Baird v Thurrock Borough Council [2005] APP.L.R. 11/07

CA on appeal from Southend County Court (HHJ Yelton) before Ward LJ; Keene LJ; Gage LJ. : 7th November 2005.

JUDGMENT : Lord Justice Gage :

1. This is an appeal by a defendant, Thurrock Borough Council, against a judgment upon a claim by the claimant, Danny Baird, for damages for personal injuries arising out of an accident at work on 28th September 2000.

2. The order that the judge made in Southend Crown Court on 3rd March 2005 was judgment for the claimant for damages in the sum of £7,500, together with interest of £225. The trial proceeded on the issue of liability only. The parties agreed quantum in the sum of £10,000, subject to liability. The judge found the defendant guilty of negligence and breach of its statutory duty but reduced the damages by 25 per cent to take into account the finding of 25 per cent contributory negligence by the claimant.

3. The background is as follows. On the day of the accident, the claimant was working as an agency worker for the defendant as a loader on a dustcart. He had been working in that capacity for only a few days before the accident. His job was to collect and load wheelie bins on to the rear of a dustcart. When the wheelie bins had been emptied of refuse, he then returned them to the property from whence they had come.

4. The dustcart was equipped at the rear with two mechanical hoists. The hoists operated independently of each other. When a wheelie bin was placed in position on the hoist, the hoist automatically raised the bin, tipped it so that the contents of the bin fell into the rear of the dustcart, lowered the bin to the ground and then released the bin on the ground. If, for any reason, a wheelie bin was placed on to a hoist and it was not raised automatically and/or not all the rubbish was tipped out of the bin the first time, the operator could raise the bin by means of a manual operation of buttons situated on both sides of the rear of the dustcart. There were photographs at the trial displaying the position of the hoist on the dustcart. They are available to this court.

5. The claimant's account of the accident was as follows. He said that, on this occasion, he put two wheelie bins on the hoists at the rear of the dustcart. The left-hand side hoist automatically raised, tipped and lowered the left-hand bin. However, the right-hand side bin was not raised by the hoist. The claimant went to the right-hand side of the rear of the dustcart and operated the buttons which manually raised the bin. He pressed the button and the right-hand side bin went into the up position. He said he walked back across the rear of the dustcart to remove the left-hand side bin. As he did so, he was struck by the right-hand side bin, which had tipped and was lowered automatically by the hoist.

6. The dustcart on that day was driven by Ms Natalie Garwood, an employee of the defendant. The other loader was Ms Lisa Mulqueen, formerly Marshall. Although neither Ms Garwood nor Ms Mulqueen saw the accident, both witnessed what happened afterwards, having immediately gone to the rear of the dustcart after hearing the incident. At the rear of the dustcart they found the claimant kneeling with injuries to his face. The left-hand side bin had been knocked off the left-hand side hoist and was lying on the pavement but the right-hand side bin, they said, remained in the up/tipping position, attached to the right-hand side hoist and had not been lowered.

7. The evidence of Ms Garwood and Ms Mulqueen conflicted with the claimant's evidence. If, as the claimant alleged, he had been struck by the right-hand side bin as it descended, then the right-hand side bin would not have been in the up/tipping position after the accident. Ms Garwood and Ms Mulqueen gave the claimant first aid and then all three got into the dustcart to drive the claimant to the hospital. The dustcart pulled off a few metres down the road and it was then that Ms Garwood realised that the right-hand side bin was still in the up/tipping position. She stopped the dustcart and Ms Mulqueen got out, lowered the right-hand side hoist and removed the bin, leaving it at the side of road. The dustcart then continued to the hospital.

8. In his witness statement prepared for the trial, the claimant made no mention of what had happened after the dustcart had driven off to hospital. In cross examination, when he was asked about the incident when the dustcart was, as Ms Garwood and Ms Mulqueen said, lowered after being driven off, he said that the right-hand side bin had always been in the down position and had remained on the hoist and had been dragged along the road by the dustcart until it was released when the dustcart stopped.

