Neutral Citation Number: [2013] EWCA Civ 665

Case No: B3/2012/1187

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRISTOL COUNTY COURT
Mr Recorder Berkley
1BS00506

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2013

Before:

LADY JUSTICE ARDEN
LORD JUSTICE BEATSON
and
LORD JUSTICE RYDER

- -

Between:

Ruth Ireland	**Appellant**
- and -	
David Lloyd Leisure Ltd	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Brent McDonald (instructed by **Berrymans Lace Mawer Llp**) for the **appellant**
Mr Gareth Compton (instructed by **Bobbetts Mackan Solicitors**) for the **Respondent**

Hearing dates: 14 March 2013

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Approved Judgment

Judgment
As Approved by the Court

Lord Justice Ryder:

1. On 1 February 2008 the claimant visited one of the defendant's clubs in Bristol (the gym) accompanied by a friend, Ms Withey, who acted as her spotter, i.e. a gym partner who provided help with weights as required and reminded the claimant to adopt the correct posture as they worked through their usual routine. The claimant and Ms Withey took it in turns to spot for each other. For convenience, I shall refer to the appellant as the claimant and the respondent company as the defendant.

2. As they neared the end of their routine, the claimant and Ms Withey decided to do some squats: from a standing position, squatting down and standing back up with a weight placed across their shoulders. They chose to use a 'Smith' machine which was on the upper floor of the gym. The machine is a large frame which roughly resembles a rectangular metal A-frame or trestle adjacent to the front of which are two vertical metal rails (referred to by the judge, Mr Recorder Berkley, as poles). The barbell is fixed within the rails which permit only a vertical movement. The barbell cannot move from side to side nor can it be raised or lowered on one side without an equivalent movement on the other. There is a slight gap between the frame of the machine and the rails which are accordingly to the left and right of the person performing squats on the machine.

3. At the base of each rail is a rubber block which acts to stop the barbell hitting the floor and in front of each rail is a series of hooks to allow the user to secure the bar at any point without the need to ask for assistance. The Recorder found as a fact that on the machine that was used on the day in question there was an additional 'rubber or other solid block' which was permanently fixed in place between the rail and the frame. A close examination of the photograph of the machine that was in use demonstrates the existence of the block at between hip and waist height on the left side of the frame and rail as one looks at the front of the person using the machine.

4. It is of note that the position of this additional solid block was not known to the defendant before oral evidence was heard by the Recorder and only came to light as the evidence developed and the Recorder asked questions to clarify the cause of the accident that happened. The replies to the defendant's Part 18 request had disclosed the existence of 'a rubber stopper' and its critical role but no-one identified its position. Although the block is shown on the photograph of the actual machine it is not visible on the trial bundle photograph of a generic Smith machine.

5. The only relevant pleading of fact in the particulars of claim is at paragraph 3:

> "The Claimant was standing next to the machine, leaning on the machine, when she suddenly experienced intense pain in her left hand. The Claimant then realised that the machine had cut off the tip of her left index finger."

6. The claimant's reply to the defendant's Part 18 request for further information includes the following:

> "The Claimant was holding the pole and leaning forward as described. When her gym partner Shonagh began to squat, the barbell across her shoulders was lowered down the pole towards a rubber stopper. The Claimant's hand was

resting on the pole and as the barbell lowered it took the Claimant's left index finger towards the stopper which acted as a guillotine."

7. What happened was described by the Recorder in the following terms:

> "whilst observing her friend carrying out exercises, [the claimant] placed her hand upon the pole so that the tip of her left finger rested on the block. As the weights descended, the plate tracking the pole and holding the weights acted in combination with the block I have referred to, acted as a guillotine, thereby slicing off the top of the [claimant's] finger"

8. The Recorder also found that there was a sign on the machine, of which the appellant was aware, which warned her to keep her "body, hair and clothing free of all moving objects". The claimant's evidence which can be compared with the photograph, was that the sign was small and that it was on the horizontal bar at the top of the A-frame. In fact this court has been taken to a photograph that demonstrates there were two signs, one in the position identified by the claimant and another at the foot of the frame of the machine near to the floor.

