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Court of Appeal

*Humphrey *v* Aegis Defence Services Ltd and another

[2016] EWCA Civ 11

2015 Dec 15;
B 2016 Jan 14

Moore-Bick, Richards, Floyd LJJ

Negligence — Duty of care — Breach — Claimant injured while working for defendants providing security services in connection with reconstruction of Iraq — Whether defendants in breach of duty of care — Whether social utility of activity relevant factor

C The claimant, a former marine, was contracted by the second defendant to work for the first defendant providing security services in connection with the reconstruction of Iraq following the war in 2003. His role was to act as part of a security team consisting of two other contractors and an interpreter. The interpreters used by the defendants, who were Iraqi civilians, were known to be less fit than the contractors, who were all former servicemen. During a training exercise the interpreter member of the claimant's team let go of the stretcher they were carrying without warning, causing injury to the claimant's shoulder. The claimant brought a
D claim against the defendants seeking damages for personal injury. The judge found that there had been a modest but not unrealistic risk of an interpreter dropping a stretcher, but that the risk was of soft tissue injury, rather than serious injury. Having had regard to the social utility of the reconstruction work done by the defendants, the judge found that it had been reasonable for them to require the Iraqi interpreters to take part in training exercises without first checking their level of fitness. Accordingly he found that the defendants had not breached their duty to take such care for the
E claimant's safety as was reasonable in all the circumstances and dismissed the claim.

On the claimant's appeal—

Held, dismissing the appeal, that when determining the nature and scope of a duty of care the social utility of the activity in question was a relevant factor to be taken into account, together with the risk of harm, the degree or likelihood that it would occur and the gravity of that foreseeable harm; that it was not the case that the social utility factor could be taken into account only if the measures required to
F reduce the risk of harm would make it impossible to carry on the activity; that, therefore, the judge had been entitled to have regard to the scarcity of Iraqis willing to act as interpreters, the importance of their role and the need for them to work as part of a team with the contractors; and that, accordingly, given the importance of the use of Iraqi interpreters and of their integration into the contractors' teams and the modest degree of risk involved, it was impossible to say that the defendants had been at fault in failing to take further steps to ensure that interpreters were fit enough to
G undertake the training exercise (post, paras 10–11, 13–15, 16, 17).

Daborn v Bath Tramways Motor Co Ltd [1946]2 All ER 333, CA and *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, HL(E) considered.

Decision of Judge Bidder QC sitting as a judge of the Queen's Bench Division [2014] EWHC 989 (QB) affirmed.

The following cases are referred to in the judgment of Moore-Bick LJ:

H *Bolton v Stone* [1951] AC 850; [1951] 1 All ER 1078, HL(E)
Daborn v Bath Tramways Motor Co Ltd [1946] 2 All ER 333, CA
Jolley v Sutton London Borough Council [2000] 1 WLR 1082; [2000] 3 All ER 409; [2000] LGR 399; [2000] 2 Lloyd's Rep 65, HL(E)
King v Sussex Ambulance Service NHS Trust [2002] EWCA Civ 953; [2002] ICR 1413, CA

Tomlinson v Congleton Borough Council [2003] UKHL 47; [2004] 1 AC 46; [2003] 3 WLR 705; [2003] 3 All ER 1122, HL(E)

No additional cases were cited in argument.

APPEAL from Judge Bidder QC sitting as a judge of the Queen's Bench Division

By a claim form the claimant, Dwayne Humphrey, sought damages from the defendants, Aegis Defence Services Ltd and Aegis Defence Services (BVI) Ltd, for personal injury following an accident on 9 August 2009 in Iraq on a fitness for role exercise. The defendants conceded that they owed the claimant a duty of care but denied breach.

By a decision dated 27 February 2014 Judge Bidder QC [2014] EWHC 989 (QB) sitting as a judge of the Queen's Bench Division, on the trial of a preliminary issue of liability, dismissed the claim.

