



Neutral Citation Number: [2024] EWHC 273 (KB)

Case No: KB-2023-001157

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2024

Before :

THE HON. MR JUSTICE TURNER

Between :

John Mills

(son and administrator of the estate of
John Edward Mills deceased)

Claimant

- and -

The Commissioner of Police of the Metropolis

Defendant

Michael Smith (instructed by **Hugh James Solicitors**) for the **Claimant**
Adam Clemens (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 5,6 and 8 February 2024

Judgment Approved

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The Hon Mr Justice Turner :

INTRODUCTION

1. This case raises issues of liability, contributory negligence and quantum arising out of a fatal road traffic accident.

BACKGROUND

2. On 12 July 2017 at about 6pm, PC (now Sergeant) Upton, a trained response driver, was making his way to the scene of an emergency in a police van. His journey took him along Queen Caroline Street, Hammersmith. It was a bright sunny evening and visibility was good. He was displaying flashing blue lights and using his sirens and, where appropriate, his bullhorn. He was responding to a report that someone had become trapped behind a door and was in danger.
3. His vehicle was fitted with a dashboard camera, footage from which played an important part in revealing the sequence of events leading up to the accident. It is to be noted that no criticism is or could be made of Sergeant Upton's driving in the minutes leading up to the point at which he approached the scene of the collision. He was often exceeding the speed limit of 20 miles per hour and driving through junctions against traffic lights showing red against him but this was permissible by the operation of s87(1) of the Road Traffic Regulation Act 1984 and he did so without presenting a danger to other road users.
4. There is a point on Queen Caroline Street, travelling from south to north, at which the layout of the road comprises no fewer than five lanes running in parallel. Close to the junction with Black's Road, the lanes begin to diverge so that two lead to the left and three to the right. Sergeant Upton intended to take the lane to the far right of the five. As he approached the traffic lights at the junction, he lowered his speed from 31 miles per hour to 23 miles per hour.
5. Having passed a vehicle which had pulled over for him to his offside, he proceeded to the junction.
6. John Mills was a pedestrian crossing the road ahead of him. When Sergeant Upton registered his presence he applied his brakes but it was too late. His van struck Mr Mills causing serious injuries from which he later died.
7. This claim is brought by Mr Mills' elder son, John Mills junior, against the defendant on behalf of himself and two of his siblings: Jane and James Mills. For the sake of convenience, I will refer to the deceased as Mr Mills and to John Mills junior as, simply, John.

THE POLICE INVESTIGATION

8. During the course of the opening, I enquired about when any account of the accident had first been taken from Sergeant Upton. He had been interviewed on 7 November 2017, which was about four months after the accident had taken place, but there appeared to be no earlier record of his version of events.
9. A contemporaneous collision report had been completed which recorded:

“PC Upton initial account was given to traffic supervisor.”

- No record of any such account, however, was to be found in the defendant's disclosure.
10. Sergeant Upton's explanation was that the “initial account” involved him merely identifying himself and confirming that he was the driver of the police van at the time of the accident. The first full account he gave was in response to questions in the interview.

11. I was not convinced that this was a satisfactory approach to the investigation of a fatal accident involving a police vehicle. The taking of an adequately detailed account from the officer or officers involved as soon as practicable would appear to be an obvious step to take.
12. The situation in this case was made potentially worse not only by the passage of time but by the fact that Sergeant Upton had been shown the dashcam footage and still images taken from it before his interview. This gave the claimant the opportunity to assert that Sergeant Upton's account was not a true record of his fresh and independent recollection of where his attention was directed at the material time but rather a reconstruction from the footage as to where his attention may have been. The quality of his evidence was arguably degraded by this.
13. I enquired into the detail of the formal written procedures relating to the investigation of road traffic accidents involving police vehicles and was assured that the procedure followed was in accordance with the relevant protocol although there was no convincing explanation as to what possible advantage this approach might bring. The following exchange between counsel for the defendant and me ensued:

“ JUDGE ...although it may not have any impact on my decision on this case. I have to say that I do entertain a certain level of concern that if what happened in this case were to be common procedure then it's not fair on anyone that the first account of any detail given by the police officer should be so many months after the event. I can see no advantage at all in that and plenty of disadvantage to all concerned. It's like the Achieving Worst Evidence interview.

