IN THE HIGH COURT OF JUSTICE **Case No.HQ01XO4809**

QUEEN'S BENCH DIVISION

B E T W E E N

MICHAEL WRIGHT

Claimant

and

ROMFORD BLINDS AND SHUTTERS LIMITED

First Defendant

and

PETER BAKER
Trading as SPRAY AND BAKE

Second Defendant

[2003] EWHC 1165 (QB)

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Michael Harvey QC

JUDGMENT

INTRODUCTION

1. On 7 December 1998 the claimant, who was then aged 55, fell from the top of a Ford Transit van onto the concrete ground at the front of the vehicle. He suffered a severe head injury involving a fracture of his left temporal bone and a subarachnoid haemorrhage. He also suffered a fractured left clavicle, multiple fractured ribs, and other less serious injuries.

2. At the time of the accident the claimant was employed by the first defendants as a fitter and installer of shutters. The first defendants, as their name implies, were a company engaged in the manufacture, supply and installation of blinds and shutters for commercial and retail premises. On 7 December 1998 the claimant was sent to the premises of the second defendant at Bankside Industrial Park, Barking, to collect bundles of shuttering which had been delivered to the second defendant a few days earlier for spray coating. He was provided with a Ford Transit van fitted with a roof rack. The accident happened at the premises of the second defendant when he was standing on top of the van engaged in loading the bundles of shuttering, which were about 18 feet 3 inches long, onto the roof rack. He was being assisted by two employees of the second defendant, Mr Paul South and Mr Tony Fisher, who were on the ground passing the bundles of shuttering up to him. The precise circumstances of the accident are in issue.

3. On 21 November 2001 the claimant commenced these proceedings against the first and second defendant. He alleges that the first defendants were in breach of various health and safety regulations and were negligent. In particular he alleges that they were negligent in failing to provide a reasonably safe system of work and in failing to send another employee to assist him in the loading operation. He alleges that the second defendant was vicariously liable for the negligence of Mr South and/or Mr Fisher in the manner in which they passed the bundles of shuttering up to him. In essence he alleges that one or both of them passed a bundle of shuttering up before he was ready to receive it, thereby striking him on his left side and causing him to fall.

4. The first defendants deny that they were in breach of statutory duty or negligent, and contend that the accident was caused by the negligence of the second defendant in, broadly, the way I have mentioned. They also assert that the claimant suffered from vertigo before the accident and raise an issue as to whether his fall was caused thereby. They allege contributory negligence by the claimant, including in particular allegations that he failed to take sufficient care for his own safety, failed to advise them of his alleged vertigo and stood on the roof of the van when, by reason of such vertigo, it was unsafe to do so.

5. The second defendant denies negligence, and adopts the allegations of breach of statutory duty and negligence made by the claimant against the first defendants. He also raises issues as to whether the fall was associated with the claimant's pre-existing medical condition. Additionally, he raises an issue as to the manner of construction of the roof rack. The claimant's case is that the

roof rack had a wooden platform upon which a person could walk or stand. The second defendant contends that it was a simple metal framework without any wooden platform such that a person on the roof of the vehicle would have to stand on the metal roof of the vehicle itself and stand upon or step over the transverse struts of the roof rack. He alleges contributory negligence by the claimant. In particular, he alleges that the claimant worked on the top of the van when it was unsafe to do so.

6. On 27 September 2002 Master Leslie ordered that there be a trial of liability before any assessment of damages. Accordingly, this judgment is confined to the issue of liability.

THE ISSUES

7. The issues can be summarised as follows:-

(1) The construction of the roof rack.

(2) The circumstances of the accident.

(3) Whether the first defendants were in breach of statutory duty or negligent, and if so whether this was a cause of the accident.

(4) Whether the second defendant was negligent, and if so whether this was a cause of the accident.

(5) Contributory negligence.

I shall consider the issues separately but I bear in mind that the evidence and arguments relating to them may overlap.

CONSTRUCTION OF THE ROOF RACK

8. Mr Ronald Arnold was the proprietor of the first defendants. He had been responsible for its affairs from 1955 until his retirement in about 1999. He told me that at the time of the accident the company had three vans, each with a roof rack, and that the one involved in the accident was a blue Ford Transit registration G397 WMK as shown in the photographs at pages 109-114 of the trial bundle. He said that these photographs had been taken about two months after the accident. He explained that they were taken because of a possible claim by the claimant, and that he had been asked by the company's insurers to make the van available for photographing. He said that he did not know who the photographer was, but that the photographs showed the roof rack as it was at the time of the accident, and that he and his employees had in fact manufactured the roof rack themselves. They had designed it to have a platform of slatted wooden boards. He agreed with the measurement of 15 feet 4 inches shown as the length of the platform on the photograph at page 113, and by inference the other measurements written on that photograph,

including the width of 4 feet and the height of 7 feet. He said that there was a roller at the rear of the platform, but none at the front, and that the front of the platform extended beyond the front of the roof to about level with the bottom of the windscreen.

9. The claimant's evidence was that the roof rack was as shown in the photographs at pages 109 to 114. He said that he had used the vehicle regularly before the accident. He agreed that there was a roller at the back, but said that there was also one at the front. He denied the second defendant's suggestion that there had been no platform at all. He said that the roof rack projected partly over the windscreen, but that about 14 inches of the windscreen was not covered.

10. Mr Arnold's evidence derives support from two documents which came into existence shortly after the accident. The first is the first defendants' Employers Liability Report form completed by Mr Arnold on 17 December 1998. This includes the statement that the claimant "fell from platform on Transit van" (page 129). The second is the entry in the first defendants' Accident Report book reading "Michael Wright fell from platform of Transit vehicle – reasons unknown" (page 131).