By an appellant's notice dated 18 March 2014 and with permission of the Court of Appeal the claimant appealed on the grounds that the judge: (1) had accepted that participation in the fitness for role exercise had called for a minimum level of fitness and that the defendants had failed to take all reasonably practicable precautions to avoid injury, but had erred in his application of the social utility factor as providing a complete answer to what would otherwise have been a breach of the duty of care; (2) ought to have found that the social utility factor did not apply unless the steps required to reduce the level of risk would have entirely prevented the continuation of the activity in question; (3) ought to have found that the defendants should have checked the fitness of interpreters before requiring them to participate in the fitness for role exercises and thereby ensured that they did not pose a danger to themselves or others; and (4) ought to have found that the defendants had a duty to reduce the risk of injury to the lowest practicable level.

The facts are stated in the judgment of Moore-Bick LJ, post, paras 2–7.

Robert Weir QC and *Eliot Woolf* (instructed by *Bolt Burdon Kemp*) for the claimant.

David Platt QC and *Patrick Blakesley* (instructed by *Kennedys Law LLP*) for the defendants.

The court took time for consideration.

14 January 2016. The following judgments were handed down.

MOORE-BICK LJ

1 This is an appeal against the order of Judge Bidder QC sitting as a judge of the Queen's Bench Division [2014] EWHC 989 (QB) by which he dismissed the claimant's claim for damages for personal injury and gave judgment for the defendants.

2 The claimant, Mr Dwayne Humphrey, is a former marine who was engaged by the second defendant to work for the first defendant providing close protection security services in connection with the reconstruction of Iraq following the war in 2003. It was common ground that no distinction is to be drawn for the purposes of the present proceedings between the positions of the first and second defendants and it will therefore be convenient to refer to them together simply as "Aegis". Mr Humphrey's role

was to act as part of a security team escorting military and civilian personnel to meet contractors.

3 The provision of protection services requires the use of Iraqi interpreters, who are also recruited and trained by Aegis. The work is dangerous, because of the risk of armed attacks by insurgents and their use of hidden improvised explosive devices, and it was necessary for both contractors and interpreters to maintain a certain level of fitness. They had to be capable in an emergency of making an orderly withdrawal under fire, taking with them a wounded colleague. In order to simulate those conditions, security escort teams, each consisting of three contractors and an interpreter, were required from time to time to undertake what was known as a "fitness for role" ("FFR") exercise designed partly as a team-building exercise, partly in order to ensure they could respond appropriately if they met armed insurgents, but mainly to test the fitness of the members of the team. The exercise, which was carried out wearing full kit, involved walking quickly for a distance of about 250 metres, making simulated contact with an enemy force, withdrawing under fire in a manoeuvre known as "pepper potting", in which each pair in turn provided covering fire while the other pair retreated, carrying a loaded stretcher a distance of 250 metres before changing positions and then carrying it a further 250 metres. The exercise had to be completed in 13 minutes. It could be completed at a reasonable walking pace, but in practice an element of competitiveness tended to creep in and it was usually carried out at a fast jog.

4 The contractors themselves were former servicemen who generally maintained a high level of physical fitness, whereas the interpreters, who were all civilians in whose culture high levels of fitness were not so prized, were generally rather less physically fit. In the course of one such exercise conducted on 9 August 2009 the interpreter member of the claimant's team let go of the back left handle of the stretcher they were carrying without warning, causing an additional weight to be thrown on to the claimant, who was holding the back right handle, wrenching his left shoulder. As a result, the claimant brought a claim against the defendants in negligence seeking damages for personal injury. The defendants accepted that they owed the claimant a duty to take such care for his safety as was reasonable in the circumstances, but they denied that they had been in breach of their duty towards him and in due course that question was tried as a preliminary issue by Judge Bidder QC.

5 The judge made the following findings of fact which are of direct relevance to the issues that arise on the appeal:

(i) That the exercise was carried out under supervision, the supervisor accompanying the team in order to observe their progress and to make them aware whether they were keeping up to time (paras 37–38).

(ii) That the interpreter found the early parts of the exercise arduous, because his cardiovascular fitness level was not good enough for the exercise (para 40), but the signs of fatigue were not particularly striking (para 41).

(iii) That the interpreter was puffing and panting after completing the first stage of the exercise, but he gave no verbal indication of wanting to give up before dropping the stretcher, nor did he warn anyone that he was about to do so (para 54).

