QB-2019-003530

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London

[2020] EWHC 2115 (QB)

Before:

MASTER DAVISON

- -

Between:

LINDA DOMENEY **(Widow and administratrix of the estate of ALBERT DOMENEY deceased)**	**Claimant**
- and -	
ALEXANDER REES (1) **ADVANTAGE INSURANCE COMPANY LIMITED (2)**	**Defendants**

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Mr Andrew Dalton (of **White Dalton Motorcycle Solicitors**) for the **Claimant**
Mr Guy Watkins (instructed by **BLM**) for the **Defendants**

Hearing date: 28 July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30am on 4 August 2020

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Introduction

1. This is my judgment on the defendants' application for permission to adduce the evidence of (a) an accident reconstruction expert and (b) an A & E consultant. I am giving judgment in writing because the application has some novel features and was argued at considerable length.

2. The claim arises out of a fatal road traffic accident on Saturday 15th April 2017 at around 5pm. The accident was of an all too familiar kind. The claimant's husband ("the deceased") then 58 years old was riding a powerful motorbike along the B489 Tring Road. The road was a single carriageway with two lanes of opposing traffic. It was subject to a 60mph speed limit. The deceased was headed south. Ahead of him a minor road joined from the left. This road was an unclassified road leading to Ivinghoe Beacon and the village of Ringshall. The deceased would have gained a view of the junction from about 170 metres away – it being from that point a straight and slightly downhill section of road. Coming in the opposite direction was a Ford Fiesta motor car being driven by the first defendant ("the defendant"). The defendant turned right into the minor road directly across the path of the oncoming motorbike. The bike hit the car, the impact being to the front as the car was halfway through the turn and approximately in the middle of the southbound (the deceased's) lane. The deceased sustained multiple injuries and was killed instantaneously.

3. On 15 January 2019 at the Luton Crown Court the defendant was convicted of causing death by careless driving whilst over the prescribed limit of a specified controlled drug (cannabis). There were two passengers in the Fiesta, one in the front and one in the back. There was evidence of cannabis being smoked in the car and the defendant admitted to having smoked cannabis earlier in the day.

4. The defendant was simply unaware of the presence of the motorbike until after the collision. His passengers saw it – but only in the instants before. There were no independent witnesses of the actual collision. But three drivers saw the deceased's driving very shortly before. One, Mr Gambling, (travelling in the same direction as the defendant but ahead of him) said that the deceased was doing more than 60mph. 'It was fast but the rider was in complete control.' Another, Mr Fitt, was overtaken by the bike and estimated that after it went past it accelerated to about 80mph. He formed the view that it was trying to catch up or keep up with another motorbike which had also overtaken him and which was slightly ahead. A third witness, Ms Dickinson, was similarly overtaken and put the deceased's speed at 70 to 75mph. She exclaimed to her passenger, 'look at that idiot'. The actions of the two riders made her feel angry.

5. I have seen two accident reconstruction reports. The first from PC Evans dated 28 June 2017 prepared as part of the police investigation; the second from Mr David Loat dated 18 December 2017. Mr Loat is a retired police officer, having served as senior forensic collision investigator with Avon & Somerset Police. His report was provided on the instruction of the solicitors who were acting for the defendant in the criminal proceedings. Neither PC Evans nor Mr Loat could give any reliable estimate of the speed of the motorbike. PC Evans said in his report that it was not possible to calculate the speed. In a supplementary statement he reiterated that "no meaningful calculation" could be made. There were no marks on the road prior to the collision site (i.e. no skid marks from which deductions as to speed could be drawn). The damage to the vehicles (which was very extensive) would not allow a calculation because of the disparity in mass and because the motorbike had not travelled through the centre of mass of the Fiesta. Because the trajectory of the deceased, who was thrown from the bike, had been arrested by a metal fence within a hedgerow, no calculation could be made from the 'throw' distance. PC Evans was similarly unable to calculate the speed at which the Fiesta attempted the turn.

