed by the Defendant pre-accident and the failure to do so was a breach of the Regulations.

40. The second question concerns whether the safety measure in question, namely instructing employees only to work or remain in the back of the van if the tail gate was in the raised position was, "reasonably practicable" within the meaning of the regulation. In this regard, in my judgment, the learned Judge did misdirect himself. The learned Judge found that all the court is required to do is to carry out a balancing exercise and decide whether it would not have been proportionate to give the instruction to the employees rather than consider whether to have given such an instruction would have been grossly disproportionate.

41. The starting point for the test of reasonable practicability is the decision of the House of Lords in *Coltness Iron Company Ltd v Sharp* [1938] AC 90. That case concerned a machine in a coal mine which, when in motion, was required to be securely fenced pursuant to section 55 of the Coal Mines Act 1911. An engineer made adjustments to

the machine when it malfunctioned and, having done so, set the machine in motion in order to test whether it was working properly. To do this, he had to remove the guard. At that very moment, the Pursuer, a workman in the mine, while passing the machine, slipped and his hand was caught in the unprotected gearing and was injured. The House of Lords held that, as it was not reasonably practicable to keep the gearing securely fenced when it had to be observed when being tested, as it would have been impossible to have observed its working if it had been protected by the guard, the Company were entitled to the protection from liability afforded by section 102 (8) of the 1911 Act which exempted them from liability in as much as it was, "not reasonably practicable to avoid or prevent the breach". In the course of his judgment Lord Atkin said the following:

> "In the facts of this case where the dangerous machinery was exposed for only a few minutes as the only means of effecting necessary repairs in a part of the mine where it was unlikely that any workmen would be exposed to risk of contact with the machine other than the engineer engaged in the work of repair, I am unable to take the view that it was reasonably practicable by any means to avoid or prevent the breach of section 55. The time of non-protection is so short, and the time, trouble and expense of any other form of protection *is so disproportionate* that I think the defence is proved." (emphasis added)

The use of the word, "so" by Lord Atkin implies a degree of gross or substantial disproportionality for the defence to apply, a degree of disproportionality which in fact was present in that case.

42. This interpretation of Lord Atkin's dictum in *Coltness* was taken up by the Court of Appeal in *Edwards v National Coal Board* [1949] 1 KB 704. All three judges referred to the dictum of Lord Atkin with approval and considered that the defendants had failed to satisfy the "heavy burden" of showing lack of reasonable practicability. For Tucker LJ and Singleton LJ, the defendants failed because the evidence of lack of reasonable practicability was lacking. Tucker LJ said:

> "We are therefore left in ignorance as to the practicability or otherwise of the measures which, in the opinion expressed by the Inspector of Mines appointed by the National Union of Mineworkers, after 12 years' experience of the investigation of fatal accidents, constitutes the only way to ensure security viz. artificially to support all roads in mines."

Singleton LJ said:

> "There is no evidence at all to show that it would not have been reasonably practicable to do this [i.e. take the measures in question], nor is there any evidence to show that it would not have been reasonably practicable to do it a month before the accident."

For his part, Asquith LJ addressed directly the question of whether, for something not to be reasonably practicable, it needs to be grossly disproportionate. He said:

> "The construction placed by Lord Atkin on the words 'reasonably practicable' in *Coltness Iron Co v Sharp*, seems to me, with respect, right. 'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one side and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and if it be shown that there is a *gross disproportion* between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident." (emphasis added)

Thus, Asquith LJ considered in terms that Lord Atkin's use of the word, "so" incorporated an element of gross disproportionality.

43. The matter was further considered by the House of Lords in *Marshall v Gotham Co Ltd* [1954] AC 360. The main point of the decision was to state that the test of what is "reasonably practicable" is not simply what is practicable as a matter of engineering but depends on a consideration, in the light of the whole circumstances at the time of the accident, of whether the time, trouble and expense of the precautions suggested are or are not disproportionate to the risks to involved and also an assessment of the degree of security which the measures suggested may be expected to afford. However, in the course of his judgment Lord Reid expressly endorsed the judgment of Asquith LJ in *Edwards'* case. He said:

> "… in my judgment there may well be precautions which it is 'practicable' but not 'reasonably practicable' to take, and I think that follows from the decision from the Court of Appeal in *Edwards v National Coal Board*. I agree with what was said in that case by Asquith LJ (as he then was), and I do not find it helpful to consider whether this statutory duty is in every case the same as an employer's common law duty. I think it enough to say if a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable and as men's lives may be at stake it should not lightly be held that to take a practicable precaution is unreasonable."