MR CLEMENS: Yes, I fundamentally agree -- there's always a but here -- but those up there, way above my pay grade, as it were, and in any other guidance, and I have looked at other guidance as well, as I said I would, whether it's IOPC or College of Policing, or that sort of thing, there is a sort of cultural, if I can put it like this, fear that you somehow disadvantage a person who's been involved in an accident by getting the account there and then..”

14. After the conclusion of the case and at my invitation, counsel for the defendant emailed to me a copy of the relevant part of the protocol which, it was claimed, applied at the time of the accident. The extract contains a very considerable number of abbreviations which I have done my best to decode. It says:

Providing Accounts

9.1 Officers and staff should realise that their involvement in a police related death does not automatically imply a degree of blame in the person's death, they will be treated as witnesses. If the IOPC [Independent Office for Police Conduct] or DPS SIO [Directorate of Professional Standards Senior Investigating Officer] has grounds to suspect a criminal offence or misconduct breach then the person(s) concerned will be treated in accordance with the Police and Criminal Evidence Act 1984 or police misconduct procedures/Police Staff

Discipline Policy. Should these circumstances arise the PIP [Professional Investigation Programme] will not take place for officers or staff in that category, although they remain entitled to legal and federation / union advice as below.

9.2 Where an initial account is made by key police witnesses this should, subject to any legal advice that they are given, be made as soon as practical. These accounts should be recorded in writing in an MG11 [a pro forma witness statement made pursuant to Criminal Procedure Rules, r 27. 2; Criminal Justice Act 1967, s.9; Magistrates' Courts Act 1980, s.5B] as appropriate, timed, dated and signed. E&ABs [Evidence and Actions Books aka police notebooks] should not be used. Each officer's account should only consist of their individual recollection of events and should, among other things, address the question of what they believed the facts to be at that time and why if relevant, they considered that their use of force was necessary, or if no force was used in the incident what rationale they considered for any actions they took.

9.3 The DPS SIO/IOPC and the PIM [Post Incident Manager] will negotiate the timings of when notes are written, and the extent of the content, will depend upon the circumstances of the incident. Any initial notes provided must contain enough detail for the SIO to direct the investigation. The initial notes should comply with Stage 3 of the note directions at paragraph 9.11 and 9.12.

15. I note, however, that in this case it was not evident that this would turn out to be a fatal accident until Mr Mills died which was over eight months after the accident. Accordingly, at the relevant time, I do not understand how this part of the protocol could have been thought to have applied or what alternative protocol could or should have been followed.
16. I note also that this cannot have been the relevant protocol at the time of the accident and subsequent investigation because the IOPC was not formed until 8 January 2018 six months after the collision had occurred.
17. This all leaves matters in a very unsatisfactory state.
18. However, as it happens, and for reasons I will give later in this judgment, the delay in obtaining Sergeant Upton's first account and the confusion which has been generated in the recent attempts to explain it does not have an impact upon my assessment of the evidence; but in many, if not most, instances this will not be the case.
19. I therefore urge the defendant to consider my observations and, if necessary, review the extent to which reality matches expectation in these cases and, in future, be prepared to provide prompt and accurate assistance to the court when relevant procedural issues arise.

BLAME

20. It has been conceded from the outset that Mr Mills acted carelessly in crossing the road when he did.
21. The following criticisms of his conduct are made out and, indeed, are not in serious dispute:

