

## GENERAL FILE NOTE

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Date & Time: 3<sup>rd</sup> May 2006  
Client: Mr D A Walker  
Matter: Professional Negligence  
Reference: NEC/ES/WAL182-1  
Doc Reference: 2029758720

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**3<sup>RD</sup> MAY 2006**

**NC attending Royal Courts of Justice with Susan Rodway QC (SR)**

**Court 72**

**Hearing before Lord Justice Chadwick and Lord Justice Thomas**

Ben Elkington, Barrister for First and Second Defendants, was in attendance but had not been requested to attend by the Court and was only able to sit in on a 'watching brief' and did not say anything throughout the hearing.

Although only scheduled for a 20 minute hearing, the actual hearing time was 50 minutes.

SR sought to persuade the Court that despite the refusal of Lord Justice Rix there were prospects of succeeding. The case had considerable importance to the Client.

When judging a member of their own professions the Court should do so carefully and correctly.

The main complaint was that Mr Justice Davis had misdirected himself on the duty of care of the driver of the JCB (that it was for Mr Walker to establish that he was present on the JCB for long enough for Mr Haynes to have seen him) and that Lord Justice Rix's refusal of permission, whilst setting out his reasons carefully, had not set out that issue.

If the duty was on the driver of the JCB, our argument was bound to be followed that he'd failed in his duty.

It was a simple case, Mr Walker's foot had been crushed. It couldn't turn on credibility.

If he'd directed himself correctly the advice that Mr Walker had received (that there was a serious risk of losing) was negligent.

Credibility was in the realm and on the issue of contributory negligence, of which there was more in her Skeleton Argument.

Lord Justice Chadwick referred to the way in which the present claim had been put – SR referred to the Appeal Bundle 2, page 14, paragraphs 28 (1) and 28(2) of the Particulars of Claim. There was a breach of duty to advise there was a serious risk of failing to establish primary liability. In essence, it was a strong case on primary liability.

Lord Justice Chadwick commented that there was a very serious risk on contributory negligence – SR that was a different issue.

Lord Justice Chadwick – there was a risk that Mr Walker would not have beaten the money in Court.

SR – that was not the case we were dealing with. Mr Chruszcz in his witness statement said he'd not applied his mind to a financial evaluation. It had been accepted that it was not near the figure on offer. Chruszcz's advice was the risk was that he would go home without a penny. It was not argued (for the Defendants) that if he'd gone ahead nonetheless contributory negligence would have extinguished the claim. That was the point that she had been concerned about when getting clarification of the preliminary issue before Mr Justice Jack.

Quantification did not have to trouble their Lordships. This was solely an issue of liability. The original trial (-v- Hather) was solely on the issue of liability.

Lord Justice Chadwick – if there had been an original trial there would have had to have been a finding on contributory negligence.

SR – yes.

Lord Justice Chadwick – there was a danger at trial of a finding of between 0 – 50% or something in between.

SR – you cannot have a finding of contributory negligence of 100%. The claim would not have been extinguished. The reasoning on which the advice was given for this Claimant was that he was demonstrating such behaviour that his credibility was so impugned he would lose altogether and the risk was that he would not have established primary liability. We say the Judge had to focus on ..... refers to paragraph 93 of Judgment .....

Lord Justice Thomas – that's the key paragraph isn't it?

SR – yes. That paragraph sets out what the Judge set out when considering my submissions..... whilst Haynes about to lower the bucket..... That sentence was the inference to be drawn that Walker jumped on when about to lower the bucket as positive support for the Defendant's case. The Judge has omitted to remind himself that if he was about to lower the arms the onus was on the JCB driver. The evidence (Haynes witness statement) that he did not see (Mr Walker) must mean that he did not check.

Further down the Judge had indicated that Walker's evidence was of prime importance. However, Walker's foot was crushed and he had not been seen. Refers to paragraph 95 of Judgment. Judge had rejected Susan Rodway's argument at trial. Treated as a semi- *res ipsa* case and it shouldn't have been considered in that way. Even if he looked at the lever, he had to prepare himself to lower the bucket and to

check before lowering the bucket ..... it did not matter how long his foot had been there.