11. The contrary evidence comes principally from Mr Paul South. In his witness statement, dated 17 April 2000, he described the roof rack as being fitted with rollers at each end, but he said nothing one way or the other about whether it had a platform. On the first day of the trial Miss Deborah Taylor, who appeared on behalf of the second defendant, informed me that the second defendant would contend that the roof rack had no platform. She said that the relevance of the point had only become apparent to Mr South and Mr Fisher that morning when they had been shown, for the first time, the photographs at pages 109-114. Supplemental witness statements were served by Mr South and Mr Fisher on the second day of the trial. Mr South's evidence was that the roof rack was made out of box section metal, with sections (or struts) across the width of the vehicle, but that there were no wooden slats creating a platform. He also said that there was a large open overhang at the front of the vehicle, supported by two vertical support bars bolted to the bottom of the vehicle. He said that he recalled the construction of the roof rack from the fact that he had been attending the claimant whilst he was lying on the ground awaiting the arrival of the emergency helicopter. He said that the void at the front of the roof rack was the one thing which struck him. He also said that there was a roller at both the back and front of the roof rack.

12. Mr Fisher gave broadly similar evidence to Mr South, but he agreed in cross-examination that he could not say whether there was or was not a wooden platform but simply that he did not see one. He also thought that there were rollers at both back and front. He agreed that his recollection could be flawed with the passage of time.

13. Mr Baker, the second defendant, went out to the van after he had been informed of the accident. He could not remember whether or not the roof rack

had wooden slats. He said that there were two rollers, one at the back and one near, but not at, the front. He said that he did not stand and study the vehicle.

14. I am satisfied that the roof rack had a wooden platform and was as depicted in the photographs at pages 109-114. This is the clear evidence of Mr Arnold and the claimant and is supported by the two contemporaneous documents I have mentioned. There is no way that Mr Arnold could be mistaken about its construction and I think it most improbable that he deliberately replaced the roof rack after the accident and deceived his insurers and others as to its true construction. I consider that Mr South is mistaken in his recollection. He must have seen many different vans with various types of roof rack during his work for the second defendant. I have not overlooked the fact that the windscreen was cracked in the accident. Whilst it is true that Mr South's and Mr Fisher's recollection of the void in the roof rack above the windscreen would readily explain how the claimant struck the windscreen before hitting the ground, the presence of the crack does not, in my judgment, lead to the inevitable inference that there was not a platform. The photographs show that the platform extended beyond the roof of the vehicle, but even if, as I think, it extended up to about the foremost part of the windscreen it is not impossible that some part of the claimant's body came into contact with the windscreen as he fell.

15. There is no dispute that there was a roller at the rear of the roof rack, but I am not satisfied that there was one at the front. Mr Arnold, who was responsible for its construction, says that there was no front roller. His evidence is that the front bar was a piece of angled metal in the shape of an L and that the wider component shown in the photograph was reinforcement of the corner.

THE CIRCUMSTANCES OF THE ACCIDENT

16. The bundles of shuttering which the claimant was collecting were described in the second defendant's invoice dated 2 December 1998 (page 121) as including:

> "24 bundles of shuttering approx size 32" x 219"
>
> 4 bundles of shuttering approx size 22" x 219"".

Each bundle consisted of about eight slats, each 4 inches wide by 219 inches long (18 feet 3 inches), joined together to form part of a roller shutter. The parts would subsequently be joined to each other by the first defendants to form a complete roller shutter capable of enclosing an area such as a shop front. Each part to be collected was rolled up thus forming a long tube or bundle, 18 feet 3 inches long, and a little over 7 inches in diameter. The second defendant's staff wrapped each such bundle in brown paper and taped it at the ends and at about two other places along its length.

17. The bundles in question have not been weighed. Mr Humphrey, the joint expert, was shown comparable bundles when he visited the first defendants' premises on 3 February 2003. They were 5.92 metres (19 feet 5 inches) long and 180 millimetres (a little over 7 inches) in diameter. They are shown in the photographs at pages 108 F, G and H. Each comparable bundle weighed 39 kilograms. They were constructed with an open or mesh type section (as Mr Arnold says were the bundles in question). Allowing for the slightly longer length of the comparable bundles I conclude that each of the bundles being collected by the claimant weighed about 36 kilograms.

18. The claimant's evidence was that he parked the van in the compound directly outside the doors of the second defendant's premises. The rear of the van was closest to the doors. Two employees of the second defendant came to help him load. He climbed onto the roof rack of the van, and the two employees began to pass bundles up to him individually. He described how each bundle would be placed so that its upper end was resting against the rollers at the rear of the platform. He would initially stand near the rear of the platform, take hold of the bundle near its uppermost end and then move to the middle of the platform, kneel down and put the bundle in place on the left side of the roof rack. He said that it was his practice to place loads on the left hand side of the roof rack so that he could gain access to the vertical steps which were affixed to the right hand rear door. He told me that the bundles were coming up faster than he could handle and that after he had loaded about four bundles and was getting up from kneeling down he was struck on the left hand side, just under his armpit. He said that he tried to stop himself falling off but he could not do so, and that he remembered hitting the windscreen but does not know what happened after that. Although he did not see what had hit him, his case is that it could only have been the next bundle being pushed up by one or both of the second defendant's employees, and that this bundle knocked him off balance, causing him to fall.

