

# A Motorcycle Case Law Update

Autumn 2020



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## PRIMARY LIABILITY

### ***Wells v Full Moon Events Ltd et al [2020] EWHC 1265 (QB) (19 May 2020)***

- C was riding an off-road motorcycle on an ‘enduro-day’, which involved instructor led groups riding along a range of terrains (muddy tracks etc.), organised by D. D’s itinerary described the day as tough and challenging ‘*while always safe*’.
- C described himself as an experienced and competent off-road motorcyclist. He rode into a puddle, hit a submerged obstacle, and fell off sustaining catastrophic injury.
- C alleged that the organiser should have carried out a risk assessment in respect of the muddy track he was riding on and/or warned of the possible presence of submerged obstacles in puddles on the track.
- The claim failed:
  - o C failed to prove that he had struck a submerged object big enough to cause him to lose control and fall from his motorcycle. The instructor had ridden through the puddle without difficulty. C’s motorcycle should have coped easily with any obstruction that could have been hidden in the 8-12cm deep puddle. As such, the accident was likely caused by C’s own failure.
  - o The muddy track was a public by-way. It had been used by many endure-day riders without incident. It would not be reasonable for the organiser to undertake detailed risk assessments, identify and guard against all hazards, instruct experienced riders how to negotiate all sections of the course, or avoid parts of the course that would ordinarily be regarded as part of the off-road experience. Bearing in mind the social value of an ‘endure-day’ as a reasonable sporting or recreational activity, such a requirement would negate the experience.
  - o The duty on the organiser was to ensure that the claimant was reasonably safe in relation to risks that were not obvious. The risk that a muddy puddle might contain



a concealed object was both inherent and obvious; D was not in breach of its duty of care. The wording of the itinerary added nothing to this.

***Brand v No Limits Track Days Ltd [2020] EWHC 1306 (QB) (22 May 2020)***

- C worked as an instructor at D's motorcycle track days. Track days included open sessions where everyone could ride around the track at speed.
- Instructors were present, (unpaid), who would assess riders and offer advice on their riding, as well as police the open sessions.
- Before taking part in an open session, riders had to undertake a sighting lap with an instructor to familiarise themselves with the track. Sighting laps took place at the same time as others were undertaking an open session. The instructors had previously raised concern as to the safety of this.
- C was leading a sighting lap with a group, when another motorcyclist, on an open session, lost control of his bike, causing collision with C.
- C's claim against the organiser that the track days were inherently dangerous failed. Amongst other issues, two factors seem to have been relevant:
  - o There had been a large number of track days on this basis without incident.
  - o There was no evidence that other track day providers did not adopt a similar practice.

## **CONTRIBUTORY NEGLIGENCE**

***McPherson v Smith et Al, [2018] EWHC 1433 (QB) (11 June 2018)***

- C motorcyclist. D car driver travelling in opposite direction. D turning right into an entrance. As D turned, C, having just overtaken a double-decker bus, and still on the wrong side of the road, collided with D's turning vehicle.
- At trial both parties referred the court to authorities in respect of contributory negligence, which the learned Judge considered, albeit stating the liability apportionment was '*exquisitely fact sensitive*' with no two cases being identical.
- Primary liability found on the basis that, had D taken one final look up the road before committing to the turn, he would have seen C approaching, on his side of the road, coming to the end of his overtaking, and not have commenced his turn.
- C found contributory negligent to one-third. C was riding on the wrong side of the road for too long following his overtaking and was travelling too fast.



- In respect of C's driving prior to the accident, the Judge commented: *'In this case the Claimant had been guilty of appalling driving for some time before he overtook the bus, but that driving was not causative of the accident'*.

