Case No: B3/2011/2058

Neutral Citation Number: [2012] EWCA Civ 672
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MAYOR AND CITY OF LONDON COUNTY COURT
(HIS HONOUR JUDGE BIRTLES)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 1st May 2012

Before:

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE HUGHES
and
LORD JUSTICE MCFARLANE

- -

Between:

COSTA

Appellant

- and -

IMPERIAL LONDON HOTELS LIMITED

Respondent

- -

(DAR Transcript of
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Ms Bella Morris (instructed by Plexus Law) appeared on behalf of the **Appellant**.

Mr Martin McLeish (instructed by Russell Cooke Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Hughes:

1. This is a defendant's appeal in a personal injury case brought with the leave of Dame Janet Smith. The claimant lady chambermaid sued her hotelier employers, relying on a breach of the Manual Handling Operations Regulations 1992. In consequence she said she had sprained her shoulder and jarred her neck when moving a hotel bed in order to hoover underneath it.

2. The claimant's primary case was that she had had no training at all in moving beds and that this one was difficult to move because it was stuck in thick carpet. That case failed on both counts. The claimant was found by the judge to be an unreliable witness. The defendants were able to produce the training video which she had been shown and some other documents with which she had been provided when she started. They were also able to produce samples of the carpet and of the wheels on the bed. The training process had been amply good enough, the judge found. The wheels were entirely satisfactory and the carpet was neither thick nor any impediment to rolling the bed out.

3. The claimant, however, succeeded in her claim. The judge held, firstly, that the regulations applied; secondly, that there had been adequate initial training but no refresher/continuing training; thirdly, that there ought to have been refresher/continuing training; and, fourthly, that the accident was caused by the lack of it. He found, however, 35% contributory negligence.

4. It follows that the judgment for the claimant depended entirely on the issue of continuing or refresher training and its causing the injury. There is in this court no appeal against the judge's first or second findings. The appeal challenges the third and the fourth and particularly the fourth. As to breach of duty, the defendants say that the judge was wrong to hold that the regulations required refresher/continuation training as something which was reasonably practicable to reduce the risk of injury. As to causation, they say that the judge applied the wrong test for deciding whether the absence of additional training caused the injury and, moreover, there was no basis for a finding that it did; alternatively no sufficient reasons were given for that finding.

5. The claimant was a Portuguese lady of 41 as at the date of the injury. She had started work for the defendant hotel group in March 2004 and had attended a training course run by the company's health and safety officer, Mr Potticary. That included a manual handling demonstration of how to *lift* with a straight back and bent legs in the conventional manner and it was supplemented by a video which showed the same thing and which was designed for those whose first language is not English, as this lady's is not. Each trainee including the claimant was required to act out the proper method of lifting with a large box and was not allowed to leave the session until she had done so and signed the record of attendance. Additionally, the claimant was given a copy of her contract of employment which required her to be familiar with company safety policy and which her sister, she said, had translated for her. Importantly, she was also given a health and safety policy booklet which had a section on manual handling, which the judge quoted at paragraph 12 of his judgment and which contained point by point advice on lifting technique. After that, the

claimant had shadowed an experienced chambermaid for two to three days before working on her own.

6. As a chambermaid her daily job included making the beds and hoovering underneath them. Each room contained either two or sometimes three beds. Chambermaids did fifteen rooms each day each, and so it follows that each moved something between 30 and 45 beds each day, and the claimant was working, she said, six days a week. Her evidence was that she did it in exactly the same way throughout her three years there until the occasion when she hurt herself, which was on 9 April 2007. Her case was that, as she pulled the bed out, she felt a sharp pain in her left shoulder and thereafter could not move her arm properly.

7. The agreed medical evidence was to the effect that she had sustained a soft tissue injury to the shoulder without any long term damage to the shoulder joint and a jarring injury to the neck. In the neck she had existing disc degeneration, broadly between the level C3 and C7 and particularly at C5/6. She also had similar degeneration in the acromioclavicular joint. There was no doubt that she was continuing to suffer from chronic pain. The medical evidence was that the pain that she experienced in her shoulder derived from the neck and that what had happened was that the pre-existing condition was now causing the pain as it would have done in any event. The acceleration of symptoms was -- so the medical evidence went -- a little under two years and was put at 20 months.

