Personal Injury

Employer liable to its owner-director for independent contractor's negligence: Carr v Brands Transport Limited

Posted on 11 April, 2023 by | Stephen Killalea | Thomas Westwell

Introduction

1. In Carr v Brands Transport Limited [2022] EWHC 3167 (KB), the High Court upheld an employers' liability claim brought by the sole director and majority shareholder of the defendant company for severe injuries he had suffered in an accident while working for the company.

2. The case is of particular interest in demonstrating how various principles of employers' liability—including employment status, non-delegable duties, and the "Brumder defence" where the employee is solely responsible for their own injuries—apply in the context of a claim brought against an employer by its owner-director. It also offers a helpful analysis of the principles for determining whether an employer is liable for an independent contractor's negligence.

3. This note summarises the decision before identifying several points arising from it which are likely to be of interest to practitioners.

Background facts

4. The Claimant was the sole director of, and the majority shareholder in, Brands Transport Limited ("Brands"). Brands owned a large double-decker car transporter [8] (references in square brackets are to paragraphs of the judgment). The transporter had two sections: a tractor unit (or cab) and a trailer. Above the tractor unit was a fixed overhead platform which had safety rails. These consisted of cables looped through steel guard pillars which were welded to the unit [5].

5. On 18 December 2017 the Claimant was loading vehicles onto the deck above the tractor unit when one of the safety rails gave way. The Claimant fell around 14 feet onto concrete and suffered a severely fractured skull and catastrophic brain injuries [6]. It was common ground that the safety rail had failed because of corrosion in one of the guard pillars [7].

6. At all relevant times Brands was required by statute to have the services of a "transport manager" to ensure that it met its regulatory obligations as the holder of an operator's

licence for goods vehicles [31]. From early 2017 Brands had engaged an independent contractor, Mr Sippitts, to carry out this role [32], [79].

7. The Claimant sued Brands in negligence on the basis that Mr Sippitts had been negligent in performance of his duties as transport manager and that Brands was responsible for that negligence. Brands in turn brought a claim against Trax (Coventry) Limited ("Trax") for an indemnity or contribution in the event that Brands was found liable.

Issues

8. The issues arising were as follows:

(1) Was the Claimant an employee of Brands with the result that it owed a common law duty of care to him?

(2) If so, what was the scope of Brands' duty?

(3) Did the transport manager owe a duty of care to the Claimant and, if so, did he breach it?

(4) If so, was Brands liable for the transport manager's negligence on the basis that its duty to the Claimant was a "non-delegable" duty?

(5) If so, was the claim against Brands defeated by the principle in Brumder v Motornet Service and Repairs Ltd [2013] 1 WLR 278 that an employer is not liable to its employee in negligence where the employee was solely to blame for the employer's breach of duty?

(6) If the claim based on the non-delegable duty of care failed, was Brands vicariously liable for the transport manager's fault because he stood in a position analogous to an employee of Brands?

(7) Was Brands liable to the Claimant under section 1 of the Employer's Liability (Defective Equipment) Act 1969 ("the 1969 Act")?

(8) If Brands was liable to the Claimant, should his damages be reduced for contributory negligence?

(9) If the claim against Brands succeeded, was Brands entitled to an indemnity or contribution from Trax?

Decision

9. Julian Knowles J gave judgment for the Claimant. The claim against Brands at common law succeeded on the basis that Brands had breached its non-delegable duty of care to the Claimant. The claim against Brands under the 1969 Act also succeeded. The Claimant's damages were reduced by 40% for contributory negligence.

Reasoning

Issue 1 – Was the Claimant an employee of Brands?

10. The judge found that the Claimant was employed by Brands with the result that it owed him a duty of care as its employee. A number of factors supported the conclusion that he was an employee despite also being a majority shareholder, including that he paid income tax on a PAYE basis, employees' national insurance contributions were paid, and the company had employee insurance in place. There was no inconsistency in his being both the sole director and an employee [46]-[47].

Issue 2 – What was the scope of Brands' duty to the Claimant?

11. Section 47(2) of the Health and Safety at Work etc. Act 1974, as amended by section 69 of the Enterprise and Regulatory Reform Act 2013, provides:

"(2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide".