6. The report of Mr Loat arrived at the same conclusion as to speed. An accurate speed could not be "reliably calculated". A little later in the report he said that there was "insufficient physical evidence to determine where the vehicles were relative to one another given their

respective speeds and the dynamic movement of their approach to the point of collision". However, he noted the evidence of lay witnesses to the effect that the deceased was exceeding the speed limit. In the short section of his report at paragraphs 6.3.15 and 6.3.16 and between paragraphs 6.3.26 and 6.3.29 he offered a hypothesis. This was that if the deceased was doing 80mph he would have been some 82 metres from the point of impact at the time when the defendant started his turn and that if, instead of doing 80mph he had been doing only 50mph, then the collision might have been avoided – or avoided with only "moderate" braking on the deceased's part. These calculations were repeated in the 'Conclusions' section of the report. (I mention that the proposition that, on the assumption or finding that the deceased was doing 80mph, he might well have avoided the collision had he been doing only 50mph is unsurprising.)

7. The defendants' application to adduce the evidence of another, freshly instructed accident reconstruction expert plus an A & E consultant was presented to me orally at a CMC on 22 July, the primary purpose of which was to decide whether to have a trial of a preliminary issue on contributory negligence (primary liability having been conceded). The claimant did not, in fact, resist the application for the accident reconstruction expert. Partly for that reason, I gave permission on the basis that the defendant was to serve his report unilaterally and that the claimant should have the like permission if, having considered the report, she was so advised. I refused permission for the A & E consultant. Having reflected on the matter overnight, I revoked the limited permission I had given and listed the matter for a further hearing, which took place on 28 July 2020. My reasoning is set out below. But first I must set out the basis of the application.

The application

8. In his skeleton argument for the 22 July hearing, Mr Watkins for the defendant explained that:

> "There is independent eyewitness evidence (obtained by the police) of the deceased riding at excessive speed at the time of the collision (80mph). The focus of the accident reconstruction evidence is likely to be on the issue of the deceased's opportunity to avoid the collision, or at least to reduce the speed of impact and the severity of his injuries, had he been riding at a lower speed."

9. As to the A & E consultant, he said this:

> "Expert medical evidence (from an A&E Consultant or similar) will be required to assist the Court to determine the issue of whether the deceased's injuries would have been reduced / his death would have been avoided had he collided with the First Defendant's vehicle at a lower speed. The Defendants suggest that exchange of expert medical evidence should take place after receipt of the joint statement of the accident reconstructions experts so that the medical experts know the parameters of the *alternative collision scenarios advanced by the accident reconstruction experts* when they produce their reports. These alternative collision scenarios will form the basis of the medical experts' opinion on causation." (My italics.)

10. In a further skeleton argument provided for the hearing on 28 July 2020 (in which Mr Watkins invited me to revisit the issue of accident reconstruction, but not A & E, evidence), he said that the evidence of an accident reconstruction expert would "enable the trial judge to reach a properly informed view as to:

> (i) How long it would have taken D1 to complete his right turn (including interpretation of the Black Box data from D1's vehicle);
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> (ii) How far the motorcycle would have been from the point of impact when D1 started his manoeuvre if the deceased had been travelling within the speed limit (it being a matter for the trial judge to decide what speed the deceased was in fact travelling at and what would have been a safe speed);

(iii) How long it would have taken the deceased to cover that distance had he been travelling within the speed limit;

(iv) Whether, within that timeframe, D1 would have cleared the southbound lane prior to the arrival of the motorcycle."

11. In his oral submissions, it was plain that what Mr Watkins had in mind was the same set of "alternative collision scenarios" referred to in his earlier skeleton – all of them variations on that offered by Mr Loat. Mr Loat's model was based upon the court finding that the deceased was travelling at 80mph when a safe speed would have been 50mph. But other models or "scenarios", indeed many such, could be framed.

12. In a somewhat complex passage of his submissions, Mr Watkins also contended that there was a distinction between, and therefore separate issues of, (i) causation, i.e. whether the defendants could establish contributory negligence by proving that excess speed on the part of the deceased was causally relevant to the collision and/or his injuries; and (ii) causative potency, which would be relevant (along with blameworthiness) to the question of apportionment under the Law Reform (Contributory Negligence) Act 1945 if the court was satisfied that contributory negligence has been established. He submitted that expert evidence was reasonably required to resolve the question of whether the collision would have been avoided if the deceased had been riding at a slower speed, i.e. it was relevant to the issue of causation (as well as to causative potency if causation was made out).

