



Neutral Citation Number: [2021] EWHC 2839 (QB)

Appeal No. M21Q333  
Claim No. D97YX718

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**HIGH COURT APPEAL CENTRE MANCHESTER**

22<sup>nd</sup> October 2021

**Before :**

**MR JUSTICE FORDHAM**

**Between :**

**VICTORIA MELIA**  
**- and -**  
**FLEETWOOD HEALTH CENTRE LIMITED**

**Appellant**

**Respondent**

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**Philip de Berry** (instructed by Pabla & Pabla solicitors) for the **Appellant**  
The **Respondent** did not appear and was not represented

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Hearing date: 22/10/21

Judgment as delivered in open court at the hearing  
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**Approved Judgment**

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

**MR JUSTICE FORDHAM :**

Introduction

1. Today's hearing is the oral reconsideration, requested by the Appellant, of permission to appeal following the refusal of permission on the papers by Robin Knowles J on 30 April 2021. The hearing was in-person. It enabled various key points to be ventilated before the Court in a way which was clearer and more engaging than through the exercise of mere consideration of the papers. The background is as follows. The Appellant is 51. She sustained an injury to her arm when a heavy sliding window fell on it while she was staying at a hotel on 30 August 2014. She was, and continued to be, employed as a pharmacy dispensing assistant by the Respondent. She brought claims for damages against both the hotel and the Respondent. The two claims were linked and were case managed together. Her claim against the hotel was that her elbow condition – lateral epicondylitis (tennis elbow) – was caused by the window falling and that the hotel was liable. Her claim against the Respondent was that aggravation and/or exacerbation of the elbow condition was caused by the pattern of work which she was required to perform, as pharmacy dispensing assistant, in respect of which the Respondent was liable. The claim against the hotel was settled on 7 August 2020 for £225k. The claim against the Respondent was limited in value to £7,920 and proceeded to trial. It was heard on 21 and 22 September 2020 by HHJ Evans (“the Judge”), who dismissed the claim for reasons given in a ten-page and 35-paragraph judgment, delivered ex tempore. The question for me is whether any arguable ground or grounds of appeal, having a real or realistic prospect of success, have been identified. On the papers, Robin Knowles J concluded that none had. I have considered the question afresh, in light of all the materials shown and submissions made to me. I also make clear that I accept that the Court should not be distracted, by the relatively modest size of the claim, from considering squarely whether there is or is not any arguable ground of appeal. I express my appreciation for Mr De Berry and Ms Newton for, very properly, ensuring that I had received and read a note from the Respondent (15.10.21). I also record that, at their invitation, I have watched three short videos, two of which were before the Judge and one of which seeks to recreate for me a demonstration which took place live at the trial before the Judge.

The Judge's key conclusions

2. It is important in this case to have clearly confronted the key steps in the Judge's analysis. What can clearly be seen is that at the heart of the Judge's judgment were two key conclusions, and then a finding in consequence on them. The first key conclusion arose in relation to the expert evidence. There was a single joint expert report (31.12.19) by Dr Ian Randle, a jointly instructed ergonomist, supplemented by his answers (4.2.20) to CPR Part 35 questions from both sets of solicitors. There were expert medical reports from Dr EC Huskisson a consultant rheumatologist (for the Appellant, the Claimant) and from Dr LC Bainbridge a consultant in plastic and hand surgery (for the Respondent, the Defendant). The Judge's first key conclusion was this: a claim for aggravation and/or exacerbation of the injury for which the Respondent was liable could succeed, in light of the expert evidence, only if – on the facts – the Appellant had been undertaking the task of deblistering (removal of tablets from blister packs to load a robotic machine) for two or more hours continuously without adequate interruption or break. I interpose that a quotation from the judgment, reflecting what I have just encapsulated, was as follows:

*Dr Randle's opinion was that if the Claimant was to undertake the deblistering task for two or more hours continuously without adequate interruption or break, then the extent of the repetition coupled with the time would give rise to a foreseeable risk of an upper limb disorder... He said the risk of somebody doing this kind of work developing an upper limb disorder is not high if the work was undertaken in reasonably short bouts, interspersed with the other activities which the Claimant is said to have undertaken (and he had read all the witness evidence by the time he did his report)...*

In relation to that first key conclusion, the Judge had started by explaining why she was focusing on deblistering. She referred to the various complaints within the particulars of claim and within the Appellant's witness statement about the repetitive nature of work, continuing:

*the only task in respect of which I have expert evidence from the ergonomist indicating a possible foreseeable risk of injury is the removal of the tablets from the packs. Similarly, the only task identified by any of the medical evidence as giving rise to an aggravation or exacerbation of her injury is the removal of the tablets from the packs, which has been referred to as 'deblistering' by the parties in the case.*