This dictum of Lord Reid brings into consideration the degree of risk, hence his reference to men's lives possibly being at stake. It is in this context that the error of the judge in the present case in misconstruing the risk assessment and the severity of the risk at stake becomes important. Had the learned Judge appreciated, as in my judgment he should have done, that the risk was high for the reasons I have already explained, because the potential severity was serious injury or death, this would have put into context the reasonable practicability of the measure of ensuring the tail gate was in the raised position when workers were in the back of the van.

44. Finally, I turn to the decision of the Supreme Court in *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17. In the Court of Appeal Smith LJ had suggested (at paragraph 84 of her judgment) that, "there must be at least a substantial disproportion" before the desirability of taking precautions can be outweighed by other considerations. I take the

view that, in so stating, she was following the established line of authority to which I have referred. As I have stated, Lord Mance, at paragraph 84 of his judgment, stated:

> "This theme was developed in paragraphs 82 – 84 of her judgment on the basis of dicta in two cases prior to *Marshall v Gotham.* But it represents, in my view, an unjustified gloss on statutory wording which requires the employer simply to show that he did all that was reasonably practicable."

In the court below in *Baker*, at paragraph 89, the Court of Appeal had stated:

> "Under the statute, the employer must first consider whether the employee's place of work is safe. If the place of work is not safe (even though the danger is not of grave injury or the risk is very likely to occur) the employer's duty is to do what is reasonably practicable to eliminate it. Thus, once any risk has been identified the approach must be to ask whether it is practicable to eliminate it and then, if it is, to consider whether, in the light of the quantum of the risk and the cost and difficulty of the steps to be taken to eliminate it, the employer can show that the cost and difficulty of the steps substantially outweigh the quantum of the risk."

45. In my judgment, the judgment of the Court of Appeal in Baker's case is not only wholly in line with the views of Lord Atkin (in *Coltness*), Asquith LJ (as he then was) in *Edwards* and Lord Reid in *Marshall*, but also makes logical sense. The starting point is whether the measure in question is practicable at all. If it is not, that is the end of the matter. However, if the measure is practicable then the court goes on to consider whether it is, "reasonably" practicable. What does the word, "reasonably" connote? This must be, as the Court of Appeal considered, whether the employer can show that the cost and difficulty of the steps so substantially outweigh the quantum of risk involved as not to be reasonably practicable. A mere balancing act, which the learned Judge considered is all that is required by the court, does not in my judgment, encompass or address the concept of, "reasonable practicability". Otherwise, references to this being an, "onerous" duty on the Defendant would be substantially watered down. In my judgment, this is not what was intended by the legislation, the policy of which is to put safety first and not provide the employer with an easy escape avenue but rather a "long stop" defence in very limited circumstances.

46. For the above reasons, in my judgment, the learned Judge misdirected himself in relation to the test to be applied and wrongly decided that the measure of directing the employees to ensure that the tail gate was up whilst they were working in the back of the van was not reasonably practicable. As I have already stated, this was, in any event a surprising decision when it was a measure which the Defendant had already taken. Nor, in my judgment, does the fact that no such accident had previously occurred to any employee of the Defendant avail the Defendant: the risk was clearly identifiable by the Defendant, indeed in some ways it was an obvious risk, and, crucially, the risk was designated by the Defendant's themselves, rightly, as a high risk given the potential severity of the injuries in question. Clearly any high risk activity with the potential to result in very serious injury (or even death) is not one which can be ignored or overlooked by an employer and the truth is that the flawed risk assessments undertaken

by Mr Williams on behalf of the Defendant had the effect of overlooking or ignoring the risk of falling from the back of the van or lorry and in that regard, in my judgment, the Defendant was in breach of its duty to the Claimant.

47. In argument, Mr Blakesley QC suggested that the safety measure of leaving the tail lift in the raised position when workers were in the back of the van would simply transfer the same risk to a different location, namely the risk of falling from the tail lift. This reflected the Defendant's pleaded case that it was not reasonable or reasonably practicable or necessary for the tail lift to remain raised while the Claimant was inside the vehicle because all this would have achieved would have been simply to have extended the floor area available to the Claimant without materially reducing the risk of a fall from height. However, in my judgment this is quite wrong. There is a world of difference between a worker being inside a van or lorry and forgetting or misjudging where the edge is at the back, and a worker being on the tail lift, out in the open, where he knows there is limited space on 3 sides. Furthermore, he would only be on the tail lift in order to carry out lifting operations, and a different set of safety rules would apply. The two situations are quite different.