19. Both defendants contend that the claimant, in consequence of his serious head injury, has no true recollection of the precise circumstances of the accident. It is therefore necessary to consider more closely the nature of his injuries and the evidence relating to his recollection.

20. The claimant was rendered unconscious. He was taken by emergency helicopter to the Royal London Hospital and remained in the intensive therapy unit until 28 December 1998. Mr Jacobson advises in his report dated 23 January 2002 that the claimant was not fully orientated until about 12 January 1999, suggesting a duration of post-traumatic amnesia of about five weeks consistent with a diagnosis of very severe traumatic brain injury. He was transferred to Southend Hospital on 12 January 1999 and discharged home one week later. Mr Jacobson records that the claimant remembers little of the following year, 1999, and that according to his wife his difficulties during that year included irritability , poor concentration and memory, and that he seemed muddled and forgetful. The claimant has not resumed work, and his persisting difficulties (at the time of Mr Jacobson's report in January 2002) included cognitive deficits affecting concentration, sequencing and memory.

21. The notes made on the claimant's admission to Southend Hospital on 12 January 1999 record the following account of his accident:-

> *"Was on top of a van, a car drove into the front of the van and the impact knocked him off"*.

The claimant acknowledged that he had thought at one time that his van had been hit by a vehicle.

22. The claimant also told me that it was not until about March or April 1999 that the memory first came into his head about being knocked off his van. However, he agreed he had been having long periods of confusion and was still in a state of confusion in June 1999.

23. Mr Jacobson interviewed the claimant and his wife on 18 January 2002. He has recorded that the claimant found it difficult to remember events since the accident (page 149) and that his last memory is of standing on the roof of the van and hitting the windscreen (page 151).

24. In the light of this evidence I do not consider that the claimant has any reliable memory of the precise events of the accident. This is no reflection upon him, but is solely the result of his very serious head injury.

25. Mr South's account is that he and Mr Fisher brought bundles of shuttering out to the van one at a time. He lifted each bundle up onto the edge of the roof rack and let the claimant take the end of the load and drag it onto the roof rack. Whilst the claimant was pulling the bundle up he guided it and Mr Fisher supported the other end. After receiving confirmation from the claimant that he was "o.k." the two of them went to collect the next bundle. He said that after they had passed up about six bundles and had started to walk back for the next bundle they heard a crash. When they turned to look the claimant was no longer standing on the roof. Mr Fisher then found him lying on the ground at the front of the van.

26. Mr Fisher's account was similar. He said that after finding the claimant lying on the ground he ran upstairs to ask Sarah Baker to telephone for an ambulance.

27. Both Mr South and Mr Fisher denied that they had sent up the bundle too quickly.

28. There were no other witnesses to the happening of the accident. However, Mr Tony Reynolds gave evidence relating to its immediate aftermath. He said that he was walking past the second defendant's premises on his way to his brother's place of work about 100 yards further on. He said that he saw a man lying on the ground next to a van and noticed blood from his head and that he was unconscious. He said that he then ran to his brother's place of work and together they telephoned for the police and an ambulance. He said that he and

his brother then returned to the second defendant's premises, placed the man in the emergency position and cleared his airway to ensure that he did not choke on his tongue. He then described how he knocked on the door of the second defendant's premises, told them that their mate was hurt, but was shocked by their response because they did not seem surprised or bothered at all. He said that they just laughed at him and said that he was mucking around and that he would get up in a minute. He then described how later, when they were waiting for the ambulance, the injured man's mobile telephone rang and one of the second defendant's employees answered it and said that the injured man had "gone". He said that this employee referred to the injured man as "John". He said that the following day he telephoned the Royal London Hospital to find out how the man was, and left his name and telephone number. He also sent a "Get Well Soon" card to "John" at the second defendant's premises.

29. There is a reference in the hospital notes to a witness visiting the hospital on 9 December and leaving his name and telephone number. This would appear to relate to Mr Reynolds, and confirm this aspect of his evidence. However, there are several difficulties in accepting those aspects of his evidence which cast aspersions on the conduct of the second defendant's employees. First, his evidence is contradicted by that of Mr South, Mr Fisher, Mr Baker and Miss Sarah Baker who variously described the urgency with which the second defendant's employees dealt with the emergency. Second, the incident could well have caused a degree of shock and alarm to those present, particularly when it was appreciated that the life threatening nature of the injuries required the police to close River Road so that a helicopter transfer could take place. Third, Mr Reynolds did not make his statement until November 2002 – almost four years after the accident and inevitably his recollection may have suffered with the passage of time.

30. Mrs Wright gave evidence of noticing a large bruise on the claimant's left side. Although there is no specific reference to such bruising in the medical notes the claimant undoubtedly suffered a head injury to his left side and a fractured left clavicle. He also suffered fractured ribs but the location of the fractures is not specified. I therefore think that it is quite likely that there was some bruising to his left side, but I cannot accept that this is any indication that he was struck on the left side by a shutter, as distinct from falling partly on his left side.

31. In my judgment there is no satisfactory evidence that Mr South and/or Mr Fisher passed up a bundle in an improper way or struck the claimant with a bundle. On the contrary I accept the evidence of Mr South and Mr Fisher and find that the last bundle which they passed up to the claimant was received by the claimant and that the accident happened after they had turned away to fetch the next bundle leaving the claimant to stack the bundle he was holding. I find that they had been passing bundles up in a normal manner, and had not been doing so too quickly.

32. This still leaves the question of why the claimant fell. Both defendants have raised issues concerning his pre-existing medical condition, and it is to this aspect that I now turn.