3. The Judge's second key conclusion arose in relation to the factual evidence. There was a witness statement from the Appellant (27.9.19) together with various other documents and together with evidence adduced on behalf of the Respondent. The Appellant gave live evidence before the Judge and was cross-examined. The Judge's second key conclusion was this: the Appellant's working practices involved relatively short periods of deblistering not more than one hour in length, and quite often significantly less than that, and for the vast majority of the time she had shared deblistering duties with at least one other member of staff so that the time she had to spend on it would be even less. In relation to this second key conclusion, the Judge had all the factual evidence and had the benefit of hearing the Appellant's oral evidence. She said this (the quotation here reflecting the substance of the key conclusion as I have already articulated it):

*It is quite clear to me on the Claimant's own evidence, and I find as a fact on the balance of probabilities, that there were natural breaks built into her working practice. She was not engaged in continuous repetitive deblistering for very long periods of time... On the balance of probabilities, I find that her working practices involved relatively short periods of deblistering not more than one hour in length, quite often significantly less than that, and that for the majority of the time she shared those deblistering duties with at least one other member of staff so that the time the Claimant had to spend on it will be even less.*

4. The Judge then, based on those two key conclusions, explained her consequential conclusion. It was that the claim must fail and that the Appellant had not established any breach of duty on the Respondent's part, apart from a failure to conduct a risk assessment which failure had no causative effect in the light of her findings. She said this (the quotation, again, reflecting the substance of what I have just articulated):

*On the basis of my factual findings as to the nature and extent of the Claimant's tasks, I find in accordance with Dr Randle's opinion that the Claimant's work in deblistering the tablets did not give rise to a foreseeable risk of injury.*

She said:

*the claim must fail on the basis that the Claimant has not established any breach of duty on the Defendant's part apart from that relating to risk assessments which has no causative effect on my actual findings.*

She later said:

*The factual scenario as I have found it ... is a factual scenario which I have found, on the basis of the ergonomic evidence, would not be expected to give rise to an upper limb disorder.*

5. Having thus confronted this as the essence of the judgment, what follows is that there are really two key questions that arise, for any proposed appeal, in the light of that analysis. One key question is whether either (or both) of the Judge's two key conclusions can be said, arguably, to have been wrong. The other key question is whether the Judge's rejection of the claim as her consequential conclusion, in light of her two key conclusions, can itself be said arguably to have been wrong. Having set the scene in that way, I can turn to the grounds by which Mr de Berry submits that the Judge's rejection of the claim against the Respondent stands to be overturned on appeal, as set out in writing and adopted, and as developed orally.

Ground a: unaddressed limb of the claim

6. The first ground of appeal is that the Judge left a main limb of the claim unaddressed. That is because, in her first key conclusion, she was focusing on expert evidence as to whether there was a "foreseeable risk" of an upper limb disorder. As I see it, the point that is made really comes to this. It is true that one way in which the claim was put was that there was a foreseeable risk which the Respondent as employer failed proactively to address, thereby breaching its duty giving rise to liability. But another way in which the claim was put was that the Appellant repeatedly reported pain and requested help which the Respondent as employer failed reactively to address, thereby breaching its duty giving rise to liability. By focusing on evidence and a logic referable to "foreseeable risk", the Judge focused only on the proactive limb of claim and materially failed to deal with the reactive limb of the claim. In support, it is said that there is a key difference between risk assessment generally and risk assessment in respect of a vulnerable individual; that there should have been an express finding of complaint being made by the Appellant; that the Respondent (whose evidence the Judge rejected) claimed to have changed the Appellant's working practices; and that it would have been perverse to find no risk assessment would have made a difference in the light of such features and all the circumstances.
7. As developed, with care, by Mr de Berry in his oral submissions, two key points emerged today as being of central significance, which relate to the first key conclusion of the Judge, based as it was on the joint expert evidence of Dr Randle. The first key point that emerged today is Mr de Berry's submission that the Judge had – and should have adopted – a route to a conclusion that the claim stood to be allowed, based on what Mr de Berry calls "an implied acknowledgement" or "an implied acceptance" by the Respondent of the Appellant's vulnerability and the need for the Respondent to take action to revise her working practices in order to avoid the aggravation or exacerbation of her condition which would otherwise occur, and which did occur. This submission is grounded in the facts that (a) the Respondent asserted as part of its defence that it had introduced adaptations to her working practices, and (b) the Judge did not accept as a fact that it had done so. I cannot accept, even arguably, that it followed from those two facts, that the only finding reasonably open to the Judge in the circumstances of the case was that there had been an actionable breach of duty causative of aggravation or exacerbation and sounding in damages. The Judge

was plainly right to grapple with the expert evidence and what it could properly be taken to show (her first key conclusion), and then to analyse the facts of the case in the light of that evidence (her second key conclusion). That, as I have explained, is what she did.