9. It is a feature of the trial that the defendant appears to have been taken by surprise by the evidence which the Recorder accepted about the mechanism of injury. The mechanism is consistent with the pleaded case, in particular the reply to the Part 18 request but it is not that which is said to have been envisaged by the defendant (or perhaps more accurately, their legal advisers). On the grounds one would imagine of proportionality there were no skeleton arguments and the Recorder came to the issues of fact and law 'cold'. He determined the issues of fact at the end of the day listed for the trial and felt unable to deal with the implications for liability without further submissions which were adjourned to a second day.

10. The particulars of negligence and breach of statutory duty were pleaded in broad terms. The relevant particulars are as follows:

    (1) failed to mark on the machine the point of danger/risk where the claimant suffered her injury;

    (2) failed adequately or at all to warn the claimant of the danger and/or dangers posed by the machine;

    (3) failed to have any or any sufficient regard to the danger posed by the machinery and/or the part of the machinery that caused the claimant's accident;

    (4) failed to take any or any sufficient steps to ensure that the claimant was safe as a visitor to the gym.

11. In oral evidence, the claimant's case was succinctly put. She would have expected to have been told how dangerous the rail was and to have been warned to stand away from it and not put her hands anywhere near it.

12. The Recorder held that alternative allegations of breach by failing to provide training, information or induction in the use of the machine were neither proved nor causative and also that it would not have been reasonable to place a cage or guard around the

rail. He relied upon the evidence of the claimant to the effect that "had a member of staff approached her and asked her whether she knew how to use the machine, she would have said that she did and declined assistance".

13. The Recorder accepted the evidence of the claimant: "I performed my squats first and then Shonagh proceeded to do hers. As we chatted I rested my left hand on one of the vertical resting points. Suddenly, I became immediately aware that something had happened to my left hand index finger". He accepted her evidence that the severed tip of her finger "lay on what she described as a 'block' approximately one third up the frame of the machine at hip-height and that the severance of the finger had been caused in a guillotine action as the weights descended, passing this block". The Recorder explained that the photograph put to the claimant from the trial bundle did not show the block and that as a consequence of his request on the afternoon of the trial day for a better copy of a black and white photograph of the actual machine, the parties and the court had had disclosed to them a better quality colour photograph of the actual machine that clearly shows the existence of the block. It is accordingly not surprising that the Recorder was able to find as a fact that there was "a rubber or other solid block, fixed in place between the pole and the A-frame of the machine".

14. The Recorder's findings of fact were inevitable from the evidence that he accepted which, it should be noted, included the evidence of the defendant's operations manager which he found to be frank and honest. It is not asserted on this appeal that any of the Recorder's findings of fact were wrong, that would be a hopeless assertion but rather that the findings were unavailable to him on the pleaded case and that accordingly he should not have found for the claimant.

15. At the conclusion of his preliminary judgment delivered on the adjournment of the hearing, the Recorder held at paragraph [38] "that it was reasonably foreseeable by the defendant that a member of the gym would be caused some physical harm by them placing their hand where the claimant placed hers". He also found that the "risk was or should have been obvious to any person who had had the opportunity of observing the machine or having used it". Having regard to the way in which the evidence turned out, the Recorder then adjourned the hearing for further submissions and judgment.

16. The claimant delivered written submissions in which she argued that the type of harm, physical harm, was foreseeable, there being no requirement to prove that the actual injury was foreseeable, whether as to mechanism or extent. The claimant relied upon the Recorder's formulation of foreseeability above which he had further summarised at paragraph [36] of his preliminary judgment as "the obvious risk of being injured by moving parts, albeit in a minor fashion". She further submitted that the degree of care required of a potential tortfeasor depends upon the magnitude of the consequences that are likely to ensue i.e. the more serious the potential consequences, the greater the degree of care that will be required. On the facts of the case, the claimant submitted that the injury was extremely serious and unpleasant, the combination of moving parts with the fixed block was a specific danger and preventative measures by adequate warnings to guard against that specific danger would have been comparatively easy and cheap.

17. The defendant declined to join issue with the Recorder's request for assistance on the legal issues raised on the facts as found or the submissions made by the claimant.

Instead, the defendant reserved its position on the law and submitted that the court had misdirected itself in that the findings of fact were not open to the court on the claimant's pleaded case. It was submitted that that left the court with only two options: either to decide the facts on the pleaded case and find against the claimant or in effect put the claimant to her election and consider an application if made to amend the pleadings.