33. The first possibility which has been suggested is that the claimant may have experienced an attack of vertigo. Reliance is placed on entries in his general practitioner's notes showing that he had attended on 11 August 1997 complaining of vertigo, and given a history of a head injury sustained 20 years previously, and that he had attended again on 6 October 1997 when a complaint of vertigo was again recorded. Although the claimant denied that vertigo had been mentioned or discussed I am satisfied that some symptoms suggestive of vertigo must have been mentioned to explain these entries. However, the fact remains, as emphasised by Mr Treverton Jones QC on behalf of the claimant, that the last attendance on 6 October 1997 was 14 months before the accident. In the meantime the claimant had worked regularly for the first defendants, often on ladders or at heights, with no complaint of vertigo.

34. The second possibility which has been suggested is that the claimant may have fainted or collapsed. He agreed that in 1998 he had been suffering from stress which he attributed to his divorce proceedings. He agreed that he had complained to his doctor of chest pain on 16 January 1998. A further complaint of aches and pains is recorded on 14 July 1998, but his blood pressure on that occasion was not abnormal (130/80). He denied that he had experienced a sharp chest pain when standing on the van on the day of the accident, and that this was the cause of his fall.

35. There has been no medical evidence directed to the cause of his fall. The three medical reports placed before me deal essentially with the injuries sustained in the accident and the claimant's present medical condition. Although they record matters relating to his pre-accident medical history they do not proffer any opinion as to whether such matters could have caused or contributed to his fall. Mrs Wright, the claimant's present wife, gave evidence of a conversation with an unnamed doctor at the Royal London Hospital a day or two after the accident to the effect that he thought it unlikely that the claimant had fainted. I cannot, however, give any weight to this evidence because I do not know what information was available to this doctor, the circumstances in which the conversation occurred, or whether the doctor's remarks and reasoning have been accurately remembered by Mrs Wright. I bear in mind that the conversation occurred at a time when the claimant was gravely ill and Mrs Wright and other relatives would have been understandably anxious about his condition.

36. There are two features, which in my judgment, give guidance as to why the claimant fell. The first is the inherent danger of the work he was undertaking. He was working on a platform about 4 feet wide by 15 feet 4 inches long, and the working area was steadily diminishing as the loading operation proceeded. If four bundles were placed side by side the available working area would be only 18 inches (48 inches less 30 inches, taking an effective diameter of each bundle of 7½ inches). If five were placed side by side the available working area would be reduced to only 10½ inches. He might, of course, have decided to place one or more of the bundles on top of the others, i.e. forming a second layer. Whether or not he did so the loading operation involved the claimant

pulling each bundle to the front of the van. This was the evidence of Mr South and Mr Fisher which I accept. This would most likely have led to him moving close to the front end of the platform. He would then have to position the bundle so that it was located, longitudinally, in the desired position, i.e. with the desired overhang at the front and rear. This would probably involve a degree of pushing and pulling of the heavy, paper covered, bundle. If his hands had slipped when, for example, he was attempting to heave the bundle forwards, or the bundle had snagged but then come loose, he could easily have found himself flying forwards, head first, over the front of the roof rack.

37. The second feature is the time at which the accident occurred. It happened immediately after Mr South and Mr Fisher had passed a bundle up to the claimant. They said that they were just walking back to collect the next one. Accordingly, the claimant would still have been engaged in the final positioning of the bundle at the time they heard a crash. I also think that the noise they heard might not have been simply the claimant falling and striking the windscreen and ground, but also a bundle falling back onto the platform of the roof rack. Both Mr South and Mr Fisher initially thought that the crash which they heard was the claimant dropping the bundle onto the roof rack.

38. I am therefore satisfied that the claimant's fall was directly associated with the loading operation which he was carrying out, and was not caused or contributed to by any medical incident such as an attack of vertigo or a faint. I think that the most likely explanation is that the claimant was positioned near the front of the roof rack and that when he was manhandling the bundle into its final position either he lost his balance in the way I have described in paragraph 36, or he lost his footing and fell, head first, off the front of the roof rack.

THE CASE AGAINST THE SECOND DEFENDANT

39. In the light of my findings the case against the second defendant fails. I find that there was no negligence by the second defendant or his employees.

THE CASE AGAINST THE FIRST DEFENDANTS

The Manual Handling Operations Regulations 1992

40. The Manual Handling Operations Regulations 1992 are health and safety regulations made under s.15 of the Health and Safety at Work etc. Act 1974. By virtue of s.47(2) of the Act any breach of a duty imposed by these regulations, so far as it causes damage, is actionable except in so far as the regulations provide otherwise. The regulations apply to the first defendants who were the employers of the claimant.

41. Regulation 4 provides as follows:-

> *"(1) Each employer shall –*

(a) *so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or*

(b) *where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured –*

(i) *make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that Schedule,*

(ii) *take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable, and*

(iii) …

(2) *Any assessment such as is referred to in paragraph (1)(b)(i) of this Regulation shall be reviewed by the employer who made it if –*

(a) *there is reason to suspect that it is no longer valid; or*

(b) *there has been a significant change in the manual handling operations to which it relates;*

and where as a result of any such review changes to an assessment are required, the relevant employer shall make them".

42. Manual handling operations are defined in reg.2 as meaning "any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or by bodily force".