(iv) That neither the claimant nor the person being carried in the stretcher thought that the interpreter was a risk to their safety (para 77).

(v) That the interpreter was on his first FFR exercise and did not have a minimum acceptable level of fitness (para 112).

(vi) That the standard of fitness of interpreters had been very low between 2005 and 2007, but that by 2009 there had been a significant improvement (para 58).

(vii) That it was sensible and reasonable to require interpreters to train with the contractors and that their training should include a stretcher-bearing exercise (para 62).

(viii) That there had been a previous occasion on which an interpreter had dropped out of a stretcher-bearing exercise as a result of lack of physical fitness (para 64).

(ix) That there was a foreseeable risk of minor soft tissue injury as a result of an unfit interpreter's dropping his handle of the stretcher during an exercise of that kind (para 71).

(x) That Aegis insisted on an induction training exercise and on regular fitness tests, but that it was reasonable to apply a more lenient standard to the interpreters; although Aegis did dismiss some interpreters whose fitness never improved, it was unrealistic to expect them to achieve the same level of fitness as the contractors (para 116).

(xi) That Aegis did not demand a minimum level of physical fitness for employment as an interpreter, but they tested their fitness on induction and encouraged them by regular tests to maintain or improve their fitness (para 73).

(xii) That interpreters were essential to the reconstruction process and that it was extremely important, having regard to their deployment in potentially life-threatening situations, that they should take part in tests designed to encourage an increase in their fitness; that it was also important for them to be part of security escort teams in order to inculcate a team spirit and to make them understand what might happen in an emergency (para 75).

(xiii) That it was not reasonably practicable to reject interpreters or dispense with their participation in the FFR tests because of their comparatively low fitness level because they were such a scarce commodity (para 76).

(xiv) That the interpreter dropped the stretcher by reason of fatigue coupled with an element of deliberation (para 81), rather than simply by accident (para 83); the dominant cause of the accident was the unfitness of the interpreter and his decision to drop the stretcher out of fatigue (para 87).

None of those findings of fact was challenged.

6 When he came to determine whether the defendants had been in breach of their duty of care the judge identified the risks as follows:

> "92. What are then the relevant factors in making the determination of whether the defendants have been proved to have failed in that duty? First of all, what was the nature of the risk? The risk which eventuated and caused the accident, in my judgment, was that of an unfit interpreter, part of the team, through fatigue deliberately or accidentally dropping his end of the stretcher.
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> "93. Secondly, what is the degree of likelihood that a risk of harm would occur? The previous incidents involving stretcher-bearers losing their grip for no apparent reason, and the limited number of incidents of translators not being fit enough to cope and one occasion at least

A dropping the stretcher through unfitness establish that there was a modest but not unrealistic risk of an accident such as this occurring.

"94. Third, what was the severity of the harm which was reasonably likely to result? It is here alleged that the claimant has sustained really serious and long-term harm, but without an assessment of the medical evidence I cannot make a judgment on that. In any event, to use the claimant's injury as a test would be to use hindsight rather than a test of B foresight.

"95. In my judgment, the risk of any serious injury was small. The risk, which was not a great one, was of a soft tissue injury to the arms, shoulders, neck or back."

7 Later, when considering various criticisms that had been levelled at C the defendants he said:

"110. The third criticism is more substantial, namely that the defendants' safety policy required team members to be of broadly similar physical capability and that there ought to be a minimum acceptable level of fitness for a person to take part. I accept the argument that if this were not the case the team would be unbalanced and there was a risk of injury, not only to the unfit member, but to the other members of the team. D

"111. This is a central part of the claimant's case, that the evidence points to this translator not being up to the necessary standard of fitness and the evidence does establish that while Aegis had made consistent efforts to achieve better levels of fitness of Iraqi translators, and had by 2009 a measure of success in achieving that, they did apply different standards to the translators and not all were up to the required standard.

E "112. The evidence does, in my judgment, establish that this translator probably, I find, on his first stretcher exercise, was not up to a minimum acceptable level. Here, I do consider that Mr Blakesley's reliance on the decision in *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, section 1 of the Compensation Act 2006, which both counsel submit, and I agree, adds nothing to *Tomlinson*, at least in this case, and the case of F *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333, is of some significance.

