Neutral Citation Number: [2018] EWHC 1695 (QB)

Case No: HQ17P00233

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 6th July 2018

Before :

ROWENA COLLINS RICE
(Sitting as a Deputy High Court Judge)

- -

Between :

Mr DANIEL SHEVLIN	**Claimant**
- and -	
EUROPEAN METAL RECYCLING LIMITED	**Defendant**

- -
- -

Mr Simon Kilvington QC (instructed by Fletchers Solicitors Ltd) for the **Claimant**
Mr Marc Willems QC (instructed by Plexus Law) for the **Defendant**

Hearing date: 13 June 2018

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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.

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Ms Rowena Collins Rice:

Introduction

At daybreak on 12th February 2014, the claimant, Mr Daniel Shevlin, was making his usual way to work. He was riding his motorcycle eastwards along the A4 Great West Road in Brentford, Middlesex. The A4 is a dual carriageway with three lanes in both directions, and a central reservation. There are gaps in the central reservation preceded by filter lanes, so that vehicles can leave the flow of traffic and turn right across the opposite carriageway.

Mr Anthony Burton was a lorry driver employed by the defendant firm. That morning, he was driving the defendant's skip lorry as usual, with a full load. He was going westwards along the A4. At about 7.15am he entered one of the right-turn filter lanes and crossed the eastbound carriageway at 90° to the claimant's direction of travel. The claimant collided with the back corner of the lorry and suffered serious orthopaedic injuries.

The claimant issued proceedings on 19th January 2017 alleging negligence against the defendant and seeking damages for the injuries sustained. An order of Master Eastman of 20th July 2017 gave directions for there to be a trial of liability as a preliminary issue. On 23rd May 2018, the defendant admitted primary liability. The claimant's contributory negligence was also admitted at trial. The apportionment between primary liability and contributory negligence was disputed. Mr Kilvington QC for the claimant proposed an apportionment in the region of 85% primary and 15% contributory. Mr Willems QC for the defendant proposed that the contributory factor was more like 75-80%.

Facts and Evidence

There are some uncontroversial facts. Between the point at which the claimant joined the A4 and the site of the collision there are two sets of traffic lights. The first, at the Syon Lane junction, is about 280m to the west of the accident locus. The second, at the Harlequin Avenue junction, is about 120m to the west of the accident locus. A 40mph speed limit applies along this stretch of the road.

Nothing of significance is suggested about the general conditions of the day or the road. The weather was dry. It was a few minutes before sunrise and vehicles were generally still displaying headlights. The streetlights were probably still on.

The court was provided with a 5-minute video taken around the area of the accident, which was helpful in understanding the general layout of the roads, getting a sense of sightlines, and observing patterns of traffic flow. That was all useful background, but of course no more than that.

(i) The Claimant's Evidence

Mr Shevlin provided written and oral evidence. He confirmed that he was familiar with the route. It was his daily commute. He joined the A4 from Syon Lane as usual on the morning in question. Although he could not be sure at which of the two possible sets, he remembered waiting at red traffic lights on the A4. He had made his way to the front of the queue of traffic. There were stationary cars beside him in all three lanes. From this position he usually used the power of his motorcycle to accelerate away strongly from the

stationary traffic beside him to secure himself a place in his chosen lane, although he said he could not be certain he did that on the day of the accident.

He said he could not remember anything else at all about the accident. His next memory was of lying on the ground afterwards. Under cross-examination he was unwavering in his evidence that he had no memory of the accident. He had no explanation himself for such a complete loss of memory. It was put to him that there was no physical explanation for it: medical notes confirmed that he had received no head injury. It was also put to him that he appeared to have given at least very brief outline accounts of the accident in each of three separate medical examinations to which he was subject in connection with this claim in 2016. He said these accounts were based on assumptions or subsequent information and not on memory. He was unable to assist the court further with any information about what had happened.