18. The Recorder in his final judgment acknowledged that the claimant's pleaded case was widely drawn and that beyond that set out in the Part 18 replies the detail relating to the block only surfaced at trial. He noted that the defendant did not seek an adjournment either at the conclusion of the evidence or during the resumed hearing so as to be able to adduce additional evidence to meet the asserted prejudice of the developed case. He came to the conclusion having heard the defendant's witnesses at trial that the key issue, which was whether the danger was so obvious that anyone could see it, would not be "cured by any additional evidence".

19. The Recorder reiterated his conclusion that the claimant knew or should have known that there was some danger of physical harm from the moving parts of the machine and that she was aware of the warnings affixed to the machine. He then considered the defendant's submission that the defendant's duty extended only to warning of the risk of injury and not the injury itself. He came to the conclusion that the severity of harm does play a part in measuring the extent of the duty of care i.e. "taking reasonable care means warning people not only of a risk but the extent and severity of the risk". He held that "the risk of amputation injury was not obvious" and that "there was a risk with this machine that was out of the ordinary".

20. He finally concluded that "the steps that had been taken ...were not sufficient to alert a reasonable user of the gym to allow themselves to keep themselves reasonably safe given the severity of the injury in question". Having concluded that the pleaded failings set out at paragraph 8 of this judgment were engaged and demonstrated by his findings he held that the defendant had been negligent. On the basis that the claimant was aware of the danger of moving parts and nevertheless put her hands near them and also that she would not have accepted any training if offered, evidence which he said was relevant to her attitude to danger, he found that she was contributorily negligent to the extent of 25%. He gave judgment in favour of the claimant and awarded damages in the sum of £12,000. Costs were apportioned so that the defendant paid the claimant's costs up to and including the trial date and the claimant paid the defendant's costs occasioned by the need to have an adjourned hearing.

21. There are six grounds of appeal. They are that the Recorder:

    i) Wrongly held that it was open to the [claimant] on the statements of case, and following an oral concession by Counsel for the [claimant] at the trial to rely upon the alleged presence of a 'block' on the machine causing a 'hidden danger', in finding for the [claimant].

    ii) Wrongly refused to accede to the [defendent's] application that it be given an opportunity to see an amended statement of case from the [appellant] and/or to respond to the [claimant's] changed case by allowing it to amend its Defence and/or adduce further evidence in response.

iii) Wrongly found that the presence of such a block was or led to a 'hidden danger or risk' to the [claimant].

iv) Wrongly found that the presence of such a block required the [claimant] to be given any further warning or required the [defendant] to take further steps and/or that any such failure was causative of the [claimant's] injury.

v) Wrongly found that the [defendant] acted in breach of its duty under the Occupiers Liability Act 1957 and/or negligently and in so doing imposed a standard far higher than that imposed at law.

vi) Failed to correctly assess the level of contributory negligence on the part of the [defendant].

22. It is convenient to deal with the substantive issues separately from the procedural issues. In written and oral submissions before this court, Mr McDonald helpfully refined the defendant's case on the substantive issues as follows:

i) The judge was wrong to find that the machine posed risks which were not obvious and apparent

ii) The judge was wrong to hold that the warning that existed was inadequate

iii) The judge was wrong to hold that had there been a specific warning the claimant would not have been injured.

23. It should be noted that in these propositions no complaint is made of the formulations of legal principle applied by the judge. These are questions of fact or mixed fact and opinion which are evaluative judgments. For the defendant to succeed he must establish that the judge was wrong in coming to these conclusions. The judge's conclusions are entirely consistent with the evidence that he heard and read. He was entitled to accept the evidence of the claimant and the defendant's witnesses from whom the findings originate. He had the benefit of diagrams and photographs which eventually assisted him.

24. As I have already commented, on the evidence before the court the findings of fact were inevitable. The evidence of the defendant's operations manager was that he was unable to identify a purpose for the block. He had never noticed it before and had wrongly assumed that the actual machine did not have such a block. In fairness to him, the block does not exist on the manufacturer's diagram of the machine exhibited to his statement and it is an inevitable inference to be drawn from his evidence that the block is not common to all Smith machines. Indeed this court has been told, without objection, that the block does not exist on later models of this machine. On the basis that the rubber block at hip height had no obvious purpose and no purpose that was explained to the Recorder and that it did not nor could it have been intended to stop a moving part, its actual role in the accident was to be the base of a guillotine which only operated in that way if someone placed their hand upon it.

