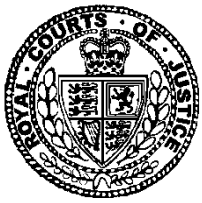

Neutral Citation Number: [2019] EWHC 2554 (Ch)

Case No: D24 YM475, Appeal No: 8BS0121C

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
BRISTOL DISTRICT REGISTRY

On appeal from the order of His Honour Berkley, sitting in the County Court at Salisbury

The Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 24 July 2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

- -

SANDRA ANN WATSON
(Executrix of the Estate of David Watson, deceased)

Appellant
(Claimant below)

- and -

THE RICHMOND FELLOWSHIP

Respondent
(Defendant below)

- -

- -

Mr Justin Valentine (instructed by **Hudgell Solicitors**) for the **Appellant**
Mr David Cunnington (instructed by **DAC Beachcroft Claims Limited**) for the **Respondent**

Hearing date: 24 July 2019

- -

Judgment Approved

Mr Justice Marcus Smith:

1. At a trial of liability only, with quantum to follow if liability was established, His Honour Judge Berkley dismissed the claim of Mrs Sandra Watson, who claimed as the dependent of her husband, Mr David Watson. Mr Watson died following an accident on 11 December 2014 at premises operated by the Defendant below and Respondent before me, the Richmond Fellowship.

2. Mrs Watson seeks to appeal the order of Judge Berkley dismissing her claim.

3. In a careful and detailed *ex tempore* judgment, Judge Berkley made multiple findings of primary fact. None of these findings are challenged by the parties before me today. The findings made by the Judge are very helpfully summarised in a series of propositions set out at paragraph six of the Respondent's written submissions. The following sub-paragraphs draw very substantially on these written submissions:

    (1) The deceased, Mr Watson, was a volunteer at and a visitor to a property called Greenacres, which was operated by the Respondent, a charity, in Devizes, Wiltshire. He attended on a twice weekly basis and had been doing so since 2005, that is to say for a period of around six to seven years by the date of the accident.

    (2) In 2002, Mr Watson suffered a breakdown in his mental health. Prior to that date he had worked as a general builder and handyman. Mr Watson had a history of being a rule-follower: the staff of the Respondent had spent a lot of time observing and getting to know Mr Watson and were entitled to regard him as a rule-obeying person, and not a risk-taker.

    (3) Mr Watson was a competent handyman. He was competent to the task for which he volunteered on the day of the accident. He had been used to using ladders at Greenacres.

    (4) On the day of the accident, Mr Watson volunteered to clean out the gutters of a workshop building at Greenacres. Most of that task was performed at ground level but, for some of it, a ladder was required. Before the task started, Mrs Ruddle, an employee of the Respondent's, went through the task in detail with Mr Watson and another volunteer, Mr Tyler, who had also volunteered for this specific task.

    (5) Mr Watson was advised to use a hoe, which was provided to him, to clean the guttering. The use of the hoe prevented his need to stretch to reach the guttering. Mr Watson was expressly told only to clear such part of the gutter as the hoe could reach. The gutter was approximately 9.5ft from the ground on the left side of the building. It was recognised that, because of the structure of the workshop, a section of the guttering would not be reachable and that cleaning it would not form part of the task allocated to Mr Watson and Mr Tyler.

    (6) Before the task was started, Mr Watson was expressly told not to go on the roof. Mr Watson heard, and indicated that he accepted, that instruction.

    (7) There was a slight slope to the ground to the left side of the workshop. There was a discussion between Mrs Ruddle and Mr Watson about the possible use of a

plank under the base of the ladder; but he was not instructed to use it. Mrs Ruddle gave clear instructions as to how the ladder was to be footed. She demonstrated how the ladder was to be sited.

(8) The task for which Mr Watson volunteered was a low-level, low-danger and low-risk job. Its risk was assessed by Mrs Ruddle. The task was then performed by the deceased and Mr Tyler. The task was performed safely. The right-hand drainpipe on the workshop was cleared from the ground. The left-hand drainpipe was cleared using the ladder. The deceased decided not to use the plank, but that decision was irrelevant to the events that occurred. The slope where the ladder was situated was completely innocuous. There was negligible movement to the ladder. It was footed safely by Mr Tyler. Mr Watson was required only to climb up a couple of steps of the ladder to perform the task. When using the ladder to clear the guttering, Mr Watson's feet were waist height to Mr Tyler, two or three rungs up from the bottom.