(ii) The Lorry Driver's Evidence

Mr Burton provided a short witness statement in these proceedings dated 30th August 2017. This gave a narrative account of events of which the following were the key points. As he entered the right-turn filter lane he slowed virtually to a stop. He looked up the eastbound carriageway to see when it would be safe for him to turn right. He saw the traffic stationary at a set of traffic lights near to him. He began the right turn manoeuvre across the carriageway, travelling at about 5mph. The lights changed and the eastbound traffic moved forwards. He saw the motorcycle pull away and into the middle lane. He saw and heard it accelerate towards him. There was nothing safe he could have done at that point other than continue the manoeuvre.

There were some discrepancies between this account and earlier accounts given by Mr Burton – at the scene, as recorded by the police, in a later statement to the police, and in his incident reports to the defendant. There were also significant discrepancies with the CCTV and expert evidence considered below.

On 29th May 2018, the defendant informed the claimant that Mr Burton would not be attending court to give oral evidence. On 8th June the defendant served a Civil Evidence Act notice of intention to rely on material contained within the police report of the accident, recording an interview with Mr Burton at the scene. In this, Mr Burton said he was waiting to turn right and saw the eastbound traffic held at lights 400 yards away. He set off very slowly. He was about half way across when the traffic started to move. He then saw the motorcycle accelerate towards him away from the rest of the traffic ("he came from nowhere"). The motorcycle did not brake. He himself just kept going because he had nowhere else to go.

The Civil Evidence Act notice appended a letter of 7th June 2018 from a doctor at Earlsheaton Medical Centre stating that Mr Burton suffered a myocardial infarction on 19th January 2015 and has since then been on medical therapy for his heart. Mr Willems explained that Mr Burton had indicated to the defendant, now his former employer, that he was extremely anxious about giving evidence.

Mr Kilvington submitted that this was an unsatisfactory state of affairs for a number of reasons, including the failure to provide medical evidence explaining why Mr Burton's present state of health was said to be incompatible with his

attending court to give evidence. He drew the court's attention to the principles set out by Brooke LJ in *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, at page 340, as to when adverse inferences may be drawn from the absence of a witness who might be expected to have material evidence to give, unless the reason given for the absence satisfies the court. Mr Willem fairly accepted that adverse inferences might properly be drawn about Mr Burton's evidence in his absence; that indeed was part of the reason for the concession of primary liability recently made.

(iii) The Expert Evidence

Experts in the investigation and reconstruction of road traffic accidents were instructed by each party and produced reports: Mr Peter Jennings for the claimant and Mr Peter Sorton for the defendant. The experts prepared a memorandum of agreement on 22nd February 2018. They were assisted by viewing brief CCTV footage capturing the moment of collision. That footage was also made available to the court.

The experts' memorandum of agreement confirmed that there were no points of disagreement between them, and set out the following points of agreement ("PoA"):

> "*1. The CCTV file available to us is a second generation copy, which limits the extent to which details can be extracted. Doing the best that we can with the evidence available, we agree that the CCTV evidence shows that the lorry driven by Mr Burton took a little over 3 seconds to turn from the end of the right turn filter lane in the westbound carriageway to the point of impact.*

2. The speed of Mr Burton's lorry as he made his turn was in the general region of 11mph. Whilst he must have slowed down from his previous travelling speed along the westbound carriageway before turning, the CCTV does not show him slowing almost to a stop and then accelerating again to make the turn.

3. We cannot identify from the CCTV evidence whether or not Mr Burton's right hand indicator was illuminated as he made his turn.

4. When the collision occurred, the rear nearside corner of the lorry was in the offside part of the middle lane of the eastbound carriageway.

5. Based upon the CCTV evidence, we believe Mr Shevlin was travelling at a speed in the general region of 55-60mph in the middle lane of the eastbound carriageway when he first came into view of the CCTV camera and appears to have remained in that lane until the moment of the collision.

6. This first view of the motorcycle on the CCTV file was approximately 1 second before the collision occurred; the brake light on the motorcycle appears to have been illuminated when that view first became available.

7. Mr Burton has stated that the motorcycle accelerated towards him from a traffic light controlled junction. There is no physical evidence to identify whether or not Mr Shevlin stopped at a traffic light controlled junction shortly before the collision, and if he did, to identify which junction it was.