25. At paragraph [17] of his final judgment the Recorder held as follows:

> "This leads me on to the question of whether the risk was an obvious risk and I find as a fact to the casual observer of this Smith machine the risk of amputation

injury was not obvious and could not have been obvious without a little bit more study. I find support for that in Mr Butcher's own evidence, who was a witness for the Defendant..."

26. To hold that the rubber block in that position posed a risk which was not obvious and apparent was accordingly well within the broad ambit of judgment afforded to a first instance judge i.e. it was not wrong. His evaluative judgment accorded with the evidence of the claimant and two of the defendant's own witnesses who conceded that there ought to have been a warning about the risk posed by the rubber block.

27. Turning then to the warnings that existed. There were two warnings on the Smith machine in the terms repeated by the Recorder in his judgment. One warning was at the base of the frame. To be read, a gym user would have had to lie on the floor. Another warning was on the cross bar above the user's head. Neither warning is immediately visible, for example by being at head height, both are in a small typeface and neither relates to the risk posed by the presence of the rubber block. The only real answer proffered by the defendant is that a plethora of different warnings in a gym would not be helpful but that does not deal with whether a warning of a specific danger on a machine might have prevented serious injury. Given the above, the Recorder's finding about the inadequacy of the warning at paragraph [22] of his final judgment is unimpeachable:

> "I find that the steps that had been taken … were not sufficient to alert a reasonable user of the gym to allow themselves to keep themselves reasonably safe given the severity of the injury in question"

28. The causation argument which was developed for the first time in this court by Mr McDonald is that a specific warning would not have assisted this claimant. That flies in the face of the claimant's own evidence which the Recorder accepted. Putting to one side the fact that this is a new argument and looking at it *de bene esse* I have to say that Mr Compton on behalf of the claimant has it right. The argument about causation goes to the claimant's lack of awareness of the risk and that goes on the facts of this case to her contributory negligence.

29. Before dealing with the procedural ground of appeal, it is necessary to consider the last limb of the first ground of appeal which is that the Recorder should have rejected any claim based in the Occupiers Liability Act 1957. Mr McDonald submits that the claimant ignored the warnings which did exist and accordingly the danger that arose was out of a misuse of a piece of machinery. He submits that on either basis the claimant would no longer be a visitor. The claim against the defendant is pleaded in the alternative both in negligence and under the 1957 Act with the consequence that the narrow construction of the pleadings submitted by the defendant may not be available. In any event, on the facts, it is a misconstruction of the Recorder's findings to say that the claimant ignored warnings; they were either not immediately visible or inadequate or both. The only basis upon which it could be said that there was a misuse of the machinery is by the act of spotting. There was evidence before the Recorder which dealt with the fact that this was an accepted common practice. Accordingly, there is no factual basis upon which this submission can achieve any traction.

30. The thrust of the defendant's primary complaint from the adjournment of the trial to date has been that the pleadings are inadequate. Let me say straight away that inadequate pleadings are the bane of a judge's life and can cause real injustice to the party who is misled, particularly where there is no skeleton argument to explain the case. That said, it is all too often the case that good pleadings are supplemented by verbatim explanations of the obvious in skeletons that involve considerable repetition to no good effect. Again, Mr McDonald helpfully focuses his complaint in the following way:

    i) The claimant was required to set out all of the facts necessary to establish the cause of action she asserts i.e. a concise statement of facts upon which she intends to rely at trial: CPR 16.4(1)(a)

    ii) The claimant's case differed from the judge's findings both as to the mechanism of the injury and the hidden nature of the danger in respect of which a specific warning was required

    iii) The prejudice to the defendant could only have been met by an application to amend the pleading which the defendant concedes could only properly have been refused.

31. It is perhaps unsurprising that a claimant who has been the victim of a traumatic amputation which occurs in a way that she had not foreseen and which she had little opportunity to analyse contemporaneously is thrown back on a general pleading. The task of determining how the accident occurred was not assisted by the failure of the defendant to ask for particulars of the position of the rubber block identified in the Part 18 replies. That was then aggravated by the genuine mistake that was made on the part of the defendant's witness in exhibiting to his witness statement a photograph of a Smith machine that is neither the actual machine nor, it is said, the same model as the actual machine. In any event, the photograph relied upon until a better quality photograph was produced to the court during evidence did not show a machine which had a rubber block in the same position as that which trapped the claimant's finger.

