

Insight

from Horwich Farrelly's
Large & Complex Injury Group

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Welcome to *Insight*

Welcome to this week's edition of *Insight* in which we report cases relating to:

- A driver acting in the agony of the moment
- The use of CCTV footage in an RTA claim



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RTA / Liability

In *Mohmed v Barnes and another* (2019) EWHC 87 (QB) the defendant's car collided with the claimant pedestrian in the car park of a McDonald's, causing him serious injuries. The claimant brought a claim in negligence. Liability was denied. The claim was listed for a liability-only trial.

The defendant was one of a group of young people who travelled to a McDonald's in two cars. He was carrying two passengers and his friend, who was driving a Ford Fiesta, also had two passengers.

While some of the party were inside McDonald's, there was a verbal altercation with a group of male Asian teenagers, at the conclusion of which the defendant's group left the McDonald's to return to their respective vehicles, followed by a number of the Asian males.

In the bay immediately to the left of the Fiesta was a parked Mercedes in which the claimant was sitting

in the passenger seat. His friend was occupying the driver's seat. Neither the claimant nor his friend knew any of the members of the two groups that emerged from McDonald's.

It was not disputed that, at this stage, one or more of the passengers in the Fiesta made clearly audible and racially provocative comments. Neither the defendant nor his friend, driving the Fiesta, was alleged to have been responsible for racist abuse at any time.

The driver of the Mercedes thought that he was the target of this abuse and reacted to it by getting out of his car and attempting to remonstrate with the Fiesta driver, who was in the process of reversing his car out of the parking bay before driving away from the scene (both the defendant's car and the Fiesta car had been parked facing a barrier which prevented them from driving forwards).

The driver of the Mercedes then turned his attention to the defendant who was, by now, intending to drive away with his passengers. In the course of doing so he collided with and injured the claimant who, by this time, had also alighted from the Mercedes.

The defendant was prosecuted in the Crown Court for the offence of causing serious injury by dangerous driving but was acquitted by the jury.

There was conflicting evidence about the precise circumstances which led to the collision. The defendant argued that the group of Asian males had surrounded his car and the Fiesta, had kicked and punched the vehicles and had opened the doors of his car. The claimant denied any knowledge of these matters, whereas the Mercedes driver denied that this had occurred.

The judge held that the evidence of the Mercedes driver was unreliable, and was satisfied that by the time he had emerged from his car, some members of the group of Asian males had already arrived at the Fiesta in irate response to the racist provocation of his passengers. The Fiesta driver described leaving the car park in a panic and never having been so scared in his life.

One particular difficulty with the Mercedes driver's evidence was that he denied in his witness statement that there was any group of Asian males around either of the other two cars, but under cross examination he conceded that he had, in fact, been aware of some people in the vicinity of the defendant's vehicle. This was corroborated by the CCTV film taken by a camera located outside the premises.

After the Fiesta had been driven away, the judge found that the driver of the Mercedes began to remonstrate with the defendant. He was not only shouting and swearing at him, but was demanding that he should get out of his car and fight. Furthermore, despite the fact that the defendant was trying to reason with him, the driver of the Mercedes had opened the driver's door and grabbed the defendant's arm in order to drag him out.

As the situation deteriorated and, in a panic, the defendant accelerated forwards with the driver's door still open, fearing for his safety and his passengers, and for the integrity of the car. By this time the claimant had got out of the Mercedes to calm its driver down. The judge found that the

claimant had seen the group congregating around the defendant's car and would have been aware of their hostile intent.

The defendant thought that the claimant would move out of the way but he did not and he ran over him and made good his escape.

'...the defendant acted in a way which did not fall below the standard of the reasonable driver placed in the threatening and rapidly developing situation in which he found himself...'

On the evidence the High Court judge found that the defendant:

"...was in genuine fear for his safety and that of his two female passengers. These are not circumstances in which the reasonable man could be expected to weigh to a nicety the relative risks involved in choosing between the options open to him...the defendant acted in a way which did not fall below the standard of the reasonable driver placed in the threatening and rapidly developing situation in which he found himself. "

In those circumstances he was not liable in negligence.

The claimant was represented by Irwin Mitchell.

The defendant was represented by Horwich Farrelly.

Comment

The defendant pleaded the defences of self-defence and necessity, and also denied negligence. Ultimately, the judge concluded that the defences of self-defence and necessity merited no separate consideration.

The litmus test of breach of duty in negligence involved the application of the test of objective reasonableness. The defendant held a genuine fear for his safety and that of his two passengers. He was enveloped in a rapidly developing and threatening situation. In those circumstances, his actions did not fall below the standard of the reasonable driver.



RTA / Contributory Negligence

In *Hernandez v Acar and another* (2019) EWHC 72 (QB) there was a road accident when the first defendant driving a BMW motor car, emerged from a side road onto the main road and into the path of a BMW R80 motorcycle driven by the claimant. (The second defendant was the first defendant's insurer). The motorcycle struck the front offside wing of the car. The claimant was unseated and was thrown some 12 metres forward. His motorbike went on to hit and come to rest in contact with the rear bumper of a Ford Focus parked on the north side of the main road. The claimant sustained injuries which had left him paraplegic. The first defendant counterclaimed in respect of a psychiatric injury.

