



Neutral Citation Number: [2022] EWCA Civ 1613

Case No: CA-2022-000820

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM KINGS BENCH DIVISION
LEEDS DISTRICT REGISTRY
Upper Tribunal Judge Ward (Sitting as a Judge of The High Court)
G91LS075

Royal Courts of Justice
Strand, London, WC2A 2LL

7 December 2022

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE WILLIAM DAVIS

Between :

LINDA TAYLOR & ANR
- and -
DAVID RASPIN

Appellant

Respondent

Darryl Allen KC and Darrel Crilley (instructed by Keoghs Solicitors) for the Appellant
Simon Browne KC (instructed by White Dalton Motorcycle Solicitors) for the Respondent

Hearing date : 10 November 2022

Approved Judgment

This judgment was handed down remotely at 11.00am on 7 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.
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Lord Justice William Davis:

Introduction

1. This is an appeal from the judgments and order of Upper Tribunal Judge Ward (“the judge”) sitting as a Judge of the High Court. The main judgment was handed down on 17 March 2022. A supplemental judgment was handed down on 6 April 2022, the judge’s order being made on that day. Judgment was entered for the claimant, David Raspin, in respect of his claim for personal injuries and consequential loss suffered as a result of a road accident on 11 August 2019. Judgment was in respect of liability only. A reduction of 45% for the claimant’s contributory negligence was made. Judgment was entered for the defendant, Linda Taylor, on her counterclaim to the extent of 45% of the value of the counterclaim. The counterclaim related to the costs associated with the damage to the defendant’s car.
2. On the afternoon of 11 August 2019 the claimant was riding his motorcycle along Ackworth Road in Pontefract. He approached the junction with Hardwick Court, a minor road on his right. As he did so, a Ford Ka being driven by the defendant pulled out from Hardwick Court and turned right onto the main road. The claimant’s motorcycle collided with the defendant’s car on Ackworth Road. At the time of the collision the car was fully in the carriageway along which the motorcycle was travelling but at an angle as it was completing its turn. The motorcycle collided with the front nearside of the car around the area of the passenger door.
3. The judge found that the collision was caused by the negligence of the defendant. He concluded that the defendant had looked right, left and right again before she pulled out from the minor road. In his judgment she should have looked left again as she continued to pull onto the major road. Her failure to do so was causative of the collision. The judge also determined that the claimant was negligent in that he approached the point of the collision at an excessive speed. He found that the claimant’s degree of responsibility for the collision was substantial thereby leading to the reduction of any damages by 45%.
4. The defendant now appeals with permission from Stuart-Smith LJ against the judge’s finding that she was primarily responsible for the collision. There are two core grounds. First, she argues that the judge was wrong to conclude that she had any duty to look left for a second time as she emerged from the minor road. Second, even if she was under such a duty, the judge erred in concluding that the breach of duty was causative of the collision. There is no cross-appeal in relation to the finding of contributory negligence.

The evidence at the trial

5. The claimant was born in September 1961. He had owned the motorcycle he was riding at the time of the collision for approximately 7 months. It was a Yamaha VMax, a large and powerful machine. He had returned to motorcycling having previously ridden when he was younger. He could recall very little of the circumstances of the collision save that the defendant’s car had pulled out in front of him. His evidence was that he knew the road well. He had lived within half a mile of the site of the collision for 26 years. Though he had not been watching his speedometer, the claimant put his speed as he approached the point of the collision at

around 30 mph. This was the kind of speed at which he was accustomed to travel at this part of Ackworth Road because there was a bend which required him to brake.

