Neutral Citation Number: [2014] EWCA Civ 182

Case No: B3/2013/0769

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Bristol District Registry
His Honour Judge Denyer QC
1BS90880

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2014

Before :

LADY JUSTICE ARDEN
LORD JUSTICE McCOMBE
and
LORD JUSTICE VOS

- -

Between :

THE PERSONAL REPRESENTATIVES OF THE ESTATE OF CYRIL BIDDICK (DECEASED)	**Appellants/ Defendants**
- and -	
MARK MORCOM	**Claimant/ Respondent**

- -
- -

Peter Burns (instructed by **Weightmans LLP**) for the **Appellant/Defendant**
Stephen Killalea QC and Glyn Edwards (instructed by **Irwin Mitchell**) for the **Claimant/Respondent**

Hearing date: 7 February 2014

- -

Judgment

Lord Justice McCombe:

(A) Introduction

1. Mr Mark Morcom ("Mr Morcom") was seriously injured in an accident when, on 4 December 2010, he fell through the entry hatch from the loft at the home of the late Mr Cyril Biddick ("Mr Biddick"), while carrying out work to fix insulation material to the hatch cover. The question that arises is whether Mr Biddick's estate is liable to pay damages to Mr Morcom and if so, to what extent Mr Morcom was contributorily negligent in causing the accident.

2. In these proceedings, which were begun by Claim Form issued on 13 October 2011, Mr Morcom claimed against Mr Biddick damages for his injuries which, it was alleged, were caused by the breach of statutory duty under the Work at Height Regulations 2005 and/or negligence at common law.

3. Mr Biddick was 80 years old at the time of the accident and had died before the trial, held at Bristol before His Honour Judge Denyer QC, sitting as a Judge of the High Court, on 24 and 25 October 2012. Mr Biddick's personal representatives are now substituted for him as defendants in the proceedings.

4. By his judgment and order of 18 December 2012, the learned judge gave judgment for Mr Morcom for one third of his damages to be assessed. The learned judge rejected the claim based upon breach of statutory duty but upheld the claim based upon negligence at common law. Having found Mr Biddick's estate primarily liable for the injury caused to Mr Morcom, the judge held that the latter was nonetheless contributorily negligent in what had occurred and apportioned the liability as to one-third to Mr Biddick's estate and two-thirds to Mr Morcom.

5. Mr Biddick's representatives now appeal (with permission granted by Hallett LJ on 12 March 2013) against the finding of liability. Mr Morcom appeals (with the permission of my Lady, Arden LJ, granted on 2 July 2013) against the extent of the contributory negligence found against him by the judge. Mr Morcom does not maintain the breach of statutory duty claim on this appeal. By Respondent's Notice to the appeal by Mr Biddick's representatives, Mr Morcom invites the court to uphold the judge's decision on primary liability on additional grounds on the basis that there were further factual features supporting the judge's finding of what caused the loft hatch to open.

(B) Undisputed Background Facts

6. The "lead up" to the accident is not the subject of contention between the parties. The relevant facts can be found in the judgment of the learned judge, in paragraph 2, from which the following is taken:

> "The Claimant has known the Defendant for a long period of time. His parents live next door to the Defendant. The Claimant is a multi-skilled tradesman and has done some work for the Defendant on several occasions in the past. Sometimes he was paid for his work. Sometimes he simply did it on a voluntary basis. On the day of the accident the Claimant was at the

> premises for the purpose of looking at insulation in the Defendant's loft. Whilst having a cup of tea to discuss matters he agreed to fit some insulation to the hatch which provides entry into the roof space or loft. The hatch opens by being pulled downwards. This was with the use of a long pole with a hook at the end. That hook fits into a locking mechanism. It is possible to open or close the locking mechanism by means of simply turning the pole. The insulation that was to be fitted was in the form of boards which had been cut into two separate pieces. The Defendant had indicated that he would stand underneath the hatch holding it in position with the pole The Defendant felt that he should hold the locking mechanism in place with the pole because of the danger of the mechanism working itself loose because the vibration from the use of the drill which was to be used to fit the insulation material into place.

In paragraphs 15 and 16 of his witness statement in the proceedings, Mr Biddick had said,

> "Mark and Malcolm (his nephew) went up to the attic to get on with their jobs. I told them I had shut the attic door which I did. I told Mark I'd hold the key lock in position via the pole to stop it vibrating open. I think I was there for about five to ten minutes holding the pole. Things had gone quiet and then the phone rang.[sic: words omitted 'it was my sister in law from Essex –she was ringing to find out how I was getting on.'] I was talking to her for a couple of minutes. I heard a terrible crash. I came back and found Mark on the floor."

The judge summarised the position as follows:

> "In summary therefore the Claimant is in the roof fixing the insulation to the loft door. The loft door is closed. The Defendant had been standing underneath it with the pole ensuring that the lock remained in the locked position. The Defendant leaves to answer the phone and whilst he is on the phone the Claimant has fallen through the loft aperture."