Lord Justice Chadwick – the duty to check cannot be an absolute. The duty is what is appropriate in the circumstances. (He) referred to the analogy of a motorist driving along the street and checking that pedestrians were not going to step off a pavement. There were lots of other things to check on and you cannot watch the pedestrian to the exclusion of not watching anyone else. There comes a point when you say to yourself that pedestrian is safe. Something happening at the last minute well may not be in breach of duty. In the last few seconds there comes a point when you can satisfy yourself that there is no-one there and tick that box. The time on the machine may be very relevant.

SR – at full Appeal it would be argued that the driver of the JCB was in a very different situation than the driver in the situation (referred to by LJ Chadwick). He had a high duty. He is reminded of it in the JCB documents and the employer should also make sure. This was heavy machinery where the slightest of error could cause serious outcome. (The duty was) not just on the side of the JCB but in the vicinity of the JCB. It was the simplest thing to cast an eye around. Refers the Judges to the photographs. Visibility is complete.

Lord Justice Chadwick – (who apparently had driven a JCB) commented that you cannot be looking at one spot all of the time. He was not suggesting that there was no duty to keep a look out. He queried the length of time on the machine. The difference between 45 and 4 to 5 seconds might be crucial.

SR – such a duty (on Haynes) that he didn't have too much to do to look around him. The Judge had not reminded himself of that. Haynes' own evidence referred to in the Judgment was that Walker had been in the cab of the pickup. He would have had to have moved from the cab to the JCB (with the hose, etc) - all without Haynes seeing him.

Lord Justice Thomas – why did he have to look around every second before lowering the bucket?. .... He would not suspect someone so stupid as to jump on the machine..... He would be looking at the job he was doing, lowering the bucket.

SR – that was her central point that Walker was there to be seen and the Judge had confused the issue of primarily liability and contributory negligence.

Lord Justice Chadwick – (it could be argued that Mr Walker had a duty not to be there at all) . You have to say it really didn't matter what view the personal injury Judge took of Mr Walker's evidence, one thing was incontrovertible, that he was on the machine when his foot was crushed and that did not turn on his credibility.

If (Mr Walker) was not going to be believed on 30-50 seconds and it might have been 4 seconds, the seconds were important. Even if the PI Judge took the view that he'd just jumped on at the last second, do you say there would have been a breach of primary duty?

SR – yes I do – the onus was squarely on the driver before he moved the arms down to glance around him.

Lord Justice Chadwick – one aspect of the evidence that he found surprising – your Client's evidence – was that Mr Haynes would have had to look down at the levers. I'd have ultimately thought that Mr Haynes would know where the levers were. Evidence heard was that he could not maintain continuous observation.

SR – wish to correct that. It was Chruszcz's suggestion that he might have had to look down to the levers. It was not something that was in Haynes' statement. It was Mr Chruszcz that had introduced it. Mr Walker had conceded that it would be a possibility but it still did not exonerate the driver from the heavy onus on him that he must look up.

Lord Justice Chadwick – that's where the core is. (You say the Judge) not focus properly on that. Foot crushed therefore Mr Walker must have been there.

Judge gave details of the injuries.

There had been instructions to other solicitors and a second firm before the Second Defendant was instructed in 1994 ..... referred to Advices earlier, eg, 1992 he'd been advised that his prospects would turn on the credibility of the witnesses, contributory negligence inevitable.

(In 1995) he'd been advised how long he'd been on the side of the JCB was important. £80,000 was paid into Court.

First Defendant became involved in 1996. Advised 50% contributory but much depended upon how the Judge perceived the Claimant.

Subsequently a great deal of work had been done and Mr Justice Davis found that the First Defendant was fully on top of the case on the day of the trial (in 1996). On the day it was clear that the Claimant would not be a good witness (refers to errors and attitude).

The First Defendant was trying to see if there was more to be obtained as he thought that there was a serious risk he'd go home with nothing at all. Raised to £95,000 plus costs and Claimant accepted.

(At the trial in December 2005) it was argued before HJ Davis that no reasonable Counsel and advisers (would have considered) there was a risk of losing on primary liability even if he was a bad witness..... because of the failure of the driver of the JCB to look out before doing so.... It did not matter that the driver should have seen him.

The Judge heard the evidence of the Claimant and Defendants. He set out the background facts with clarity (Judge refers to passages of the Moy case and reads them) Legal advisers should (not be inhibited to settle, etc....)

