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STEVEN FLYNN: CASE COMMENT

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## SUPREME COURT HANDS DOWN JUDGMENT IN 'WHEELCHAIR – v – BUGGY' DISPUTE

### Paulley – v – FirstGroup PLC [2017] UKSC 4

1. Earlier this week (18 January 2017), the Supreme Court handed down judgment in the case of FirstGroup Plc v Paulley, a case that has been described in the media as the 'Wheelchair –v- Buggy' dispute. The judgment was a victory for Mr Paulley. However, the Supreme Court did not go as far as Mr Paulley and some disability rights organisations had hoped. Rather than provide certainty as to the extent of service providers obligations, the decision has left both wheelchair users and transport companies unsure as to exactly what is required in order to comply with the duty to make reasonable adjustments.

#### **Facts**

2. Mr Paulley, a permanent wheelchair user, attempted to board a bus operated by FirstGroup Plc. A sign on the bus asked passengers occupying the wheelchair space to "please give up this space if needed for a wheelchair user". On the day in question, the designated wheelchair space was occupied by a woman with a baby in a pushchair. Upon being asked by the bus driver to move, pursuant to company policy, she refused saying that the buggy would not fold. The driver took no further action and the Mr Paulley was unable to board the bus, which significantly delayed his travel plans. He sued the bus company for unlawful discrimination. The issue in the case was whether the bus company must have a policy to compel all other passengers to vacate the wheelchair space irrespective of the reason they are



in it, on pain of being made to leave the bus if they do not, leaving no discretion to the driver.

3. Mr Paulley was successful at first instance. He was awarded £5,500. That decision was overturned by the Court of Appeal. In the Supreme Court, the case was heard by 7 justices, as opposed to the more usual 5.

### **Statutory Provisions**

4. Discrimination under the Equality Act 2010 ('EqA') includes direct discrimination (section 13 EqA), discrimination arising from disability (section 15 EqA), indirect discrimination (section 19 EqA), and a failure to make reasonable adjustments (sections 20 & 21 EqA).

5. Part 2 EqA prohibits discrimination in the provision of goods and services. Section 29(7) EqA applies the duty to make reasonable adjustments to those providing goods and services.

6. Where a provision, criterion or practice of the service provider puts disabled persons generally at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the service provider is required to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3) and Schedule 2(2), EqA 2010).

7. Those providing transport services are covered by the definition of service providers (section 29(1) EqA). Whilst covered by the services provisions, including the duty to make reasonable adjustments, the duty in relation to transport vehicles is limited in that there is no obligation to alter physical features (Sch.2 para 3 EqA).



8. The Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 1990 (SI 1990/1020) governs the conduct of bus drivers and their passengers ('the Conduct Regulations'). Under the Conduct Regulations, a driver may remove (or request a police constable to remove) a passenger who unreasonably impedes any person travelling on or entering or leaving the vehicle or refusing to remove or relocate a bulky or cumbersome article, when requested to by the driver.

9. As regard wheelchairs, the Conduct Regulations state that a driver must allow a wheelchair user to board the bus if there is an unoccupied wheelchair space. A wheelchair space is treated as occupied if passengers and their effects are in the space and they cannot readily and reasonably vacate it by moving elsewhere.

### **Supreme Court Decision**

10. The Supreme Court allowed Mr Paulley's appeal but on a limited basis. By a majority of 4:3, the Supreme Court declined to make any award for damages.

11. The lead judgment was given by Lord Neuberger (with whom Lord Reed agreed). He considered that the Recorder's decision effectively required the operator to adopt a policy that could lead to a non-wheelchair user being ordered from the bus. Lord Neuberger held that the Court of Appeal had been right to reject this. An absolute rule that a non-wheelchair user must vacate the space if it was required by a wheelchair user would be unreasonable and enforcement of such a rule, whether absolute or qualified, would be likely to lead to confrontation and delay. He went on to comment that it was not clear whether there was any statutory



obligation on a passenger to comply with a policy relating to the use of the space for wheelchair users or that they should leave the bus if ordered to do so by the driver.

12. Lord Neuberger also rejected the argument that the notice used by the operator, which said "Please give up this space for a wheelchair user", was inadequate. The operator could not be criticised for not having expressed the Notice in more forceful terms. The Notice amounted to a requirement rather than simply a request, albeit it was politely expressed. Lord Neuberger referred to evidence given at trial that directive notices were less effective than less confrontational notices. FirstGroup had made a reasoned decision, based on research, to use emphatic language. This decision should not give rise to legal liability. Lord Neuberger went on to reject the submission that the Notice should have made it clear that the priority of wheelchair users would be enforced, given that such a statement would be incorrect.

13. However, Lord Neuberger accepted that it was not sufficient for the operator to instruct its drivers simply to request non-wheelchair users to vacate the space and then do nothing further if the request was refused. Where the driver concluded that the non-wheelchair user's refusal to vacate the space was unreasonable, it would not be justifiable for a bus-operating company to have a policy that did not require some further step from the driver in any circumstances. In particular, a driver could be expected to rephrase any polite request as a requirement and, if that did not work and the bus was ahead of schedule, the driver should stop the bus for a few minutes with a view to pressuring the non-wheelchair user to give way.

14. Lord Toulson agreed that there were reasonable steps that an operator could take beyond simply requesting the non-wheelchair user to move. The driver could



make it plain that this was a requirement even if securing compliance might depend upon the exercise of moral pressure. Lord Sumption agreed with this approach, albeit with reservations, considering that there was no ideal solution in a case like this, simply degrees of unsatisfactory ones.

15. Their Lordships were divided on whether damages should be awarded to Mr Paulley, the majority holding that an award of damages was not justified in this case.