7. One can go a little further with undisputed facts by saying a little more about the construction of the loft hatch and the work carried out by Mr Morcom up to the moment of his fall. The layout was described by the judge in this way, by reference in particular to a plan prepared by the expert instructed by Mr Biddick (Mr Peter Taylor) which was at p.109 of the trial bundle and a copy of which is appended to this judgment:

> "Access to the loft is by means of a ladder. The ladder is normally housed in the loft. In order to gain access to the ladder and therefore to the roof the trap door has to be opened. The trap door is hinged at one end by means of two hinges. On the

> opposite side of the door to the hinges is the lock mechanism. If one is standing or kneeling at the hinge end, the ladder is to one's left. As you climb the ladder from the area below there is a wooden railing mechanism on one's right which provides a hand hold or support as you leave the ladder to actually get into the roof. The plan at page 109 is particularly useful. The hinge side of the loft door is 1,007 millimetres in length. The ladder side of the loft door is 793 millimetres in length. The plan shows the two insulation sheets in place. The insulation sheet nearest the hinge end of the door is now held in place by some eight screws which are shown in position on the plan. The second insulation sheet nearer the catch end of the door shows five screws in position."

By way of clarification, one can add that the loft ladder which, of course, had to be withdrawn into the loft for the hatch to be closed while the work was carried out, lay (when so withdrawn) to the right of Mr Taylor's plan as we look at it.

(C) The Judgment

8. The judge recorded certain parts of Mr Morcom's evidence, given in cross-examination, as to the background of the task which he agreed to undertake for Mr Biddick. The judge said this,

> "He was referred to his CV at page 250 of the bundle. He had extensive experience in the building trade. He had attended various training courses and was capable of providing risk assessments. He always risk assesses his own work. He was familiar with the risks attached to working adjacent to an unprotected edge. He said he had done a number of jobs for the Defendant over the years. During the course of his career he had done similar work for other clients to that which he was engaged upon at the time of his accident. He agreed that the Defendant was not competent to undertake a risk assessment. He might be prepared to go along with any suggested method of work that the Defendant made provided it would not take him extra time to complete the job. He said that if he had had any concerns about doing the job in any way suggested by the Defendant namely from the inside the loft with the door closed he would have said so. He accepted that the Defendant did not dictate to him how to do the job. He knew that the hatch was not strong enough to support his weight. He agreed that where he had positioned himself, even on t he basis of his oral evidence and not the further particulars, there was a risk of falling if he overstretched. He said that the Defendant had said that he would stand under the hatch with the pole in position. This was because the Defendant had it in mind that the door could come loose through vibration. He said this would not have occurred to him if the Defendant had not mentioned it. He was not relying on the Defendant to take any weight by means of the pole."

9. As for the task itself, Mr Morcom had said, in response to a further information request on the Particulars of Claim, that he had initially inserted screws 9 to 13 first, then 5 to 8, and finally screws 4, 3, 2 and 1. He said that the last screw that he inserted was either 1 or 2 and that the first had been screw 9. In other words, according to Mr Morcom he affixed the piece of insulation on the latch side of the hatch first and the piece closer to the hinges second. His initial case was that at the time of the fall he was positioned in "the next kneeling board area next to screws 4 to 8". In evidence, he corrected this and said that the position at the time of fall was between screws 3 and 4, in the vicinity of the hatch cover's hinges.

10. The judge rejected this account and preferred the evidence of Mr Malcolm Biddick, Mr Biddick's nephew, who was working on electrics in the loft at the time. He said that he heard the noise as the hatch fell open and said that he saw Mr Morcom fall from "the ladder end of the loft hatch". He said he was 90% sure that the first piece of insulation fixed was the one fitted by screws 1 to 8.

11. Based on this evidence, the judge found that Mr Morcom "had located himself between the ladder end of the hatch being the end where the securing mechanism is located". I understand that by this, the judge meant that Mr Morcom was positioned near the ladder, but at a location towards the bottom of Mr Taylor's plan, near the lower of the two patches of adhesive marked on that plan.

12. The judge concluded that the first section of insulation fixed was the one closer to the hinges and that Mr Morcom was working on the section of insulation on the latch side when he fell. It is now agreed that the judge's finding was that Mr Morcom was working on screw 9 when he fell. That finding is not contested by either party. Nor is it now in dispute that, immediately before the fall, Mr Morcom was kneeling in the approximate position found by the judge.

13. The judge addressed the liability issues under three heads in the following order: the cause of the hatch opening, the application of the 2005 Regulations and the claim in negligence.

14. On the first point, the judge identified three possible mechanisms. He put it in this way:

> "6. There are therefore as it seems to me three possibilities so far as this accident is concerned. The first is that there was a sudden opening of the hatch because of vibration. The second is that the hatch opened because the Claimant fell on it. The third is that the lock was not fully in position but only partially in position and that the Claimant applied a degree of force to the only partially supported hatch."

He did not mention a fourth possibility, namely that Mr Morcom was "over-reaching" and over balanced, with weight on his mechanical screwdriver, leading to the hatch cover giving way.

15. The judge rejected the first of the possibilities, vibration (Mr Morcom's primary case). He based this upon Mr Taylor's evidence as to the likely extent of the vibration that would have occurred and on Mr Morcom's own evidence that he had not

regarded this as a serious possibility. He mentioned certain other factors which it is not necessary to rehearse here. The "vibration possibility" is not now pursued on Mr Morcom's behalf.