12. The judge noted that the effect of section 69 in the present context was that any breach of an employer's duty under statutory health and safety regulations would be actionable by the claimant employee if, but only if, it also amounted to a breach of the employer's common law duty to take reasonable steps to provide a reasonably safe place of work, and system of work, for the employee [252].

13. The Claimant's claim was made by reference to various health and safety regulations, the principal of which was regulation 9(3) of the Lifting Operations and Lifting

Equipment Regulations 2008 ("LOLER"). This requires employers to ensure that "lifting equipment" of a specified kind that is "exposed to conditions causing deterioration which is liable to result in dangerous situations" is examined at least every six months "to ensure that health and safety conditions are maintained and that any deterioration can be detected and remedied in good time".

14. The judge found that by virtue of this regulation there should have been an inspection ("a LOLER inspection") of the transporter's cab and trailer no later than 4 July 2017, i.e. five months before the accident [84], [85]. Such an inspection would have identified the dangerous corrosion to the failed pillar [85].

15. Having regard to LOLER and other health and safety regulations which assisted in defining the scope of Brands' common law duty of care to the Claimant, that duty included obligations to ensure that work at height was properly planned, appropriately supervised, and carried out in a manner which was so far as reasonably practicable safe; and to ensure that the lifting equipment in question, i.e. the cab and trailer, was thoroughly examined in accordance with LOLER [253].

Issue 3 – Did the transport manager owe a duty of care to the Claimant and, if so, did he breach it?

16. The judge held that the transport manager, Mr Sippitts, owed a duty to Brands and the Claimant (among others) to perform his obligations as transport manager with reasonable care and skill. The scope of the duty was defined by a declaration he had been required to sign in order to be added to Brands' operator's licence [255]. The duty included ensuring that "a suitable maintenance planner is complete and displayed with preventative maintenance dates at least 6 months in advance", that "vehicles … are kept in a fit and roadworthy condition" and that defects "are recorded and repaired promptly" [257].

17. Knowles J's judgment at [91]-[130] records several key passages from the cross-examination of the transport manager by Steve Killalea KC.

18. The judge found that the transport manager had known that the transporter needed a LOLER inspection because its operation involved lifting, and that an inspection was required, at the latest, on 4 July 2017. But he had not entered this date in a Google

Calendar planner which he had created for the Claimant and which set out the maintenance and inspection schedule for the transporter. In the light of his knowledge, it had been negligent for him not to do this. It was a specific duty according to the declaration which he had signed [262].

19. If the transport manager had put the LOLER date into the maintenance planner, the Claimant, who was an "assiduous operator", would have had a LOLER inspection carried out, and that would have prevented the accident [268]. Accordingly, but for the transport manager's breach, the accident would not have happened [277].

Issue 4 – Was Brands liable for the transport manager's negligence on the basis that it had breached a non-delegable duty to the Claimant?

20. The next question was whether Brands was liable for the transport manager's negligence. The Claimant's first argument here was that Brands owed the Claimant a "non-delegable" duty of care and could not escape liability on the basis that the transport manager was an independent contractor [278].

21. Knowles J agreed with that argument. He held that, where a duty in care is non-delegable, the defendant will be liable for the negligence of another person whom it has engaged to carry out a task falling within the scope of that duty, regardless of whether that person is an independent contractor [285]. An employer's health and safety duty towards its employees was a non-delegable duty [290]. The duty did not cease to be non-delegable simply because the Claimant was a sole director of Brands [298].

22. Alternatively, Brands' duty to the Claimant was non-delegable by reference to the five criteria set out in the Supreme Court's decision in Woodland v Swimming Teachers Association [2014] AC 537 [299]:

(1) the Claimant was in a vulnerable position given the requirement for a professionally competent and experienced transport manager [301];

(2) there was a pre-existing relationship between the Claimant and Brands from which could be imputed a positive duty on Brands to protect the Claimant from harm [303];

(3) the Claimant had no control over how Brands chose to perform those obligations [304];

(4) Brands had delegated to a third party, the transport manager, a function which was an integral part of its positive duty to the Claimant, namely the function of devising, instituting and enforcing a safe system of working by ensuring there was a full and accurate maintenance planner of the required inspections of the car transporter [305]; and

(5) the transport manager had been negligent in the performance of the very function assumed by Brands and delegated by Brands to him [306].

Issue 5 – Was the claim against Brands defeated by the principle in Brumder?