8. The claimant's case was agreed to depend on the Manual Handling Operations Regulations. Common law negligence was pleaded but it added nothing on the facts of this case. The relevant regulation is regulation 4, and the judge set it out *in extenso* at paragraph 24 of his judgment:

> "Duties of employers
>
> **4.**—(1) Each employer shall—
>
> (a) so far as is 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 in 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, and

(iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on—

(aa) the weight of each load, and

(bb) the heaviest side of any load whose centre of gravity is not positioned centrally.

(2) Any assessment such as is referred to in paragraph (1)(b)(i) of this regulation shall be reviewed by the employer who made it if—

(a) there is reason to suspect that it is no longer valid; or

(b) there has been a significant change in the manual handling operations to which it relates;

and where as a result of any such review changes to an assessment are required, the relevant employer shall make them. ”

9. Regulation 4(1)(b) applies where the job involves manual handling which cannot reasonably practicably be avoided and which involves a risk the employee being injured. This was a repetitive manual task moving the beds; the judge found that there existed such a risk, and indeed the company's own carefully conducted written risk assessment proceeded on the basis that employees could hurt themselves moving beds. There is and could be no appeal against the judge's finding that the regulation applied. It is crystal clear that it did.

10. Regulation 4(1)(b)(i) requires a risk assessment to be done, but this had been done by Mr Potticary in exemplary fashion. The regulation which was relevant to this case once the judge had rejected the claimant's primary case was regulation 4(1)(b)(ii). The defendant's case was that there was continuing/refresher training. It was conducted via the head housekeepers and it would have involved a session for each chambermaid either once a year or a little more frequently. The judge, however, having heard the evidence was not persuaded of that, and the case proceeded on the basis that there had been none. Once again, there is no appeal against that finding nor could there be.

11. The defendant's first ground, as I have said, is that the judge was wrong to find that the absence of continuing or refresher training constituted a breach of regulation 4(1)(b)(ii). Essentially, Ms Morris's submission is that the judge applied too strict a test. She refers to paragraph 34 of his judgment where the judge said this:

> "In my judgment, the Defendant should have provided the Claimant with further training or

> instruction about moving beds. On the facts of this case such regular training was necessary, as Mr Potticary accepted in his evidence."

He then went on to refer to the repetitive nature of the task.

12. Says Ms Morris, in speaking of "should" and "necessary" the judge was applying the wrong test and making it akin to strict liability. I agree with her that the test of reasonable practicability under regulation 4(1)(b)(ii) is not one of strict liability, nor even of practicability or possibility; it is of reasonable practicability. I do not, however, agree that there is any sign of any error of self direction as to the law in what the judge said. If anything, to require that continuation training be necessary before there is a breach of the regulation was to erect for the claimant a hurdle higher than the legislation requires, and thus it was a benefit to the defendants rather than the reverse. In fact, I have not the slightest doubt that the judge's use of that word as of the word "should" was a perfectly simple, proper and acceptable way of saying that refresher training was a step which was appropriate to reduce the risk of injury from bed-moving to the lowest level reasonably practicable. It was squarely an application of the terms of the regulation.

13. The step of providing refresher training was in this case undeniably reasonably practicable. First of all Mr Potticary said that it was, and indeed said such training was actually given; and, secondly, it is abundantly obvious that no other conclusion was possible: such training would have been cheap, easy and eminently practicable. Nor, despite the invitation in Ms Morris's written submissions, do I detect any abdication of any judicial responsibility in the judge's reference to Mr Potticary's evidence. Kent County Council v Lawrence [2011] EWHC 1590, a pavement-slipping case cited to us, was a very different case. It is true that in that case the judge had erred in relying on a lay witness's assertion that a pavement was dangerous, but that was because the lay witness had left out of consideration an important additional balancing factor relating to the prioritising of scarce public resources when it comes to mending pavements. This case was quite different; there is no similar balancing act to carry out; the sole question was whether refresher training was a step which was appropriate to lower the risk of injury to the lowest level reasonably practicable, and the fact that Mr Potticary, the defendant's own health and safety officer, thought that it was, was relevant evidence to support the judge's independent conclusion that that was undoubtedly the case.