6. The defendant was a registered mental health nurse aged 72. Although retired, she continued to work part time as a healthcare assistant. In that capacity on 11 August 2019 she had been visiting a patient who lived in Hardwick Court. She also knew the road well. She was familiar with the car she was driving. Her evidence was that she stopped at the junction with Ackworth Road for three to four seconds. During that time she looked right, then left and then right again. She said that there was no traffic on the main road in either direction. In particular, the motorcycle was not in view. She recalled pulling out at around 5 mph. After she had pulled out, she heard the thud of the collision. She had been unaware of any oncoming vehicle prior to that and she was shocked by the impact.
7. Although the defendant's evidence was that there was no traffic in view when she looked to her right, this was contradicted by the evidence of two witnesses in a Vauxhall Astra car approaching along Ackworth Road from the defendant's right. The driver of the Astra, Mr Ward, saw the defendant's car stop briefly at the exit from Hardwick Close before it pulled out onto the main road. He concentrated on that car because that was where he saw potential danger to his own vehicle. There came a point when he looked up the main road and along the opposite carriageway. That was because his front seat passenger, his mother, shouted out. The defendant's car was halfway across the main road by this point. Mr Ward saw the motorcycle approaching. There was sufficient time for him to think to himself "why is she (the defendant) not stopping" before the collision occurred. Mr Ward estimated the speed of the motorcycle at around 30 mph.
8. Mrs Ward's evidence was that she saw the defendant's car move out of the mouth of the junction with Hardwick Close. At this time she could see the motorcycle approaching. It was close to the Masonic Hall on Ackworth Road, that being a landmark between the apex of the bend on the main road and the mouth of the junction with Hardwick Court. It was as the defendant's car moved out onto the main road that she shouted out because she could see the motorcycle and she could not understand why the defendant's car just kept coming out of the junction. In her view the motorcycle was travelling at what she described as an "entirely normal" speed.
9. Coming along immediately behind the Astra was a VW van being driven by a Mr Barker. His evidence was that he saw the defendant's car pulling out of the junction. She was part way through the manoeuvre. The motorcycle was in view coming along the opposite carriageway of the main road. He considered that the motorcycle was travelling "at an entirely normal speed for the road". The defendant's car just kept on moving into the path of the motorcycle. The motorcycle swerved to the left but could not avoid the collision.
10. Both the claimant and the defendant relied on expert evidence. The expert witness called by the claimant was a Mr Taylor who, prior to going into private practice, had worked for 12 years as an accident investigator for West Mercia Police. The defendant's expert was a Dr Walsh, a mechanical engineer with nearly 20 years' experience of accident investigation. The experts were able to provide evidence of the road geography and of relevant distances. When travelling along Ackworth Road as the claimant did on the day of the collision, traffic on the main road had to

negotiate a right-hand bend before reaching the junction with Hardwick Court. The consensus was that someone in the defendant's position could see about 80 metres (or possibly slightly less) to their left along Ackworth Road with the view to the right being a little further.

11. However, the primary purpose of the expert evidence was to provide an assessment of the speed of the claimant's motorcycle before and at the time of the collision. Both experts took as their preliminary reference point the fact that the claimant had passed a CCTV camera on Ackworth Road approximately 320 metres from the collision site at which time the motorcycle could be measured as travelling at 52 mph. However, the estimate each expert made of the claimant's speed as he approached the point of the collision was primarily based on calculations drawn from marks left on the road by the motorcycle and from where the motorcycle came to rest. Mr Taylor calculated a maximum speed of 40 mph at the point at which the motorcycle began to skid reducing thereafter to 33 to 37 mph. Dr Walsh considered that the speed of the motorcycle remained at around 52 mph. This was the midpoint of range calculable from the available data, the 25th percentile being around 40 mph and the 75th percentile being around 64 mph. Dr Walsh's evidence was that there was no reason to place the speed anywhere other than in the midpoint of the range.
12. Dr Walsh also gave evidence about something he referred to as the principle of gap acceptance applying to drivers intending to turn right into a major road. A driver making such a manoeuvre will assess the gap in any traffic approaching from the left on the major road. The driver will accept the gap as sufficient or reject it as inadequate. Dr Walsh determined that, given the road geography at the junction of Hardwick Court, a driver emerging from the junction would be required to accept a gap in the vicinity of 70 metres. His evidence was that this was a gap that would have been acceptable to about 50% of drivers on the road. Finally, Dr Walsh referred to a phenomenon known as looming threshold distance. This is the primary means of assessing speed when looking at a vehicle approaching head on.

