IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2018] EWHC 297 (QB)

No. TLQ17/0543

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 12th January 2018

Before:

MR. JUSTICE FOSKETT

B E T W E E N :

WRIGHT — Applicant

- and -

FIRSTGROUP PLC — Respondent

MR RIVERS (instructed by Irwin Mitchell) appeared on behalf of the Applicant.

MR A GLASSBROOK (instructed by Clyde & Co) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE FOSKETT:

1 This application relates to a three-day trial due to commence in a five-day window which starts next week. The case concerns a serious road traffic accident which took place in February 2013 when the claimant, who was crossing a toucan crossing, was struck and seriously injured by a bus driven by a Mr Toft, who was employed by the defendant company.

2 In a nutshell, the issue is whether Mr Toft should have been driving more slowly in the circumstances as he approached the toucan crossing and if he had, whether he could have taken avoiding action, either in the form of simple braking or swerving or steering to the right, so that the collision would not have occurred.

3 It is recognised on the claimant's behalf that there would be an element of contributory negligence on his part in moving into the crossing or onto the crossing before it was safe to do so.

4 It is right to say that in a disciplinary interview undertaken by the defendant not long after the accident, Mr Toft accepted that he was aware of the claimant's presence on the side of the road and that in the circumstances, even though there was a green light in his favour at that time, he ought to have approached the crossing more slowly than the twenty miles per hour that the objective evidence demonstrates was his speed before he started braking. As it stands, that evidence would, at face value, afford an admission of some liability on the part of the defendant.

5 The claimant has no recollection of the accident at all. He suffered a serious head injury and it is not surprising that this should be the case.

6 Against that background, both parties instructed reconstruction experts to assist in the preparation of the respective cases and, indeed, obtained the permission of the court to rely upon such evidence. The claimant's expert is a Mr Michael Handy whose CV suggests that he has appropriate experience and experience. The same applies to Dr John Horsfall instructed by the defendant.

7 The position taken by the claimant's advisors, in short, is that there has been a very recent change in the opinion of Mr Handy that has not been fully explained which, if it is permitted to stand as the opinion on which the claimant must rely at trial, will, in effect, destroy any prospect of success that he may have on the claim. The primary application made today is for an adjournment to enable a fresh expert to be instructed.

8 I will say a little bit more about the basis for the application shortly, but it is an unusual application in my experience - or more accurately, an application made at an unusual time. I do have to consider, from time to time, applications for a change of expert but usually, that is at an earlier stage and, more often than not, when the original expert is indisposed or otherwise no longer available to give evidence.

9 Substitution of experts can occur in other situations, but the court will always deter what is often known as "expert shopping", and any attempt at such a practice is ordinarily stamped upon.

10 Whilst Mr Glasbrook for the defendant resists the application made, he has not suggested, and in my view correctly, that this application is based upon an “expert shopping spree” and

it is not such a spree that drives the application. Nonetheless, as I have said, it is an unusual application and the court will need to ensure that litigants do not perceive it as their right to change experts, particularly at a late stage in the litigation process, simply because the expert has agreed something in discussion that is disadvantageous to the particular litigant.

11 The whole purpose of discussions between experts is to see if, after proper and informed discussion, there is agreement on various issues and that does sometimes involve an expert changing his or her opinion.

12 In that context, one provision of Practice Direction 35 (introduced, I was told, in 2009) is para.9.8 which reads as follows:

> "If an expert significantly alters an opinion, the joint statement must include a note or addendum by that expert explaining the change of opinion."

13 Mr Rivers for the claimant says that there was a significant alteration in Mr Handy's opinion as expressed in the joint statement, compared with the opinion he had previously expressed and yet, there has been no explanation for this as required by the Practice Direction.

14 It is right to say that Mr Handy's opinion emerged over a period of time with the emergence of new evidence - and indeed there is nothing wrong with that. His substantive opinion prior to the discussion he had with Dr Horsfall was set out in a report dated 21st September 2017. He prepared a further report some weeks later commenting on the witness evidence, but I have not read that as changing the substantive opinion that he expressed in the report of 21st September.

15 I will not set out his conclusions as expressed in that report in detail, but in essence he expressed the view, having taken into account the material at his disposal, that Mr Toft should have appreciated the potential hazard of the claimant standing by the command button at the crossing and could and should have slowed sufficiently to have avoided impacting with him if he walked out onto the crossing.

16 If that conclusion was accepted at trial, it would mean that at least some liability would attach to the defendant and, of course, it would be consistent with what Mr Toft said at the interview to which I have referred.

17 Dr Horsfall's position in his report was, in effect, and putting it in very summary form, that there was nothing that Mr Toft could have done in the circumstances, there was no time to stop or swerve or steer to avoid the claimant.

18 After their joint discussion, which was conducted by telephone and email exchanges, they each signed a joint statement, the effect of which appears to be that there was, indeed, nothing that Mr Toft could have done. They addressed the possibility that he could have braked or steered to avoid a collision, but their conclusion was that that was not possible at an approached speed of twenty seven miles per hour. Indeed, if the joint statement is to be understood correctly, the speed before braking would have to have been significantly less than twenty-seven miles per hour for any successful avoidance action to have been achieved.

19 One interpretation of the joint statement is that the experts simply agreed some speeds, reaction times and distances and it would really be for the court to choose which was

appropriate, having regard to its factual findings. If that is so, I would not necessarily conclude that there had been any change in Mr Handy's previously expressed position. Indeed, this may be an explanation for his apparent failure to see that his opinion has changed in any significant fashion. Mr Rivers has told me on instructions that when confronted on this by his instructing solicitors, he was of the view that the joint statement was perfectly acceptable from the claimant's point of view.

20 However, since the defendant immediately called off a joint settlement meeting and withdrew any outstanding offer of settlement after the joint statement had become available, suggests that its advisers take the view that the pendulum has swung sufficiently in its favour that contesting the case fully is justified.

21 In the short time I have had to consider the position, I have not found this an easy situation to resolve. There is, however, a lack of clarity about Mr Handy's current view which is exacerbated, to some extent, by certain answers he has given to written questions posed to him by the claimant's advisers. That lack of clarity is sufficient for me to think that the claimant may be at an unjustified disadvantage if he is forced to proceed on the basis of the present expert evidence. These were life-threatening and life-changing injuries and the damages on a full liability basis would probably be substantial.

22 It is against that background, but with considerable reluctance, that I have decided to err on the side of caution and grant the claimant's application. I am particularly reluctant to do so, given the imminence of the trial, for all the obvious reasons which I need not set out. Nonetheless, I consider on the very unusual facts of this case as presented to me today, that I should take this exceptional course.

23 I should emphasise, that the case should not be cited as a precedent in any other situation: it is a decision based entirely on the facts presenting themselves in this case.

24 It therefore seems to me that that decision in substance having been made, counsel can probably agree the consequences arising from it, but if they cannot then I will make the decisions for them.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.