16. The judge also rejected the second possibility as follows:

> "As to the second possibility although I have more doubts about this on balance I reject the theory that the Claimant applied his full force to the trap door by falling on it. First, the Claimant himself denies that this happened. Although as I shall explain in a moment it is my view that the Claimant is mistaken about certain things he was patently an honest man. Even allowing for overbalancing I find it slightly difficult to see how he would be applying a force greater than 30 kilograms to the trap door which is the amount of force needed to open that door on the burst open scenario. Even allowing for him to be stretching in order for example to fit screw 9 I doubt whether that would generate a sufficient downward force of itself to cause the trap door to break free from its securing lock if the locks were fully in position."

17. In the result, the judge concluded that his third possibility was the most likely. His short finding on this was in these terms:

> "In my view the most likely scenario is that at the time of his fall the lock was only partially in position in other words only partially engaged."

The basis of this finding does not appear at this point in the judgment. Earlier the judge records the evidence of Mr Morcom's expert, Mr Gillam, to the effect that he had found no deformation to the latch, which he would have expected to find if the hatch had been forced open by Mr Morcom's body weight falling onto it. Later in the judgment, however, after dealing with the question of the duty of care at common law, the judge said,

> "As I have already indicated it is my view that the most likely i.e. the more probable than not explanation for this accident is a combination of the lock being partially disengaged coupled with the Claimant's positioning himself in the way in which he did and overreaching thereby leading to some excessive weight being placed upon the trap door. The more probable than not explanation as to why the latch became partially disengaged is that the Defendant when going to answer the phone had removed the pole and in so doing had partially caused the lock to turn thereby rendering the trap door to be in a more precarious position than would have been the case had the lock remained fully secure. To that extent therefore his leaving of his post was of causal significance so far as this accident is concerned and was a foreseeable source of the accident and subsequent injury which the Claimant suffered."

18. The judge rejected the application of the 2005 regulations and I say no more about that aspect of the case, as it is no longer live. With regard to the duty of care, the judge's conclusion was as follows:

> "Had the Defendant not chosen to involve himself in the operation which the Claimant was carrying out there would be no basis at all upon which to make any sort of finding of negligence against him. Quite simply he would not owe the Claimant a duty of care in this context. Of course, as the occupier, he owes a duty for example to warn against hidden dangers. This is not a hidden danger case. In other words if he had simply asked the Claimant to get on with the job and had then busied himself with other things I cannot see that he could in any way be regarded as responsible for the accident. However the strange quirk in this case is that the Claimant (sic, Defendant) did involve himself (and at his own instigation) with the operation. As a matter of fact, the Claimant thought that the risk of vibration causing the catch to unlock was somewhat fanciful. Nevertheless this is clearly something that the Defendant thought was a possibility. To that end he agreed to position himself under the hatch with the pole holding the catch in position. To that extent therefore it seems to me he brought himself into close proximity with the Claimant. Having chosen so to do if in fact he was at fault I would not be inclined to say that it was not "fair, just and reasonable" to impose a liability upon him. In other words, to the limited extent of the Defendant's involvement and within the scope of that involvement it is not in my view improper to say that the Defendant did assume a duty of care and that if within that limited context he failed to exercise that duty of care to the requisite standard that in those circumstances he is capable of being negligent."

19. As to contributory negligence, the judge found:

> "The fact of the matter is that the Claimant was a highly experienced workman. He had attended appropriate safety courses. He was fully capable of making a risk assessment of any work which he did. He was aware of the dangers of working close to an unguarded edge. He knew that the hatch was not capable of supporting his weight. Both the experts say that the manner in which he chose to carry out this task was inherently not very safe. Further if as I have found he had positioned himself between the ladder and the corner of the trap door to the left of the ladder he was putting himself in an obviously precarious position. To then reach over as he must have done in order to get to screw 9 or indeed any of the other potential screwing positions in the area adjacent to the catch was in my view of primary importance so far as the causation of the accident is concerned and indeed was the major

> contributor. In my judgment the major cause of this accident was the failure by the Claimant to take proper case (sic) for his own safety."

In the result, the judge apportioned blame as to one-third to Mr Biddick and two-thirds to Mr Morcom.

(D) The Appeal/Cross Appeal and my Conclusions

20. Mr Biddick's representatives now challenge the judge's findings as to the cause of Mr Morcom's fall and as to the existence of a duty of care which he found to be owed by Mr Biddick to Mr Morcom. By his Respondent's Notice, Mr Morcom submits that the judge should have made certain other findings of fact in his favour, which would have reinforced his finding as to the cause of the fall. By his cross-appeal, Mr Morcom submits that the judge's finding of two thirds responsibility for the accident on his part was unduly harsh and wrong.

21. It is convenient to deal with the points now arising in the order in which the judge took them and in which the parties argued the case before us. I propose therefore to address, first, the cause of Mr Morcom's fall, secondly, the alleged duty of care and finally, on the assumption that the judge was correct that Mr Biddick was liable to Mr Morcom, contributory negligence.

