Mrs Rhonda Stewart (New Rohonda White) v Lewisham and Greenwhich NHS Trust [2017] EWCA Civ 2091 – by Andrew Wilson

Headline

In a case where the claimant alleges breaches of an employer's duties under the Management of Health and Safety at Work Regulations 1999, of the Manual Handling Regulations 1992 and of its common law duty of care, in relation to an injury caused by lifting an object, the Claimant must first prove that there was a real risk of injury before deciding whether there was any breach of duty.

Background

The Claimant was employed by the Defendant Trust as a Community Midwife. On 28th May 2010, in the course of her employment, she suffered an injury to her back; she was lifting a plastic carry case that contained an oxygen cylinder and some ancillary equipment ("the case"). It was agreed that the case weighed between 7.5 and 8 kgs.

The Claimant brought a claim for personal injury alleging the Defendant's breach of the Management of Health and Safety at Work Regulations 1999, of the Manual Handling Regulations 1992 and of its common law duty of care.

The Trial

The trial was heard by Recorder Gastowicz QC on 2nd March 2016.

The Claimant brought her claim on the basis that the lifting of the case was sufficiently hazardous to require a risk assessment pursuant to 1992 regulations. The regulations can be found here.

In short, an employer has a duty to make suitable and sufficient assessments of all manual handling operations having regard to the factors in column 1 of Schedule 1 including “the loads”, “The working environment” and “Individual capability”. This duty only extends where “it is not reasonably practicable” to avoid the need for an employee “to undertake any manual handling operations at work which involve a risk to their being injured”.

The Health and Safety Executive have published guidance in the use of the 1992 regulations. The purpose of the guidance is to create an “approximate boundary within which the load is unlikely to create a risk of injury sufficient to warrant a detailed assessment”; this is referred to as “the Guidance Filter”. In other words, an attempt to find the limit of the employer’s duty.

The following facts were found by the Recorder:

i. The contents of the case were frequently used and thus the case was lifted and moved frequently by the Claimant and other employees;
ii. The Claimant had raised no problems with the lifting of the case;
iii. It was not reasonably practicable to have avoided manually handling the case;
iv. There was no risk assessment carried out on the manual handling of the case;
v. The Claimant had been given general moving and handling training in 2009 and 2010;
vi. The Claimant had picked up the case using both hands underneath (and not used the handle) and this caused a “pull” to her back as she lifted;

The Claimant’s pain worsened. It was later discovered that she had a degenerative back condition which would have caused the onset of back pain if the index injury had not occurred.

The Recorder dismissed the claim

The Judgment

He found that the Defendant was not required to make a risk assessment beyond the instinctive formation of the view that the case was safe if properly handled; this was based on the nature and weight of the case.

The Claimant failed to lead any evidence to show that the presence of a risk assessment would have resulted in anything different.

In view of her degenerative lower back condition, she could have just as easily injured herself using the vacuum cleaner or lifting a small piece of luggage.

Lifting the box was not unsafe for a normal person but was unsafe for the Claimant.

Grounds of Appeal

The Claimant appealed on the following grounds:

i. The Recorder misdirected himself as to which party bore the burden of proving whether or not a risk assessment ought to have been undertaken;
ii. The Recorder mistakenly held that a risk assessment was unnecessary;
iii. The Recorder wrongly refused to find that the Defendant had failed to take proper steps to reduce the risk of injury to the lowest level reasonably practicable;
iv. The Recorder mistakenly applied the law on the issue of proving causation;
v. The Recorder misdirected himself when finding that the injury was not caused by a breach of the Regulations but by the Claimant's degenerative back condition. He confused "vulnerability" and "period of acceleration" with "causation".

Reasons for Dismissing the Appeal

In a Judgment given by Hamblen LJ with which Newey LJ and Longmore LJ agreed, grounds one and 2 were dismissed.

A proper analysis of the Recorder's Judgment shows that he found as a fact that there was no real risk of injury. In those circumstances, no risk assessment was necessary. The Recorder's finding as to the burden of proving whether a risk assessment was necessary was irrelevant once he had formed the view that it was unnecessary.

There was no duty on the Defendant as alleged under regulation 4; grounds 1-3 therefore fell away. Grounds 4 and 5 did not arise.

Andrew Wilson deals with all types of personal injury (PI) claims litigated on the multi-track, including road-traffic accidents, accidents at work dealing with the health & safety regulations, and occupiers' liability claims.

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