- (i) He started crossing the road nine seconds after the green man in favour of pedestrians had stopped showing and five seconds after the red man was illuminated;
 - (ii) The sirens of the police van would have been audible to him before he started crossing. The actual location of the van may have been unclear as a result of echoes from adjacent buildings but there was only one direction from which any vehicle might have been approaching the junction and that was from his right;
 - (iii) He was not as agile as he had been in his youth and needed a walking stick to get about. He would have known that his ability to take evasive action upon the approach of any vehicles was thus limited;
 - (iv) The police van would have been within his view for several seconds before the collision but he nevertheless continued to proceed across the road into its path.
22. The alleged culpability of Sergeant Upton is more controversial.
23. Accident reconstruction experts were instructed by both parties. They reached substantial agreement in a joint report as a result of which neither needed to be called.
24. It was agreed that Mr Mills would have been visible to Sergeant Upton for 4.4 seconds before the impact. Sergeant Upton did not, however, notice Mr Mills until about 3.2 seconds later. Had Sergeant Upton reacted 0.64 seconds earlier than he did, the collision would have been avoided. The developing situation is captured in the dashcam footage and the stills taken from it at a rate of 25 frames per second.
25. The central question is thus whether or not this sequence of events is consistent with Sergeant Upton keeping a proper lookout.
26. In this context, the role of an anonymous pedestrian wearing green trousers has featured heavily. For the sake of conciseness and convenience he was referred to during the hearing simply as “green trouser man”.
27. On Sergeant Upton’s account, green trouser man who was positioned on the pavement close to the kerb at the traffic lights to his right posed the more immediate threat. His body language and the movements of his right foot were said to present a risk of his stepping out in front of the van. Mr Mills, would at this stage, have been visible in the road a little further away and to Sergeant Upton’s left.
28. It is on this basis that it is argued on behalf of the defendant that the time taken for Sergeant Upton to respond to the emerging presence of Mr Mills was both explained and justified by his prioritisation of the hazard which he perceived to be presented by green trouser man.
29. The issue arose as to whether the part played by green trouser man was an accurate reflection of Sergeant Upton’s memory of the circumstances leading up to the collision or, alternatively, an exculpatory reconstruction of events which derived from a combination of the delay in obtaining his first account of the accident and the availability of the dashcam footage and stills before he gave such account. After all, the footage reveals only what was visible to the camera and not where the attention of Sergeant Upton may have been focussed at any given moment.
30. On behalf of the claimant, a number of valid points were made about the reliability of Sergeant Upton’s account of the location and description of what he could see of green trouser man’s movements and appearance. My attention was drawn to a number of discrepancies which, it was contended, would justify a finding that green trouser man was a convenient scapegoat rather than a real or significant factor in Sergeant Upton’s failure to notice Mr Mills sooner than he did.
31. I will not spend time analysing such discrepancies because even Sergeant Upton’s own account in his oral evidence fell short of establishing that the presence and

- movements of green trouser man provided an adequate explanation for the length of time it took him to register the presence of Mr Mills in the road ahead.
32. In short, Sergeant Upton agreed that his response to the presence of green trouser man fell into two distinct stages. When he first noticed him, he slowed down. He then scanned up and down the road ahead of him before redirecting his attention to green trouser man when he perceived that he had moved his right leg closer to the kerb. It was conceded on behalf of the defendant that Mr Mills would have been visible to Sergeant Upton during the time he was scanning up and down the road ahead of him and that if the latter had reacted at that stage then the accident would have been avoided.
 33. In Sergeant Upton's defence, it was pointed out that Mr Mills would not yet have been directly ahead of him but somewhat to his left. Notwithstanding this, he would have been well advanced in crossing the road and moving towards the lane in which Sergeant Upton was travelling.
 34. In this regard, Roadcraft – The Police Driver's Handbook provides under the heading "Peripheral Vision":

"Move your head and eyes so that you also scan the areas in your peripheral vision."
- This is accompanied by a simple diagram depicting, as one might expect, peripheral vision above and to either side of the point immediately ahead of the driver.
35. Roadcraft forms the basis of the training which Sergeant Upton underwent as an emergency response driver. But the advice in the section to which I have referred provides for a level of vigilance which is very much the same as would be expected from any reasonably competent driver.
 36. I bear fully in mind that police officers responding to an emergency have to make difficult judgements balancing the competing priorities involved in making rapid progress to their destination and in avoiding the disproportionate creation of dangers to other road users whilst en route. Furthermore, decisions made within seconds of real time are, as part of the forensic process, analysed at leisure. It is the test of reasonable foresight and not the pure wisdom of hindsight which must be deployed.
 37. Nevertheless, I am satisfied that, in this instance, the evidence leads inexorably to the conclusion that Sergeant Upton failed to keep a proper look out in the moments leading up to the collision and that, had he done so, the accident would have been avoided. This was a busy area for pedestrians and Sergeant Upton conceded that he had experience of pedestrians jaywalking not merely generally but at this junction in particular. A green light permits a driver to proceed but only when it is safe so to do.
 38. Primary liability is thus established. I add only that I am satisfied that Sergeant Upton's evidence was given entirely honestly and that what happened on this occasion was an uncharacteristic lapse of attention.
 39. I turn now to the issue of contributory negligence.
 40. The assessment of the appropriate level of contributory negligence will inevitably depend very much on the individual facts of the case under consideration. The almost limitless permutations of circumstances means that in most cases, including this one, little or nothing is to be gained by a trawl through large swathes of first instance decisions for guidance. It is to the credit of both counsel before me that they resisted this temptation.
 41. It is appropriate for me to observe that the culpable lapse of Sergeant Upton was, all other things being equal, of a lower order than the failing of Mr Mills which I have already listed. I am obliged, however, to take into account the approach illustrated by

way of example in the case of *Eagle v Chambers* [2003] EWCA Civ 1107 in which Hale LJ, as she then was, observed:

“It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle...The court “has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon”...”