"113. For completeness sake I should say at this stage that I have had regard to and have applied section 1 and I do find that the work of reconstruction of the war-shattered Iraq, which was being done by Aegis, and which was necessary in order to preserve lives, as a desirable activity within the meaning of section 1. I do find that the use of interpreters was G an essential part of that work, and that the taking part in these FFR [fitness for role] exercises was essential for the reasons I have given earlier.

"114. It was not, on the evidence, a reasonable option, a realistic option to make physical fitness a requirement for translators to be engaged in the first place. They were too scarce a commodity for that."

"116. Aegis insisted on an induction training exercise and on regular tests, but it was reasonable to apply a more lenient standard to the H translators. While ultimately they did dismiss some whose fitness simply never improved, it was unrealistic ever to expect them to achieve the same level as the contractors.

"117. The FFR was an intrinsic part in the effort to get them fit. If interpreters were rejected because they were less physically fit than

contractors, there would simply, I find, not have been a sufficient number of them to allow the [security escort teams] to function and the reconstruction work to go on at the required pace.

"118. The House of Lords in the *Tomlinson* case determined that when assessing what care is, in the circumstances of the case reasonable, the social value of the activity giving rise to the risk and the costs of preventative measures must be taken into account. See Lord Hoffmann's judgment at para 34."

"121. In my judgment, it was reasonable in all the circumstances for the defendants to require Iraqi interpreters whose fitness levels were below the standards required for contractors to take part in FFRs and to take the risk that an individual may not have kept up minimum standards of fitness between tests, or in this case, between induction training and the first FFR, and thereby introduce an extra danger into the exercise."

8 Mr Robert Weir QC for the claimant submitted that, properly understood, the judge had accepted the submission that Aegis had failed to take all reasonably practicable precautions to avoid injury to him, but had erred in his application of what might be called the "social utility" factor as providing a complete answer to what would otherwise have been a breach of the duty of care. He argued that the judge had accepted that participation in the FFR test called for a minimum level of fitness, but had wrongly held that to have excluded those interpreters who did not meet the minimum standard would have been to waste a scarce commodity and was therefore not justifiable. That was wrong, however, because the social utility factor did not apply unless the steps required to reduce the level of risk would entirely prevent the continuation of the activity in question. That was not the case here, since those who failed the test were liable to be dismissed in any event. There was no reason why Aegis could not have checked the fitness of interpreters before requiring them to participate in the FFR test and thereby to have ensured that they did not pose a danger to themselves or others by being unable to complete it. Aegis, he submitted, had a duty to reduce the risk of injury to the lowest practicable level.

9 Mr David Platt QC took issue with all these propositions. He submitted that in determining the extent of the duty of care owed by Aegis to the contractors it was necessary to have regard to the nature of their relationship, the degree of risk and the nature of the foreseeable harm. In addition, he submitted that, when the judge referred to a minimum level of fitness in the context of the FFR test, he had in mind the minimum level of fitness required to pass the test rather than merely take part in it.

10 I can say at once that I am unable to accept Mr Weir's submission that the social utility factor can be taken into account only if the measures required to reduce the risk of harm would make it impossible to carry on the activity in question. In my view that puts the matter too high. In para 36 of his speech in *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, on which Mr Weir placed much emphasis, Lord Hoffmann drew a distinction between cases such as *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082, in which there was no social utility in leaving a derelict boat lying about, and *Bolton v Stone* [1951] AC 850, in which the cricket club was engaged in a socially useful activity which would have had to cease if it were to eliminate the risk of balls being hit into the garden of an adjoining property. His purpose in doing so, however, was simply to illustrate the

point that the risk of harm, the nature and gravity of that harm and the social utility of the activity are all factors to be taken into account in determining the nature and scope of any duty of care. That is the point that Asquith LJ was seeking to make in *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333, 336:

> "In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or that . . . The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk."