22. On the first issue, the cause of the accident, Mr Burns for Mr Biddick's representatives, submits first that the judge's finding that the latch was only partially engaged failed to give proper regard to evidence from both Mr Morcom and Mr Biddick that they observed the latch to be fully closed and Mr Biddick's evidence that the latch remained in the closed position when he went to answer the telephone. Secondly, Mr Burns argues that the judge failed to give adequate regard to his own finding, at the end of his judgment, that Mr Morcom was reaching over to screw 9 from his kneeling position when he fell and that this was of "primary importance" in the causation of the accident. Both experts regarded Mr Morcom's work method to be unsafe and said that to affix screw 9 he would have had to be leaning over from his position to do so. Accordingly, it is submitted, the judge failed to recognise the "fourth possibility", namely that the cause of the accident was not a partially open latch but the act of overreaching, causing excessive weight to be transferred through the screwdriver onto a fully closed latch. Thirdly, it is submitted that only a modest amount of extra pressure would have been necessary to exert the 32 kg force which the expert evidence indicated was required to force open a fully closed latch.

23. In the result, Mr Burns contends that the judge's finding as to the cause of the accident was outwith the reasonable range of possible decisions on this issue, leaving the matter open for this court to decide.

24. Mr Killalea QC (with whom Mr Edwards appears) for Mr Morcom argues that the judge's finding was entirely open to him on the evidence and that Mr Burns' contentions to the contrary rely to an extent upon "cherry-picking" aspects favourable to the defence case, without regard to the evidence as a whole.

25. As for the "direct" evidence of Mr Morcom and Mr Biddick as to the state of the latch at the crucial time, one of the problems with Mr Morcom's evidence is that his

recollection of the order in which he fitted the two halves of insulation material proved to be faulty. His evidence was that he was working on the piece of insulation nearest the hinges when the hatch opened. This was wrong. His evidence in chief was this (Transcript Day 1 p. 25A-E):

> "Q. While we are looking at those photographs, just help with this. You began, it is very clearly said in those replies, you were asked the question was the latch fully engaged when you were working and you said "Yes", but what I would like to ask you now is from what positions would you be able to see that when you were working?
>
> A. Now, the latch was engaged when I fitted the first board. After that, I would have had no view. When I was the other side, I would have had no view of it, but, when I last seen it, yes, it was engaged.
>
> Q. Yes. So certainly when, as you told my Lord, screw 9 has gone in and you were that side, you would have been able to see it?
>
> A. Yes, definitely.
>
> Q. Yes, and it was closed at that point?
>
> A. It was."

26. In cross-examination Mr Morcom added (Transcript Day 1 p.63C-H):

> "A. I could only see the latch from one side and it was in the closed position, like I said before, but when I was the far side fitting the last board, it would have been here and I would have had an insulation board on top of it, which would have restricted my view of the catch.
>
> Q. So, when you were fitting screws 9 to 13, you would have been able to see the catch?
>
> A. Even if I was there, yeah, even if I fitted those screws on that side.
>
> Q. Okay, but when you fitted screw 9, your recollection is that the catch was fully closed.
>
> A. When I fitted the board…..
>
> Q. Fitted the board?
>
> A. …around, around to make sure that it didn't bind with the catch, yes, it was in a closed position.
>
> Q. Yes, yes okay.

> A. Because Mr Biddick cut out the slots so I was making, you know, when I fitted the board, I made sure that the catch wasn't going to bind to the side of the notch."

27. Mr Biddick's evidence in his witness statement was this:

> "15……..I told Mark I'd hold the key lock in position via the pole to stop it vibrating open. I think I was there for about 5 or 10 minutes holding the pole. I can't now remember how long I was there for with any precision. I was putting some pressure on the door – I recall my arms ached.
>
> 16. Things had gone quiet and then the phone rang. It was my sister in law from Essex – she was ringing to find out how I was getting on. I was talking to her for a couple of minutes – I believe it was a couple of minutes, I can't be sure of exactly how long it was now – but it was for some time when I heard a terrible crash. The sound will be with me for the rest of my days."

Additionally, he provided a note which he said had been typed out for him by his brother about a week after the accident. In it, Mr Biddick recorded as follows:

> "8……. I handed Mark the 2 insulation pieces and I closed the loft door from the underside, which meant securing the plastic locking mechanism with the appropriate stick by turning it to the normal locked position. I held the stick to prevent the mechanism from vibrating to open position.
>
> 9. Mark commenced work with adhesive and he obviously secured additionally with screws using a battery-charged drill. This took a little while.
>
> 10. There was a pause in the sound of activity and during this pause my telephone rang and I left to answer it from the living room land-line. This meant the securing catch was in the lock position when I left.
>
> 11. There was a terrible crash and I heard Mark shouting "Gil" in distress and shouting "I can't feel my legs!" I immediately went to find him…"

28. Mr Burns argues that this evidence clearly indicates that Mr Morcom and Mr Biddick both considered that the latch was fully closed at the material times.

29. Mr Killalea submits in contrast that this is only a superficial reading of the evidence. First, in Mr Biddick's case, the evidence does not amount to an assertion that he positively looked and checked that the latch was closed as he left to answer the telephone. There was nothing at all to that effect in the witness statement and the note does no more than imply an assumption on Mr Biddick's part in saying, "This *meant* the securing catch was in the lock position when I left…" (Emphasis added).

30. In addition, Mr Killalea points out, Mr Morcom's evidence was that the catch was engaged "when I last seen it" (see above), which begs the question of when that last sighting was.