42. With this in mind, I have come to the conclusion that the appropriate level of contributory negligence falls to be assessed at the level of 50%.

DAMAGES

43. As the case proceeded towards trial, there were four categories of claim which remained unresolved. Two of these were compromised at the eleventh hour leaving two still in dispute. The controversial remaining claims are for alleged losses of dependency brought on behalf of Mr Mills’ adult children: James and Jane.
44. The family dynamics were and are not entirely straightforward. Mr Mills had five children. Jane was the eldest. She was followed by two sisters both of whom went into foster care and who play no part in this litigation. John and James were the fourth and fifth respectively. Mr Mills separated from his wife about 30 years ago.
45. By the time he came to give evidence, the quantum of John’s claim had been agreed. The purpose of calling him was, therefore, primarily to address the issue of what resources his father may have had to provide for the future support which Jane and James claimed they would have enjoyed from their father but for his death.
46. It is clear that John, who is a 43 year old solicitor specialising in commercial property, was close to his father. In the years leading up to the accident, he spoke to him on the telephone nearly every day. John and his wife often met up with him for meals and the like. His father was retired and received a modest pension from his former employer together with a state pension.
47. Mr Mills lived in Clacton but had inherited a substantial property at 134 Hurlingham Road, Fulham and owned jointly with John a flat at 31A Stokenchurch Street which was also in Fulham. He and John had spent a lot of time clearing out the flat which had been in a poor state of repair with a view to renovating it to sell or rent.
48. Jane moved to Spain in 1988. She spent ten years in Guernsey from 1991 before returning to Spain where she still lives. She has one daughter, Maisie, who is now eleven years old.
49. The basis of her claim is that Mr Mills had repeatedly reassured her that he would fund Maisie’s private education in Spain from the ages of 6 to 18. He was insistent about it and they had discussed at length a choice between two particular schools. On this basis, a dependency claim was calculated in the sum of £74,150.
50. James has been married to Eve since 2014. After his father’s death, he moved to a modest rented house in Manchester. He contends that his father would have paid a deposit on the purchase of another house in the sum of £20,000 had he lived.
51. James has three children: Minerva aged 8; Iris aged 6; and Senan aged three. He contends that his father would have contributed towards their school fees at the rate of £3,000 per year until he reached the age of 87. He said that Mr Mills had specifically discussed such contributions with Eve.
52. Two issues of particular importance arose. They are not necessarily unrelated:
- (i) What financial assistance, if any, did Mr Mills intend to commit himself to provide; and