14. Accordingly, the first ground fails.

15. It was, however, the defendant's remaining grounds which relate to causation, which persuaded Dame Janet Smith to grant leave in this case and which raised the real issue before us. First, I agree that the test of causation in a case like this is the simple and purely factual one: was the breach a (not necessarily the only) cause of the injury? It is in this case wholly unnecessary to journey to the exceptional situations contemplated in multiple cause cases, such as Fairchild v Glenhaven [2002] 3 WLR 89. In a case like this either the breach made an impact on the injury or it did not. If it did not it does not found

liability. If on the balance of probabilities the injury would have occurred anyway, the defendant is not liable.

16. Here the judge does appear to have included in his judgment the assertion that causation had been proved. It was, however, a bare assertion, and there are a number of difficulties surrounding it. First, it is unavoidable to record that the formulation of the test was erroneous at least at one point in the judgement. The judge reserved judgment over a few days and delivered a judgment in which his conclusions were itemised issue by issue. He reached the issue number 8, causation, at paragraph 36 of his judgment, and he said no more than this:

> "I accept Mr McLeish's [counsel for the claimant] submission that refresher training on a regular basis would have prevented or at least reduced the risk of the Claimant pulling the bed from the wall in the way that she demonstrated at trial."

17. Pausing there, that is the wrong test. It is not enough that any breach of the regulation would have reduced the risk of injury; the claimant has to demonstrate that the breach was a cause of the injury; in other words that it would have prevented the injury. However, two paragraphs earlier in the judgment the judge had been dealing with breach of duty under issue 6 and considering the steps which needed to be taken to comply with the regulations. In that paragraph, having held, as I have already quoted, that the defendant should have provided the claimant with additional training, he went on to say this:

> "Such training would have prevented this accident"

and continued to say that it would have been inexpensive and easy to do.

18. What seems to have happened is that the formulations of the law have been inadvertently inverted. The proposition that refresher training would have at least reduced the risk of the claimant suffering injury was the appropriate question to ask when one was considering whether or not there was a breach of duty under the regulation 4(1)(b)(ii). Conversely, the question whether training would have prevented the accident was not the question on the breach of duty issue but was the question on the causation issue.

19. It may be that these two passages in the judgment -- albeit a judgment which was reserved for a few days -- could thus be explained as simple inadvertent inversion, if there were no other difficulty about the finding of causation. I for my part have asked myself whether there is sufficiently present in the judgment the finding, based on a proper foundation, that if this lady had had continuation training, which the judge held that she did not have, she would not have hurt herself. Can one treat the proposition in paragraph 34 that I have cited as a sufficient finding that continuation training would have prevented the injury?

20. That begs the question: how would it have prevented the injury? The only possible answer is that it would have done so by reminding her of the need to act in manual handling operations, including the pulling out of a bed with a straight back and bent legs. The causation question in this case must involve two propositions. First, that refresher or continuation training would have altered her practice, and secondly, that that alteration of practice would have meant that she did not hurt herself despite her already sensitive shoulder when moving the bed.

21. For my part I am prepared to accept that the judge was entitled to find that continuation training would alter her practice. On that topic I am bound to say I think some judges might have taken a different view. The claimant knew all about the straight back rule. She had absorbed it at the time of her initial training and agreed that she had known it. She also told the judge that she had known it from training received in three previous jobs that she had, albeit ones that did not involve the same level of physical activity. She had been doing the same by way of bed moving, she said, throughout the three years that she had been at the hotel and had suffered no injury or fear of injury. It is one thing to say, as is undoubtedly true, that the purpose of refresher training is to give the trainee the opportunity to recognise bad habits and to change them. It is another to say that it would have had that effect. However, that was a matter for the judge and there is no proper basis to reverse him on that finding.