43. The expression "injury" includes any form of injury (other than immaterial exceptions relating to toxic or corrosive substances present on or leaking from

a load) and is not, for example, confined to back injuries. There must, however, be a real risk of injury. As Hale LJ explained in Koonjul v. Thameslink Health Care Services [2000] PIQR 123 at p. 126,

> *"There must be a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability".*

44. In my judgment there was no breach of reg. 4(1)(a). I am satisfied that it was not reasonably practicable for the first defendants to avoid the need for their employees to undertake any manual handling operations at work which involved a risk of their being injured. Their business involved the manufacture of shuttering which had to be sent away to specialists, such as the second defendant, for coating. The delivery and collection of the shuttering would have to be made by road, and whatever size or type of vehicle was used it would not be reasonably practicable to avoid manual handling which involved a risk of injury. The shuttering was heavy and bulky, and even if mechanical aids, such as a hoist affixed to a vehicle, had been provided there would still have been a need for manually transporting the shuttering to or from the vehicle.

45. The duties under reg.4(1)(b) therefore arose, and it is common ground that sub-paragraphs (i), (ii) and (iii) create separate obligations. See Swain v Denso Marston Limited [2000] ICR 1079.

46. It is convenient to consider reg.4(1)(b)(ii) first. This required the first defendants to take appropriate steps to reduce the risk of injury to the claimant arising out of his undertaking manual handling operations to the lowest level reasonably practicable. It is accepted by Mr Pershad who appeared on behalf of the first defendants that the burden of proving that it was not reasonably practicable to do so lies upon the first defendants, but for the reasons which I explain below my conclusion does not depend upon burden of proof.

47. The method of work adopted by the first defendants for transporting long lengths of shuttering involved the use of this, and two similar, Ford Transit vans, fitted with roof racks of the construction I have described. The particular roof rack was 7 feet (2.1 metres) above the ground. As I have said it measured about 15 feet 4 inches long and 4 feet wide. It had no guard rails or hand holds. It had no raised edges to prevent a foot slipping over the edge of the platform. It had two, or sometimes four, short removable vertical poles about 18 inches high for retaining loads, but I reject the suggestion that these poles were intended to be hand holds or grab handles or could readily have been used as such. The method which the first defendants adopted for the loading of the bundles of shuttering onto the roof rack was as I have already described. One employee, in this case the claimant, would stand on the roof rack while the bundles were passed up to him individually. He would then pull the bundle onto the roof rack, walking towards the front as he did so, and manhandle it into the correct position. The bundles were heavy (about 36 kilograms) and awkward. It is likely that the employee would from time to

time be exerting a considerable force upon the bundle as he pulled it up, or positioned it before lowering, or then moved it into its final desired position.

48. In my judgment this was an inherently dangerous method of work. There was a serious risk of falling from the platform. If an employee were to fall he would be likely to suffer injury, and perhaps very serious injury. I reject Mr Arnold's suggestion that working on top of a van was no different from standing on a pavement.

49. I am fortified in this conclusion by the fact that both the United Kingdom Parliament and the Council of the European Communities have passed legislation aimed at preventing falls at work, often stipulating that safeguards such as guard rails must, so far as reasonably practicable, be provided where a person is liable to fall more than two metres or a distance likely to cause personal injury. I refer particularly to:-

(1) Reg.13 of the Workplace (Health, Safety and Welfare) Regulations 1992 (referring to a distance likely to cause personal injury). This is considered in more detail below.

(2) The Temporary or Mobile Construction Sites Directive of 24 June 1992 (92/57/EEC). See annex IV, Part B, Section II, para. 6(2) relating to work platforms on construction sites.

(3) Reg.6(3) of the Construction (Health, Safety and Welfare) Regulations 1996 (referring to a distance of two metres).

(4) Reg.24(3) of the Shipbuilding and Ship-Repairing Regulations 1960 (referring to a distance of two metres).

50. I have also been referred to the following guidance literature relating specifically to the risk of falls from vehicles:-

(1) The Approved Code of Practice relating to the Workplace (Health, Safety and Welfare) Regulations 1992. Paragraph 138 reads,

"Loading or unloading vehicles

The need for people to climb on top of vehicles or their loads should be avoided as far as possible. Where it is unavoidable, effective measures should be taken to prevent falls".

(2) Guidance Note GS9(R) entitled "Road transport in factories and similar workplaces", issued by the Health and Safety Executive in October 1992. Page 7 includes the following passage,

"Falls from vehicles and loads

Accidents occur frequently when people fall from vehicles during loading, unloading, or sheeting operations. It is inevitable that people will from time to time have to work on top of loads and, although it is not possible to ensure total safety in this work, the risk of injury may be reduced by giving attention to the following points:

(a) provision of safe means of access to and from the vehicle;
(b) instruction of all personnel in the danger involved;
(c) the use, where appropriate, of suitable mechanical handling equipment.

Other precautions may also be available depending upon the nature of the work involved…"

(3) Guidance booklet "Workplace Transport Safety" issued by the Health and Safety Executive in 1995. Paragraph 145 reads,

"Wherever possible, the need for people to climb on top of vehicles should be avoided. For example, 'bottom filling' and fitting level gauges and controls, which are accessible from ground level, avoid the need for drivers to climb on top of road tankers".

51. The evidence satisfies me that the first defendants failed to take appropriate steps to reduce the risk of injury to the claimant to the lowest level reasonably practicable. There were three courses of action, each of which was reasonably practicable, which would have substantially reduced the risk of injury.