8. It is a matter for the Court to determine which junction Mr Burton was referring to:

- *Mr Sorton has understood Mr Burton to be referring to the junction with Harlequin Avenue, which was approximately 120 metres west of the locus.*

- *Mr Jennings believes that Mr Burton's evidence could alternatively be a reference to the junction with Syon Lane (also known as Gillette Corner) which was 280 metres west of the locus and notes that Mr Burton referred to Gillette Corner in his civil statement.*

9. If Mr Shevlin started from stationary at the junction with Harlequin Avenue, then he must have accelerated firmly from that junction in order to achieve the speed that he was travelling at, then perceive a hazard and brake before coming into view of the CCTV camera. In round terms, that overall movement would probably take 6 to 8 seconds.

10. If Mr Shevlin started from stationary at the Syon Lane junction, or did not stop at either junction, then he could have achieved a speed of 55-60mph under moderate acceleration and would have been moving for a time well in excess of 10 seconds before the collision occurred.

11. There is no evidence available to us to suggest that Mr Shevlin's perception and response to the turning lorry was unduly slow.

12. If it is accepted that Mr Burton was turning for about 3 seconds before the collision occurred, then Mr Shevlin must have been travelling

towards him for at least 3 seconds before Mr Burton commenced his manoeuvre and was probably about 50 metres closer than the stop line at the Harlequin Avenue junction when Mr Burton commenced his turn.

13. If Mr Shevlin had approached the scene at 40mph, the speed limit for the road, then all other things being equal, Mr Burton would have been able to complete his turn without incident.

14. If the Court finds that Mr Shevlin accelerated firmly from the junction with Harlequin Avenue, that acceleration is likely to have been audible for several seconds before Mr Burton started to turn. It cannot be correct that Mr Burton saw or heard the motorcycle pull away from the traffic lights only after he had commenced his turn."

(iv) Discussion and Conclusions

I begin with the CCTV material. The footage available to the experts and the court was of poor resolution. It was too poor to allow for many reliable conclusions about circumstantial detail – such as, for example, whether Mr Burton's lorry had its right-hand indicator on. It was certainly a shocking record of the violence of the collision, all the same. As well as that, its principal relevance to these proceedings is the assistance it gives to enabling some basic arithmetic to be done about speed, time and distance. There was no controversy about the reliability of the experts' calculations for that.

It is clear from the CCTV footage that Mr Burton did not stop, or virtually stop, before turning. He executed his turn on the move, calculated at a speed of a little over 10mph (PoA 2). From the point he emerged from the filter lane to

the point of the collision was a little over three seconds (PoA 1). At the start of the final second, which is the total of the CCTV footage showing the motorcycle, the claimant was travelling at 55-60mph (PoA 5), so getting on for 50% in excess of the speed limit. I am satisfied as to these conclusions, and the parties did not suggest otherwise.

The CCTV footage shows the motorcycle followed in that final second, after a space, by a surge of other traffic (cars) travelling together. It is right to accept the point made in submissions that it is unsafe to draw too many conclusions about, or from, the speed of the rest of the traffic. The other road users could already have been reacting to the accident in front of them by the time they entered the CCTV field of vision. The pattern of traffic does, however, support an inference that the eastbound road users collectively had recently been held at a traffic signal, the motorcycle out in front.

The claimant remembered being stopped at a traffic light. Mr Burton thought the eastbound traffic had been held at a traffic light. I am satisfied that was indeed the most probable precursor to the accident. Realistically, it was more likely to have been the Harlequin Avenue set 120m to the west of the accident than the set near where the claimant joined the A4, another 160m further west. I come to that conclusion partly by inference from the CCTV traffic pattern, partly by making reasonable inference about Mr Burton's line of visibility and taking into account his evidence at least as far as goes to his general perspective along the eastbound carriageway, but principally because it seems to be the most reasonable explanation of the calculations of distance, speed and time suggested by the CCTV material.