22. For my part I also accept that, having seen the claimant demonstrate in court something of what she did, the judge was entitled to form his own conclusion about what her practice was. There has been some debate about what exactly she did show and the two hotel witnesses who were present, Ms Souza, a housekeeper, and Mr Potticary, the health and safety officer, the former called to support the claimant and the latter to support the defendants, both asserted in evidence that the claimant's demonstration was of exemplary practice. The judge however found at paragraph 26 that the demonstration that she had given showed her "bending over to pull the bed out and that her back was not straight". The judge had seen the demonstration; we have not. He was entitled to reach that conclusion and there is no possible basis on which we could interfere with it.

23. It is true that the two witnesses who had described the demonstration in entirely different terms had not in any way had their assertions queried either by counsel for the claimant or by the judge. The opportunity to counsel for the claimant to do it arose in the case of Ms Souza, although less obviously so in the case of Mr Potticary because his evidence came in re-examination though even there the query could have been raised with leave. Nor did the judge invite either witness to reconsider; nor, more importantly, when it came to judgment did he refer to that evidence at all. It would have been better if the query had been raised at the time if only because the response to it might for all one knows have revealed that the judge had mistaken somewhat what he had seen, but that is pure speculation and not a basis for departing from his finding. It is also right that the judge had elsewhere in his judgment described the claimant's evidence as unreliable although on this point he clearly did treat it as sufficient, but again that was a matter for him.

24. The problem in this case is that the difficulties do not stop there. The critical question in the case as it eventually became was whether a reminder of the well known straight back bent leg lifting (my emphasis) technique would have prevented this injury. If the claimant had lifted the bed then there would be a clear basis for saying that such reminder by way of continuation training would have had that effect. Not everybody would have reached that conclusion but there would be a proper basis for it. The claimant's evidence of what she actually did was given through an interpreter and there were points in it when it was less than crystal clear through no fault of her own. There were points in the evidence at which the lifting of a bed and the movement of it on the furthermost two wheels from the lifter was raised and discussed. Whether the claimant had ever been saying that she had done anything at all like that is to me at least very unclear. What is not unclear is that any doubt if it ever existed was resolved, because at pages 24 and 25 of the transcript, which we now have, the claimant was asked on two or three different occasions whether there had been any occasion at all to lift the beds given that they had perfectly good wheels and her answer was on three different occasions that she had pulled it or rolled it or dragged it; she had not -- repeat not -- lifted it.

25. The judge clearly regarded the question of whether she had lifted the beds as significant as we can see from a transcript of the submissions made to him at the end of the evidence. He inquired of counsel for the defendants as follows:

> "We have to try to find out whether she lifted the bed."

And then he asked this very pertinent question:

> "Would this strain the upper torso?"

bearing in mind that the injury in this case was to the neck. That he made the query is to my mind wholly unsurprising, it is exactly the right query to make. When it came a few days later to drafting judgment in rehearsing the claimant's evidence at paragraph 8(c) the judge fell into error in the way that he recorded it. He said this:

> "There was a real issue in this case as to whether or not the Claimant lifted the end of the bed as she pulled it away from the wall. My distinct impression is that at the beginning of her evidence the Claimant was saying that she did not have to lift the bed. Later she resiled from this position and said that she pulled the bed out."

26. There seems to be an intrusive ‘not’ in the second sentence. It follows that the claimant did not leave her evidence on the basis that she had lifted it, if that is what the judge was saying. She made it abundantly clear that she had not.

27. The judge's findings on this issue are, it has to be said, a little less than clear. At paragraph 22 in making his findings of primary fact he held first of all that

the claimant's assertion that the carpet was thick and made it difficult to pull the bed out was to be rejected. He found that she was not bending her legs and keeping her back straight and was bending over the curved bed back. He then said this:

> "She **may** [my emphasis] also have tried to lift the bed at the end of the bed and pull it out on the front two wheels."

28. A little later in paragraph 26 he said this:

> "I find that this accident occurred by the Claimant either: (a) lifting or pulling the rear end of the bed away from the wall in order to hoover underneath the bed and/or (b) not keeping her back straight and her knees bent."

29. However when he came to his conclusions set out as I have said issue by issue at the end of the judgment, he said at paragraph 38 as follows:

> "I also found when the accident occurred because she lifted the bed and pulled the bed away from the wall and did not keep her back straight and her knees bent as she was instructed to do..."