- (ii) how could he have afforded it?
53. All three siblings gave evidence at trial. In the light of what they said, counsel for the claimant was driven, realistically, to concede, that the claim as set out in the schedule was unsustainable and that I should calculate the relevant losses on a loss of a chance basis. I invited him to identify what he contended was the residual value of such claims but he, albeit with characteristic courtesy, declined to do so and was content to pronounce that it was a matter for me.
54. It is necessary, therefore, for me first to articulate the various obstacles in the path of the dependency claims before evaluating what, if anything, may be left of them.
55. One issue arises as to the degree of optimism inherent in the original assumption that Mr Mills would have continued to provide support for his grandchildren up to the age of 87 when, at the time of his death at the age of 71, he was already suffering from chronic renal disease, diabetes and a heart problem. In the light of the other significant challenges to the dependency claim and the demotion of the actuarial calculation to one of loss of a chance, I do not find it necessary to reach any precise conclusion on the issue.
56. To my mind, however, a more significant question arose out of the evidence of John. On 6 February 2015, Mr Mills made a gift of the Hurlingham Road property to John alone. The difference between the market value of the property and the transfer value was £655,250.
57. One is entitled to ask why, if Mr Mills had any firm intention to bestow significant future benefits on Jane or James, he did not take the obvious opportunity to do so when divesting himself of his most substantial capital asset. There was no evidence to suggest that John had any particular need for the money which would otherwise explain his receiving all of it.
58. Furthermore, John said that he was his father's confidante in all matters including property and financial planning. His father had never mentioned to him any plan to make substantial payments to either Jane or James in the future and he would have expected him to do so if this had been his intention. Indeed, Mr Mills did express concern for the future but this was directed towards his fear that he might at some stage be sent to live in a nursing home. There was talk of investing in a granny flat for him.
59. The financial experts instructed by the parties agreed that only by using the proceeds from selling or renting 31A Stokenchurch Street could Mr Mills have paid for some or all of the dependency claims. He had insufficient spare income for this purpose.
60. I find that if Mr Mills had intended to commit himself to make any financial support to Jane and James of the order now claimed then he would not have failed to raise the issue with John. This is particularly so since John was the joint owner of the Stokenchurch Street property the future of which was so integral to there being any chance of any significant donations being made.
61. John confirmed that if, hypothetically, his father had asked him if he could deploy the entirety of any rental income which would otherwise be apportioned to John then he would acquiesce. He said: "he always supported me in doing what I wanted to do and if he'd have asked me for that sort of thing then I think my view would be to reciprocate what he has always done to me and that is to support my goals and reciprocate with that."
62. Importantly, however, Mr Mills had never broached the topic in his lifetime. He made no provision for Jane or James in a will having died intestate.

63. I am invited to conclude by Jane and James that not only did Mr Mills make a formal commitment to pay the sums claimed in respect of the school fees but that his word on this issue was his bond.
64. Unhappily, the evidence suggests the contrary. Jane's evidence was that Mr Mills had promised her that he would divide the proceeds of the gift of the Hurlingham Road property equally. In the event, he did not even tell her that he had given it all to John. She was extremely upset when she found out, much later and just before his death, that it had all gone to John. Bearing in mind that, with an equal share, Jane would have received about £220,000 this was, on her own evidence, a major betrayal of trust.
65. In this light, Jane's oral evidence that "my father was somebody that if he said he was going to do something, he would do it" marks, sadly, the triumph of hope over experience.
66. James' evidence was in the same vein. He said that his father had regularly promised him over many years that he would get a proportion of the benefit from the Hurlingham Road property and when he found out that he had got nothing he was upset and alarmed. Nevertheless, his father, he said, was very keen on education and had promised both him and Eve to fund his grandchildren's private education. Eve was not called to give evidence on the topic.
67. The claims in respect of Jane and James were said to be supported by Mr Mills' historic generosity to them but the last significant donation to Jane was in January 2013 upon the birth of Maisie in the sum of £1,000 and to James in the sum of £10,000 as a contribution towards the cost of his wedding in about 2014. John and James had fallen out at about the time of the latter's wedding and were no longer on speaking terms. John and Jane had fallen out in 2010 and had not spoken since. This was not simply a question of losing touch but there was positive and enduring animosity between the siblings. Mr Mills never saw fit to explain to either Jane or James why he had cut them out of any benefit from the sale of the Hurlingham Road property and he had made no significant payment to either of them after he had made the transfer to John. It is perhaps worthy of note that Maisie had been going to a private school in Spain from the age of three which was the year *before* Mr Mills death and he had neither offered nor paid any contribution towards her fees at that stage.
68. It is not without regret that I have come to the conclusion that the prospects that Mr Mills would have made any very significant or regular contributions towards the school fees of his grandchildren or a deposit for a house for James are negligible.
69. I am not without some sympathy for the position of Jane and James. I do not doubt that they may have hoped that their father might, in the end, make good on his professions of good intentions notwithstanding his reneging on his earlier promise to give them each a share of the value of the Hurlingham Road property. However, the weight of the evidence leads me to conclude that such promises as he may have made were writ in water. The chances that he would make any significant regular gifts were very low.
70. I accept, however, that as his grandchildren grew up he may well have made some modest donations from some part of the rental payments or proceeds of sale from the Stokenchurch Street property or his modest income but that is as far as it goes. I would assess the total value of such donations to be £5,000 for each child. I consider that the claim for a deposit on a house for James and Eve is too speculative and remote to be reflected in damages even on a loss of a chance basis.

CONCLUSION

71. I will now invite the parties to agree an order which reflects my findings and proceed to hear any arguments relating to collateral matters including costs.