Point 9 of the PoA calculates, working back from that final second of CCTV footage, that if the claimant had been stationary at the Harlequin Avenue lights, then that would have had to have been something like 6-8 seconds before the collision. He was travelling at 55-60mph at the beginning of that last second and braking hard during the rest of it. To get up to that sort of speed from a standing start, perceive a hazard and react to it could not plausibly have happened in a shorter space of time. That 6-8 second period also fits with the general pattern of evidence and events. It was the claimant's practice to accelerate firmly away from traffic lights. Mr Burton said he saw and/or heard a firmly accelerating motorcycle. The lorry was plain to see in front of the claimant, and the combination of distance, speed and time implied by the 6-8 second period is consistent with his having had no better chance than he did to adjust his trajectory and avoid the collision, all else being equal (and there was no suggestion that it was not).

The next piece of calculation is particularly important. If it took 6-8 seconds for the claimant to get from a standing start to the point of collision, and if it took Mr Burton 3 seconds to get from the start of his turn to the point of collision, then there would have been a 3-5 second window during which the claimant was travelling towards Mr Burton *before* he began his turn. (If I am wrong about the claimant and the rest of the traffic having been held at the Harlequin Avenue traffic lights rather than the more distant Syon Lane set, then of course the claimant would have been travelling towards Mr Burton for an even longer period before he began his manoeuvre.) That would also have placed the claimant, at the moment Mr Burton began to turn, about 70m away from him

(PoA 12 – he would have been around 50m closer than the Harlequin Avenue traffic light stop line, which was 120m away).

Those are the relevant facts as I find them. They are also the facts on which the defendant conceded primary liability. The claimant's speed of 55-60mph in the second before impact was the basis of the concession of contributory negligence.

The Legal Framework

Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides (as relevant):

> "*Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage...*"

The proper approach to this apportionment exercise was recently considered by the Supreme Court in *Jackson vs. Murray* [2015] UKSC 5. The immediate issue for the Supreme Court in that case was the appellate reviewability of apportionment decisions, but it gave some helpful guidance on the approach that should be taken at first instance. Lord Reed, giving the majority judgment, reviewed the authorities and noted the emergence of the concepts of 'respective causative potency' and 'respective blameworthiness' as aids to

forming a conclusion on just and equitable apportionment. He observed more generally (paragraph 27):

> "*It is not possible for a court to arrive at an apportionment which is demonstrably correct. The problem is not merely that the factors which the court is required to consider are incapable of precise measurement. More fundamentally, the blameworthiness of the pursuer and the defender are incommensurable. The defender has acted in breach of a duty (not necessarily a duty of care) which was owed to the pursuer; the pursuer, on the other hand, has acted with a want of regard for her own interests. The word 'fault' in s.1(1) of the 1945 Act, as applied to 'the person suffering the damage' on the one hand, and the 'other person or persons' on the other hand, is therefore being used in two different senses. The court is not comparing like with like.*
>
> "*It follows that the apportionment of responsibility is inevitably a somewhat rough and ready exercise (a feature reflected in the judicial preference for round figures), and that a variety of possible answers can legitimately be given.* "

Further guidance as to the sort of factors it is right to take into account, and how to weigh them, is available from cases decided on comparable facts. A number of points of comparison were suggested as guidance in this case.

The claimant cited two Court of Appeal cases about emerging drivers and speeding oncoming vehicles - *Dolby vs. Milner* [1996] CLY 4430 and *Armsden vs. Kent Police* [2009] RTR 31 - on the significance of relative traffic priorities, sightlines and speeds. The defendant cited two further Court of Appeal cases

– *Lambert vs. Clayton* [2009] EWCA Civ 237 and *Goad vs. Butcher* [2011] EWCA Civ 158 – as well as the first instance decisions in *Train vs. Secretary of State for Defence* [2014] EWHC 1928 (QB) and *Buchan vs. Whiting* [2008] EWHC 2951. All of these cases considered the significance of the limited opportunities drivers turning right have to avoid collision with speeding oncoming motorcyclists.

