

B3/2005/2833

Neutral Citation Number: [2006] EWCA Civ 1031
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CLERKENWELL COUNTY COURT
(HIS HONOUR JUDGE HAMILTON)

Royal Courts of Justice
Strand
London, WC2

Wednesday, 7th June 2006

B E F O R E:
LORD JUSTICE AULD
LORD JUSTICE CARNWATH

KEVIN PHILIP CHAMBERS

CLAIMANT/APPELLANT

– v –

EXCEL LOGISTICS LIMITED

DEFENDANT/RESPONDENT

-

(DAR Transcript of
Smith Bernal Wordwave Limited
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Official Shorthand Writers to the Court)

MR C WALKER (instructed by Messrs Pattinson Brewer, London, WC2 6ST) appeared on behalf of the Appellant.

MS R VICKERS (instructed by Messrs Beachcroft Wansbrough, London EC4A 1BN) appeared on behalf of the Respondent.

J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE AULD: This is an appeal by Kevin Philip Chambers against the smallness of an award by HHJ Hamilton sitting in the Luton County Court in his favour for loss of earnings in a personal injuries claim against his former employer Excel Logistics ("Excel") arising out of two accidents in his work for it as a warehouse man. There is also an application by Excel for permission to appeal the judge's making an award for loss of earnings at all, and of the judge's order of costs an application, which we have not, so far, and will not have occasion to consider.
2. At the time of Mr Chambers' accidents, which were in December 2001 and April 2002, he was aged about 32 and already suffering from degeneration in the disc in the lumbar spine. On the undisputed medical evidence of Mr Moore, a consultant orthopaedic surgeon, that condition without the accidents would in time have led to the protrusion of the disc and sciatica. His view was that the accident injuries would have accelerated the onset of that condition by about three years. I shall return to what he said about that.
3. Liability was admitted. The judge awarded Mr Chambers general damages of £6,000 for pain and suffering and loss of amenity, and, by way of a preliminary ruling and a cursory assessment based on it, £1,250 for past and future loss of earnings. As to the loss of earnings' claim the evidence before and accepted by the judge was that in the three years following the accidents, broadly up to the turn of 2004/2005, he continued to work, though with periods of absence as a result of the accident injuries, but was in receipt of full pay, save for the last three months, in respect of which he suffered a partial loss of pay and at the end of which he was medically retired.
4. As the judge put it in paragraph 8 of his judgment, from December 2001 until three years later in December 2004, Mr Chambers, despite the effect on him of the accident injuries, soldiered on and thus suffered only a partial loss during that period, a loss which the judge assessed at £1,250; although he did not attribute it to that bracket of time.
5. The issue that brings the matter before this court is Mr Chambers' claim for loss of earnings for the three years 2005 to 2007, following his retirement on medical grounds at the beginning of 2005. He maintained that he was entitled to a sum of about £60,000 for loss of earnings for those three years, during which, but for the three years' acceleration by the accident injuries of his back symptoms, he would have been able to continue in full employment.
6. Excel denied his entitlement to any such sum, save possibly for a small sum in respect of a short period extending beyond three years from the date of the first accident in December 2001 into early 2005. Alternatively, it argued that if Mr Chambers was prima facie entitled to full loss of earnings for the three years 2005 to 2007, there were credits to be made and various other matters as to mitigation and damages and causation to be taken into account that would reduce that prima facie entitlement. However, it is only as the prima facie entitlement that this appeal is brought.
7. The critical question it seems to me is what Mr Moore meant in his report - he was not called to give oral evidence - by stating that the accident injuries had accelerated the degeneration in Mr Chambers' back by about three years, and the judge's interpretation of

it. It is, as I have said, on that question, which the judge dealt with as a preliminary issue and upon which he gave permission to appeal, that the matter comes before this court.

8. This is how Mr Moore expressed himself in his main report, written at the end of 2004 and to which he adhered in a further report in early 2005:

"Disc degeneration does not occur as a result of a single accident. The accident would have precipitated the onset of the protrusion in a degenerative disc. It is probable that in the course of the next 10 years without these accidents similar symptoms would have developed spontaneously, or with minor strain. The accident therefore has led to an acceleration. It is impossible to be precise but I would suggest an acceleration of three years. That is to say, had the accidents not occurred his symptoms would have reached the present level in three years from the time of the accident."