9. Ms Garwood and Ms Mulqueen on the other hand said that the right-hand side bin was always in the up/tipping position until it had been lowered down by Ms Mulqueen. Ms Garwood said that, if the vehicle had driven off with the right-hand side bin in the lowered position, the clamp which attached the wheelie bins to the hoist would have been released and the dustcart would have been left behind. That, she said, was not the position when they drove off.

10. There was evidence in the form of an agreed report by an expert in forensic health and consultancy work, Stewart Page. He inspected and examined a vehicle which either was the vehicle involved in the accident or one very similar to it. The judge found that whether it was the one being used at the time or one very similar was not material. The expert in his report described the hoists and the way in which they operated. He went on in his report to describe the circumstances of the accident before setting out his analysis of the accident. At paragraph 26 he said this:

    "There is some confusion between Mr Baird and the other members of the crew. According to Mr Baird the bin that struck him was the offside bin whilst according to other members the right hand bin was still in the raised position after the accident had occurred."

    Later in his report, he underlined this conflict between the two different versions. At paragraph 33, having set out Mr Baird's version of the accident, he said:

    "Under these circumstances both bins would have been on the ground after the accident."

    He then dealt with the evidence that was to be given by Ms Garwood and Ms Mulqueen and stated this, paragraph 36:

    "This would leave the offside bin in the raised position and the nearside bin on the ground."

11. The three important witnesses at the trial were, as I have indicated, the claimant, Ms Garwood and Ms Mulqueen. It is not disputed that neither Ms Garwood nor Ms Mulqueen had actually seen the accident but, as I have already said, each said that after the accident the right-hand side wheelie bin was in the raised position. Further, in cross examination, Ms Garwood said that, when she drove off, if the hoist had been in the lowered position on the right-hand side, as described by the claimant, the wheelie bin would have been released from the clamp on the hoist and would have been left behind. It was because it was still in the raised position on the hoist that she stopped.

12. The judge in his judgment recited the evidence given by the claimant and then turned to the defence case. He said at page 14 of the appeal bundle, starting at line 5:

"It is very difficult to understand from the pleadings what exactly the Defendants' case is but eventually, with a certain amount of tongue-lashing from the Judge, that was extracted. The Defendants' case in essence is either that what occurred was that the bin that hit Mr Baird was on automatic and he simply failed to get out of its way as it came down again, or, secondly, that he did not put the bin on properly and it broke away."

Pausing there, there is no reference there to the part of the defence case which was that it was the left-hand side bin which must have struck the claimant. He continued, at line 10:

"I have had the opportunity of seeing and hearing the witnesses in this case. I do not think that either of the two ladies who gave evidence were in any way trying to mislead the Court. What they told me about the way in which the system operates, and so on, I accept without reservation."

13. Other than the reference to the fact that he did not think that either of the two ladies were in any way trying to mislead the court, the judge did not recite their evidence and what, on behalf of the defendants, it is submitted was the central issue in the case, namely the position of the right-hand side wheelie bin after the accident. The judge continued in his judgment at line 14:

"I have to assess whether or not Mr Baird is telling the truth. Not only have I got to assess whether or not he is telling the truth, but I have to look also at the account of things that he gave in writing to his line manager fairly shortly afterwards, and that is set out at page 69. He gave there, in short terms, exactly the explanation that he is giving now. He gave that about four weeks after the accident. We are now four-and-a-half years after the accident.

"He said that he had put the bin on the hoist on manual. It went up, then it came down automatically and unexpectedly and hit him.

"That account is corroborated by the evidence of the jointly instructed expert, Mr Page, who is a very experienced engineer. He carried out various tests on the vehicle. It may or may not have been the same vehicle. It does not matter for these purposes. His report I have read. He has not given evidence because he is a jointly instructed expert.

