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The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (Nil returns are required) to the clerk to Judge Simpkiss, via email to Brighton County Court, by 4.00 pm on 6th January 2020, so that changes can be incorporated, if the judge accepts them, in the handed down judgment.

Neutral Citation Number:

Case No: D71YM927

IN THE COUNTY COURT AT HASTINGS

Date: Double-click to add Judgment date

Before His Honour Judge Simpkiss

Between :

MICHAEL TURK

Claimant

- and –

SW BLACKBURN BUILDING CONTRACTORS LIMITED

Defendant

- -
- -

Mr. David Rivers (instructed by DAS Law) for the **Claimant**
Ms. Emma Corkhill (instructed by Plexus Law) for the **Defendant**

Hearing dates: 2nd December 2019

- -

DRAFT JUDGMENT

If this draft Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Introduction

1. The Claimant (who was born on 12th March 1959 was employed by the Defendant building company as a carpenter. He is an experienced building worker and at the relevant time had worked for the Defendant for about 7 years. On 30th October 2014 he was working on the renovation of a cottage called Golden Cottage, a substantial job that had been going on for some months. While measuring some plaster on the first floor of the cottage, from a landing at first floor level, he fell some 8 to 10 feet onto the ground floor and suffered very serious injuries. From these he has made a very good recovery and he brings these proceedings to recover damages on the ground that the Defendant was in breach of its statutory and common law duties to him.
2. The quantum of the claim has now been admitted and the trial concerned liability and contributory negligence only. As regards the latter, at the end of the hearing it was agreed that I would decide whether contributory negligence should reduce the damages in principle, but not decide the exact percentage without further written submissions once counsel had seen my judgment on liability.
3. In the end the liability issue gave rise to very narrow issues of fact.

The witnesses

4. The Claimant gave evidence and for the Defendant I heard from Stuart Blackburn, the sole director of the Defendant and from Robert Delahaye, an independent contractor who was working on the property on the day of the accident. All them gave completely honest evidence and was doing their best to assist the court. The problem is that the Claimant recalls almost nothing about the accident save for the very start of his fall and the others did not witness it. Mr. Blackburn wasn't inside the property and Mr. Delahaye only saw the actual fall and the aftermath.

The background facts

5. The Claimant was employed by the Defendant, but had not been working at the property immediately before the accident. On 30th October 2014 he had been working with Mr. Delahaye in the hallway of the cottage "*dotting and dabbing*" plasterboard on a wall of the cottage ("wall A"). This involved putting plasterboard on the wall and gluing it to the wall with adhesive ready for plastering.
6. At this stage the hallway went up the full height of the cottage as the floor upstairs had been removed above it. This left a narrow landing off which there were two upstairs rooms. The landing was exposed with a drop along its full length into the hallway of about 3 metres. It is common ground that at the time of the accident a temporary rail had been constructed along the right had edge of the landing. The original stairs had been removed while a new staircase was constructed at one side of the hallway alongside wall A. The original staircase had been moved to provide access to the landing during the works. Its right hand edge was about a metre, or slightly more, from the right hand wall ("wall B"). It is also common ground that the rail between wall B and the staircase consisted of 2 parallel planks of wood (4 x1) one at knee level and one at waist level. Each was supported at one end by a post (the dimensions are not stated but in a photograph it looks reasonably substantial of at least 3x2) attached at the bottom to the floor of the landing. At the other end the planks were attached to the wall. Each plank was fixed to the post and wall with screws from the landing side so that anyone pushing onto them would push them into the post and wall.
7. The HSE report states that the planks were 4 x 2 but in his oral evidence Mr. Blackburn said that the rails post-accident used the same size rails as at the time of it. The photographs make clear to me that they are not 2 inches thick and are in fact 4 x

1. Although there was no direct evidence about this, the photographs show that the ratio of width to depth is not 2 to 1.