32. The defendant sought and obtained clarification about the claimant's pleaded case in her replies to a Part 18 request. The mechanism of injury was adequately pleaded in the Part 18 reply. The purpose of a Part 18 request is to obtain clarification of a party's pleaded case. The mischief asserted is that the defendant did not understand the significance of the position of the rubber block because it was not particularised and because their operations manager did not have a photograph of the actual machine until the latter part of the day on which he gave evidence. In so far as the operations manager was disadvantaged by not having an adequate photograph of his own machine until the court asked for one to be produced, one has limited sympathy bearing in mind that the manager concerned asserted in evidence that he had inspected the machine for the purposes of an 'assessment' after the accident. The defendant had ample opportunity to request an adjournment to adduce additional evidence or to undertake an inspection during the period of the adjournment that was necessitated. Just as it chose not to ask for further particulars of the Part 18 reply, so it chose not to ask for an adjournment. A party who seeks to rely upon an entirely proper but tactical decision on the pleadings must weigh up the possible consequences of that decision.

33. The consequence here is that the judge and this court might consider the pleadings to be adequate. I do. The Recorder was generous to the defendant in analysing the fact that the position of the block was not identified and that a specific warning was not pleaded in terms even though the mechanism and particulars of breach were perfectly adequate in general terms. The Recorder examined the asserted prejudice to the defendant and given the fact that it is conceded that he would have likely refused an application to amend the pleadings at that late stage, the only question was whether the defendant was being denied the chance to adduce evidence about the block and the specific danger it represented. Given that the defendant's witnesses knew nothing of the block and the defendant chose not to ask for an adjournment, it is unsurprising that the Recorder concluded as he did that further evidence would not assist.

34. The defendant's third ground relates to the Recorder's finding of contributory negligence. The defendant submitted that a contribution of 75% would have been appropriate given the claimant's attitude to risk and the asserted fact that the machine was an obvious danger. With respect, the latter submission misunderstands the whole nature of the Recorder's formulation on the facts that the block represented a danger which was unusual and unknown to the claimant and which should have been guarded against by a specific warning. The Recorder had the benefit of conducting an evaluative judgment based upon evidence which he accepted including that of the defendant's witnesses. There is no basis put to this court which undermines that judgment which cannot on the facts be said to be plainly wrong.

35. Finally as to costs the defendant relies upon the decision of this court in *Beoco Ltd v Alfa Laval Co Ltd & Anor* [1995] QB 137 where in respect of very different facts the general rule was stated by Stuart-Smith LJ at 154B as follows:

> "As a general rule where a plaintiff makes a late amendment as here, which substantially alters the case the defendant has to meet and without which the action will fail, the defendant was entitled to the costs of the action down to the date of the amendment"

Stuart-Smith LJ recognised in the same paragraph as that cited that "There may, of course, be special reasons why this general rule should not be applied. An example of this is […] where the judge was satisfied that, even if the amendment had been made earlier, the action would have been vigorously resisted." .

36. In this action Mr McDonald had fairly to concede that he could not say that the case would not have been fought if the position of the block had been properly identified on the pleadings. An amendment was not asked for or granted and the Recorder concluded that the pleadings were adequate. The prejudice asserted was not sufficient for the defendants to ask for an adjournment and the defendant's witnesses' evidence would have been the same on the key issues of knowledge, purpose and risk. Only one issue was unknown to the defendant on the day of trial, the rest was known to them at least from the date of the Part 18 replies. In all the circumstances, I have come to the conclusion that the Recorder's decision on costs was an example of a circumstance which was within his broad discretion.

37. For these reasons, I would dismiss this appeal.

Lord Justice Beatson:

38. I agree that in the circumstances in which, after the thrust of the claimant's case was made clear, the defendant did not seek an adjournment to enable further evidence to be put before the court, the Recorder was entitled to reach the conclusion that he did. Accordingly, the appeal should be dismissed.

Lady Justice Arden:

39. I agree that this appeal should be dismissed for the reason given by Beatson LJ (which is also made by Ryder LJ), and also for the further reasons given by Ryder LJ. There is nothing that I wish to add.