"He found at paragraph 12, that what the Claimant says occurred did occur when he carried out tests. He says:

"'During repeated operations of the hoist it was found there were times when the manual hoist button was pressed, the hoist would rise up as expected, but if the button was released the hoist would continue through its cycle, tipping the bin and then lowering the bin back on the ground'.

"In other words, it shifted into automatic mode, is the way I see it put.

"That, as I have said, is exactly what the Claimant not only says today happened, but has always said happened.

"Having seen and heard the witness, as I have said, I find that the Claimant was telling the truth about what occurred and that this accident occurred for the reason I have described - the reason set out by Mr Page. In other words, the hoist shifted from manual to automatic mode without giving any warning that that was what was going to happen.

"Once I come to that conclusion, which I do in this case on the evidence that I have seen and heard, it seems to me that the Claimant, who puts his case contrary to the Defendants in the pleadings in almost every possible way - and I have not heard argument to the contrary - is bound to succeed on that version of events."

The judge then went on to deal with the issue of contributory negligence, finding that, because the claimant stood too close to the hoist, he was 25 per cent to blame for the accident.

14. The single ground of appeal is that the judge failed to give any or any adequate reasons for finding that the claimant was a truthful and accurate witness. The bald statement that, having seen and heard the witnesses, he had found the claimant to be the telling the truth, it is submitted, was insufficient. In particular, it is submitted that the judge failed to deal with the conflict of the claimant's evidence with that of the evidence of Ms Garwood and Ms Mulqueen, which, if accurate, was entirely inconsistent with the claimant's version of how the accident occurred. In short, the defendant's case on appeal is that they are left in a position that they are unable to understand why they lost the case.

15. The claimant's submission is also short and simple. Mr Livingstone submits that it is obvious from the whole of the judgment that the judge accepted the evidence of the claimant and he sufficiently explained, in the course of the judgment, why he had. It is accepted by Mr Livingstone that he did not deal in precise details with the evidence of Ms Garwood and Ms Mulqueen but the effect, it is submitted, is to show that the reason that he found for the claimant was simply that he accepted the claimant as a truthful and accurate witness.

16. In their skeleton arguments, both counsel have referred to a number of decisions of this court dealing with the need for a judge to give reasons and to the sufficiency of the reasons. It is necessary, for the purposes of this judgment, to refer to but one: the decision of this court in ***English v Emery Reimbold & Strick Ltd & Orrs*** [2002] 1 WLR 2409. I shall refer only to short passages in this judgment. At paragraph 19, Lord Phillips MR, as he then was, said:

"It follows that, if the appellant process is to work satisfactorily, the judgment must enable the appellant court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied on."

At paragraph 21:

"When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellant tribunal readily to analyse the reasoning that was essential to the judge's decision."

Finally, at the very end of the judgment, the court said this:

"There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."

17. It is clear that a judge is entitled to express the reasons for his decision briefly. For my part, I would wish to say nothing which would discourage a judge from expressing the reasons for his decision briefly but it is equally clear that the reasons for his or her decision must be sufficient to explain why he reached that decision. The question therefore in this appeal is: do the judge's reasons for his decision meet the test of adequacy? In my judgment, in this case they did not.