23. The principle in Brumder is that, where an employee bringing a personal injury claim establishes that the employer is liable to him or her for breach of a statutory duty, the employer will have a defence to the claim if it can show that the employee was solely to blame for the breach [313]-[314]. The defence applies only if the claimant is "the sole author of his own misfortune" [325]. Where the claimant is the sole director of the defendant company, the latter must show that the claimant "has paid no attention whatsoever to health and safety issues" and has "abrogated his responsibilities as owner and director" [322].

24. While the Claimant had a degree of fault for not having the LOLER inspection carried out, this was "a world away" from abrogating responsibilities for health and safety [330]. In addition, the company bore responsibility for the transport manager's failure (which was an important causative factor for the accident) on the basis of its non-delegable duty [326]. As the Claimant's fault was not "co-extensive with" Brands' fault arising from the transport manager's errors, the Brumder defence did not apply [331].

Issue 6 – Alternatively, was Brands vicariously liable for the transport manager's fault?

25. The Claimant also argued that Brands was vicariously liable for the transport manager's negligence on the basis

that, despite being an independent contractor, he stood in a position analogous to an employee of Brands [332]. The judge noted that, as the Supreme Court's decision in Various Claimants v Barclays Bank plc [2020] AC 973 made clear,

the question was whether the transport manager was carrying on business on his own account and working for Brands under a contract for services, or whether he was in a relationship "akin to employment" with Brands [355]. The judge held that the transport manager was an independent contractor who worked under a contract for services with Brands, and that Brands was therefore not vicariously liable for his negligence [362].

Issue 7 – Was Brands liable to the Claimant under s. 1 of the 1969 Act?

26. The Claimant further argued that Brands was liable under section 1 of the 1969 Act. This provides that where an employee suffers personal injury in the course of his employment because of defective equipment provided by the employer for the purposes of its business, and where the defect is attributable wholly or partly to the fault of a third party, the injury "shall be deemed to be also attributable to negligence on the part of the employer" [364].

27. The judge found for the Claimant "on a straightforward application" of the section, on the basis that: (a) the Claimant was an employee; (b) he suffered personal injury in the course of his employment; (c) this was caused by defective equipment; (d) this was provided by his employer, Brands; and (e) the defect was in part at least due to the fault of a third party, namely the transport manager [365]. It made no difference here that the Claimant was Brands' sole director, given that he was also an employee [366].

28. The requirement for the defect to be at least in part the fault of a third party meant that the Brumder principle did not apply (or at least could not easily apply) because the employee could not easily be the sole author of his own misfortune in this respect [370].

Issue 8 – Contributory negligence

29. The Claimant was told of the need for a LOLER inspection some time soon after he engaged the transport manager in around March 2017 and had an absolute duty under LOLER to ensure compliance. There was therefore a culpable failure by him to have the vehicle inspected [375]. On the other hand, the transport manager was also at significant fault for not putting the relevant date on the maintenance planner [376]. There was accordingly a joint failure by both the Claimant and the transport manager to deal properly with the LOLER issue. The Claimant was 40% responsible for the damage and his damages would be reduced by that amount [377].

Issue (9) – Contribution / indemnity claim against Trax

30. This claim failed because the Claimant knew both that he needed a LOLER inspection and that Trax was not doing that inspection. Accordingly, Trax was not at fault for not telling the Claimant of the need for such an inspection [383].

Comment

31. Knowles J's judgment is likely to be of particular interest to PI practitioners for the following reasons:

(1) It provides an illustration of the circumstances in which a company's sole director and majority shareholder will also be an employee for the purposes of an employers' liability claim against that company.

(2) As well as reiterating that the employer's common law duty to employees is non-delegable, it offers a detailed analysis of the circumstances in which a non-delegable duty may arise under the test in Woodland.

(3) It indicates that the employer's common law duty remains non-delegable even where the employee in question is also the employer's sole director.

(4) It emphasises the difficulty that employers are likely to face in seeking to rely on the Brumder defence, even where the claimant is the owner-director of the company. In the context of a claim by a sole director, an employer must show that the claimant "paid no attention whatsoever to health and safety issues" and "abrogated his responsibilities" in order to rely on the defence. If the company bears any responsibility for breach of the duty separate from the claimant's, Brumder is unlikely to apply.

(5) It makes clear that the Brumder defence is unlikely to apply to a defective equipment claim under section 1 of the 1969 Act.