31. On this point, Mr Killalea asks us to note that, in the second passage quoted, Mr Morcom seems to be speaking of seeing the catch when he was "fitting" the board and making sure that it did not "bind with the catch", i.e. (he submits) when fitting the board with adhesive rather than when inserting the screws. Mr Biddick speaks of leaving in a period of silence when screw insertion had stopped, perhaps (says Mr Killalea) when the gluing activity was being done and before the screwing recommenced. There is, therefore, nothing to show that the movement of the latch by Mr Biddick was not at a stage *after* Mr Morcom had observed the catch but *before* the screwing recommenced.

32. Mr Killalea also submits that the judge was entitled to be influenced in his findings by the numerous times in which Mr Taylor, the defence expert, referred in his report to the possibility of the latch having become partially disengaged as a possible precursor for Mr Morcom's fall. He gave us nine such references including the following, paragraphs 7.5.8, 8.3.2 and 9.1.1 in which Mr Taylor stated:

> (1)
>
> "7.5.8 Therefore, on the basis of these tests, it is highly unlikely that had the latch been fully engaged the Claimant would have burst open the loft door simply by using the power tool to tighten the screws."
>
> (2)
>
> "8.3.2 The highest probability that the Claimant could apply sufficient feed force with the power tool to burst open the latch occurs at screw position 9. This is because there is a larger turning moment at that screw location. Even at that location I rate the probability of the latch bursting open as improbable because an estimated 32kg of feed force would have to be applied to be in danger of overcoming the latch. It would be improbable that the Claimant would apply such a heavy feed force given that the nature of the task is so light. At all the other 12 screw positions the probability of the power tool applying sufficient feed force to burst open the latch is even lower due to the smaller turning moments involved."
>
> (3)
>
> "9.1.1 On the basis of my tests, it is highly unlikely that the loft door would burst open by the normal application of the power tool providing the latch was fully engaged when tightening the screws."

33. These points were supplemented in Mr Taylor's oral evidence. On the morning of Day 2 (pp.49F – 50D of the Transcript), there were the following questions and answers in cross-examination:

> "Q. All right. What we have here though, on your postulation, and let's just look at it, Mr Taylor, in fairly blunt terms is your report advances the idea that there is overreaching, yes? Do you suggest that the overreaching must occur in respect of any specific screws for your thesis and your hypothesis to work? Does it have to be a s pecific screw that Mr Morcom was working on at the time?
>
> A.There may have been overreaching. Whether there was or not is matter for the judge.
>
> Q. Yes, but you do agree that he still has to be applying through overreaching a certain amount of force to the hatch cover for it to burst open?
>
> A. Well. It could have been precarious to start with?
>
> Q. The hatch cover could have been precarious to start with?
>
> A. Yes.
>
> JUDGE DENYER: No, no I am sorry you meant his positioning would have been precarious to start with.
>
> MR EDWARDS: No, he said hatch cover.
>
> A.No, that latch. The latch could have been precarious. If it wasn't fully engaged, it could have been in a precarious position.
>
> Q. Yes.
>
> A. It could have been……"

Then this :

> "Q. And, in short, for your thesis to work, in reality Mr Morcom has to have been putting in screws much closer to the latch side of the hatch cover than he says he was in order for the force which he put through the screwdriver to cause that to burst open?
>
> A. If the latch was fully engaged.
>
> Q. Right. So you contemplate the possibility here that the latch was not fully engaged?
>
> A. It may, it may not have been fully engaged.

> Q. Yes. So, if in fact that was left by Mr Biddick in a position that was not fully engaged, it created a vulnerability here, did it not?
>
> A. It could do.
>
> Q. Because then it wouldn't take much at all, I think on your reports, your thesis, it wouldn't take much at all for it then just to drop open?
>
> A. It could. It could just drop open.
>
> Q. Without in fact there being a need for Mr Morcom to drop his weight on it?
>
> A. Indeed."

34. There were further questions and answers to similar effect when the judge questioned the witness towards the end of his evidence: see Day 2 Morning Session pp.58G-59A and p.60B-H.

35. Mr Killalea argues that Mr Taylor's tests suggest that, if the latch on the cover had been fully closed, it was likely to have required pressure of almost half of Mr Morcom's body weight of 75kg to impart sufficient force to cause the hatch cover to open. This, it is submitted, is highly unlikely to have occurred.

36. Finally, Mr Killalea referred to some evidence given by Mr Malcolm Biddick about what he saw as Mr Morcom fell from the loft. Mr Biddick said that he heard the bang as the hatch opened and hit the wall. This attracted his attention and made him look up. He then saw Mr Morcom's head "more or less level with the top of the loft hatch" (Day 1 p.177 B/D) Mr Killalea submitted that, if it was excessive weight on the screwdriver that caused the hatch to open, it might have been more likely that Mr Morcom would have fallen immediately, head first with the hatch cover as it dropped and Mr Biddick would then have seen perhaps only Mr Morcom's legs rather than the whole of his body still in the loft (even if only for a split second).

37. In my judgment, when one examines these features of the case, and in particular, the course of the oral evidence of Mr Taylor and his report (which I summarise above), it is fully understandable how the judge reached the conclusion that he did as to the cause of the collapse of the loft hatch, i.e. that the catch was only partially engaged. The evidence taken as a whole provides important amplification and qualification of the short assertions by Mr Morcom and Mr Biddick that the securing catch was closed when observed by them. Mr Taylor was clearly a very impressive witness upon whose evidence the judge relied to a considerable extent. Given this state of the evidence, I find it impossible to say that the judge arrived at a conclusion as to the cause of Mr Morcom's fall which was not open to him.