8. The longer stretch of land towards wall A (the left side of the staircase) was protected with a barrier of sterling board up to 1.2 metres high which the Claimant described as "*sturdy and strong*".

9. It is quite clear from the evidence that there was no formal risk assessment of the risks of working at height. Mr. Blackburn said that he had no recollection of any assessment, but that he would have looked at the rail and checked that it was suitable. He did not know who had constructed it "*as far as I am aware it was sound – I had seen it there*". This is understandable with an experienced builder but clearly gives rise to the risk of complacency and an assumption that one's workmen are doing what they should be – ie constructing a sound rail. There is no record of any assessment.

10. After the accident the top rail was found next to the Claimant in the hallway, intact, but had become detached from the post and wall and fallen. The lower rail was still attached at one end but not at the other, which had drooped down to landing level. Unfortunately, there are no photographs of the rail at the time of the accident and very little evidence about how it became detached. No-one saw how the screws had been wretched out and which end of the lower plank had become detached. We do not know how long the screws were. There are photographs of a new rail which was put in place after the accident. This has 3 parallel planks but is otherwise said to be of the same construction.

The accident

11. The Claimant had finished the "*dotting and dabbing*" on wall A and preparing for the next day's work (which was to "*dot and dab*" the plasterboard on wall B. In his oral evidence he explained how the plasterwork on wall B up to the first floor was proud

of the plasterwork upstairs because the areas had originally been plastered when there was a floor between the two floors. He therefore needed to put packing behind the new plasterboard. This would be done the next day but he wanted to have a preliminary assessment of how much packing he would need, and therefore needed to establish how far the ground floor level plaster extended beyond the face of the upstairs plaster.

12. The Claimant therefore went onto the landing and stood next to the rail holding a 6 foot spirit level upright against wall B with enough of its bottom end against the ground floor plaster. When it was vertical, but against the lower plaster face, he measured the distance between the face of the upper plaster and the top end of the spirit level

13. His evidence of the accident is extremely limited. His witness statement simply states that he cannot recall what happened until he remembers being treated by paramedics on the floor. The HSE report (22nd December 2014) records the Claimant as saying that he felt his feet give way beneath him. The particulars of claim also plead "*He remembers a sensation of his feet giving out under him and the is the last he recalls*". In his oral evidence the Claimant said he remembered the sensation of something moving under his foot. This are fine distinctions and he was clearly doing his best to recall what happened, but I have to prefer his initial account because of the lapse of time in between the accounts.

14. The only other evidence was Mr. Delahaye's. He was working in the hallway tidying up from the day's work. He remembers the Claimant going up to the landing to check the levels of wall B. Out of the corner of his eye he saw the spirit level fall down followed by the Claimant. He says that he believes that the Claimant either reached out over the rail and fell or that he stepped on the bottom plank and lost his balance.

This is pure speculation on his part and not something that I can take any account of. There is no indication that he has given the matter any serious consideration.

15. It is not disputed that the Claimant is 5 foot 9 inches and that at the time of the accident he weighed 9 ½ stone.
16. Ms. Corkhill submits that the evidence points to the accident having been caused by the Claimant standing on the lower plank. This, she says, is consistent with his evidence that his feet gave way beneath him. Alternatively, he was overreaching and toppled over. It is also consistent, she says, with the damage to the rail. As the rails were fixed from the landing side, the screws would not have given way unless considerable force had been applied.
17. The Claimant accepts that there must have been some force applied to the rail in order for it to become detached, and that is obviously correct. How much force is impossible to assess on the information available.
18. I am satisfied that the Claimant neither stood on the lower rail no overreached and thereby overbalanced or put force on the rail beyond that which might reasonably be expected from an experienced workman.
19. The Claimant's evidence was that he would not have stood on the rail nor overreached because he knew this was dangerous and there was no need to. He also said that he expected any rail to be able to take some pressure from his body weight. The measurements were only being taken in order to get a rough idea of what packing he would need next day. Further measurements would be taken before doing the work, which would require the use of a tower which was available at the property. There was no point in being able to reach above the top of the spirit level as that would make the measurements meaningless. The spirit level would have been no higher than

the top of his head, and probably a little lower so that there was a firm connection with the lower plaster.