(9) On the completion of the task, Mr Watson put the ladder away in a garage across the yard from the workshop. He was seen to have done this by Mrs Ruddle. Mr Tyler cleaned up the silt and the debris which had been removed from the gutters.

(10) The task was carried out and completed by the time of a morning tea-break. At the tea-break, Mr Watson told Mrs Ruddle that he had finished the task. He stated that the sections of guttering which were known to be unreachable remained blocked. It was accepted that they would remain blocked, because they could only be reached from the roof and there was an express prohibition against going on the roof for anyone, including employees. The prohibition against going onto the roof was repeated by Mrs Ruddle, who told Mr Watson that the job was over. That was accepted by Mr Watson.

(11) After the tea-break, Mr Watson and Mr Tyler had different (additional) tasks for which they had volunteered. Mr Tyler understood the morning's task with Mr Watson to have finished. He was now going to look after the bees. Mr Watson understood the morning task to have finished and was going to fix some fence panels. This is what the Respondent expected him to do.

(12) Contrary to the prohibition he had been given, without consultation and without warning, rather than go to the task for which he had volunteered, Mr Watson, in the face of the warning and prohibitions he had been given, secretly went to retrieve the ladder from the garage.

(13) As Mr Tyler returned from his beekeeping activities, he found that Mr Watson had retrieved the ladder by himself. There was a discussion between Mr Tyler and Mr Watson. Mr Tyler told Mr Watson he was not to go on the roof. In response, Mr Watson said words to the effect that: "What the eyes don't see...". These words suggested or expressed Mr Watson's knowledge that he was acting contrary to an instruction from the Respondent, and that he was acting without the knowledge of the Respondent and was seeking to keep his actions from the knowledge of the Respondent.

(14) Whereas, when performing the task for which he had volunteered, Mr Watson only climbed two or three steps of the ladder, on this occasion he climbed up it and onto the roof. The ladder was not designed for access to the roof. It was far shorter than the vertical distance to the roof. Mr Tyler had repeated the prohibition against going on the roof twice more, but Mr Watson ignored him.

(15) The ladder did not wobble to any degree as Mr Watson climbed it. Mr Watson got onto the roof and, "walking like a duck", disappeared from the sight of Mr Tyler. He then changed his mind about being on the roof and came back. He attempted reversing to step back on the ladder. He put his left foot on a rung and then his right foot on the same rung. As his right foot went on the rung it slipped.

(16) The cause of the accident was the way that Mr Tyler had reversed off the roof. He did not have clear sight of his descent and – by that time – had slippery footwear, because of the nature of the surface of the roof. Also, the ladder was too short for properly accessing the roof. The cause of the slip was not any wobbliness of the ladder. The ladder was not unstable to any relevant extent, and Mr Watson did not fall because of any instability in the ladder.

(17) The accident was not caused by any failure to assess the risks associated with the task Mr Watson had volunteered to perform nor by any lack of instruction. Mrs Ruddle had provided instruction that was sufficient for the task in question. The level of instruction that was given by Mrs Ruddle was appropriate for the particular task in question and there was no need to supervise what Mr Watson and Mr Tyler were doing. Mr Watson had sufficient experience to undertake the task for which he had volunteered. There was no failure in the training which caused any problem with the carrying out of the task which Mr Watson was asked to undertake. The task was, as far as is relevant, complete by the tea-break.

4. These points, drawn substantially from the Respondent's written submissions, are no more than a very helpful summary of what one derives from the Judge's judgment. I find that they are an accurate summary of what the Judge found and I am very grateful to Mr Cunnington for their clear and helpful formulation.

5. It is clear from the Judge's decision that the job of cleaning out Greenacres's guttering was done in two phases:

(1) First, what I may call the "authorised" first phase, during which no accident occurred.

(2) Secondly, what I shall term the "unauthorised" second phase, which involved Mr Watson doing what he had expressly been told not to do: namely, ascend a ladder so as to mount the roof and go onto the roof. It was during this phase that Mr Watson fell off the ladder whilst attempting to climb off the roof.

6. It is very clear from the judgment that it was the fact that the second phase was unauthorised – Mr Watson's "frolic of his own", as the Judge put it – that was determinative of the outcome in this case. There are various passages in the judgment that make this clear (notably paragraphs 14, 17, 18, 56, 71, 78 and 79). These paragraphs all make clear the centrality of the dividing line between that which was

authorised (or not a "frolic" of Mr Watson's own) and that which was unauthorised (and so a "frolic of his own").