9. As I read that passage until the last sentence, the sense of what Mr Moore appears to have been saying, assuming the end of 2004 to be the time when the degenerative processes in Mr Chambers' back disabled him from full-time work, was that, but for the accident injuries, such disablement would not have occurred until the end of 2007. That is Mr Chambers' case. However, the last sentence in the passage is not only inconsistent with that interpretation, but appears to allow for no acceleration at all.
10. Alternatively, as Miss Rachel Vickers for Excel put it in argument, the acceleration had occurred on the onset of the accident injuries and was spent by the end of 2004, when the gradually degenerating condition of Mr Chambers' back would have produced those disabling symptoms in any event.
11. If the accident injuries had not occurred and Mr Chambers would have reached the December 2004/January 2005 degree of disablement by then anyway, where I ask is the acceleration attributable to the accident injuries? Certainly on one interpretation of Mr Moore's report, it could only have taken effect immediately following the accidents, that is at the turn of 2001/2002, or at some identified stage in the 3-year period 2002 to the turn of 2004/2005. Otherwise, as Miss Vickers has submitted, by the time Mr Chambers began to suffer some loss of earnings, that is from October 2004, the effects of the accident injuries were spent; or perhaps more accurately, had not had time to have an accelerating effect. That was seemingly Excel's case before the judge on its interpretation of Mr Moore's written evidence, and, as I have said, is explicitly so in the arguments of Miss Vickers for Excel addressed to the Court today.
12. Given that divergence as to the interpretation of Mr Moore's evidence, made plain to the judge at the outset of the matter below and at the heart of this appeal, it is unfortunate that he was not asked to clarify at or before the hearing what he meant, either by a further short written report or in oral evidence. The judge, in his judgment having properly identified Mr Chambers' case in paragraph 12, was perhaps confused in his task by his further specific reference in paragraph 13 to the last sentence of the passage from Mr Moore's report that I have set out and discussed. Maybe he was also confused, as

Mr Walker for Mr Chambers has suggested, by the coincidence of the three years' period for both the initial soldiering-on period of three years mentioned by the judge, for the best part of which the accident injuries had no effect, and the acceleration period of three years to which Mr Moore had referred in his report.

13. While purporting to compare what had happened as a result of the accidents with what would have occurred if they had not taken place, the judge took as his premise from that sentence that, because there had been only a partial loss, albeit towards the very end of the three year period 2001/2004, but for the three years' acceleration due to the accident injuries, he would have been able to soldier-on for another three years, albeit at a comparable partial loss towards the end of it.

14. This is how the judge put it in paragraph 14 of his judgment:

"What has happened? In fact the claimant has suffered a partial loss which is yet to be quantified up to the period December 2004 (in reality up to a date to be determined in January 2005). But for the accident I see no escape from the following scenario: from 2001 to 2004 he would have suffered no loss since the effects of the accident would not have prevented him working at all. Thereafter the symptoms which in fact kicked in in 2001 would have kicked in in 2004. But in the same way as the claimant soldiered on in 2001 to 2004, when he was experiencing symptoms, in my judgment on the balance of probabilities he would undoubtedly have soldiered on into the period 2004 to 2007. Thus his loss during the period 2004 to 2007, had the accident not occurred, would have been precisely the same in principle, i.e. as a partial loss as that which did occur in 2001 to 2004."

15. Save for the concluding words in that passage, on the approach there expressed the judge was positing three putative good years for which he was in any event paid most of his earnings and three further putative soldiering-on years in 2004 to 2007, an approach consistent with Mr Walker's interpretation of Mr Moore's evidence. However, that is not how the judge went on to express the matter in explaining his decision, which he did in paragraph 15 of his judgment in the following terms:

"The position is no doubt susceptible of the comment that the two do not necessarily produce precisely the same figure but in my judgment they produce such a close figure that I can in reality and in justice adopt the same figure as is calculated from 2001 to 2004 (January 2005), partial loss as being the same as that which would have happened had the accident not occurred in 2004 to 2007. That is for the reason that any increase in earnings for the period 2001 to 2007, and specifically 2004 to 2007, would be offset by the fact that the claimant will be receiving early damages which are referable to a period 2004 to 2007."