8. The second key point which emerged clearly this morning was Mr de Berry's submission that the Judge should have treated Dr Randle's report as being a "framework", and not as identifying a 'line' which factual findings by the Judge needed to cross in order for the claimant to succeed. There were a number of strands to this "framework" argument. One strand was that the tentative nature of, and limited factual basis for, Dr Randle's report left an important question for the Judge as to whether other activities such as the use of the workstation were themselves also aggravating or exacerbatory. Another strand was that Dr Randle's report left an important question for the Judge as to whether other activities including the use of the workstation constituted an adequate interruption to the deblistering activity, to prevent it from being aggravating or exacerbatory. A third strand was whether Dr Randle's report left an important question for the Judge as to what sort of duration of deblistering activity would risk aggravation or exacerbation in the case of the Appellant with her pre-existing injury, and therefore her vulnerability, and including questions of time pressure put on her. Putting the third strand another way, what is said is that Dr Randle's report was an analysis relating to any person with no vulnerability, and no pre-existing condition, and no further such circumstances; it was not a report relating to the Appellant's position. I cannot accept, even arguably, that the Judge was wrong, in her first key conclusion, to identify Dr Randle's report as giving her the reliable factual question to be addressed. Dr Randle was a joint expert who gave a report for the Court in this case. He was asked questions under CPR Part 35 by both sides. His report identified in its main body and also in its conclusion a very clear dividing line for the Judge to apply in finding the facts. Nothing in the Part 35 replies meant that that very clear dividing line had become qualified or caveated. It would have been very easy for questions to be put to elicit any such change in position. Moreover, Dr Randle could also have been called, and questioned before the Court. Further, Dr Randle, in giving his report, was well aware of the other activities and the way in which they had been described. He was also well aware of the pre-existing condition and, importantly, referred in terms to it earlier in the report. Dr Randle's expert opinion was clearly being given in relation to the Appellant. The relevant and adequate interruptions identified by Dr Randle were the other activities which the Appellant was said in the evidence to have undertaken. The Judge, beyond argument, was entitled to treat that expert evidence in the way that she did. This was a solid expert evidential basis for approaching the case and then making findings of fact.
9. Having dealt, as I have, with those two points, the answer to this ground of appeal is that the expert evidence, to which the Judge was referring, securely provided the answer to both the proactive and the reactive routes to liability. The Appellant had her pre-existing condition following the injury at the hotel. The question that arose in the context of her employment with the Respondent related to whether she was allowed to be or continue to be in a position where she faced exacerbation or aggravation through the working practices. The expert evidence of Dr Randle dealt with the dividing line: where the line was to be drawn as to whether the working pattern did stand to aggravate or exacerbate. Dr Randle said:

*if it is found that deblistering was undertaken intensively for long durations without regular breaks or changes in activity, then in my opinion the work would give rise to a foreseeable [upper limb disorder] risk.*

On the other side of the line, Dr Randle said:

*if it is found that the deblistering was undertaken in reasonably short bouts and interspersed with the other activities which the Claimant is said to have undertaken, then in my opinion the risks of [upper limb disorder] are adequately managed and I would not consider the task to give rise to a foreseeable risk of injury.*

So, whether addressed proactively or reactively, there was a ‘foreseeable risk’ scenario and an ‘adequate management’ scenario. The question was which side of the factual line did the actual working pattern fall. As the Judge said in her judgment:

*On the balance of probabilities, if there had been a risk assessment undertaken, the risk assessor would have come to the same view that I have come to and that Dr Randle came to as to the lack of risk of development of an upper limb disorder, given the other tasks with which the work was interspersed, the nature of the task and finding I have made of the limited length of time for which the Claimant was engaged without a break at any one time.*

As the Judge said when asked to grant permission to appeal:

*I found that if they did a risk assessment, whether they did one at the beginning or whether they did one at the end, the risk assessment of the task is it’s a task that doesn’t carry with it any foreseeable risk of upper limb disorder... A proper risk assessment would have said there was not any foreseeable risk of injury because this is not a task that is going to cause any problem.*

As Robin Knowles J said in refusing permission to appeal on the papers:

*On the facts of the case derived from an assessment of the evidence in the case, [the Judge’s] finding holds good as an answer – whether it was a first or second risk assessment, whether the Claimant had raised the matter that was said to require risk assessment (e.g. reported pain), and whether the focus of the assessment was on the Claimant or on employees generally.*

So, whether proactive or reactive, the logic of the answer on the evidence was the same.

