

CA on appeal from the Central London County Court (His Honour Judge Roger Cooke) before Ward LJ.  
Sedley LJ. 26<sup>th</sup> April 2002.

**JUDGMENT : LORD JUSTICE WARD:**

1. Mr Matuma is a litigant in person who seeks permission to appeal against the order made by His Honour Judge Roger Cooke in the Central London County Court on 19th October 2001, when he dismissed the applicant's claim for damages for personal injuries which he says he suffered in the course of his employment with the London Borough of Barnet. He worked as a care assistant in a home which catered for handicapped young people and one of his duties was to assist in the lifting in particular of a young man called Stuart Edwards from his wheelchair onto a bed to change him when he soiled himself.
2. The application came before Lord Justice Sedley on 25th February, when Mr Matuma expressed his deep concern about a document which was numbered MED4, that being an exhibit to a witness statement of a Mr Davies. This document had gone missing. My Lord adjourned the application for permission, directing that the London Borough explain in writing what was the true situation about MED4 relevant to Stuart Edwards. We have in response to that a witness statement from Mr Simon Johnson, the solicitor presently having conduct of this action for the defendants. He has explained that the exhibit MED4 should have been the risk assessment for Stuart Edwards which had been completed in August 1994. "Regrettably" (his word) the actual document exhibited as MED4, though dated August 1994, related to a female patient at the day centre and had nothing whatever to do with Stuart Edwards.
3. I should observe that the reason for the production of that document by Mr Davies was to provide the answer to paragraph 3(d) of the particulars of claim, which alleges that the local authority had failed to make suitable or sufficient assessment of the manual handling operation to be undertaken in respect of this young man, or to take appropriate steps to reduce the risk of injury arising out of that handling of him, contrary to regulation 4(1)(b) of the Manual Handling Operations Regulations 1992. I observe that subparagraph (e) of the particulars of claim complained of failing to take appropriate steps to reduce the risk of injury arising out of that operation, contrary to regulation 4(1)(b)(ii); and paragraph (f) complained of failing to ensure that the claimant received proper training and information on how to handle correctly, pursuant to regulation 11 of those Regulations.
4. Mr Johnson's explanation for the error is that it was an honest mistaken belief by Mr Davies. He, Mr Johnson, when he came to prepare the trial bundle, did not notice that the exhibit was missing, "although the document was within the trial bundle and marked as exhibit TMG2 to the witness statement of Timothy Morris Gray" (as he said in paragraph 7). When I look to the witness statement of Mr Gray, I note that he too purports to answer paragraph 3(d) of the particulars of claim. He says that there is now produced and shown to him marked TMG2 a copy of the risk assessment which was completed on 4th February 1994. This document was given to all members of the staff, including the claimant.
5. I observe immediately, therefore, that the defendants' case is not consistent. Mr Gray relied on an assessment of February; Mr Davies purportedly on an assessment in August. There was some support for an August assessment because a Miss Linda Compton had made reference to that assessment being carried out on 23rd August 1994, but it may be (and we do not have a transcript of her evidence to conclude any view of this) that she had no independent recollection of what in fact she had advised should be done.
6. There is a suggestion in the papers that I have read that the position of poor Mr Edwards had deteriorated after February, requiring a reassessment because of his deteriorating condition and symptoms - one of which was, interestingly, that he could go into spasm. Whether the effect of that spasm would have produced the kind of involuntary jerking of his legs of which Mr Mutuma gave some account as being the cause of his partner in the lifting, Mr O'Donoghue, dropping those legs, I simply do not know at this stage. But what remains significant to me is that there was apparently a need to change the system and there are two conflicting accounts of what the prevailing system was at

the material time. All of that make the document MED4 the more vital for a proper consideration of the case.