7. In making submissions on behalf of Mrs Watson, Mr Valentine suggested that the distinction between phase one and phase two had been too starkly drawn. In one sense, he is right about that: for example, when one looks at the evidence of Mr Tyler. Mr Tyler, in his witness statement, which the Judge accepted as true and which was expanded upon by Mr Tyler in his cross-examination, mades clear that the distinction between phase one and phase two was less clear than the distinction drawn in paragraph 6 above might suggest.

8. In paragraph 16 of his statement, Mr Tyler confirmed that, during the morning, he and Mr Watson were able to complete most of the task before a morning tea-break. In paragraph 17, he made clear that they had managed to clean the guttering as far as they could with the hoe and then he said:

> "I remember that we decided that we could not unblock the entire guttering because we were not allowed to go onto the roof."

He then described how the job finished and how Mr Watson put away the ladder that had been used to execute the job. In addition, he described how they went on to do their respective new jobs.

9. Mr Tyler then described what happened after he had attended to the bees for approximately 30 minutes. He said he went back to find Mr Watson. In his statement, he described what then happened:

> "19. We discussed the blocked guttering. Mr Watson decided to give it a second go; at unblocking them. We therefore went and got the ladders again. I footed the ladders for David. I remember that to reach further up the guttering, David began to stand higher up the ladder.
>
> 20. In the morning we had cleared the gutter at the front of the building and put on the end stops. After tea break David advised that part of the task was to clear the gutter between the apex roof and the flat roof of the woodwork workshop.
>
> 21. I remember David couldn't quite reach along the gutter, so he tried to reach the rest of the gutter by extending one of the poles on the hoe. I remember him telling me that he wanted to get the job finished.
>
> 22. As I was footing the ladder, Dave Poole came out of the woodwork shop and I remember a vague conversation with David and Dave Poole. David was frustrated that he could not get all of the work done because he wasn't allowed to go on the roof. I remember Dave Poole talking about getting a plank on the roof to distribute David's weight. I cannot really recall the exact wording of the conversation. Dave Poole is a not a member of staff at Greenacres but another person who attends it like me and David.
>
> 23. Dave Poole went back into the woodwork building, which is directly below where the incident occurred and, within two or three minutes, Paul Hiscock, who is a staff member at Greenacres, walked by. At this point David was up the ladder and I was footing it. I clearly remember as Paul paused and he said to Dave he wasn't allowed to go on the roof. Dave muttered something under his breath.

> 24. After Paul had gone, I remember David climbed up the ladder and whilst he was there, he was able to see the roof. I remember telling him that we had been told that we shouldn't go on the roof but he muttered the phrase, "what the eye doesn't see" etc. which I took to mean something like: that when the cat's away, the mice will play.
>
> 25. I said again that he shouldn't go on the roof, although I didn't say anything after that because David is an ex-builder and experienced and I was only there to assist him.
>
> 26. After that, David then climbed on the roof. During our using of the ladder it felt solid. It wasn't wobbly or anything like that."

10. Facts are rarely as clear cut as lawyers would want them to be and Mr Tyler's evidence is a good example of this. Nevertheless, having heard the evidence, the Judge made a very clear finding that there was an authorised part of the job that was performed without accident and without incident, and an unauthorised part of the job that resulted in the accident. That, to my mind, justifies the shorthand that I am going to use in this judgment between a first phase and a second phase. I should also make clear that, when I refer to an authorised first phase and an unauthorised second phase, I am using that as a descriptive term only. The legal significance of authorisation, just as the question of foreseeability, is a matter that I will come to in greater detail later on in this judgment.

11. What is clear is that the Judge's finding, regarding the unauthorised phase two, was central to his decision on liability. Once that finding was made, all of the other findings – rejecting any breach of statutory duty and rejecting negligence on the part of the Respondent – followed. As Mr Cunnington, on behalf of the Respondent, frankly conceded, if the second phase was not, to use the Judge's phrase, "a frolic of his own" then there was a breach of the health and safety rules and a failure to exercise reasonable care in breach of the Respondent's duty of care. In short, were the Respondent in some way implicated in the second phase – and I will come to what that means in due course – then there would be no answer to the claim. There would, for example, on that hypothesis, be no doubt that the Work at Height Regulations 2005, on which Mrs Watson relies and relied, would have been breached in some respects.