The judge's findings of fact

13. The judge began his consideration of the evidence with a review of the expert evidence. He found that there were significant criticisms to be made of the evidence of Mr Taylor whereas he found Dr Walsh to have been a convincing witness. He noted that Dr Walsh's approach meant that there was a range of speeds at which the motorcycle could have been travelling i.e. 40 to 64 mph. The judge considered the evidence of the lay witnesses as to the speed of the motorcycle. He observed that this evidence was incompatible with the evidence of both experts. Because of their limited opportunity to observe the motorcycle's speed, the judge concluded that the lay witnesses had underestimated that speed significantly. In making his finding of fact as to speed, the judge acknowledged that accident reconstruction cannot be an exact science. Nonetheless, he found that the motorcycle was travelling "in the low 50s" as it approached the junction with Hardwick Court.
14. The judge considered the evidence of the defendant in relation to the absence of any vehicles on the road to her right. He rejected the proposition that she could be correct when she said that there was nothing on the road when she looked to her right. He found that the Astra car was there to be seen. He said that "any attempt to explain why the defendant missed it is necessarily speculative". He said that "it might go to

how effective or otherwise the defendant's observation was when making (her) exit and whether she might likewise have missed the claimant's motorcycle approaching from her left". The judge did not reach his conclusion based on this line of reasoning.

15. The judge concluded on the basis of the defendant's evidence and the analysis of Dr Walsh that it had taken the defendant around 5 seconds to move from the mouth of the junction with Hardwick Close to the point of the collision. Taking into account the defendant's line of sight and the speed at which the claimant was travelling, that led to the conclusion that the claimant was not in view when the defendant began her manoeuvre. However, based on the evidence of the defendant herself, she had not looked again to the left at any time as she moved onto the far carriageway of the main road.

Consequential findings

16. The judge accepted that the reasonable driver turning right from a minor road onto a major road would not necessarily need to look to the left for a second time as they emerge from the minor road. Whether looking to the left again would be necessary to fulfil the duty of care owed by the reasonable motorist to other road users would depend on the circumstances. Thus, emerging onto a road with fast moving traffic may require a second look left to ensure that the gap perceived as adequate on the first look has been maintained. A similar requirement would arise where there was insufficient clear visibility to the left. There is always a continuing obligation on the driver emerging from a minor road to give way to traffic on the main road. In the circumstances which applied to the defendant i.e. emerging from Hardwick Court with visibility restricted by the bend, she should have looked left for a second time. This was not a counsel of perfection; rather, it was to recognise that some junctions will be more difficult than others.
17. Having concluded that the defendant was under a duty to look to her left for a second time, a duty which she failed to fulfil, the judge moved to consider whether that failure was causative of the collision. He found that the time at which the defendant should have looked left for a second time was when she could have avoided encroaching substantially into the far carriageway of the main road by sharp or emergency application of her brakes. He rejected the argument that, even if the defendant had looked left and had seen the motorcycle, she still would have ended up in the path of the claimant. He found that, given her speed of around 5 mph, her stopping distance would have been short. Further, a motorcycle, the width of which was 0.8 metres, would not have needed the whole of the width of the far carriageway (3.7 metres) to move past without a collision.
18. The judge considered the notional perception and response time of the defendant as being relevant to the determination of when in her 5 second journey from her entry onto the main road to the point of the collision the defendant ought to have looked left for a second time. Since she gave no evidence which allowed any strict calculation of her perception and response time, the judge found that it was reasonable to conclude that the second look ought to have been at about 2 seconds into her manoeuvre. The claimant would have been in view at that stage. The judge made that determination in part in reliance on the expert evidence in relation to the distance over which the defendant would have had a view and the time the motorcycle would have taken to cover that distance. However, he also relied on the lay evidence, in particular that of

Mr and Mrs Ward, which expressed surprise that the defendant “just kept coming” when the motorcycle was in view.