18. I reached this conclusion for four reasons. It is not clear, from his judgment, that the judge understood the importance of the evidence given by Ms Garwood and Ms Mulqueen. If their evidence was correct, the claimant could not have been injured by the right-hand side wheelie bin because, on his version of the accident, it would have been found after the accident in the down position. The evidence of the two lady witnesses was that it was in the raised position after the accident, which is wholly inconsistent with the version of the accident given by the claimant. Secondly, the judge made no finding on the issue of whether, when the dustcart drove off, the right-hand side hoist was in the down position or upright. He did not find whether or not Ms Garwood was right when she said that, if the claimant said it was in the down position, the wheelie bin would have been left behind. Thirdly, having said that, in his opinion, neither of the two ladies were in any way trying to mislead the court, the judge did not explain on what basis their evidence was untruthful or inaccurate in respect of the position of the wheelie bin after the accident and after the vehicle drove off. In my judgment, it was necessary for him to explain that inconsistency if he was to say that he was accepting the claimant's evidence in preference to the evidence of those two witnesses. Fourthly, the judge cited the expert's evidence as corroborating the claimant's evidence. As the defendants submitted in their skeleton argument, that is factually incorrect. It is true that Mr Page's statement concluded that the accident was due to lack of proper training but he did not venture an opinion, nor could he, as to how the accident occurred. Put shortly, in my judgment, the judge never grappled with the need to explain why it was that he rejected the evidence of Ms Garwood and Ms Mulqueen on the crucial issue, the issue of how the accident happened. In my view, it was not sufficient for him to say, without more, that, having seen and heard the witnesses, he accepted the claimant's evidence. He ought to have explained why he rejected the evidence of the two ladies as either untruthful or mistaken.

19. The tragedy of this case is that, having reached this conclusion, in my judgment the matter will have to go back to be re-heard by a different judge. Mr Shapiro has sought to persuade this court that we should decide the case on the transcript of the evidence of the witnesses. In my judgment it is quite impossible for this court to accede to that submission. The judge accepted the claimant's evidence. We have not heard either him or the two witnesses before the defendant. The result of the case depends upon which witness was accepted as truthful and accurate. There is now no way that this court can make that decision. For my part, I would allow the appeal and direct that the matter go back to the County Court to be re-heard by a different judge.

20. **LORD JUSTICE KEENE**: I agree that this appeal should be allowed, for the reasons given by my Lord. I do so with regret because it will only add yet another amount of costs to the already excessive costs incurred in relation to this claim. Those costs are grossly disproportionate.

21. **LORD JUSTICE WARD**: I also agree. I am bound to say that I am extremely sorry for the claimant, who sits at the back of the court and who, having been believed by the judge, must feel quite bewildered that the case must go back for a new hearing.

22. Secondly, I would add this: when the judge dealt with the permission to appeal, Mr Shapiro had said to him, and I read from the transcript on page 17:

"The grounds on which I ask that [permission to appeal] is that the judgment does not, I submit, address the issue of how the bin...

"JUDGE YELTON: No. What I said was -- and I am always very careful in these judgments -- I followed the advice of the Court of Appeal, which is that a judgment should be as short as possible. I said that I preferred the Claimant's evidence on all material matters. That is a finding of fact. That is what County Court Judges are here for. I shall refuse permission to appeal. I think this is a wholly unappealable case."

23. Short judgments are, of course, all fine and well and to be encouraged but only if they are careful judgments. Second, judges do not have to deal with each and every point in issue but where the dispute is as fundamental to the case as this one then it does deserve mention and an explanation being given for the apparent inconsistency between his appearing to believe the two ladies yet also finding that they could not have been correct in saying that the right-hand bin was still up in the air. If the judge had not so intemperately interrupted counsel, he would have heard Mr Shapiro's point, he would have had a chance to consider the suggested omission and expanded his reasoning to cover it if he thought fit. It is a great shame that he did not do so. As it is, this small claim, with its huge attending costs, must go back for a retrial, unless attempts at ADR can bring about a settlement which ought to have been reached before the case got to the court in the first place.

24. I would therefore also allow the appeal to send the matter back to the County Court with a different judge.

Order: Appeal allowed. The respondent is to pay the appellant's costs.

MR D SHAPIRO (instructed by Messrs Eversheds, Franciscan House, 51 Princes Street, Ipswich Ip1 1UR) appeared on behalf of the Applicant
MR P LIVINGSTONE (instructed by Messrs Tattersalls, 42 Norton Road, Ingatstone, Essex CM4 0AB) appeared on behalf of the Respondent