12. The converse is true, if the Judge was wrong on this central finding. If, for example, notwithstanding the prohibition by the Respondent, this was a case where an accident of that general kind can be foreseen, then the outcome in relation to all of these alleged breaches would be different. In other words, it was on causation that the Judge determined the outcome of the appeal and it was this finding that the applicant attacked in her various grounds of appeal. Although no less than five grounds of appeal are articulated by Mrs Watson, this is the essential point on which the appeal stands or falls, in relation to all the grounds of appeal advanced.

13. The Judge directed himself carefully in regard to the law. In particular, he considered the important decision of the House of Lords in *Boyle v. Kodak Ltd*, [1969] 2 All ER 439. I consider the following propositions to be important:

(1) There is no need for exclusive causation. It is sufficient that the defendant's wrong is a cause of the claimant's injury or a particular part of it, in the sense that "but for" the wrong the accident would not have occurred. The claimant does not need to go further and show that the defendant's fault is the sole or only cause of his injury. Put another way, the defendant cannot escape liability merely by

showing that the claimant's loss or damage was also the result of someone else's wrongful act or some other event.

(2) When considering causation, the relevance of what one might call "counterfactuals" is sometimes of considerable importance. Often, in an employment context, the application of the "but for" test relates not only to the conduct of the employer who is the defendant, but also to what the employee would have done had the employer acted differently. The hypothetical question or counter-factual question is: what would have happened if there had not been a breach of duty by the defendant?

(3) One example of such "counterfactual" thinking is *McWilliams v. Sir Arrol & Co Ltd*, [1962] 1 WLR 295. In that case, a steelworker fell 70ft to his death. His employers were found to have been in breach of statutory duty in failing to provide him with a safety harness. However, the evidence showed that the dead man had rarely, if ever, worn a safety harness, even when one was provided. His widow's claim for breach of statutory duty failed because she could not show that but for the defendant's wrongdoing, her husband's death would have been avoided. This was because of the probability that even if he had been provided with safety equipment, he would not have worn it. I say nothing about the correctness of that decision in today's legal environment: however, it is a very good example of the sort of counterfactual question that a Court must consider when seeking to resolve, whether at first instance or on appeal, matters of causation.

(4) Causation, of course, is relevant not merely where the cause of action is that of negligence, but also where it is one of breach of statutory duty. In the context of breach of statutory duty, it is important to note that difficulty has in the past arisen where the defendant employer has been held to be in breach of its statutory duty, but where the reason that this has occurred has been solely because of the conduct of the claimant employee. In such a case, where the employer has taken all reasonable steps to ensure that his employees are safe, and the employee then, in those circumstances, nonetheless undertakes a course of action which negates the employer's efforts, then basic common law principles dictate that the employee, and not the employer, is responsible for any consequential damage in such case. That to my mind is the central question in this case and it is something that I will be considering in detail later on in this ruling.

(5) As I have noted, one of the cases which the Judge considered in some detail was *Boyle v. Kodak Ltd*, [1969] 2 All ER 439. At 668, Lord Reid said this:

> "Employers are bound to know their statutory duty and to take all steps to prevent their men from committing breaches. If an employer does not do that, he cannot take advantage of this defence. On the respondents' admission there is a difference under this regulation between cases where there is another practical means of access to the top of the ladder and cases where there is none or there is nothing to which the ladder can be lashed. In the former case, the man must use alternative means of access via the stairway to get to the top to lash the ladder and then return that way before ascending the ladder. In the latter case, he is permitted to ascend the ladder without lashing it. I think the evidence shows that a skilled, practical man may easily fail to appreciate this and that the respondent ought to have realised that and instructed their men accordingly. So they have not proved that they did all they reasonably could be

> expected to do to ensure compliance and they cannot rely on this defence so as to avoid their absolute vicarious liability under the regulations."

That is, as I find, an important illustration of the line that I must draw in this case. Similarly, Lord Diplock at 672:

> "The employer's duty to comply with the requirement of the Regulation differs from that of his employees. The employer, at any rate when he is a corporation, must if needs perform his duty vicariously through his officers, servants, agents or contractors; but he does not thereby rid himself of his duty. He remains vicariously responsible for any failure by any one of them to do whatever was necessary to ensure that the requirements of the Regulations were complied with; and among those for whose failure he is prima facie vicariously liable is any employee who is himself under a concurrent statutory duty to comply with those requirements. The employee's duty, on the other hand, is in respect of and is limited to his own acts or omissions. He is not vicariously liable for those of anyone else."

14. I ask myself whether the Judge properly directed himself in relation to the law. I find that he did. He certainly set out the relevant law. His use of the phrase "a frolic of his own" is helpful as long as it is seen as a useful shorthand between the case where an employer has done all that is reasonably necessary to prevent harm to an employee and the case where the employer has not done so. I take the use of the Judge's phrase as a shorthand for the law that I have described more fully in this ruling a moment ago and I propose to use the phrase in exactly the same way myself.