19. In those circumstances, the judge found that the defendant’s failure to look left as she was moving across the main road and approaching the far carriageway was causative of the collision.
20. The judge moved on to consider the causative significance of the speed at which he had found the motorcycle to be travelling as it approached the site of the collision. It is unnecessary to consider his reasoning. The defendant’s case is that she was not in breach of any duty of care. Even if she was, such breach was not causative of the collision. It is not argued that the judge made an error of apportionment. The claimant does not challenge the finding of fact made by the judge in relation to his speed and, in those circumstances, he does not suggest that it was wrong to make a finding of contributory negligence. Since there is no cross-appeal, the apportionment of liability is not an issue in the appeal.

Grounds of appeal

21. Although the notice of appeal sets out four grounds, in reality there are two core grounds of appeal. The first ground concerns the judge’s finding that the defendant was under a duty to look to her left for a second time as she moved across the main road. It is accepted that a driver emerging from a minor road onto a major road owes a continuing duty of care to traffic on the major road. The submission of the defendant is that, in the circumstances of her case, this did not require her to look left for a second time. Reliance is placed on these matters. First, the judge fell into what was described as a trap of the kind referred to in *Lambert v Clayton* [2009] EWCA Civ 237. He elevated what might have been done into a duty. Second, the junction from which the defendant was emerging was not unusual. Visibility in each direction was comparable. Third, a driver in the position of the defendant must make allowance for what is reasonably foreseeable on the main road. The approach of the motorcycle at speed was not reasonably foreseeable. Fourth, the judge equated the defendant’s duty to those using the main road with a duty to keep the main road clear. No such duty exists: see *Lambert v Clayton* at [31]. Fifth, the judge accepted the evidence of Dr Walsh in relation to gap acceptance theory. Since approximately 50% of drivers would consider that it was reasonable to emerge onto a major road in the circumstances facing the defendant, the judge must have erred in concluding that the defendant was in breach of her duty to the claimant.
22. The second ground is that, even if the defendant should have looked for a second time to her left, the findings of fact did not permit the conclusion that the breach of duty was a cause of the collision. First, the judge did not consider where the defendant was on the road when the claimant came into view. Thus, the starting point for causation was not established. Second, there was no finding by the judge about the length of time a reasonable driver would need to realise that the motorcycle was approaching at speed and that braking was required. Given the speed at which the motorcycle was travelling, the defendant was faced with a split-second decision. She was in no better position to judge the speed of the motorcycle than the lay witnesses whose estimates were wrong. That error as to speed ought to have led the judge to conclude that their overall sense of the accident must have been faulty. Third, the judge did not say where the defendant’s car would have ended up had she taken steps upon seeing the

motorcycle. Had he addressed that point, he would have been bound to conclude that the circumstances were akin to those in *Lambert v Clayton* as discussed at [27]. The defendant should not have been open to criticism for acting in the agony of the moment.

23. As a discrete point in relation to causation, it is submitted that the judge's fundamental misunderstanding of the issue was demonstrated by his initial conclusion in relation to the counterclaim. In his main judgment, the judge dismissed the counterclaim because the primary cause of the collision was the defendant's breach of duty. When the judgment was circulated in draft, both parties submitted that this was an error and that there should be judgment for the defendant for 45% of the sum counterclaimed. So it was that the judge gave a supplemental judgment. The argument is that the judge's basic error in relation to the counterclaim undermines his conclusion on the issue of causation generally.