38. I turn now to the question of the duty of care alleged.

39. On this part of the case, Mr Burns submits that the danger to which Mr Morcom was exposed was that the loft hatch would not take his weight and would, therefore, burst open. It was a danger which did not arise from the limited extent of Mr Biddick's

involvement and it was an obvious risk which Mr Morcom appreciated and voluntarily accepted. Further, Mr Morcom agreed in evidence that he was an experienced workman, that he appreciated the risk that the hatch would not take his weight and did not rely upon Mr Biddick in respect of that risk. He took us to a passage in the cross-examination of Mr Morcom to that effect, on Day 1 (transcript pp.50D-51E, pages 135-136 of the Appeal Bundle).

40. Mr Burns relied in particular in this respect upon the speech of Lord Hoffmann in *Tomlinson v Congleton BC* [2004] 1 AC 46, 84-5, paragraphs 44 to 46, pointing to these passages:

> "44. The second consideration, namely the question of whether people should accept responsibility for the risks they choose to run, is the point made by Lord Phillips of Worth Matravers MR in *Donoghue v Folkestone Properties Ltd* [2003] QB 1008, 1024, para 53 and which I said was central to this appeal. Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk….
>
> ……
>
> 45. I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may be think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.
>
> 46. My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ, ante, p 62B-C, para 45, that it is "only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability". A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger

> (*Herrington v British Railways Board* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves : *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360"

41. The immediate distinction can be drawn between the present case and that of *Tomlinson* in that the occupiers of the relevant land in the reported case did not choose to participate in any way in the undertaking by the claimant of the "obvious risk" inherent in diving into shallow water in a disused quarry.

42. In this case, Mr Biddick chose to involve himself in the activity. He assumed responsibility, not for bearing Mr Morcom's weight if he happened to fall on the hatch cover, but in undertaking to ensure that the latch remained closed. Admittedly, Mr Biddick's concern was through vibration and the accident occurred through weight applied to screw 9. However, his task was as I have described. He chose to abandon his post, and, in doing so, (as the judge found) caused the lock partially to disengage.

43. Examining the traditional criteria for the existence of a duty of care, it seems to me, therefore, that Mr Biddick put himself in a degree of proximity to Mr Morcom in the performance of the work in circumstances in which it was foreseeable that, if his task was neglected, the hatch might work itself open, with a risk of causing Mr Morcom to fall and sustain injury. There can be no doubt that, in such circumstances, that it would normally be fair and reasonable to find that a duty of care arose. However, Mr Burns adds into the equation that Mr Morcom expressly denied that he was relying upon Mr Biddick to take any weight or that he regarded Mr Biddick's position as being "safety critical". Mr Burns submits that the absence of such reliance is critical in negating a duty of care in this case.

44. He referred for support in this submission primarily to the requirement of "reasonable reliance" by the claimant on the exercise of care by a defendant in the economic loss cases of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] AC 465, *Henderson v Merritt Syndicates Ltd.* [1995] 2 A C 145 and *Spring v Guardian Assurance plc* [1995] 2 AC 296. He referred us to the speech of Lord Goff of Chieveley identifying the governing principle of liability in the speech of Lord Morris of Borth-y-Gest in *Hedley Byrne* case as showing it to be "…now…regarded as settled that if someone possessed of a special skill undertakes to apply that skill for another person who relies on that skill, a duty of care arises…" (Mr Burns' emphasis): [1964] AC at 502-503, quoted by Lord Goff at [1995] 2 AC at 178E-F and see also Clerk & Lindsell on Torts 20th Edn. (2010) paragraph 8-112, where the feature of "reasonable reliance and dependence" is considered in the context of financial loss resultant upon such dependence, Loc. Cit. paragraph 8-91 et seq.

45. Mr Burns submits that this element of necessary reliance by the claimant upon the defendant to exercise care has been translated into cases of personal injury: see *Watson v British Boxing Board of Control* [2001] QB 1134; *Wattleworth v Goodwood Road Racing Co. Ltd.* [2004] PIQR P25 and *Mitchell v Glasgow City Council* [2009] 1 AC 874.

46. From *Watson's* case, Mr Burns relied upon two short passages from the judgment of Lord Phillips of Worth Matravers MR (as he then was) in which Lord Phillips said (at

p.1149F) that the principles alleged to give rise to liability on the defendant's part were an "assumption of responsibility and reliance". After a review of the authorities, Lord Phillips concluded (in Mr Burns' second passage) that,

> "49. It seems to me that the authorities support a principle that, where A places himself in a relationship to B in which B's physical safety becomes dependant upon the acts or omissions of A, A's conduct can suffice to impose on A a duty to exercise reasonable care for B's safety. In such circumstances A's conduct can accurately be described as the assumption of responsibility for B, whether "responsibility" is given its lay or legal meaning."

Watson v British Boxing Board of Control Ltd. was a case where a boxer injured in a bout claimed damages from the defendant Board for negligence in failing to ensure that prompt medical attention was available to him.

47. It seems to me that Lord Phillips' conclusion, quoted above, does not rule out a duty of care on the part of Mr Biddick in our case.