I reflected on all of these cases with interest, noting the factual similarities with, and differences from, the present case. It is clear from all of them, and the range of outcomes that were reached, that the exercise of making a just and equitable apportionment of liability is extremely fact sensitive and highly evaluative. It is the precise combination of facts in this case that must be determinative. I am required to consider relative causative potency and blameworthiness by reference to the acts and omissions of the claimant and Mr Burton. That turns on the choices they had in the circumstances that faced them and the principles that should have guided the exercise of those choices.

Liability

The actual choices they each made – their perception of their circumstances, the options they judged available to them, the evaluation of those options, their decisions and their reasons – cannot be accessed, since neither the claimant nor Mr Burton was both able and willing to assist the court with a full and testable explanation of them. I begin therefore with what can fairly be deduced objectively from the facts as I have found them.

(i) The Lorry Driver's Negligence

Mr Burton was employed as a professional driver. He was in charge of a heavy, solid and relatively slow lorry. He wanted to turn right across a major, three-lane trunk road at a time when it could be expected to contain traffic. It was his duty to ensure that he did not begin that manoeuvre until he was satisfied that it was safe – for himself and for the oncoming traffic that he could see – to do so and to complete it fully. Once he began that manoeuvre, he was committed. There would be very few choices available to him once he had embarked on it. That was the calculation he had to make.

He shortened the time he had available for making that calculation by rolling forward into the manoeuvre at 10mph rather than fully pausing in the filter lane. On the other hand, he had an elevated view from his cab, and an unimpeded prospect up the eastbound carriageway. He had only to look in that single direction for all the information he reasonably needed.

There was no traffic immediately in front of him. As to what there was to check, therefore, there were only so many possibilities. At the safest end of the spectrum, the road might have been empty, with perhaps traffic beginning to pull up at the Harlequin Avenue lights. At the most dangerous, the traffic might have been accelerating towards him and almost upon him. As I have found it, the reality was somewhere in between. I have to assess where.

At the time Mr Burton began his turn – so logically *after* he had made his assessment and his decision, however fractionally – the traffic had been moving forward from the traffic lights towards him for something between three and five seconds. The claimant was out in front, about 70m away and approaching at speed. That was within the range of predictable scenarios. Motorcyclists

accelerate firmly away from traffic lights and may be continuing to do so as they travel into unoccupied lanes. That was what was happening here.

I consider that to be towards the more dangerous end of the spectrum. By beginning his turn across the path of that oncoming traffic, Mr Burton was executing a manoeuvre of considerable risk. Instead of giving way to the oncoming traffic, he was creating a hazard for it. His lorry became a potential obstruction which, on seeing it emerge, the traffic might have to slow down to avoid – if it could. At the least, that needed a judgment from Mr Burton as to whether he could beat the traffic to the other side of the road. The information he needed to make that judgment was available to him. He did not give himself the best opportunity to make it in the first place. He nevertheless had a fair opportunity, in those 3-5 seconds, to make a decision about whether to wait or to cross – to judge what was safe. He went on for the turn, and the judgment turned out wrong.

(ii) The Claimant's Contributory Negligence

The claimant had accelerated from the traffic lights to a speed of 55-60mph. He had exceeded the 40 mph speed limit by up to 50%. He knew the road. He knew traffic regularly crossed it, no doubt sometimes at risk, given the inherent challenges of getting across a busy three-lane trunk road at filter crossing points. That traffic could be expected to include slow-moving heavy lorries of the sort owned by the defendant.

The claimant owed a duty to himself and to other road users, a legal duty, to comply with the speed limit. Speed limits, as well as being traffic regulatory measures, are above all about everyone's safety. Exceeding them reduces

time for hazard assessment and reaction, as well as exacerbating the impact of collisions when they do occur. It is one thing to use a powerful motorcycle's acceleration to achieve carriageway positioning in pulling away from traffic lights. It is another to fail to control and calibrate that acceleration thereafter to comply with the speed restrictions to which you, as well as the traffic following you, are subject.

(iii) Apportionment

Taking all of this into account, I turn to the relative assessment of 'causative potency' and 'blameworthiness', as directed by the authorities. I bear in mind that these concepts are designed as aids to analysis and judgment rather than requiring rigidity of categorisation – far less mutual exclusivity – of the relevant considerations.