52. The first course of action, and probably the easiest, would have been to change the method of loading such that the claimant was not required to stand and work on the roof rack. In my judgment the bundles could have been safely and satisfactorily loaded from the side albeit (1) the claimant and an assistant would have needed to mount stepladders, or boxes, to reach the roof rack and (2) it might have been necessary for the first defendants to reduce the individual weight of the bundles. As I explain below each bundle consisted of

about 8 interlocking slats so that the first defendants would easily have reduced the weight of a bundle by reducing the number of slats in it.

53. Both the claimant and Mr Arnold told me that there were in fact two stepladders in the van which could have been used. The claimant also said that it was his practice to use a stepladder to enable him to tie the bundles to the roof rack at front and back. In the light of this practice I found it difficult to accept his objection to the use of stepladders for side loading, namely that they had a tendency to walk across the floor. I accept that care would have to be taken in the positioning of the stepladders, as indeed would always be the case with stepladders. Mr Pershad elicited from Mr Humphrey that stepladders would have to be of a sufficient duty rating to carry the weight of the workman and the load he was carrying, but that presents no problem. Mr Humphrey explained that stepladders with a duty rating of 130 kilograms are obtainable, and I would be surprised if the stepladders on the van were of inadequate duty rating.

54. Mr Pershad submitted that side loading would introduce a new and different risk, namely that of injury from lifting the bundle above shoulder height. He referred me to appendix 1 of booklet L23 entitled "Guidance on Regulations" showing a basic guideline figure of 10 kilograms and submitted that if the claimant had to carry half the weight of the bundle (i.e. 18 kilograms) he would be exceeding this figure. The figure of 10 kilograms is, of course, a guideline and not a limit. Paragraph 3 of the appendix explains that the intention of the guidelines is "to set out an approximate boundary within which the load is unlikely to create a risk of injury sufficient to warrant a detailed assessment". I also bear in mind that under the first defendants' loading procedure there was no suggestion that the man carrying the front end of the bundle had found it difficult to lift the front end onto the roller at the back of the roof rack. Nevertheless a detailed assessment of the proposed side loading method, involving as it would the mounting of steps or boxes, might have shown that the weight of the bundle should be reduced. Such a reduction would have been reasonably practicable because each bundle consists of about eight separate interlocking slats. The first defendants could therefore have delivered lighter bundles, containing fewer slats, and required the second defendant to redeliver the bundles in the same composition.

55. The second course of action would have been to provide a different type of vehicle, such as an open truck as frequently used by builders. If sufficiently long and fitted with raves (i.e. a metal framework with a horizontal bar and two short vertical retaining posts) located behind the cab the bundles could conveniently rest with their back ends near the tailboard and their front ends over-sailing the cab – in the way that builders often transport ladders. There would be no difficulty for two men in manually loading such a vehicle from the rear, i.e. by lifting the bundle onto the back of the truck and then, with one man standing on the bed of the truck, lifting the front onto the raves. Similarly, the bundles could be loaded from the side (with the side panels and tailboard lowered) and then placed on the raves. Alternatively, raves could also be located at the rear of the truck so that the bundles were carried horizontally on the front and rear raves. Again there would be no difficulty in

manually loading such a vehicle. The loading operation could be facilitated by the provision of a hoist fixed to the truck.

56. It is relevant to note that Mr Arnold hired a flat bedded vehicle to transport the rollers for these bundles of shuttering to the customer at Chester. The rollers were substantially heavier than the bundles of shuttering. I do not know whether the shuttering went on this vehicle or not. I also note that the second defendant had, at sometime prior to the accident, had a flat bedded vehicle which had been used for carrying long lengths of shuttering.

57. I heard evidence about the possibility of using a van, lower in height than the first defendants' Ford Transit, for carrying long bundles of shuttering on the roof rack. The advantage of such a vehicle is that it could be loaded from the ground. This is the type of vehicle that the second defendant now uses. Mr Arnold recognised this advantageous feature. He told me that he did not like the height of his Ford Transit for loading, that it was "not ideal to handle things above shoulder height", and that he wished manufacturers would think of a longer lower vehicle. His reference to a longer vehicle reflected his concern that it was not satisfactory to have the load over sailing the front or rear of the vehicle unless it was above the height of pedestrians. I think that he was right to be concerned about this aspect, particularly if the load is about head height where pedestrians could, when passing in front of or behind stationary or slow moving traffic, fail to see it. Para. 29 of the Highway Code states that loads must not stick out dangerously. I have not received any specific evidence about the maximum length of low vans, but on Mr Arnold's evidence it would seem that no such vans are available.

58. The third course of action would have been to provide guard rails to the platform of the roof rack. Mr Humphrey said that there was no engineering reason why removable guardrails could not be constructed and used. They could be fairly substantial and would provide support. They could be constructed so as not to inhibit the loading operation to any great extent. I accept this evidence. He thought that such guardrails would give significant additional protection. He agreed the assembly and disassembly of the guardrails would introduce its own risks, but I regard such risks as being of a low order when compared with the risk of injury from falling from an unprotected roof rack during the course of a loading operation such as the claimant was undertaking.

59. I therefore find that the first defendants were in breach of reg.4(1)(b)(ii). I am also satisfied that causation is established. I am satisfied that if the first defendants had followed either the first or second course of action the claimant would not have been working from a roof rack, and would not have fallen. Similarly, if the first defendants had followed the third course of action I am satisfied that the guardrails would have prevented his fall.

60. I turn to reg.4(1)(b)(i). The claimant alleged a breach of the duty imposed by this regulation in his Particulars of Claim served on 15 March 2002. Approximately one year later, on 13 March 2003, the first defendants served a witness statement from Mr Arnold. This contained no evidence of any risk

assessment having been carried out. Mr Arnold simply stated, in paragraph 5 of the statement, that the weight of the shutters was such that they could be lifted and transported by one individual. He said in his evidence that he did not know at the time, and still did not know, what the weight of the shutters was.