**Judgment delivered by Lord Justice Thomas.**

First Defendant is a Barrister and QC and Second Defendant's solicitors acting for the Claimant against employer G Hather in respect of a claim for personal injuries..... claim settled December 1996 at the door of the Court. Almost as the limit was about to expire in 2002 the Claimant began proceedings alleging that the First Defendant and Second Defendant gave him negligent advice and settled the claim when they should not have done.

There had been a trial of liability on the First and Second Defendants ..... complex .... In careful and clear Judgment 30<sup>th</sup> January 2006 the Judge held that the Claimant failed to prove either Defendant negligent..... Permission to Appeal refused. Application to this Court was refused..... received the application before us.

(Judge set out background, eg, dates Walker commenced working at Hather, events January 1990 – refers to disagreement as to why he was there and whether he was working which were not significant to the Appeal )

(Claimant's case) refueling a JCB was a 2 person job. Claimant and Derbyshire were in a truck with fuel which moved next to the JCB which Haynes was driving. Claimant's witness statement - stood between the 2 vehicles when JCB stopped. The fuel hose was in his hand. Right foot on step, left on chassis to unscrew the filler cap. Was there 30 or so seconds. Unscrewed cap, inserted hose, shouted to Derbyshire to pump, which he did..... crushed left foot. It was in pleadings and witness statements that the case of Hather was that they were not negligent. Evidence of Derbyshire and Haynes that the Claimant had not been asked to assist with the refueling that was to be done by Derbyshire and Haynes.... (Walker) jumped on JCB whilst still moving ..... hose did not need to be held in place ..... Haynes had been manouvering to get as close as possible and (he had last seen Walker) still in the cab of the pick up.... Had heard a shout. Saw Claimant trapped and raised bucket. He'd been told that (Walker) had jumped on as moving but he'd not seen him as he was concentrating.

The Judge found in the circumstances that the Claimant had failed to prove the First and Second Defendants negligent in the advice.

The crucial finding is referred to today – paragraph 93 of the Judgment (Judge reads this out verbatim).

It is that passage in the Judgment that has been the focus of argument today. It is right to record that Lord Justice Rix considered the matter and he also came to the view that it was not inevitable that the original trial Judge would reach the conclusion (whatever the performance of the witnesses) that Mr Haynes the JCB driver was negligent in not seeing Mr Walker – credibility irrelevant – Walker positioning himself on the side of the JCB could not have occurred only instantaneously before his foot was crushed.

In argument before us (it was said) the Judge hadn't grappled with the real issues. There was no defence unless it could be shown that he'd jumped on the machine when the bucket was being lowered. The trial Judge had failed to consider the duty of the driver. That had been argued forcibly today..... duty to look around ... fraction of second to lower. If had looked around at all would have been bound to see.... Credibility not an issue. Liability certain.

As I see the matter the Defendants in the action had to ask themselves whether the person concerned, as a bad witness..... the evidence he would give in the light of statements made he would be put at serious risk of receiving nothing at all. It is clear that they faced conflicting evidence. Had to focus on the credibility of the Claimant.... Time on machine must have been such that a person concentrating on lowering of a bucket must have been in a position to see him.

Reminds that it was clear in the witness statements I've referred to Derbyshire and Haynes had both seen Claimant in the cab (of the pick up). Secondly the Claimant's evidence was that he got on the machine for 30 seconds at most before the bucket was lowered. Derbyshire and Haynes said they had not seen him manoeuvre onto the JCB. That must have been only a matter of seconds. Timing was crucial.

It is unreal to say that there was a duty on JCB (driver) ... that he is expected before every single manouvre to look around. It is not inevitable a Judge would have said there was time to look.

For my part I cannot see how with witnesses of this type the Defendants could have been expected to conclude the Claimant was bound to succeed. I agree with the Judge.... In reality I see no basis for expecting this Court to find any arguable..... not allow (permission to Appeal)

Lord Justice Chadwick – I agree. It is unreal (to suggest) that there was no risk of a Judge trying the personal injury case taking the view that credibility was irrelevant to the issue of primary liability.

(Judge made another point but NC unable to decipher note)

Application dismissed.

Order for funding of costs as usual for assessment.

Travel – 10.45 – 2.00pm

Waiting – 1 hour 10 minutes

Hearing – 50 minutes

Travel (return) 4.00 – 7.15pm

Mileage – 24 miles

Parking - £4.50

Subsistence - £6.00

Train - £49.50

Time preparing note of submissions and Judgment – 2 hours