**Shelvin v European Metal Recycling Limited [2018] EWHC 1695 (QB) (6 July 2018)**

- Three lane dual carriageway in Middlesex. 40mph speed limit. C, a motorcyclist, had just pulled away from traffic lights from stationary, accelerating to 55-60mph. 280 metres further down the road from the traffic lights, D driver of a skip lorry, travelling in the opposite direction to C, turned right across C's carriageway. Collision.
- C was there to be seen when D driver pulled out, with a collision some 3-seconds later.
- In assessing contributory negligence, the Judge considered matters through the lens of causation and fault, but noted 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'*.
- In respect of the D driver:
  - o D driver was a professional driver in charge of a heavy, solid and relatively slow lorry. It was his duty to ensure that he did not begin the manoeuvre until he was satisfied it was safe.
  - o D driver had shortened the time available to him to observe oncoming traffic by not coming to a complete stop prior to commencing his manoeuvre.
  - o D driver had pulled out when the traffic was travelling towards him, a manoeuvre of considerable risk. Rather than giving way to oncoming traffic, he had created a risk for it.
- In respect of C:
  - o C knew traffic regularly crossed the road. He could be expected to anticipate slow moving lorries like D's undertaking such a manoeuvre.
  - o C accelerated to 55-60mph in a 40mph zone. *'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.'*
- In balancing the two:
  - o The lorry had crossed C's carriageway as C approached, thereby creating a hazard in the face of accelerating oncoming traffic.
  - o The lorry had a far greater destructive potential than the bike.



- Had C not been speeding, the accident would have been avoided as the lorry would have cleared the road before C got to the point of impact. However, C's speed in this case 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'*.
- In the final conclusion, the right of way obligations and need for care on the part of the crossing traffic were found to be the *'more distinctive, extensive and demanding'* than the obligations of the approaching traffic *'to be vigilant and prepared for hazards emerging in front of them'*.
- Liability apportioned 75/25 in favour of C.

## **ACCIDENT RECONSTRUCTION EVIDENCE**

### **VLADIMIR MITRASINOVIC v STROUD [2020] EWHC 914 (QB) (17 April 2020)**

- C was part of a motorcycle club. He was riding a motorcycle belonging to the club on a single carriageway road which had double white lines down the middle. As C navigated a sharp left-hand bend, positioned towards the centre of the road, he collided with D, who was driving a car in the opposite direction.
- The only two witnesses were the two drivers. Both parties instructed collision investigation experts who disagreed on many things.
- C's witness statement was dated more than two years post-accident. In it C gave a detailed account of everything he had done on being confronted with the D's car up to the point of impact. At trial, the C acknowledged that it all happened *'in a split second'*.
- On considering the C's evidence, the Judge stated: *'In a case such as this where the events unfolded within a very short period of time the more actions that took place within the narrow timeframe the less likely it is that it occurred'*.
- D's witness statement was noted to have been provided within five months of the accident, (as compared to two years in the case of C), when *'the events were relatively fresh in [D's] mind and when there was less opportunity for her to reconstruct her evidence in the light of other evidence'*.
- D's account preferred. Claim failed in its entirety.

### **DOMENEY v REES et al [2020] EWHC 2115 (QB) (28 July 2020)**

- Application by D for the instruction of a new accident reconstruction expert.



- Road traffic accident: C motorcyclist v D car. D convicted of death by careless driving whilst on drugs. Primary liability not in dispute. Issue: Contributory negligence.
- For the criminal proceedings against D, the police had produced a reconstruction report which had concluded that *'no meaningful calculation'* could be made of the speed of the C: there were no skid marks, the disparity in vehicle mass and oblique collision angle meant the vehicle damage would not assist, nothing could be gleaned from the throw distance of the rider as he had *'been arrested by a metal fence within a hedgerow'*.
- D's criminal team had also obtained an accident reconstruction report for the purposes of the criminal trial which agreed that no accurate speed could be *'reliably calculated'*.
- At the CMC D sought permission to rely on a further expert report from an accident reconstruction expert, together with a report from an A&E expert. The A&E expert was refused outright. In respect of the reconstruction expert, despite C not objecting, the Master also refused permission.
- The Court concluded that the test under Part 35 that expert evidence be *'reasonably required'* had *'nowhere near'* been made out. The Judge stated that the court is not bound to give permission for expert evidence simply because the parties have agreed it, adding that he should have been provided with two things to assist him to form a judgment:
  - o Enough material to form a judgment as to the need for the evidence.
  - o As required by CPR 35.4(2), the costing of such reports, (which, in this case would have been c£24k for the recon experts, rising to £40-50k if permission were also given for the A&E experts).
- The court found the two existing experts' reasoning *'cogent and well-expressed'* with no reason to doubt them stating: *'If there is no or no sufficient forensic material from which conclusions can be drawn, then experts are redundant'*, citing the well-known passage from the judgment of Stuart-Smith LJ in *Liddell v Middleton* [1996] PIQR P36:
 