13. Lastly, Mr Watkins submitted that a freshly instructed accident reconstruction expert could 'form his own view' of the speed of the motorbike, i.e. might be able to do better than PC Evans or Mr Loat.

Discussion

14. I have reached the conclusion that the test in Part 35 of the CPR namely that the expert evidence "is reasonably required to resolve the proceedings" is nowhere near made out. I should mention that I was told by Mr Dalton, for the claimant, that he had only agreed to the defendant having permission for a freshly instructed accident reconstruction expert on a 'pragmatic' basis. But I can see no proper basis.

15. It is, of course, the case that the court is not bound to give permission for expert evidence just because the parties have agreed to it. It was therefore incumbent on the parties (and particularly the defendants) to do two preliminary things. First, I should have been provided with enough material to form a judgment for myself as to the need for the evidence. In a case like this, that meant furnishing me with the police report, the report of the police accident reconstruction expert, PC Evans, and the report of Mr Loat. I was not given these until after the first hearing and I had to rely instead on the descriptions of Mr Watkins and Mr Dalton as to what was in them. Second, neither side (but the criticism again applies mainly to the defendants) complied with CPR rule 35.4(2) which required them to provide costs estimates for the proposed expert evidence in advance of the first hearing. When I raised this matter at the second hearing, I was told by Mr Dalton that he estimated that the overall costs of both sides for the accident reconstruction experts would be around £24,000. That figure seems realistic to me. If A & E evidence were added then the overall 'worst case' costs for the experts would be around £40,000 to £50,000 – a significant sum. The involvement of these experts would also impact on the time required for the trial.

16. There are the following objections to the proposed instructions.

17. Two experts having already stated in unequivocal terms that they can offer no reliable opinion as to the motorbike's speed, I see no realistic prospect of a third expert doing any better. PC Evans and Mr Loat have explained in detail why they cannot do so. Their reasons are cogent and well-expressed and there is no reason to doubt them. This is a case where the court will have to make findings as to speed based upon the evidence of lay witnesses. There is nothing unusual or untoward about that.

18. It would, however, be very unusual to have expert evidence from accident reconstruction experts in circumstances where those experts cannot in fact reconstruct its single most important feature. PC Evans and Mr Loat (especially), being unable to comment meaningfully on the speed of the motorbike based upon science or data, resorted to their interpretation of what the witnesses said about speed. That is, of course, a matter for the judge. If there is no or no sufficient forensic material from which conclusions can be drawn, then experts are redundant. The following well-known passage from the judgment of Stuart-Smith LJ in *Liddell v Middleton* [1996] PIQR P36 is in point:

> "In this case, as I have already indicated, there were four eyewitnesses of the accident, though, as is almost inevitably the case, each of those witnesses saw only part of the scene that unfolded. From their evidence, the Judge had to determine what happened and, based on her findings of fact as to what each of the two parties involved did, decide whether or not their conduct was negligent, and if so whether that negligence caused or contributed to the Plaintiff's injuries. In some cases expert evidence is both necessary and desirable in road traffic cases to assist the judge in reaching his or her primary findings of fact. Examples of such cases include those where there are no witnesses capable of describing what happened, and deductions may have to be made from such circumstantial evidence as there may be at the scene, or where deductions are to be drawn from the position of vehicles after the accident, marks on the road, or damage to the vehicles, as to the speed of a vehicle, or the relative positions of the parties in the moments leading up to the impact.
>
> In such cases the function of the expert is to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence of the marks on the road, the damage or whatever it may be. What he is not entitled to do is to say in effect 'I have considered the statements and/or evidence of the eyewitnesses in this case and I conclude from their evidence that the defendant was going at a certain speed, or that he could have seen the plaintiff at a certain point'. These are facts for the trial judge to find based on the evidence that he accepts and such inferences as he draws from the primary facts found".