15. It is important to stress that the legal test that must be applied is, as I have stated: has the employer taken all reasonable steps to ensure that his employees are safe? It is not a question of foreseeability. It is not a question of authorisation. It is a question of what reasonable steps could and should have been taken by the employer in all the circumstances. Obviously, I accept that questions of authority and questions of foreseeability are relevant factors in considering what were and what were not "reasonable steps", but they are no more than that: the critical test is as I have stated it.

16. I should also say a word about the distinction between employees and volunteers at the Respondent's premises. The Respondent worked through both employees and volunteers. As I understand it, the Respondent is a charity in the mental health field. In addition to its employees, it works with and through persons who voluntarily lend their assistance. Mr Hiscock, whose role I shall come to describe in a moment, was an employee. Mr Tyler and Mr Watson were volunteers. This distinction is not one that I propose to make anything of. It was not articulated before the Judge and he applied the law as if everyone were an employee; or, to put it another way, he drew no distinction between volunteers and employees in terms of the Respondent's responsibilities towards Mr Watson. It is not suggested that that approach was wrong. Indeed, I find that the Judge was right in declining to draw any such distinction, and I propose to adopt exactly the same approach.

17. Had Mr Watson embarked upon the second phase entirely on his own, and without any involvement of other persons acting for the Respondent, then that would be one thing. However, that was not in fact the case. There was, as I have described, no watertight distinction between the authorised phase one and the unauthorised phase two. There

was involvement by agents of the Respondent, after the authorised first phase of the job was concluded.

18. I remind myself that it was the Judge's finding that on completion of the first, authorised, phase, the job was done and there was no need to embark upon the unauthorised second phase. However, in embarking upon that second phase, Mr Watson did not act in isolation. I have already described the evidence of Mr Tyler in this regard, and the evidence of Mr Tyler is very important. As the Judge observed, Mr Tyler was an important witness in the sense that he was with the deceased throughout the process. Those last words – "throughout the process" – bears emphasis.

19. Although Mr Tyler did not, as the Judge found, see Mr Watson re-acquire the ladder and take it back to the roof where he wanted to work, he did see Mr Tyler in the early stages of commencing the second phase and from that point on, he participated in it. Mr Tyler was present throughout the unauthorised second phase. In these circumstances, it would not be right to say that Mr Watson acted, during the course of phase two, entirely in isolation. He did not climb up onto the roof with no-one else observing or with no-one else present. Had he done so, this case would be extremely clear cut. But there were people present – notably Mr Hiscock and Mr Tyler – and the question that I must ask myself is whether their presence makes a difference when applying the test I have articulated.

20. I will deal first with Mr Hiscock. The Judge considered the role of Mr Hiscock carefully in paragraph 86 of his Judgment:

> "I also deal with what Mr Hiscock saw. In my judgement, Mr Hiscock had insufficient knowledge of the deceased's tasks to have been expected to intervene. He was busy doing something else. He merely observed, as he went past the ladder, and according to Mr Hiscock there was no-one on the ladder at that time. He had not sufficient knowledge of the deceased's task to fix the defendants with the knowledge that the deceased would breach a well-known prohibition by going on the roof and, of course, he was assured by the deceased, at the time, that he would not go on the roof."

The Judge clearly considered whether the presence of Mr Hiscock rendered the Respondent responsible, in the sense that the Respondent could, through Mr Hiscock, reasonably have done something to prevent the accident. The Judge's factual finding was that the Respondent could not, for the reasons given in paragraph 86 of his judgment. I found those reasons to be sound and I do not consider that, on an appeal, I can properly go behind them. I therefore consider that the presence of Mr Hiscock, transitory as it was, cannot fix the Respondent with liability, as the Judge found.

21. I turn to the question of Mr Tyler, whose presence was altogether less transitory than that of Mr Hiscock. The suggestion that the Respondent might, through Mr Tyler, have reasonably taken further steps to prevent or avoid the accident that befell Mr Watson was not one that was clearly or separately advanced before the Judge at first instance. Mr Valentine, who appeared for Mrs Watson, frankly acknowledged this in argument. Obviously, the failure to articulate this point before the Judge is something I must bear in mind when considering the Judgment under appeal. Mr Cunnington, for the Respondent, suggested that this omission was actually fatal to the point now being advanced and submitted that I should dismiss any point regarding Mr Tyler's role out of hand for two related reasons:

(1) First, the point was not properly a ground of appeal; and

(2) Secondly, the point was not squarely addressed before the Judge.