30. It is right to say that that last finding appears under the heading issue 9 contributory negligence but it is a finding of primary fact and primary facts do not, self evidently, vary from the time when they are under consideration on the question of causation to the time when they are under consideration under the question of contributory negligence. On the evidence that the judge had, Mr McLeish for the claimant rightly concedes that a finding that she lifted the bed is unsustainable. It appears to me however that the judge did make such a finding. Says Mr McLeish, that is not fatal to the claimant's case. The judge's decision includes at least a finding of the claimant rolling out or pulling out the bed. That, he says, is enough because that too would carry a risk of injury unless it was done with a straight back and bent legs. The difficulty about that is that the judge had found earlier in his judgment, as I have already recited, that the carpet was not thick and the bed was not stuck and there was nothing making it difficult to roll out.

31. On that finding I, for my part, cannot see any proper basis for the conclusion that a reminder in refresher training of a lifting technique would prevent this injury. It is certainly likely that she jerked the bed because she did end up with an injury of some kind, albeit transient, to her shoulder and an aggravation of the pre-existing degeneration in her neck. It does not however follow that there is any basis for saying that refresher training would have eliminated that possibility and indeed that was not suggested either at the trial nor has it been suggested here.

32. The medical evidence in the case was for understandable reasons in a small claim agreed. The surgeon had advised on the basis that he was dealing with a case of an injury suffered when a bed got stuck in the carpet. If there had

nevertheless been lifting it seems to me that a judge experienced in personal injuries cases would have been entitled to say that an injury to the vertebrae of the back was precisely the kind which would be averted by the use of a different technique. But there was simply no evidence in this case whether bending over to roll out the bed would cause an injury, when doing it in some manner or other squatting with a straight back and presumably moving backwards at the same time would not. The presence of the arguable gap in the medical evidence is no kind of criticism of the conduct of the case. It was exactly the kind of case for agreed medical evidence but it seems to me that the conclusion is unavoidable that the gap was effectively filled by the judge by a finding of lifting which brought into play causation when there was not any basis for the finding of lifting.

33. Ms Morris had some other complaints to make about the judgment. She complained that if the judge was correct in his assessment of the demonstration, the evidence that he had heard ought also to have led to a conclusion that, if there had been any continuing or refresher training, Mr Potticary or Ms Souza, far from correcting the practice of the claimant, would have endorsed it. The judge did not, as I have said, address the evidence of Mr Potticary and Ms Souza at all, perhaps because he was treating it as a lifting case.

34. Additionally, says Ms Morris, the finding of 35 percent contributory negligence suggests that the judge was approaching the case not on the basis of a mere bad habit or a claimant forgetful of her teaching. As to that, for my part I am not impressed. The assessment of contributory negligence is necessarily a broad brush matter and I see no basis for reading into it a contradiction of the judge's approach to the case otherwise.

35. The written argument for the defendants contains the now conventional reliance on English v Emery Reimbold [2002] EWCA Civ 605 for the proposition that no proper reasons were given. As in most such arguments, that adds practically nothing to the case. This is not a case in which the judge did not explain himself. The problem here is that he reached a conclusion through inadvertence, understandable inadvertence, which was not open to him. The only thing that can be said for the proposition that there were few reasons is that it does underline the fact that the finding as to causation was in the end a bare assertion and one has to assume that the judge applied the right test despite the inversion that I have mentioned in paragraphs 34 and 36. That it was a bare assertion and that on the careful examination that we have had there proves to be no sufficient foundation for it I am for my part persuaded. We must assume the correctness of the judge's findings of primary fact but having done so we are in as good a position as he was to reach a conclusion as to causation. It was for the claimant to prove the causation in this case as in all such cases and the clear consequence of the analysis which I have attempted to give to the case is that she was unable to do it. Anyone must be sympathetic to anybody who is doing a menial job and suffers an injury in the course of it but the fact remains that, on the evidence that there was in this case, it was not her employer's fault. For my part therefore I would allow this appeal.

Sir Andrew Morritt:

36. I agree.

Lord Justice McFarlane:

37. I also agree.

Order: Appeal allowed