19. I accept that an accident reconstruction expert would be able to put forward alternative scenarios as, to some extent, Mr Loat has already done. But there are difficulties with admitting evidence of that type:

i) As first postulated by the defendants, the alternative scenarios were extraordinarily elaborate. It was proposed that the accident reconstruction experts formulate the speeds and dynamics of each hypothetical collision and then that A & E consultants should pronounce on the type of injuries that might have been expected to have been suffered in consequence. Whilst it is true that in 'seatbelt' and 'helmet' cases, A & E consultants do often give evidence on the issue of how much more serious the claimant's injuries probably were for want of a seatbelt or helmet, such evidence relates to an actual accident the dynamics of which are known. I have never encountered such evidence being given outside that specific context. In the context of entirely counterfactual 'alternative scenarios' the evidence would be highly speculative, indeed absurdly so.

ii) It is also difficult to see how the judge would be assisted. The assessment of contribution requires an evaluation of the culpability and causative potency of the negligence found against each motorist. That is an essentially impressionistic decision, involving the weighing and balancing of a range of different factors. For this reason, there is authority discouraging the type of exercise that Mr Watkins proposed; see *Stanton v Collinson* [2010] EWCA Civ 81 (a seatbelt case) where Hughes LJ (as he then was) said:

> "Both parties in this appeal urged upon us, in different contexts, the undesirability of a prolonged or intensive enquiry in these cases. They were right to do so; there

> is a powerful public interest in there being no such enquiry into fine degrees of contributory negligence, so that the vast majority of cases can be settled according to a well-understood formula and those few which entail trial do not mushroom out of control."
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> The deprecation of "prolonged or intensive enquiry in these cases" and the reference to the undesirability of such an enquiry into "fine degrees of contributory negligence" have resonance in this case. Though the case before Hughes LJ was a seatbelt case, his remarks seem to me seem to me to apply with equal force to other cases of alleged contributory negligence. The exercise proposed by Mr Watkins would suffer from precisely the vices referred to in those remarks and it would lend a spurious precision to a decision which is in fact necessarily 'broad-brush'.

iii) The proposed evidence would itself be a series of questionable constructs and it would be based upon an assessment of the deceased's speed that could only ever, on the evidence available, be the trial judge's rough estimate.

20. For these reasons, I refused permission for accident reconstruction and A & E evidence and I have not been persuaded to modify that decision. I would add that the distinction Mr Watkins attempted to make between causation and causative potency is, in the present context, a distinction without a difference. But even if there was a difference, it would still not require the involvement of the proposed experts.

21. I can test this part of my judgment by posing the following question. If I were the trial judge (as, indeed, I may be – that matter has not yet been addressed) would I want or require expert evidence of the type proposed? The answer is emphatically that I would not. And if I permitted it, I fear that my stance towards it in retrospect would be rather in line with what Stuart-Smith LJ said in *Liddell v Middleton*: "We do not have trial by expert in this country; we have trial by judge. In my judgment, the expert witnesses contributed nothing to the trial in this case except expense".

The defendants' fallback position

22. Having revoked the permission that I initially gave on 22 July, I re-listed the case primarily to consider whether to permit the defendants to rely upon the written evidence of Mr Loat, which was or proved to be Mr Watkins' fallback position. (There was no issue about the reports of PC Evans. Mr Dalton accepted that the reports of PC Evans were or should be admissible.) But Mr Dalton objected to the report of Mr Loat going into the bundle. His submission was that it was "62 pages of no probative worth".

23. I do not regard the report of Mr Loat as having no probative value whatsoever. As I have made clear, I think that the construction of alternative scenarios has far, far too little probative value to justify the instruction of a further expert. But, as I observed in the brief reasons that I gave when I revoked the permission given, the report of Mr Loat is in existence, all parties have seen and considered it, it contains various data and observations not in PC Evans' report and the cost has been incurred. I do not think that it will help very much. But, given Mr Dalton's stance on it, neither will it place the claimant at any disadvantage. I mention also that, based upon legal submissions that I do not need to go into, Mr Watkins submitted that it was admissible anyway and without the need for any permission from me.

24. Resorting perhaps to a pragmatism that I did not feel it appropriate to extend to freshly instructed accident reconstruction and A & E experts, I have decided that the balance is in favour of admitting Mr Loat's report in written form. To the extent that my permission is needed, I will direct that it, together with the reports of PC Evans and the police report, should be placed into the court bundle and that it should be admissible as to its contents, including where those contents are or consist of opinion evidence.