On the question of causative potency I attach particular weight to the creation of a situation of hazard by the slow-moving lorry crossing the eastbound carriageway in the face of accelerating oncoming traffic. I also weigh the disparity in the vulnerability of the skip lorry creating the hazard, and that of the oncoming traffic being subjected to it – or, as the authorities put it, the potential 'destructive disparity' between the two.

I also note, accept, and take into account the calculation of the experts that if the claimant had not been exceeding the speed limit the lorry would have passed in front of him by the time he reached the point of collision, and the accident would never have happened (PoA 13). It is important to approach counter-factuals such as this with care, however. That calculation is not determinative of the causation of the accident (or the damage) in a legally relevant way, nor

by itself of the 'causative potency' of the claimant's contributory negligence. It has to be weighed alongside the limited options that were in fact available to the claimant for avoiding the hazard once it had been created – that is, from the point at which it became apparent that Mr Burton was not stopping but turning. Nevertheless, I have no doubt that the causative potency of the claimant's excessive and unlawful speed must be fairly reflected in the apportionment exercise. It prevented the hazard created by Mr Burton from passing off harmlessly, even if it does not establish that that was a hazard he was properly entitled to create or to rely on others to be able to avoid.

As to blameworthiness, my starting point must be Mr Burton's lack of priority over the oncoming traffic and his clear duty to give way to it. He did not do so. Despite having a fair opportunity to do so, he either did not notice the claimant moving towards him until too late, or saw him and proceeded to turn anyway, perhaps misjudging the motorcycle's speed or options. In either event considerable fault must attach. Mr Burton pulled out in front of a motorcyclist travelling in plain view in the middle of the road around 70m away from him, who was going too fast to stop in time. On the evidence before me, no explanation or mitigation appears for that, and it would be sheer speculation to introduce possible reasons for this course of conduct which might affect the apportionment exercise.

The blameworthiness attaching to the claimant is limited to the question of his speed; no evidence to support criticism of his conduct and his reaction otherwise appears. While he was not entitled to ignore the possibility of traffic crossing the carriageway ahead, the decision of Mr Burton to emerge in front of him

rather than wait was not readily predictable either. From the point at which the lorry did begin to turn across him, the claimant appears to have seen it and done what he could to avoid it. But he was going too fast to do so effectively.

Real fault attaches to speeding, and I attach it without hesitation in this case. I also take into account that while the claimant was in clear excess of the speed limit, this was not a case of the sort of reckless flagrancy or breach of the limit at the multiple levels which appear in some of the cases we looked at. The claimant was riding on an arterial dual carriageway where a volume of traffic is expected, all else being equal, to be able to move together consistently, close to the maximum speed, in safety. That is what dual carriageways like this are for. The traffic flow on stretches such as this one has cause to be frequently interrupted by traffic lights to allow for busy junctions or pedestrian safety. It expects to move off again in a brisk and orderly fashion. The claimant's conduct may be considered consistent with undertaking what would be a very standard manoeuvre in such conditions, albeit in a poorly executed manner as regards respect for speed restrictions.

Realistically, on a dual-carriageway road such as this, I conclude that the right of way obligations of deference and carefulness on traffic proposing to cross a carriageway are more distinctive, extensive and demanding than the (undoubted) obligations of traffic to be vigilant and prepared for hazards emerging in front of them. The conduct of the defendant's driver was more exceptional, and more negligent, than the conduct of the claimant, both in kind and degree. It created a considerable hazard for the oncoming traffic in general, and an apparently unavoidable one for the claimant in the event. At

the point of the decision whether or not to turn, in the crucial 3-5 second window he had available to assess both the situation as it actually was, and the risk of the very outcome which in fact occurred, the lorry driver had the significantly better practical opportunity to avoid this accident than the motorcyclist, and a clear duty to do so. Instead, he went ahead and took the unwarranted and faultily judged risk.

In these circumstances, I conclude that a just and equitable apportionment of liability would be 75% in respect of the defendant and 25% contributory in respect of the claimant.

1.