48. In *Mitchell's* case it was sought to hold the city council liable where one council tenant attacked and killed his neighbouring council tenant shortly after the former (known to have a history of aggressive behaviour) had been summoned to a meeting with council officials to be warned about his anti-social behaviour. The House of Lords held that the council had given no undertaking to make itself responsible for protecting the deceased from the criminal acts towards the neighbouring tenant.

49. It is hard to see how this case advances Mr Burns' argument.

50. In *Wattleworth* Davis J (as he then was) dismissed a claim for damages for personal injuries brought against a number of defendants in respect of the death (in a track event) of a racing car driver killed when he drove into a tyre-fronted earth bank, said to have been negligently designed or constructed, at a bend in the track. One of the defendants was a company ("MSA") which advised the track owners upon safety matters. Davis J held that MSA did owe a duty of care to the deceased but acquitted it of the negligence alleged. At P407, paragraph 118 of the judgment, the judge said this:

> "118. It is quite right, I accept, that Goodwood did not require an MSA Track licence or event permit for the track day. Indeed in some previous years Goodwood may (perfectly lawfully) have operated at the track without a Track licence; and at the time Mr Wattleworth contracted to hire the circuit on this occasion the only MSA licence then extant related to sprints. I also accept that there is nothing to show that Mr Wattleworth, in hiring the circuit, specifically relied on the existence of any MSA licence (even though, as I find, he must have thought that the MSA would have had some involvement in regulatory terms with regard to the circuit). However while reliance was important in the *Watson* case, I do not think the lack of specific reliance here is of itself dispositive of the question of whether a

> duty of care was owed. After all the claimant in *Perrett* – Mr Collins' passenger – presumably did not know of or rely on the inspection before agreeing to fly in the plane. In the present case I consider that in using the circuit Mr Wattleworth, in common with other lawful users, was entitled to assume and would have assumed that all due care had been exercised by the persons – whoever they be – who had undertaken responsibility for safety matters."

It seems to me that this passage tends away from the principle for which Mr Burns contends and suggests that specific reliance upon the care exercised by the defendant is not a necessary element of liability.

51. The reference by Davis J to *Perrett*, in the passage quoted above, is to *Perrett v Collins & ors* [1998] Ll. R. 255, a case to which we were also referred. In that case, the claimant was injured when a "kit built" light aircraft, in which he was a passenger, crashed shortly after take-off. The owner had carried out alterations to the aeroplane, replacing its gearbox but without changing its propeller as he ought to have done. The claimant sued the owner, a technical inspector and the company who had appointed the inspector whose responsibility it was to inspect and approve the aircraft to enable it to obtain its certificate of airworthiness. This court upheld the trial judge's finding that the inspector, and the company appointing him to carry out the inspection, owed the injured man a duty of care.

52. Mr Burns frankly recognised that an important passage in the judgment of Hobhouse LJ (as he then was) was "unhelpful" to his case, but he submitted that this "flew in the face" of the speech of Lord Hoffmann in *Tomlinson*. The passage from Hobhouse LJ's judgment was this (at page 262 of the report):

> "Where the plaintiff belongs to a class which either is or ought to be within the contemplation of the defendant and the defendant by reason of his involvement in an activity which gives him a measure of control over and responsibility for a situation which, if dangerous, will be liable to injure the plaintiff, the defendant is liable if as a result of his unreasonable lack of care he causes a situation to exist which does in fact cause the plaintiff injury.
>
> Once this proximity exists, it ceases to be material what form the unreasonable conduct takes. The distinction between negligent misstatement and other forms of conduct ceases to be legally relevant, although it may have a factual relevance to foresight or causation. Thus a person may be liable for directing someone into a dangerous location (e.g. the Hillsborough cases; e.g. *Sharpe v. Avery* [1938] 4 All E.R. 85) or a producer may be liable for the absence of an adequate warning on the labelling of his product (e.g. *Heaven v. Pender,* (1883) 11 Q.B.D. 503 at p. 517, per Lord Justice Cotton). Once the defendant has become involved in the activity which gives rise to the risk, he comes under the duty to act reasonably in all respects relevant to that risk. Similarly none of the particular

> difficulties which arise in relation to economic loss arise in relation to the causing of personal injury. Once proximity is established by reference to the test which I have identified, none of the more sophisticated criteria which have to be used in relation to allegations of liability for mere economic loss need to be applied in relation to personal injury, nor have they been in the decided cases."

53. For my part, I do not see any inconsistency between this passage in the judgment of Hobhouse LJ and the decision of the House of Lords in *Tomlinson's* case. It seems to me that in *Tomlinson* neither defendant had involved itself in any relevant activity giving control or responsibility over a dangerous situation. In the present case, Mr Biddick in contrast had chosen to involve himself to a limited, but important extent in the potentially hazardous activity being conducted by Mr Morcom. His undertaking was to keep the hatch door latched. It seems to me that it was entirely foreseeable that, should he fail to do so, the hatch door might fall open, whether through vibration or pressure. There is no need to import any element of "reasonable reliance" in such a case, as might be required in a case of economic loss, in order to lead to the existence of a duty of care. Once Mr Biddick took upon himself the task of ensuring that the latch remained closed it seems to me that he assumed a duty to perform that task carefully, even if Mr Morcom did not see Mr Biddick's role as an element in his own safety.