The trial of the preliminary issues concerned whether the first defendant did not look properly before pulling out and whether the claimant was riding at too high a speed (around 50mph in a 30mph speed limit), so that the first defendant had no reasonable chance of seeing him and/or avoiding the collision.

Because of parked cars, the sight line of a car waiting at the give way lines on the side road would only be 21 – 23 metres up the main road, when looking in the claimant's direction of approach. If the driver moved forward so that he (the driver himself) was over the give way lines, the sight line would be 28 – 30 metres. In order to get a clear view up the main road, the driver of a car such as the first defendant's BMW would have to come forward still further so that the nose of his car was 4.5 metres from the give way lines.

A house on the main road, some 45 metres before the junction with the side road had a CCTV camera on the first floor, facing down into the road. The resident of that property, informed the police of its existence and

the CCTV footage played an important part of the inquiry into the accident.

The police downloaded and analysed the CCTV evidence and gave the claimant's motorbike a speed of 58mph as it passed in front of the house where the CCTV was sited.

The footage was also subjected to examination by experts on both sides. The Master gave detailed reasons for rejecting the claimant's expert's criticisms of the reliability of the CCTV footage. In addition, he referred to the impression gained from simply watching the CCTV recording. It lasted 6 minutes and, in that time, numerous cars went by. Most of them were going, or could safely be assumed to be going, at around 30mph. Then came the claimant's motorcycle. It was travelling at a considerably higher speed. The contrast with the other vehicles was obvious and striking.

The Master found that some 44 metres from the accident site, the claimant was travelling at least 45mph and probably nearer 50mph.

On his analysis of the accident reconstruction experts' evidence, the Master found that it seemed likely that the claimant started to react roughly when he was riding through the arc of the CCTV camera positioned within the house and that he actually applied the brakes some 26 metres short of the impact point. It also seemed likely that:

"the claimant and the motorcycle were out of sight from the first defendant's perspective when the first defendant committed to pulling out from the junction".

Once the claimant had applied the brakes heavily, he was then more or less committed to his line in the road, which was slightly to the left of centre.

When considering the legal framework, the Master cited a number of relevant sections of the Highway Code (170-172, 180, 204 and 211). He found that the case, in its essentials, was relatively simple and straightforward. The claimant was going too fast. He was exceeding the speed limit by a margin of 50% or more. Not only was he exceeding the speed limit, but it could also be said the limit was too high for that stretch of road and a prudent speed would have been below 30mph. At that speed, the accident would have been avoided. So, the claimant's speed was not only negligent, it was also causative of the accident.

The first defendant was also negligent. It was incumbent on him, making this turn to ensure the road was clear to the right. This could only be done by pulling out of the junction slowly to a point where he could see down the line of the parked cars to his right, which would also give the claimant the opportunity to see and react to his emerging vehicle. It was not sufficient for the first defendant to edge out to the point where he could see to approximately 40 metres up the road. At some level, he was conscious that he had not managed to see as far up the road as he would have liked before pulling out. He did not see the claimant, and that strategy did not avoid the claimant coming into collision with his car because of the difficulty of swerving a motorcycle under heavy braking pressure.

'...road users must always be aware of the fact that other road users may exceed the speed limit or act foolishly or dangerously'

The view that the first defendant described was an oblique or diagonal view to the northern edge of the main road. A motorcyclist (or a cyclist for that matter) who was keeping to the left hand (southern) edge of the carriageway would not have come into the first defendant's sight line until he was much nearer to him than the 40 metre view the first defendant said he had achieved. The defendant had a blind spot to his immediate right. This alone demonstrated that there was a need for an emerging driver to obtain a view down the line of parked cars on the southern side. Secondly, road users must always be aware of the fact that other

road users may exceed the speed limit or act foolishly or dangerously. The view up the main road which the first defendant actually achieved did not sufficiently allow for that possibility.

The accident was the product of fault on both sides, the claimant's in going too fast and the first defendant's in not getting a proper view down the main before pulling out. The apportionment required an evaluation of the culpability and causative potency of the negligence found against each motorist. There was a certain "broad symmetry" between the faults of the claimant and the first defendant. In terms of culpability or blameworthiness, there was a little more of the blame on the claimant than the first defendant.

Although the Code and the authorities laid heavy emphasis on the duty of the motorist emerging from the minor on to the major road, the fact remained that the claimant was doing around double a safe speed for the conditions. However, as to causative potency, there was a significant difference in the comparison, which tilted the balance back in favour of the claimant. As the Highway Code noted, motorcyclists are vulnerable road users. In collisions with other motor vehicles it was the motorcyclist who was liable to suffer significant injury and not the driver.

Balancing those features and the overall circumstances of the accident, liability was apportioned 60/40 in the claimant's favour. There was judgment for 60% of the claim with damages to be assessed and 40% of the counterclaim with damages to be assessed (though, in the case of the counterclaim, medical causation was also in issue).

The claimant was represented by Levenes Solicitors.

The defendants were instructed by DAC Beachcroft Claims.

Comment

One of the issues that the Master had to deal with in this case was the reliability of the CCTV footage. The experts' oral evidence on this occupied the best part of a day. The Master found that there was 'a gulf' between the expertise of the defendants' expert (Mr Cass), on which 'very considerable reliance' could be placed and that of the claimant's expert (Mr Carter) in which he 'did



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