Discussion

24. I have no difficulty in rejecting the first ground of appeal. It is axiomatic that a driver emerging from a minor road onto a major road owes a continuing duty to vehicles on the major road. How that duty is to be fulfilled will depend upon the particular circumstances. In this instance the defendant was moving out onto a road on which a regular flow of traffic was to be expected where the view to her left was affected by the bend in the major road. She travelled at a slow speed out of the junction. That is not a matter of criticism. Rather, it increased the need to check for a second time that it was safe to continue into the far carriageway of the major road. To that extent I consider that the submission that the junction in question was not unusual to be misconceived. The situation confronting the defendant is to be contrasted with a driver emerging onto a major road where there is a lengthy and uninterrupted view to the driver's left. The judge's finding of fact in relation to the speed of the motorcycle was relevant to the issue of the claimant's contribution to the collision. However, the notion that it was unforeseeable that a vehicle would be exceeding the speed limit to a significant degree on the major road is not sustainable. The judge at one point referred to drivers being under a duty to anticipate some degree of failure to comply with the Highway Code on the part of other road users albeit not the degree of failure represented by the claimant's speed. This reference was not developed. It did not amount to a finding by the judge that the claimant's approach was unforeseeable. There would have been no proper basis for such a finding.
25. I do not accept the proposition that the judge imposed a duty on the defendant to keep the major road clear. At no point in the judgment did the judge suggest that this was the nature of the duty. Indeed, when he referred to the fact that a motorcycle would not require the whole of the carriageway to be able to pass along the road safely, he implied that the defendant would not have been in breach of duty had her car stopped part way into the far carriageway. The duty of the defendant was not to drive onto the carriageway along which the motorcycle was travelling and into the path of the motorcycle. That is what she did. By the time of the collision she was wholly in the far carriageway. She was wholly unaware of the presence of the motorcycle until the collision occurred.
26. The gap acceptance theory expounded by Dr Walsh could not be determinative of whether the defendant was in breach of duty. I doubt whether this evidence was

relevant. Dr Walsh's expertise in relation to estimating speed by reference to the marks left on the road by the motorcycle was unquestioned. The speed of the motorcycle was relevant and important. What Dr Walsh had to say about the behaviour of motorists in general could not assist on the issue of how a reasonable motorist should have coped with the junction from which the defendant emerged. If his evidence was intended to say what did or did not amount to a breach of duty, it was inadmissible. In any event, what kind of gap a group of motorists thinks is reasonable to allow entry from a minor road onto a major road tells us nothing about whether the emerging motorist should check to their left for a second time as they move out onto the major road.

27. The judge did not purport to impose a general duty on a driver in the defendant's position to look left for a second time when turning right from a minor road onto a major road. Rather, he found that, in the particular circumstances facing the defendant, she should have looked left before she moved into the far carriageway. The judge was wholly justified in reaching that conclusion.
28. In relation to the first ground of appeal, Stuart-Smith LJ in giving permission expressed hesitation as to its arguability. Had it stood alone, he may not have given permission to appeal. However, he considered that it was arguable that the judge's consideration of causation was defective. The submissions of the defendant unsurprisingly concentrated on this issue. Notwithstanding all of that, I am satisfied that the judge did not fall into error.
29. The first question in relation to causation is whether the judge made a sufficient finding as to the position of the defendant when the claimant first came into view. I agree that the judge did not explain in terms where on the road the defendant was at that moment. He did make a clear finding as to the time it took for the defendant to move from the mouth of the junction to the point of collision, namely approximately 5 seconds, and the speed at which she was travelling, namely 5 mph. He further found that the claimant would have travelled from the point at which he was first visible to the defendant to the point of collision in 3 seconds or a fraction longer. From those findings it is apparent that the defendant had yet to move onto the far carriageway of the major road when the claimant came into view. The precise point reached by the defendant at that moment was unnecessary to determine. The judge also referred to the evidence of Mrs Ward that she was surprised when the defendant "just kept coming" even though she could see the approach of the motorcycle. The only sensible interpretation of that evidence was that the defendant's car was yet to move into the path of the motorcycle when it was already in view. This conclusion is fortified by consideration of the evidence of Mr Ward who asked himself why the defendant was not stopping. He would not have asked himself that question if the defendant by then was in the far carriageway of the major road.
30. The next criticism of the judge is that he made no finding about how long a reasonable driver would have needed to react to the motorcycle approaching at speed. It is said that he should have found that the defendant was faced with a split-second decision. In relation to this issue, the judge found that the defendant's perception and response time was unknown. That was clearly correct. Since the defendant at no time saw the motorcycle – or any other vehicle on the major road – she did not in fact respond to anything. But the judge found as a fact that she should have looked left 2 seconds into her manoeuvre which equated to her car not yet being onto the far