#### Ground b – failure to follow Keefe

10. The second ground of appeal is that the Judge erred in failing to follow the approach in Keefe v Isle of Man Steam Packet Company Ltd [2010] EWCA Civ 683. That was a case in which the employer had breached a duty to undertake measurements of the noise level on board ships. The judge there had rejected the claim on the basis that the claimant had not proved exposure to excessive noise levels over relevant time periods. The Court of Appeal identified an error of approach, because it was an important factor that the difficulty of proving the relevant facts had been caused by the defendant’s breach of duty in failing to take measurements; the defendant in breach of duty had made it difficult or impossible for the claimant to adduce relevant evidence and thereby ran the risk of adverse factual findings: see paragraphs 18 and 19. The argument in this case was and is that once the Judge decided that the Respondent had breached a duty to undertake a risk assessment, that breach needed to be given weight and reasons for rejecting the Appellant’s evidence could not justify refusing the claim

(in parallel with the two points made in Keefe at paragraph 21). It ought to have followed in this case from the breach and the other circumstances of the case that the Appellant had established the basis of the claim, applying the approach in Keefe.

11. The answer to this point is that the breach in not conducting a risk assessment did not make it difficult or impossible for the Appellant to adduce relevant evidence on the key factual question. The key factual question, as the Judge found, was as to the length of time which without relevant interruption the Appellant had been required to undertake deblistering. Unlike the claimant in Keefe, who was in no position to say what the unmeasured decibel level was, the Appellant was able to tell the court what the working practices had been and for how long she had been required to undertake deblistering at a stretch. That was the basis on which the Judge distinguished Keefe. As the Judge said:

*In Keefe the claimant was simply unable to establish on his own evidence a noise emission level that was actionable. Because there had been no risk assessment, no noise level surveys, he could not say whether there was an actionable level of noise or not. All his expert could say was there was a range, with the bottom end of the range not actionable and the top end of the range actionable. In this case the Claimant can and has given me ample evidence about the task she undertook. If her actual evidence had supported continuous deblistering for three hours at a time without any break, for example, she would have succeeded in establishing a breach. It is a completely different kind of case.*

#### Ground c: treatment of the Appellant's evidence

12. This ground of appeal involves the contention that the Judge was wrong in characterising the Appellant's evidence as not always having been consistent. A number of points have been made to contextualise and explain parts of the evidence to which the Judge referred, and references which the Judge made to inconsistencies. As I have already explained (and set out), the Judge found:

*... as a fact on the balance of probabilities, that there were natural breaks built into her working practice. She was not engaged in continuous repetitive deblistering for very long periods of time... On the balance of probabilities, I find that her working practices involved relatively short periods of deblistering not more than one hour in length, quite often significantly less than that, and that the vast majority of the time she shared those deblistering duties with at least one other member of staff so that the time the Claimant had to spend on it would be even less.*

Those were the findings that mattered. This was the Judge's second key conclusion.

13. What emerged very clearly from the oral submissions this morning was that the Appellant argues – head-on – that the Judge's second key conclusion, and her key finding of fact, was not sustainable on the evidence before her. In that context, points are made about what the Judge characterised as the inconsistencies in what had been said by the Appellant, including in relation to the “impression” which had been given by her to her medical expert Dr Huskisson. It is also in this context that emphasis is placed on what is said to be the absence of relevant, concrete findings of fact by the Judge: for example, about how many tablets per day were being deblistered; about the degree of overtime worked; about the extent to which the Appellant was working solo or was accompanied; and so on. The ultimate submission is that the Appellant's evidence, including as given orally at the trial was not consistent with the Judge's expressed finding of fact, and that the Judge had no proper basis for rejecting the

Appellant's evidence including as given orally at the trial. In short, the Appellant's witness statement had said that she "spent hours at a time just on blister packs" and that was the finding which the Judge should have made.