*'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 statement 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'.*

## QUANTUM

### **AB v KL [2019] EWHC 611 (QB), (15 March 2019)**

- AB brought a claim on behalf of the dependants of GH, their motorcyclist father killed in a road traffic accident.
- The dependants were GH's three sons: One was independent at the age of death, two were fifteen year-old twins living with GH's ex-wife, their mother. The judgment makes clear that GH was *'a loving and generous father who took an active interest in the lives of his three children'*.
- There were a range of claims for various aspects of financial dependency, including:

#### *Deposit for first house*

- A claim for assistance towards the deposit of the first house in the sum of £15,000 per child.
- Evidence in support:
  - o Witness statement of the eldest son:
    - *'Knowing my father as I did, I know that he was the sort of person who would want to make sure his children were okay in life.'*
    - *'I have no doubt in my mind that when the time had come my father would have wanted to help me get a first foot in the property market.'*
  - o In oral evidence the eldest son added how his father had spoken constantly about how renting was money down the drain.
  - o Documentary evidence:
    - A 2018 survey conducted by Legal & General Assurance Society Limited entitled: *'Bank of Mum and Dad'*, which found that 27% of purchasers in 2018 required help from friends and family, increasing to 41% in London, with average assistance amounting to £18k in 2018, and £30,600 in London. The court found this evidence *'helpful as far as it goes'* although noting that



it was general, saying nothing about the deceased's willingness or ability to help his son.

- The Court granted a sum of £9,000 to each child under this head.

#### *Services only a father can provide*

- Claim for £5,000 for each son.
- The teenage twins were given £3k each, with a recognition that they did not, at the time of death, live with their father. The elder son was awarded £500.

#### *School trips and holidays*

- Claim for monies towards a special school trip the twins were planning to take in their GCSE year to Nepal in the sum of £2,000 each, together with £1,000 for a further school trip in sixth form.
- Each awarded £2,000 for the Nepal trip and £750 for the sixth-form trip.
- Claim for £2,500 per year for holidays until the twins reach 18 and two further large holidays at £1,000 each.
- Each awarded £4,500 to aged 18, and £1,000 p/a to age 21.

#### *Christmas presents*

- Claim for Christmas presents for the twins of £350 each per year to age 30.
- Awarded £350 p/a per child to 18, £250 per child to 26, and £100 per child to 30.

#### *Wedding costs*

- Claimed £12,500 for each son.
- Evidence in support:
  - o 2016 article from Brides Magazine – 'How much does a wedding cost?'
  - o Article from 'Money Saving Expert' website - '40 Cheap Wedding tips'.
  - o Article from BBC News website – 'Hold the bubbly: How to have a wedding on a budget' –
  - o Articles valued the average cost of a wedding at £21-£30k.
- The eldest son was in a stable relationship, such that, the court found that marriage was '*a real possibility*' albeit not a certainty. £7,500 awarded.
- The younger twins, due to their younger age, and lesser of a firm prospect of marriage for some time, were each awarded £3,750.



**Y v (1) A HEALTHCARE NHS TRUST, (2) HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, (3) Z [2018] EWCOP 18 (2 August 2018)**

- C's husband catastrophically injured in a motorcycle accident. C and husband married for four years, and had a two-year old son together. Before the accident C and her husband had wanted another child, but been unable to conceive naturally. They had been referred to a fertility clinic and were due to commence IVF when the accident occurred.
- The husband sustained catastrophic brain injury and massive internal injuries. Medically it had been decided that, if no brain activity was identified during tests, the husband would be pronounced dead and taken off life support.
- Before that happened the C applied for a declaration that, notwithstanding her husband's incapacity and inability to consent, it was both lawful, and in his best interests, for his sperm to be retrieved and stored before his death.
- The Court of Protection undertook a consideration of the husband's past and present wishes and feelings, together with the beliefs and values that would be likely to influence his decision had he capacity. The court accepted the settled intention at the time of the accident to have another child. Due to the consultation process involved in the run up to fertility treatment, the couple had in fact discussed and agreed the posthumous use of the husband's sperm. The court concluded that it seemed that the husband would have chosen to allow clinicians to retrieve his sperm so that it could be stored and used after his death.
- In these circumstances, the court allowed the declaration as being in the husband's best interests even though his death was imminent.

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**Robert Horner**