54. As Davis J said in *Wattleworth* the passenger in the aircraft in *Perrett v Collins* did not know of, or rely upon, the inspection of the aircraft carried out under the auspices of the second and third defendants in that case. There was nonetheless sufficient proximity between the passenger and those defendants to give rise to the duty of care. The duty would, I think, have existed still even if the aircraft passenger had been intent on carrying out (for example) an additional hazardous activity such as "wing walking"[1], against the dangers of which no careful inspection could have protected him.

55. Mr Biddick's careful performance of his task could not have protected Mr Morcom if he had fallen with his full weight upon the hatch door – a real additional risk in the circumstances of this case, as the experts recognised, because of the method of work that Mr Morcom adopted. However, the additional hazard undertaken, against which Mr Morcom acknowledged Mr Biddick's role could not protect him, did not in my judgment negate the existence of the more limited duty of care in the task which Mr Biddick did in fact undertake.

56. I would, therefore, dismiss the appeal against the judge's finding of liability on the part of Mr Biddick. That leaves Mr Morcom's cross-appeal on the apportionment of liability between him and Mr Biddick. As noted, the judge found Mr Morcom principally to blame and held that his damages should be reduced by two-thirds.

57. On this issue, Mr Killalea argues that, while the court would not interfere with a trial judge's finding of contributory negligence of 40% or 45%, the judge's attribution of blame was excessive. The judge, he argues, found that primary liability rested with

[1] This is the name given to the activity where a person stands on an aeroplane wing in flight, harnessed to a frame constructed on top of the wing.

Mr Biddick and he should therefore have apportioned liability at no more than 50/50 between Mr Biddick and Mr Morcom. Mr Killalea acknowledged the significant elements of negligence on Mr Morcom's part, such as the respective expertise of Mr Morcom and Mr Biddick, the unsafe work method adopted by the former, failure by Mr Morcom to carry out a proper risk assessment in spite of his training, an element of excessive pressure applied through the tool and other factors[2].

58. In my judgment, it is not possible for this court to undermine the apportionment of liability. The judge's reasoning, to be found in paragraph 8 of the judgment, appears to me to have been entirely sound. Mr Biddick was negligent in failing properly to perform the small task which he undertook, but Mr Morcom was principally to blame for the unsafe method of work which he chose to adopt, for the reasons identified by the judge. The assessment by the judge of the proper apportionment of blame between the parties seems to me to be unassailable.

(E) Proposed result

59. For my part, for these reasons, I would dismiss both the appeal and the cross-appeal.

Lord Justice Vos:

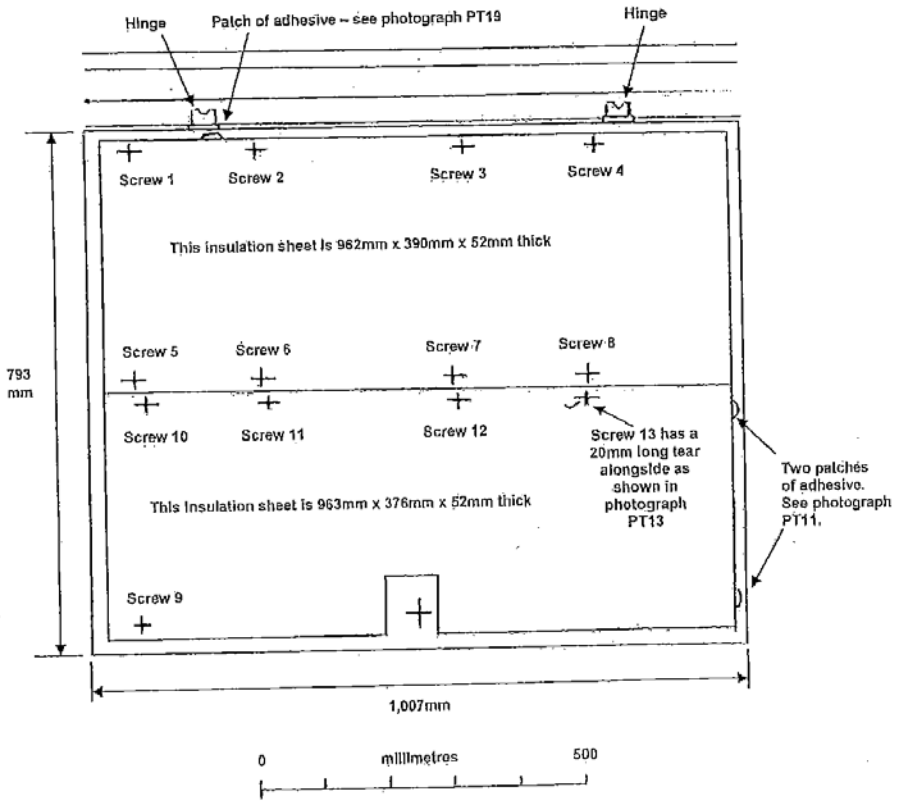
60. I agree.

Lady Justice Arden:

61. I also agree.

APPENDIX

[2] See paragraph 9 of the Defence.



Drawn by Peter Taylor using the measurements he recorded during the inspection on the 3rd June 2011.

The loft door is shown hanging down from the door aperture (ie the door is fully open) to reveal both sheets of insulation and the pattern of 13 screws which have been numbered.

FIG 1: PLAN OF THE LOFT DOOR