61. He was asked about risk assessment, and he said that this was done on the job by the people who were doing the job. In my judgment that cannot be a sufficient discharge of the duty imposed upon the employer. The assessment must at least be under the control of management, or an outside consultant, even if, as will frequently be the case, employees are involved in the assessment. See the remarks of Robert Walker LJ in Swain v. Denso Marston Limited [2000] ICR 1079 at paragraphs 12 and 19.

62. As regards working from a roof rack Mr Arnold said that the design of the roof rack had been discussed by a committee of the employees, before the claimant had joined. However, I am far from convinced that this involved any assessment of the risk of loading and unloading bundles of shuttering whilst standing on the roof rack.

63. I find that the first defendants made no assessment of the manual handling operations to be undertaken by the claimant and other employees when collecting bundles of shuttering from the premises of outside contractors such as the second defendant. If I am wrong and some degree of assessment was made by the first defendants then I am satisfied that it was not a suitable and sufficient assessment, and that breach of this regulation is established. For the reasons explained in paragraphs 46 to 59 above, causation is established because a suitable and sufficient assessment would have shown that the first defendants' method of working did not reduce the risk of injury to the lowest level reasonably practicable.

Provision and Use of Work Equipment Regulations 1998

64. The claimant also relies upon the Provision and Use of Work Equipment Regulations 1998. These are also health and safety regulations, the breach of which gives rise to civil liability. They applied to the first defendants as the claimant's employer.

65. Reg.4 provides:-

> *"Suitability of work equipment*
>
> *(1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.*
>
> *(2) In selecting work equipment, every employer shall have regard to the working conditions and to the risks to the*

health and safety of persons which exist in the premises or undertaking in which that work equipment is to be used and any additional risk posed by the use of that work equipment.

(3) Every employer shall ensure that work equipment is used only for operations for which, and under conditions for which, it is suitable.

(4) In this regulation "suitable"-

(a) …means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person …"

66. Work equipment is defined in reg.2(1) as meaning "any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)". The claimant contends that the van, including its roof rack, was work equipment, and I accept this contention. I think that the van came within the meaning of the expression "appliance" or "apparatus". I note that in Crane v. Premier Prison Services [2001] CLY 3298 a prison van was held to be work equipment.

67. The claimant first alleges a breach of reg.4(1). It is therefore necessary to determine the purpose for which the van, and in particular its roof rack, was used or provided. If the purpose is to be regarded as simply the transportation of bundles of shuttering, then the construction of the roof rack was suitable for that purpose. If, however, the purpose is to be regarded as a wider purpose, namely the use of the roof rack for both the transportation of the bundles and as a workplace for the claimant when loading the bundles, then the answer may be different.

68. On the evidence before me the first defendants provided the van with the intention that the claimant would stand and work upon the roof rack for loading in the manner I have already described. In short, they were expecting the claimant to use the roof rack as a work place during the loading operation. Accordingly, I think that I must consider this wider purpose when applying reg. 4(1). On this basis there was a breach of the regulation because the platform, having no guardrails, was not so constructed as to be suitable for this purpose.

69. Alternatively, if I am wrong in my characterisation of the purpose for which the van and its roof rack were used or provided, I am satisfied that there was a breach of reg. 4(3). For the reasons I have already explained the roof rack was not suitable for operations, or use under conditions, which involved the claimant standing and working upon the roof rack whilst loading the bundles. The first defendants failed to ensure that it was not so used.

70. For the reasons considered previously I am satisfied that causation is established.

71. Mr Treverton Jones informed me that he was not pressing a claim under reg. 9 of these Regulations relating to training.

THE WORKPLACE (HEALTH, SAFETY AND WELFARE) REGULATIONS 1992

72. Next, the claimant relies upon the Workplace (Health, Safety and Welfare) Regulations 1992. These are also health and safety regulations, the breach of which gives rise to civil liability. The claimant contends that the first defendants were in breach of reg. 13 in failing, so far as was reasonably practicable to take suitable and effective measures to prevent him from falling a distance likely to cause personal injury.

73. Reg.13 provides as follows:-

> *"Falls or falling objects*
>
> *(1) So far as is reasonably practicable, suitable and effective measures shall be taken to prevent any event specified in paragraph (3).*
>
> *(2) So far as is reasonably practicable, the measures required by paragraph (1) shall be measures other than the provision of personal protective equipment, information, instruction, training or supervision.*
>
> *(3) The events specified in this paragraph are –*
>
> *(a) any person falling a distance likely to cause personal injury…"*

74. The duty imposed upon the first defendants, as employers, is set out in reg.4. This provides,

> *(1) Every employer shall ensure that every workplace, modification, extension or conversion which is under his control and where any of his employees works complies with any requirement of these Regulations which –*

(a) applies to that workplace or, as the case may be, to the workplace which contains that modification, extension or conversion; and

(b) is enforced in respect of the workplace, modification, extension or conversion".

75. An initial question is whether the platform of the roof rack upon which the claimant was standing and working was a workplace to which these regulations applied. Workplace is defined in reg.2 as meaning "any premises or part of premises which are not domestic premises and are made available to any person as a place of work". Premises is defined in s.53 of the Health and Safety at Work etc. Act 1974 as including any place and, in particular, any vehicle. This definition will be applicable to the regulation by virtue of s.11 of the Interpretation Act 1978. Accordingly, I am satisfied that the platform of the roof rack was a workplace.

