

Neutral Citation Number: [2011] EWCA Civ 1791
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRIGHTON COUNTY COURT
(HIS HONOUR JUDGE BARRATT QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 13 December 2011

Before:

LORD JUSTICE TOULSON

Between:

BLAIR

Appellant

- and -

CHIEF CONSTABLE OF SUSSEX POLICE

Respondents

(DAR Transcript of
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Mr Andrew Roy (instructed by Russell Jones & Walker) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented.

Judgment

Lord Justice Toulson:

1. On 23 September 2011 Smith LJ gave the appellant written permission to appeal on limited grounds from a judgment of His Honour Judge Barratt QC in which he dismissed the appellant's claim for damages for personal injury.
2. Quantum was agreed subject to liability at £10,500. Smith LJ directed there should be an attempt at mediation. She also directed that if the applicant wished to renew his application for permission to appeal on grounds which she had refused the renewed application should be dealt with orally prior to the hearing of the appeal.
3. The appellant now renews his application. Mediation has been put on hold pending the outcome of this renewed application. The appellant is a police officer. The accident happened on the last day of a three week advanced motorcycle course. The exercise involved off road riding on a track which in places was rutted, muddy and with holes full of water. For this exercise the appellant was provided with a trailer cycle which he had not previously used. He was an experienced motorcyclist and had experience of riding off road as well as on roads.
4. At one point the appellant had difficulty changing gear from first to second gear. The cycle slipped; he lost control of it and fell, with the cycle landing on top of him. As a result of this unfortunate accident he suffered a fractured ankle.
5. He alleged breaches of the sets of regulations: the 1992 Personal Protective Equipment at Work Regulations and the 1998 Provision and Use of Work Equipment Regulations. The alleged breach of the 1992 regulations had to do with the boots with which he was provided. The judge rejected those allegations, but Smith LJ has given him leave to appeal against that part of the judgment.
6. The matter with which I am concerned arises under the 1998 Work Equipment Regulations, which were passed to give effect to an EU directive. Breaches were alleged of Regulations 4 and 5. Regulation 4.1 requires every employer to ensure that work equipment is safe, constructed or adapted as to be suitable for the purpose for which it is used or provided. "Suitable" has a definition. It means suitable in any respect which it is "reasonably foreseeable will affect the health or safety of any person". Regulation 5 requires that work equipment is maintained in an efficient state, in efficient working order and good repair.
7. The case as put to the judge was that there was breach of Regulation 5 because the motorcycle was defective in that the gears were too stiff. The case under Regulation 4 was put more broadly. The judge summarised the way in which that part of the case was put in paragraph 8 of his judgment, where he correctly recorded that the submission was that on the facts of this case the use of the trailer bike to ride across rough, rutted, muddy, waterlogged terrain

carried inherently a real risk of injury, that the officer had not used the bike before that morning, nor indeed that type of bike at any stage during the preceding three weeks, and that there was an inherent risk in the circumstances of him suffering an accident. Accordingly, the motorcycle was not suitable equipment.

8. The judge went on to consider the cause of the accident. The motorcycle had been examined after the accident. It was found that the gears were stiff, but the judge rejected the contention that the motorcycle was on that account defective. He said that this was something which fell short of amounting to a defect and there is no appeal against that finding of fact. He tried evidently to cushion the way in which he made his findings, but the substance of it was that the accident was caused by pure rider error.
9. The applicant, he said, had arrived somewhat late that morning and had been given an introduction which he did not seem altogether to follow in the event that ensued. The judge found that if, as he should have done, he had kept looking ahead, staring ahead and using the throttle, he would have continued to engage first gear, which would have been the appropriate thing to do. He said that he found nothing on the evidence to indicate that, properly operated, the vehicle would not have continued to have been driven forward at a slow walking speed and the appellant would have come out of the rut competently, efficiently and safely. He concluded that there was nothing unsuitable in the motorcycle itself and therefore rejected the allegation of breach of Regulation 5.
10. It is argued that he misdirected himself in that he failed to grapple adequately with the way in which the case was being put, namely that the whole operation carried with it an inherent degree of foreseeable risk and that there was therefore strict liability.
11. It is plain on authority that the employer has to start by considering what the foreseeable degree of risk is from an operation and then provide suitable equipment. It is true that the judge did not spell out his findings in that regard as fully as he might. However, he clearly had well in mind the way in which the appellant put the case because he set that out in some detail and it is, I think, plain from his findings that he considered that the equipment itself was suitable. Of course, with any equipment which is itself inherently safe to use, there may be a possibility of user error, but it does not follow from this that the equipment which was safe, if properly used in accordance with instructions, is to be regarded as statutorily unsuitable. Essentially, there was a finding of fact by the judge that there was nothing unsuitable or defective about the motorcycle itself; the fault, unhappily, was in the appellant's operation of it.
12. I see no real prospect of this court reversing a finding of fact on a matter of that kind. It involved an evaluation, but it was a matter for the judge's evaluation having seen and heard the witnesses.

13. Accordingly, I am not persuaded that there is any real prospect of an appeal succeeding and this renewed application is refused.

Order: Application refused