48. A further matter, raised by Mr Brooks in evidence and relied upon by Mr Blakesley QC in his submissions, needs to be considered, namely that whilst to have the tail gate in the raised position would eliminate the risk of an employee falling from the back of the van, it would create an alternative risk, namely a danger to pedestrians walking round the side of the lorry and potentially into the raised tail gate thereby injuring themselves. However, in my judgment, this is relatively easily dealt with: if this was, in reality, a significant alternative risk, then it would or should have been taken into account by the Defendant when they devised the toolbox talk and safe system at work document in 2013. That it was not so identified shows it is somewhat fanciful. In any event, it would potentially be addressed by alternative safety measure such as, for example, some kind of warning to pedestrians when the tail gate is in the raised position. The risk would not in fact have been present on the facts of this case where the van was being unloaded at a building site from a road which was closed off to the public.

49. Having so determined this appeal in favour of the Claimant subject to contributory negligence, it is unnecessary for me to deal with the other issues raised. However, for the sake of completeness, I should indicate that, in my judgment, the learned Judge was right to rule that, except in the case of clear and obvious measures, it is for the Claimant to raise at least evidentially the safety measures which they say should have been in place for those safety measures then to be "in play" so far as the court is concerned. In the present case, the Claimant raised in terms, on the face of the pleadings, the question whether the tail gate should have been in a raised position for employees working in the back of the van. If the Claimant wished also to put forward a positive case that other measures should have been in place such as the wearing of hard hats or the painting of safety lines in the back of the van, then those should have been raised on the Pleadings as well, thereby giving the Defendant the opportunity to deal with them and call evidence, including in relation to reasonable practicability, if so advised. It is not satisfactory for such matters to be raised for the first time in cross-examination of the Defendant's main witness and I agree with the learned Judge that to do so is unreasonable and unfair on a Defendant. Accordingly, I agree with the way that this matter was put by the learned Judge at paragraph 24 of his judgment (see paragraph 18 above in this judgment) and in that regard, there was no misdirection on his part.

Contributory negligence

50. Given that, as I have found, the Defendant was in breach of duty to the Claimant, the question of contributory negligence on the part of the Claimant arises. As stated, I have been asked by the parties to assess contributory negligence myself rather than remit the matter to the judge. In relation to contributory negligence, I have received some supplemental written submissions from Mr Blakesley QC.

51. On the one hand, given the relative maturity, experience and knowledge of the Claimant and the obviousness of the danger together with the fact that no such accident had ever occurred previously in the Defendant's experience, I can see the strength of the Defendant's argument that contributory negligence should be assessed at greater than 50%. The Claimant himself had lowered the tail lift only a short time earlier, and so was aware that it was in lowered position and should have been aware that there was therefore a drop from the back of the van. However, I can also see the strength of the Claimant's argument that the breach of a Regulation which is intended to protect an employee's safety and, indeed, is intended to protect against an employee's lack of care for his or her own safety should mean that the majority of the blame should fall on the employer.

52. Mr Blakesley QC has helpfully referred me to Chapter 4, section 1 of Charlesworth & Percy on Negligence, 14th Edn. This contains a detailed table of examples of contributory negligence, ranked by percentage, including cases of falls. Different cases do, of course, turn on their own facts and findings of other judges in other cases are of limited use, but they help to identify the "ballpark" level of contributory negligence. At paragraph 4-72, the editor cites a dictum of Lord Tucker in *Staveley Iron & Chemical Co Ltd v Jones* [1956] A.C. 627 at 648 where he said that in cases under the Factories Act:

> "the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute."

53. The editors go on to say: "It was said that the courts must be careful not to emasculate the protection given by statutory regulations through the side wind of apportionment and that a workman must not be judged too harshly for a momentary error, where there was a continuing breach of the law by his employers" citing Sachs LJ in *Mullard v Ben Line Steamers Ltd* [1970] 1 W.L.R. 1414. They then state:

> 4-73 Nevertheless, there is no principle of law which requires that, even when there has been a breach of statutory duty in circumstances where the intention of a statute is to give protection against folly on the part of an employee, there cannot be a finding of contributory negligence to the extent of 100 per cent against the claimant.

54. Examples of cases of falls where the finding was 50% contributory negligence are cited in Charlesworth as follows:

- where a coremaker in a foundry walked backwards, whilst helping others to carry a ladle of molten metal for the purpose of pouring it into a mould, failed to watch his feet and stumbled at the edge of a pit;

- where an experienced workman was injured when he fell from an unfixed and unfooted ladder;

- where a joiner erected his own working platform less safely than he should, because of the lack of material required for its proper construction;

- where a sales director of a company went upon the roof of the company's premises to investigate a wire thought to have been placed by vandals or burglars and fell through a skylight.

55. In my judgment, taking the above matters into account, the appropriate assessment of contributory negligence in this case is 50%.

Conclusion

56. I accordingly allow the appeal and give judgment for the Claimant subject to a deduction of 50% for his own contributory negligence.