7. According to the witness statement of Mr Johnson, that document (assuming, contrary to what he says, that it is not the same as TMG2) has simply disappeared. I find it deeply unsatisfactory that we do not have an explanation from Mr Davies, and I think that should now be given to this court together with a proper explanation of what efforts have been made to trace MED4, which must have been in existence, one would think, at the time Mr Davies signed his witness statement. In my judgment, these matters do have a significance.
8. There are possibly two aspects to this case. One is whether the lifting operation on the day in question happened as Mr Mutuma explained it, or whether it happened as Mr O'Donoghue explained it. The applicant, Mr Mutuma, has a very real difficulty, perhaps - and I hope he is listening to me carefully - in persuading the Court of Appeal that the judge was not entitled to prefer the evidence of Mr O'Donoghue to the evidence he gave. If that decision is upheld, a very large part of his case falls to the ground.
9. What I find unsatisfactory, however, is that there was a wholly separate part of his case, namely that pleaded in subparagraphs (d), (e) and (f), which complained about a lack of proper instruction. Without the relevant assessment being there to indicate what instructions were appropriate to comply with the Regulations and the ordinary duties, it is perhaps very difficult to see why the conclusion of the jointly appointed expert received such scant attention from the judge. I refer to pages 9 and 10 of the joint report of the expert, Gillian Whorwell. She concluded that, although Mr Mutuma had failed to follow procedures and guidelines and should not have lifted Mr Edwards by himself: *"Although some training was given to Mr Mutuma, there was failure to provide adequate manual handling training and supervision of the manual handling techniques he was using. There was also failure to warn him against unsafe medical practice."*
10. I am surprised that that received little close attention in the judgment.
11. The judgment seems to imply that the case depended only on subparagraphs (a) and (b) of the particulars of claim. Paragraph (d) was dismissed, the judge saying: *"There is some doubt on the evidence, I think, as to whether the assessment that I saw among the documents was the most up-to-date one, though Miss Harris's evidence, which suggests that that is the assessment that came out of the files, coupled with the evidence of Miss Compton that up-to-date assessments in effect replaced earlier ones, would certainly suggest that it was the up-to-date one."*
12. I ask, parenthetically, was the judge referring to exhibit TMG2 or to exhibit MED4; and why was the judge not insisting on the correct MED4? He continued: *"It is impossible I think to reconstruct everything in terms of date, but the strong probability seems to me to be that we have seen the one that matters, and any difference between that and an up-to-date one would, I think, be slight."*
13. I am not sure about that, in view of the deteriorating position of Mr Edwards and the need to update the procedures. I note, for example, the difference in the layout of the forms in the two exhibits to which I have been making reference, and I wonder therefore whether there is some strength to the claimant's claim that, on that part of it at least, he was entitled to find that the local authority were in breach of their duties, whatever contributory negligence may be found against him if he did something he ought not to have done.
14. These are all question-marks which in my judgment require the local authority to make a further and better attempt to explain to this court what has gone wrong.
15. I would therefore adjourn the matter to be listed on notice to the London Borough of Barnet. I do so with a measure of reluctance. Again I would like Mr Mutuma to listen carefully: it may be that he would not be successful, or wholly successful, on any appeal in the light of the judge's preference for the evidence of Mr O'Donoghue against his own. On the other hand, it could be that at least some of the claim ought to have been found in his favour. There is a considerable expense to which the local authority will be put in coming to this court and that is a matter of regret. To prepare this case properly one would need transcripts of evidence and a good deal of preparation, and I cannot but

wonder whether it would not be sensible for both parties to look realistically at the respective difficulties in which each is placed: one with a harsh finding of fact against him; the other with perhaps vital documents gone missing, with a great deal of expense to be incurred which might be better deployed in mediating this claim and seeing whether it cannot be brought to a satisfactory conclusion. I would therefore direct that the parties should attempt mediation through the Court of Appeal office. Their failure to do so may have costs consequences when this matter comes back.

16. This should be listed on notice - formal notice this time - to the respondents, the London Borough of Barnet, with the appeal to follow if permission is granted. I express my gratitude to the London Borough for attending as a matter of courtesy before us today. They did so at their own risk of costs and I am grateful to Mr Preston for the help he has tried to give us today, but in the difficult position of not having the bundle and not even having the judgment.
17. So this matter should be adjourned on that basis and it should come back preferably before Lord Justice Sedley and myself, with possibly three hours or half a day at least set aside.

**LORD JUSTICE SEDLEY:**

18. I entirely agree with the course proposed by my Lord. Perhaps I could just mention that, when the London Borough of Barnet sets about preparing more satisfactory evidence about the fate of the material document, they could do worse than start with their own list of documents which, at page 31 and as amended at page 36, contains in Schedule 1, Part 1, item 4, "*Manual handling assessment 24.8.1994*". For my part, I would certainly want to know how that could have been drawn up unless the document was in the hand of the person drawing it up.

**Order:** time extended; application adjourned and, in the event of mediation not proving successful, to be listed on notice to the London Borough of Barnet, with appeal to follow if permission granted; transcripts of this judgment to be provided to parties at public expense.

The Applicant Mr Mutuma appeared in person.

Mr Hugh Preston (instructed by Messrs Browne Jackson, WC2) appeared on behalf of the Respondent Defendants (as a courtesy to the court).