14. This topic was undoubtedly at the heart of the case. I have been able to consider with some care, with the assistance of Mr de Berry, key passages in the transcript. These have included the passages relating to what had been said to Dr Huskisson, who gave live evidence and was cross-examined. They also included the passages relating to the Appellant's own evidence and cross-examination of her. They included the passages relevant from the closing submissions. Most importantly, they included key passages in the transcript in which the Judge herself put questions to the Appellant in order to understand what she was saying about her working day. In the passage in the judgment which is sought to be impugned the Judge made clear that she was taking full account of the Appellant's own evidence and made clear that her conclusion was derived from what had emerged in and by reference to that evidence. The crucial finding of fact, which I have already set out more than once, is preceded in the judgment by the following two sentences:

*The only time she ever referred in her oral evidence to spending as much as two hours at one time deblistering was when she said if she had a two-hour break in the day, she would spend that filling the robot so that it could run without interruption. The strong impression that I got from her evidence was that that was something that did not happen often.*

Looking at the evidence as a whole in the light of the judgment this is a case, beyond argument, this is a clear and classic example of a Judge making findings of fact on the basis of the evidence which she had considered including crucially the evidence directly on point from the Appellant. The points made do not, even arguably, provide a basis on which those findings could be said to have been wrong.

#### Ground d: unjustified failure to make legal findings

15. This ground of appeal involves the contention that the Judge failed to make findings on the aggravation or exacerbation arising from other aspects of the working practices including the workstation setup. This ground materially overlaps with points with which I have already dealt. It relates to the Judge's first key conclusion, and also to the idea of Dr Randle's report as a "framework" which left key questions about other aspects such as the workstation as requiring to be assessed and determined. Ground d also refers to the Keefe point with which I have also already dealt.

#### Ground e: medical evidence from the hotel claim was wrongly excluded

16. This fifth ground of appeal, maintained from the skeleton argument, is that the Judge was wrong to exclude a joint statement from two medical experts which had been filed and served in the claim against the hotel. The Judge ruled on that point on day one. She had before her the joint ergonomist's report, and the expert medical evidence on both sides which had been filed in the claim against the Respondent. It is true that if both claims have been determined together all of the evidence would have been before the Court. The answer to this ground is that the Judge was entitled, beyond argument, to come to the view which she did on this point, and for the reasons she gave. As she explained, one of the experts who had given the joint statement in the hotel claim was an expert (Dr Sylvester) whose underlying report was not before the court, nor did the Court have the underlying material; nor was that expert in court to



be cross-examined; and that expert material was concerned with the primary and original cause of the elbow injury namely the hotel window, none of which was disputed. The Judge was, beyond argument, entitled to focus on expert evidence which had fairly and squarely been capable of being adduced, and had been adduced, between the Appellant and the Respondent. There is no arguable error or unfairness in her having done so.

#### Ground f: relevant considerations ignored

17. Ground f involves a long list of relevant features which are said to have been ignored by the Judge. I am satisfied of two things. One is that I have dealt with the key points already. The other is that none of the features, either individually or cumulatively, provide a basis for impugning the Judge's finding on either of her two key conclusions, or the consequential finding dismissing the claim.

#### Other points

18. In addition to the six grounds set out in the grounds of appeal, other criticisms of the Judge are advanced. The judgment is said to have been superficial and inadequately reasoned. The point is made that the Judge gave the judgment ex tempore, from notes and from her recollection, having handed back the bundles. These points add nothing. I agree with Robin Knowles J that the judgment was thorough and properly reasoned. In particular, the Judge clearly identified the two key conclusions which were of themselves fatal to the claim, giving clear and sustainable reasons why she had arrived at them. Nor indeed did she stop there. Having by paragraph 25 of the judgment explained why the claim could not succeed, she then dealt between paragraphs 26 and 35 with a number of other issues which had been raised. Then the general submission is developed in writing that the Judge ought to have approached the medical evidence differently and ought to have allowed the claim based on preferring Dr Huskisson's evidence, rather than the evidence of Professor Bainbridge. The answer to that is that the Judge explained that the claim failed because of her conclusions in the light of the ergonomic evidence. She said: "The factual scenario as I have found it ... is a factual scenario which I have found, on the basis of the ergonomic evidence, would not be expected to give rise to an upper limb disorder". She also explained that Dr Huskisson's evidence was based on the description and impression recorded as having been given by the Appellant, a point on which she had heard live evidence. There is no arguable ground of appeal arising out of any of this.

#### Conclusion

19. In my judgment, notwithstanding the raft of criticisms made of the Judge's judgment, and the considerable assistance I derived from Mr de Berry in bringing headline points to life through his oral submissions, nothing put forward can begin to dislodge the powerful and logical, reasoned analysis based on the key conclusions which I identified right at the beginning of this judgment. They do not provide any properly arguable basis for answering in favour of the Appellant either of the two key questions which I identified. Beyond argument, the Judge identified a clear and robust, logical and sustainable reasoning path which the arguments and grounds – whether individually or collectively – do not and cannot justify disturbing. In those circumstances and for those reasons, I have reached the same conclusion as did Robin

Knowles J on the papers, and permission to appeal is refused. There will be no order as to costs.

22.10.21