In the present case the judge was entitled to have regard to the scarcity of Iraqis willing to act as interpreters, the importance of their role and the need for them to work as part of a team with the contractors when determining the nature and scope of any duty of care owed by Aegis to the contractors.

11 Nor do I think that the claimant is able to obtain significant assistance from the case of *King v Sussex Ambulance Service NHS Trust* [2002] ICR 1413, to which we were referred. The case concerned a claim by an ambulance worker against his employer for injury suffered when his colleague momentarily let go of his end of a carry chair which they were using to move a patient down a flight of stairs. The activity was inherently hazardous, but no other reasonable means of moving the patient were available. The claimant alleged that the defendant had been in breach of the Manual Handling Operations Regulations 1992 (SI 1992/2793), which require an employer to assess the risks of injury in carrying out particular operations and to take appropriate steps reducing them to the lowest level reasonably practicable (in that case, it was said, by asking for the assistance of the Fire Brigade). He also alleged that the defendant had been negligent. Mr Weir drew our attention to a passage in the judgment of Hale LJ, at para 21, in which she observed that public servants accept the risks that are inherent in their work, but not the risks which the exercise of reasonable care on the part of their employers can avoid. No doubt that is correct, but it does not tell one what standard of care is required in any given circumstances. Mr Weir submitted that the case supported the proposition that Aegis should have taken all means at their disposal to minimise the risk of harm to the claimant by testing the interpreter's physical fitness before allowing him to take part in an FFR test, but that depends on whether, taking all the circumstances into account, the duty of care extended that far. In deciding that question it is necessary to consider the nature of the risk and the cost and effectiveness of the measures necessary to eliminate or reduce it.

12 The claimant's criticisms of Aegis, as set out in the particulars of claim, were directed mainly to the manner in which the FFR exercise had been conducted. They were all rejected by the judge as having no causal link to the accident and there was no challenge to any of his findings. The only other criticism was that Aegis had failed properly to take all reasonable steps to remove or reduce the risks posed by the FFR exercise and had allowed the interpreter to take part, despite the fact that he was not fit enough to do so. To put the case in that way, however, simply invites the question what steps Aegis should reasonably have taken and whether they would have made any difference. Mr Weir's response was that they should have tested the

interpreter's fitness to take part in an exercise of that kind before allowing him to do so, but he was unable to identify with any precision what kind of test that might have been. That is particularly significant in view of the fact that, although he was clearly under pressure during the first part of the exercise, the interpreter did not appear to be so distressed as to suggest that he ought to be withdrawn. If in the course of the exercise he had not given any warning of his inability to complete it, it is unclear what kind of additional testing could reasonably have been expected to disclose the fact.

13 As the judge's findings make clear, Aegis was aware that the interpreters were not as physically fit as the contractors and did test their fitness during an induction training exercise to ensure that it reached a minimum level. They also encouraged them by regular tests to maintain or improve their fitness. They did dismiss some whose fitness did not improve, but the FFR exercise was itself designed to test physical fitness and it is implicit in that that some might not pass it. The judge found that there was a foreseeable risk of harm resulting from the dropping of a stretcher (he described it as a "modest" risk), but of harm only in the sense of minor soft tissue injury. In those circumstances, given the importance of the use of Iraqi interpreters and of their integration into the contractors' teams and the modest degree of risk involved, it seems to me impossible to say that Aegis were at fault in failing to take further steps to ensure that interpreters were fit enough to undertake the FFR exercise.

14 I am not persuaded that the judge treated social utility as a complete answer to what he would otherwise have accepted as a well founded claim. Although he referred to the passages in Lord Hoffmann's speech in *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 and Asquith LJ's judgment in *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 to which I have referred, he appears to have been treating them as no more than authority for the proposition that the importance of the activity in question and the measures required to avoid the risk of harm, as well as the nature of the foreseeable harm, are factors which must be taken into account when deciding whether the defendant is in breach of a duty of care. In my view he was right to do so.

15 For the reasons I have given I think that the judge reached the right conclusion in this case. I would dismiss the appeal.

RICHARDS LJ

16 I agree.

FLOYD LJ

17 I also agree.

Appeal dismissed.

ALISON SYLVESTER, Barrister