20. It was suggested by Mr. Delahaye that it might be necessary to lean over the bannister because the upper plaster might not be level across the face of wall B. Again, it would have been pointless to measure further out because there would still be a very large section of the upper wall that would be unmeasured and this could all be measured more accurately next day.

21. I therefore conclude that the Claimant did not stand on the rail nor lean out unreasonably far across the rail. When one works next to a rail and across it there is always a risk that pressure will be put on it. How this interacts with the negligence allegation I will come to later.

Liability

22. Since the Enterprise Act 2013 the Claimant must prove that the Defendant was negligent.

23. It is common ground that the Work at Height Regulations 2005 requires suitable edge protection to be fitted to any platform, surface etc. that in the event of a fall might likely result in serious personal injury. "*Suitable*" means a top rail at least 950 mm above the platform, surface etc., a toe board to prevent material and equipment being kicked off, and a mid-rail positioned between the two so that there is no gap greater than 470 mm or some other equally effective arrangement. The edge protection should be constructed such that it is robust and strong enough to withstand the impact of someone falling against it.

24. In this case, the evidence shows that the rail was of sufficient height but there was no kick-board – although this is not relevant to the accident. Its absence does, however, suggest that there was a less than adequate consideration of the requirements.

25. Counsel approached the case differently. Ms. Corkhill's approach is that the evidence points to the Claimant having overreached or standing on the lower rail. This is the only way in which it could have given way. In that case, it was caused by the Claimant's own negligence. Mr. Rivers came at the point from a different direction. He said that the starting point was for the court to satisfy itself that the rail was unsuitable. It it was not strong enough to stand the weight of a 9 ½ stone man pressing against it then there is a breach of both the statutory and common law duties. Once that is established, the Claimant only fails if he was doing something that he should not have done – standing on the rail or overreaching.
26. Regulation 3(1) of the Management of Health and Safety at Work Regulations 1999 provides that every employer shall carry out an assessment of the risks to the health and safety of his employees to which they are exposed when they work for the purpose of identifying measures which need to be taken to comply with the requirements and prohibitions imposed on him by or under the relevant statutory provisions. It was therefore necessary for the Defendant to carry out a proper assessment of the risk to which anyone working on the landing might be exposed to. This should have concluded that there needed to be a strong and secure rail which was strong enough to prevent someone falling if they lent on it or accidentally pressed into it. This is not to say that it had to be strong enough to withstand unforeseeable risks, such as a workman standing on a cross-rail or leaning out beyond the rail dangerously.
27. The relevance of a risk assessment was considered by the Supreme Court in **Kennedy v Cordia (Services) LLP** [2016] UKSC 6. The following propositions relevant to this case can be drawn from this decision:
    a. Their lordships approved the statement of Smith LJ in **Allison v London Underground Ltd** [2008] EWCA Civ 71 where she said that the most logical

way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment.

b. This should have led to a consideration of the means of protection from any identified risks and the implementation of adequate protection.

c. In relation to the common law duty, their lordships said as follows:

"110. .... in more recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. .... The requirement to carry out an assessment, whether statutory or not, forms to context in which the employee has to take precautions in the exercise of reasonable care for the safety of its employees. That is because the whole point of a risk assessment is to identify whether the particular operation gives rise to any risk to safety, and if so, what is the extent of the risk. The duty to carry out such an assessment is therefore .... logically anterior to determining what precautions a reasonable employer would have taken in order to fulfil his common law duty of care."