76. Reg.3 is concerned with the application of the regulations to particular workplaces. Reg.3(3) states,

> *"As respect any workplace which is or is in or on an aircraft, locomotive or rolling stock, trailer or semi-trailer used as a means of transport or a vehicle for which a licence is enforced under the Vehicles (Excise) Act 1971 or a vehicle exempted from duty under that Act –*
>
> *(a) …*
>
> *(b) Regulation 13 shall apply to any such workplace only when the aircraft, locomotive or rolling stock, trailer or semi-trailer or vehicle is stationary inside a workplace and, in the case of a vehicle for which a licence is enforced under the Vehicles (Excise) Act 1971, is not on a public road."*

The van was stationary at the time of the accident. It was inside a workplace, namely the compound used by the second defendant, and on the evidence of Mr Baker, which I accept, the compound was not a public road. Therefore reg.13 was applicable to the platform of the roof rack.

77. Accordingly, it was the duty of the first defendants to ensure that the platform of the roof rack complied with the requirements of reg.13. I have set out reg.13 above. I am satisfied that any person falling a distance of 7 feet from the platform onto the concrete of the compound was likely to cause himself personal injury. For the reasons I have given in paragraph 58 above I am satisfied that it was reasonably practicable to take measures, involving the provision of guardrails, to prevent such a fall. A breach of this regulation is therefore established. It would, of course, have been possible for the first defendants to have avoided a breach of this regulation by ensuring that the

platform was not used as a workplace. Reg.13 would not then have applied to the platform.

NEGLIGENCE

78. Finally, the claimant alleges that the first defendants were in breach of their common law duty of care. It is the duty of an employer to see that reasonable care is taken to provide a safe system of work for his employees. The method adopted by the first defendants for loading bundles onto the roof rack of the vans involved the claimant, or other employee, standing and walking on the roof rack whilst manhandling the heavy and unwieldy bundles. For the reasons I have given in paragraphs 47 to 50 above this was not a safe system of work. There was a foreseeable risk of the claimant, or other employee, falling from the van, and the height was such that injury was likely. Quite apart from the obviousness of the danger there was considerable literature pointing out the risks. Whilst I would not have expected a reasonable employer in a small way of business, such as the first defendant, to have been aware of all such material I would have expected such hypothetical employer to have become aware of at least some of it, and to have taken appropriate steps to institute a safe system. The taking of any of the courses of action described in paragraphs 52 to 58 would have brought above a reasonably safe method of loading.

79. The first defendants elicited from Mr Baker that about two thirds of the second defendant's customers used vans to collect shuttering and the like, and that the normal procedure would be for the driver to get on top of the van. Indeed Mr Fisher said, in relation to different work, that he presently works on a roof rack of a van with no boards. In my judgment the fact that others have adopted a dangerous method of work, and have probably contravened various health and safety regulations, cannot excuse the first defendants. Reg.13 of the Workplace (Health, Safety and Welfare) Regulations 1992 and the literature which I have referred to at paragraph 50, are designed to prevent accidents from falls at work, including falls from vehicles, and it is an unfortunate fact of life that such guidance is not always followed.

80. Mr Arnold referred to the fact that there had been no previous falls from the top of his vans. In my judgment this is the result of good fortune, and is not indicative of the safety of his method of working.

81. I find that the first defendants were negligent, and that such negligence was a cause of the accident.

CONTRIBUTORY NEGLIGENCE

82. The first defendants allege contributory negligence by the claimant. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides that:-

> *"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage …"*

83. One of the allegations is that the claimant failed to take any or any sufficient care for his own safety. I have found that he was following the method of work adopted by the first defendants. I have also found that the accident probably happened when he was manhandling the bundle into its final position and when he lost his balance, or he lost his footing, causing him to fall head first off the roof rack. The accident would not have happened if there had been a guardrail or he had not been working on the roof rack. If there was any clumsiness or inattention by the claimant it was, in my judgment, a momentary lapse in the course of performing a difficult activity with inadequate working space. It is helpful to remember the observations of Lord Tucker in Staveley Iron and Chemical Co v. Jones [1956] AC 627, 648, cited with approval by Lord Hoffmann in Reeves v. Commissioner of Police [2000] 1 AC 360 at 371E ,

> *"in Factory Act cases the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute."*

In my judgment the first defendants have not established that the claimant was responsible for the accident so as to justify any reduction of his damages.

84. Another allegation is that the claimant had failed to advise the first defendants of his bouts of vertigo in 1997 and had decided to stand on the roof of the van when, by reason of his vertigo, it was unsafe for him to do so. I decline to find that he was negligent in either respect. In particular, I note that there is no evidence that he was given a certificate to be off work, or told by his doctor to avoid any particular activities, such as working at heights. Moreover, I have held that the accident was not caused or contributed to by any medical incident such as an attack of vertigo or a faint. This allegation therefore also fails.

85. A further allegation is that the claimant failed to hold onto the rails of the van provided in the form of the roof rack. This fails on the facts. I have found that there were no guardrails, and neither the wooden slats of the roof rack nor the short vertical posts formed adequate hand holds.

86. Other allegations of contributory negligence relate to the claimant's liaison with the second defendant's employees, but these are no longer relevant in the light of my findings as to how the accident happened.

87. The allegations of contributory negligence therefore fail.

88. For all the above reasons there will be judgment for the claimant against the first defendants, with no reduction for contributory negligence. The claimant’s action against the second defendant will be dismissed.

Michael Harvey QC