16. Mr Walker framed his submissions to this court on the basis that I have already indicated, that is, that Mr Moore's report properly and sensibly read was that the condition of Mr Chambers at the turn of 2004/2005, leading to his retirement then on

medical grounds, would not have occurred, but for the accident injuries, for a further three years. On that basis he maintained that the earnings Mr Chambers would have received, and for the loss of which he was entitled to damages, were earnings at the full rate from 2004 less what he received until starting to suffer partial loss in October 2004, and full loss of earnings from 2004 to about October 2007. During that time he would, but for the accident injuries, have been able to soldier-on, and thereafter partial loss for about three months to the turn of 2007/2008, when he would no longer have been able to cope with full-time work regardless of the accident injuries.

17. In the result, Mr Walker submitted, the judge wrongly failed to rule on Mr Chambers' claim for loss of earnings in a way, consistent with his approach in the main body of paragraph 14 of his judgment that would have placed him in the same position that he would have been in but for the accident injuries. To put it another way, he wrongly failed to calculate the loss by comparing the difference between the earnings that Mr Chambers would have enjoyed, but for the accidents, and those that should be credited to him as a result of the three years' acceleration attributable to them. That exercise would have required the judge to do what his erroneous approach did not: assess what reductions should be made from a sum paid by Excel to him in January 2005 for loss of future employment for matters such as residual earning capacity, other failures to mitigate his loss, and factors arguably contributing to his unemployment during that period.
18. Miss Vickers, albeit softly, acknowledged in her submissions to the court the scope for confusion in Mr Moore's report and/or in the judge's interpretation of it. Nevertheless, in reliance on the sentence of Mr Moore's report apparently suggesting that Mr Chambers would have experienced the partially disabling symptoms that he did in late 2004 regardless of the accident, suggested that what he meant was that the effects of the accidental injuries were spent by December 2004.
19. In short, she submitted that, on a proper interpretation of Mr Moore's evidence in that sentence and in the passage as a whole, not only was there in fact no acceleration period of any length to take into account the loss of earnings claim, but also, and in consequence, the judge should not have allowed as he did for a putative partial loss of earnings towards the end of 2007 to mirror the actual and uncompensatable partial drop in earnings towards the end of 2004.
20. In doing so, she suggested that the judge's assessment of loss of earning is consistent with his interpretation of Mr Moore's meaning of acceleration in the context of the claim for loss of earnings. But that, it seems to me, cannot help as to the correctness of his decision if that interpretation would or should have led to a wholly different assessment. At most, Miss Vickers maintained that all that Mr Chambers was entitled to for loss of earnings was the partial loss from the middle of December 2004, three years to the day from the date of the first of Mr Chambers' two accidents to early January 2005.
21. For the reasons I have given, I can only say that I very much doubt that Mr Moore can have intended what he said in his report that, regardless of the accident injuries, Mr Chambers would have been in the same condition in December/January 2004/2005.

It is strongly arguable, as Mr Walker did argue, that it would just not make sense, given his earlier reference to a three year acceleration period.

22. Whatever the proper conclusion on that matter of interpretation, it is one that should have been cleared up at the hearing one way or another by asking what Mr Moore's evidence on this aspect amounted to overall, and with particular regard to the loss of earnings' part of the claim. In any event, the correctness of the judge's interpretation and application of Mr Moore's evidence on the facts of the case is, for the reasons I have given, open to doubt. That question in essence is as to the assessment of such loss of earnings caused by such acceleration as there was time for, following the approximate date when, to use the judge's expression, the effects of his degenerating back condition would have "kicked in" regardless of the accident injuries.
23. In my view, it is vital that Mr Moore's evidence as to what he meant by acceleration on the facts of this case should be clarified but not by this court. Accordingly, I would allow the appeal, set aside the judge's order assessing Mr Chambers' damages for loss of earnings at £1,250, and order a new trial to assess his claim for damages for loss of earnings to include the matters of deductions for sums credited or to be allowed for in respect of any failure to mitigate and/or other contributory matters.
24. It follows too, that I would also refuse Excel's application for permission to appeal the judge's assessment of £1,250 for loss of earnings on the basis of his determination of the issue of acceleration. Consideration of that issue and of any credits, deductions or allowances that may fall to be made for any loss of earnings figure would necessarily fall to be dealt with on the re-hearing.
25. For those reasons and in those terms I would allow the appeal.
26. LORD JUSTICE CARNWATH: I agree.

Order: Appeal allowed.