28. The Supreme Court then went on to consider causation. The case concerned the PPE Regulations (Personal Protective Equipment at Work) which are different from those that apply in the present case. Mr. Rivers referred me to paragraph 119:

"It follows that where an employee has been injured as a result of being exposed to a risk against which she should have been protected (in this case slipping on ice) *by the provision of PPE, and it is established that she would have used PPE if it had been provided, it will normally be reasonable to infer that the failure to provide the PPE made a material contribution to the causation of the injury. Such an inference is reasonable because the PPE which the employer failed to provide would, by definition, have prevented the risk or rendered injury highly unlikely, so far as practicable. Such an inference would not, of course, be appropriate if the cause of accident was unconnected with the risk against which the employee should have been protected."*

29. Applying the above principles my decision is as follows.

30. No proper risk assessment was carried out and there is therefore no evidence about the risks identified and how they were to be protected against. The obvious risk is a fall from the landing leading to serious injury. The risk and the required precaution may seem so obvious that a formal risk assessment would be unlikely to add anything to

common sense and experience. In this case a proper risk assessment ought to have considered in what circumstances a workman might be on or working on the landing and whether he would be at risk of falling over any protective railing or leaning (accidentally or in the course of reasonable actions) against it. In other words an assessment of how high and strong the rail needed to be and should the workman be told firmly that to do certain work he must use a tower or ladder, even if it was within reach of the landing. None of this appears to have been done in this case.

31. Having concluded that the Claimant did not stand on the lower rail and did not lean out unreasonably far from the rail, my conclusion is that the rail was not sufficiently strong to protect the Claimant from the inevitable risk that he might lean against it or push against it in a relatively confined space and cause it to come apart and expose him to the risk of falling. The Defendant has adduced no evidence to show that the rail was in fact constructed robustly and strongly, sufficient to protect the Claimant when acting reasonably. The inference from my finding that the Claimant was acting reasonably, is that the rail wasn't strong enough and that there is therefore a breach of statutory and common law duty.

Contributory negligence

32. The pleaded case is that the Claimant was negligent by coming into contact with the railing, leaning over it, standing on it, failing to use a tower to access wall B or to obtain assistance.

33. I have rejected the suggestion that he stood on the rail or overreached the rail. It was reasonable for him to take these measurements from the landing, although it would not have been reasonable if he had had to lean well out from the rail. The use of a tower would have been unnecessarily cumbersome for this relatively straightforward task.

34. I was referred to **Toole v Bolton Metropolitan Borough Council** [2002] EWCA Civ 588 where Buxton LJ said:

"I approach the question of whether a finding of contributory negligence should have been made in this case at all from a background of principle. It is not usual for there to be marked findings of contributory negligence in a breach of statutory duty case, and it is, I'm bound to say in my experience, very unusual indeed for there to be a finding of contributory negligence at the level of 75%"

35. He went on to refer to Lord Hoffman's statement in **Reeves v Commissioner of the Metropolitan Police** [2000] 1 AC 360 where he pointed out that the Contributory Negligence Act required an apportionment not of degrees of carelessness but the relative responsibility of the two parties, and that an assessment of responsibility must take into account the policy of the rule.

36. In fact I have found that the Claimant was not careless, but in any case, the responsibility for making a risk assessment and taking suitable precautions against reasonably foreseeable risks lay entirely with the Defendants. I therefore reject the defence of contributory negligence in its entirety.

Conclusion

37. My decision is that the Defendant is liable to the Claimant for breach of statutory duty and in common law in failing to provide a suitable rail or barrier to protect him when working on the landing. I reject the defence of contributory negligence.

38. It follows that the Claimant is entitled to damages of £52,500 (including interest to the date of the trial) and provisional damages in terms that are to be agreed by the parties following this judgment. The gist of the main term is that he may return to court for an further assessment of damages if he develops epilepsy within 5 years of the trial date (2nd December 2019).

39. I will hand down judgment in the absence of the parties on a date to be notified and list a telephone hearing to make any costs order and deal with any application for

permission to appeal. Time for appealing will be extended to 21 days after the final hearing. If a consent order is filed then the final hearing will be dispensed with.