carriageway. She was travelling very slowly. Mr and Mrs Ward observed her progress. They concluded that the defendant should have stopped her car. Whilst the judge did not have the material to allow him to reach a specific conclusion as to the defendant's response and reaction time, the evidence was sufficient to allow his final conclusion i.e. the defendant had time to avoid materially encroaching onto the far carriageway of the major road. This was not a case of a split-second decision or of a driver dealing with the agony of the moment.

31. Finally, it is said that the judge did not explain what would have happened to the defendant's car had she taken steps once she had seen the motorcycle. In my view the judge made the position perfectly clear in his final conclusion to which I have just referred. She would not have done what she did which was to drive so as to place herself fully in the carriageway along which the motorcycle was approaching. Rather, her car would have stopped so that it did not encroach to any material extent into the far carriageway.
32. I am unimpressed with the discrete argument raised in relation to causation. The fact that the judge made an error in relation to the effect of his apportionment of liability on the counterclaim is of no relevance to his conclusions on causation. The error was a slip in relation to a counterclaim valued at significantly less than £10,000 in the context of a very substantial claim for catastrophic injury. It says nothing about the judge's reasoning on primary liability.

Conclusion

33. It follows that I would dismiss the appeal. The judge was correct to find that the defendant was under a duty to look left for a second time as she moved out into the major road given the particular circumstances of the junction. On the entirety of the evidence the judge did not fall into error in concluding that the breach of duty was the primary cause of the collision.
34. Although unnecessary for my decision on this appeal, I consider that, if there were anything arguably open to criticism in the judge's approach, it would be in the emphasis he placed on the expert evidence. This was a collision which was witnessed by three lay witnesses who had a clear view of what happened. Their evidence was consistent. The defendant's car continued to pull out onto the major road when the motorcycle was there to be seen. The car could have stopped in time for the collision to be avoided. That evidence should have been the central focus of the judge's consideration of the case. To that he needed to add the fact that the defendant did not see any traffic on the main road. In her evidence she was categorical in her assertion that there was no vehicle on the main road in either direction. The judge said that this factor "might go" to the issue of the effectiveness of the defendant's observation. It quite plainly did go to that issue. More to the point it demonstrated that the defendant was not keeping a proper lookout when the claimant was there to be seen, whatever his speed.
35. In *Stewart v Glaze* [2009] EWHC 704 QB Coulson J (as he then was), having considered observations made in *Liddell v Middleton* [1996] P.I.Q.R. P36 CA, said this:

“...it is the primary factual evidence which is of the greatest importance in a case of this kind. The expert evidence comprises a useful way in which that factual evidence, and the inferences to be drawn from it, can be tested. It is, however, very important to ensure that the expert evidence is not elevated into a fixed framework or formula, against which the defendant's actions are then to be rigidly judged with a mathematical precision.”

I agree with that proposition. In this case the expert evidence was of significance in providing evidence of the speed of the motorcycle though it seems to me that the judge did fall into the trap of engaging in an exercise of mathematical precision. The expert evidence was not central to the case. The lay evidence which established that the defendant pulled out of a minor road and continued to pull out even when the motorcycle was in view and when she could have stopped was paramount. This only reinforces my conclusion that this court should not interfere with the judge's conclusion.

Lady Justice Nicola Davies

36. I agree.

Lord Justice Peter Jackson

37. I also agree.