16. Lord Neuberger (with whom Lords Sumption, Reed and Toulson agreed) concluded that the Recorder did not specifically consider whether, if FirstGroup had simply required its drivers to be more forceful, there was a prospect that it would have made a difference in this case. In their view, it was therefore not possible to conclude that there would have been a real prospect that such an adjustment would have resulted in Mr Paulley not being placed in the disadvantage that he was, and so an award of damages is not possible.

17. Lady Hale, Lord Kerr and Lord Clarke dissented on the issue of damages. They noted that the Recorder had found that it was reasonable to expect bus operators to do more than FirstGroup did. They felt that his judgment did not necessarily require ejection of a passenger who refused to move from the bus nor did it create an absolute rule. Against this backdrop, they concluded that had the practice suggested by the claimant been in force, then there was at least a real prospect that Mr Paulley would likely have been able to travel. On this basis, it was unjust in their opinion to deny Mr Paulley damages.

### **Comment**

18. The characterisation of this as the ‘wheelchair –v- buggy’ case has been unhelpful. Many wheelchair users make use of public transport on a daily basis



without issue. As noted in the judgment of the Supreme Court, Mr Paulley was a frequent user of public transport and this was the first time that he was unable to get on a bus because someone refused to vacate the space. There are not daily battles between wheelchair users and parents with young children. The opening paragraph of the Court of Appeal's judgment made it clear that common decency and respect for wheelchair users should mean that other passengers make way for them where possible. Such decency largely prevails on the public transport system. Attempts to characterise this as a battle between these different groups is likely to cause the erosion of such decency and potentially lead to confrontation, something that should be avoided at all costs.

19. This was a victory for Mr Paulley and wheelchair users, but on a more limited basis than he had hoped. Mr Paulley wanted the Supreme Court to decide that bus operators were required to remove non-wheelchair users who unreasonably refuse to vacate a space for a wheelchair user. This decision says that such a requirement would be unreasonable. Instead, transport operators must adopt policies whereby drivers:

- a. Initially request that the passengers obstructing the wheelchair space move.
- b. If the passenger refuses, then the driver will have to assess the reasonableness of the refusal.
- c. If the driver decides that the refusal is unreasonable, then the driver must state that it is a requirement that the passenger move. The driver must seek to persuade or apply moral pressure to the passenger in an attempt to secure compliance.
- d. If the passenger continues to refuse, then the driver should refuse to continue the journey for a few minutes.



e. In the event that the passenger continues to refuse, then the driver will have exhausted his options. The driver has no power or duty to physically remove the offending passenger from the wheelchair space. In such circumstances, the wheelchair user will be unable to travel on the service.

20. As someone who regularly represents disabled people in disputes over access to goods and services, I have some insight into the difficulties faced by them on a day-to-day basis. Many service providers are oblivious to their statutory obligations. This needs to change. This case has highlighted the obligation to make reasonable adjustments and led to national debate on the issue. This is a positive consequence of the decision and will hopefully result in more shops, restaurants and transport providers complying with the provisions of the Equality Act 2010.

21. However, as somebody who also advises service providers, I have concerns about the practicality of that suggested by Lord Neuberger. Lord Neuberger places great emphasis on the driver's ability to persuade an obstinate passenger to move. The driver will have to assess the reasonableness of the refusal, and then decide upon appropriate action. It will likely bring the driver into conflict with the passenger, and also gives rise to the possibility of conflict between passengers. The possibility for violence to be directed towards the driver and other passengers will no doubt be increased by the adoption of the steps detailed above.

22. Transport providers are required to make reasonable adjustments to their services if they place disabled persons at a substantial disadvantage, but they also owe a duty of care to their employees. Requiring drivers to confront unreasonable passengers may result in drivers being injured; thereby giving rise to claims for personal injury against the transport company. Lord Neuberger recognised that the



temperaments and experiences of different drivers are bound to vary; some will handle the situation well and others will find it difficult to cope. Those who find it difficult to cope may suffer work related stress if they are required to confront a passenger who reacts in a hostile manner. Similarly, they are likely to be caused stress if they refuse to continue the journey until the offending passenger moves. This is likely to bring the driver into conflict with other passengers and, if stationary on a busy high street in rush hour, with other road users.

23. Transport providers will need to give great thought to how they implement any change of policy arising from this decision if they are to avoid increasing the risk of employer liability claims. Practical training as to how to deal with the situation will be essential. Exposing employees to staged confrontations may be advisable if the employer is to ensure that staff know how to defuse a situation so as to avoid the possibility of violence. Support, counselling and monitoring of those involved in an incident will reduce the possibility of stress at work claims arising from the application of such a policy. All of these steps will limit the transport provider's exposure if implemented correctly.

24. The implications of this case extend beyond transport providers. Shops and supermarkets will need to take positive steps to ensure that disabled parking spaces are not used by non-disabled persons. Restaurants that provide accessible seating will need to consider requiring patrons to vacate if a disabled person requires use of the seating. They may also have to refuse service. Those service providers with disabled toilets and changing facilities will also need to police their use.

25. In his judgment, Lord Toulson suggested that legal reform of this area may be necessary. This was something raised by the Court of Appeal also. Whilst such





reform may be possible in the context of transport services by providing drivers with the right to order offending passengers from the bus, it is difficult to see what could be done more generally in relation to reasonable adjustments. Whilst in an ideal world, disabled people would be able to access all services; there are innumerable practical difficulties with this. That is why service providers are subject to the duty to make reasonable adjustments, not an absolute duty. Reasonableness depends on the circumstances of each case. The decision in *Paulley –v- FirstGroup PLC* has not changed this, nor is it likely that any legislative change would either.

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**Should you require any further guidance on the implications of this case or assistance in dealing with issues arising from discrimination in the provision of goods and services, please contact my clerk Chris Shaw on 0161 214 1500**