22. I reject these points. The grounds of appeal are very widely framed and I consider that this point is a matter that falls within those grounds. I reject the first objection that the point is not before me as a ground of appeal. The more serious point is Mr Cunnington's second point, namely that the argument was not squarely raised before the Judge. As I have said, I am going to bear this very much in mind when considering the terms of the Judge's Judgment. However, in my determination, the point can still be made by Mrs Watson. I conclude that the point can still be made for the following reasons:

(1) It involves the adduction of no new evidence. Obviously, if new evidence were being adduced, the test in *Ladd v Marshall*, [1954] 3 All ER 745 would have to be satisfied. No application to adduce new evidence has been made.

(2) In these circumstances, it is simply a question of applying the law to the facts as found by the Judge in relation to Mr Tyler. If those facts, as found by the Judge, do not support the conclusion that there was nothing more that the Respondent could reasonably have done, then this appeal ought to succeed. Conversely, if Mr Tyler's presence made no difference, in that – taking account of his presence – there was still nothing more the Respondent could reasonably have done, then the Judge's conclusions and his order must stand. But there is no reason why I cannot properly consider this point on appeal.

23. I turn, then, to the question of whether the presence of an agent – that is to say, Mr Tyler – meant that the Respondent could or should reasonably have done more to prevent the accident. It might be said, and indeed was said on behalf of Mrs Watson, that even if Mr Tyler knew that Mr Watson was going up on the roof – and it seems to me there is material to justify such a finding – he should not have tacitly abetted Mr Watson in embarking upon the second phase. That puts the matter at its highest. I do not consider that putting the matter this way is sufficient to affix the Respondent with liability. One must ask what, if anything, Mr Tyler, as the Respondent's agent, could reasonably have done to prevent the accident? I can see nothing that Mr Tyler could have done to prevent the accident. Put another way, I can see nothing that Mr Tyler could have done to prevent Mr Watson's ascent beyond the second and third rungs of the ladder.

24. The Judge's finding was that Mr Watson was determined to ascend no matter what and despite the repeated warnings that multiple persons had given him, including Mr Tyler. Mr Tyler's statement, which the Judge accepted, refers to no less than two warnings.

25. Employers are, as I have said, bound to know their statutory duty and bound to take all reasonable steps to prevent persons committing breaches of those statutory duties. What steps, I ask rhetorically, could reasonably have been undertaken by the Respondent in. this case to have prevented Mr Watson's accident. That was a question that the Judge explicitly addressed in his Judgment; and he concluded that there was nothing more that the Respondent could have done:

(1) In paragraph 77.7 of his Judgment the Judge addresses the risk assessments that were carried out by Mrs Ruddle in respect of this task. The Judge concluded, and this is a question of fact, that Mrs Ruddle had gone through the task in some detail and this was sufficient for the task in question. At paragraph 83, the Judge noted:

> "I have to bear in mind, as I have already said, that the deceased was tasked with a low-level, low-danger and low-risk job. In that regard, it cannot be said that the defendants took all reasonable steps bearing in mind the sort of jobs the deceased was ever going to be asked to do. I find that they had done all that was reasonable in the circumstances."

(2) In paragraph 85, the Judge noted:

> "I bear in mind the low threshold of reasonable foreseeability in these cases as set out in the extract from *Munkman* and urged on me by Mr Valentine that given the deceased's history, the conversation at tea time, his specific agreement that the task had been completed and the prohibition to which he agreed, that he was not to try and finish off clearing the gutters, coupled with the deceased's comments about, 'what the eyes don't see', or something similar, I find that it was not reasonably foreseeable by the defendant that the deceased would breach the prohibition and undertake a task that he had not only not been asked to do but that in fact he had been prohibited from doing and in fact he had agreed not to do. It was, to use the time-honoured expression, a frolic of his own which the defendant could not have foreseen given all of the circumstances that he would do."

26. In these circumstances, there was nothing more that the Respondent could reasonably have done to prevent the accident and to prevent the harm that occurred to Mr Watson. That, as I find, is a complete answer to this appeal. There was, in short, no evidence to support a finding that the Respondent could, through Mr Tyler or anyone else, have prevented the accident. It follows that the appeal must be dismissed and I do not need to consider the question, which would have arisen had I allowed the appeal, of contributory negligence.