



Neutral Citation Number: [2019] EWHC 1804 (Admin)

Case No: CO/5214/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2019

Before:

LADY JUSTICE NICOLA DAVIES DBE
MRS JUSTICE FARBEY DBE

Between:

THE QUEEN (on the application of ANN TORPEY)

Claimant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

- and -

PC PAUL SUMMERSON

Interested Party

Iain Daniels (instructed by **Tuckers**) for the **Claimant**
Louis Mably QC (instructed by **Crown Prosecution Service**) for the **Defendant**
Edmund Gritt (instructed by **Reynolds Dawson**) for the **Interested Party**

Hearing date: 12 June 2019

Approved Judgment

Lady Justice Nicola Davies and Mrs Justice Farbey:

1. This is the judgment of the court to which we have each contributed.
2. The claimant is the mother of Lewis Johnson who died on 9 February 2016 as a result of a road traffic accident while being pursued by officers of the Metropolitan Police Service (“MPS”). An application for judicial review is brought to challenge a decision of 2 October 2018 by a reviewing lawyer at the Crown Prosecution Service (“CPS”) on behalf of the Director of Public Prosecutions (“DPP”). The reviewing lawyer decided that the interested party who is a MPS police officer (“the Officer”) should not be prosecuted for the offences of causing death by dangerous driving contrary to section 1 of the Road Traffic Act 1988 (as amended by the 1991 Act) (“the Act”) and/or causing death by careless or inconsiderate driving (section 2B). Permission to apply for judicial review was granted by Julian Knowles J. No permission was given to challenge a CPS decision not to prosecute the same Officer for an offence of misconduct in public office or another officer in relation to other offences. The application for permission on those refused grounds has not been renewed.
3. The essence of the written claim is that:
 - a) The decision not to prosecute the Officer for causing death by dangerous driving or death by careless driving was irrational;
 - b) There was sufficient evidence that the Officer was driving dangerously at the time of the collision (and before) particularly taking account of the fact that the reviewing lawyer initially found that the manner of the Officer’s driving was one of the causes of the accident. The decision failed to consider relevant evidence. The findings on the evidence it did consider are irrational;
 - c) Where the Officer had wilfully involved himself in a pursuit when he was neither qualified nor authorised to do so, the CPS Guidance on the public interest test in relation to whether police officers should be prosecuted for driving offences in emergency situations had been unlawfully applied.

The accident

4. On 9 February 2016 Mr Johnson was the rider of a white moped registration number 2557GKZ in the Hackney area of London. His friend, LK, was a pillion passenger. The moped was suspected of involvement in a number of thefts of mobile phones in the area, including one that morning in St Peter’s Street, Islington. The MPS put out a call on the radio airwaves. Using CCTV cameras the moped was followed by their control room. The Officer was the driver of a marked police BMW car; another officer was his passenger. When the Officer heard the radio call he requested that the control room assign him to the incident. He was a Level 1 advanced driver without Tactical Pursuit and Containment training (“TPAC”). The MPS policy at the relevant time was that a police driver could not engage in the pursuit of a motorcycle or moped unless they were TPAC trained. The Officer turned on the blue lights and sirens on the BMW and went in search of the moped.

5. At 11:47:31 the Officer commenced pursuit of the moped. A second police vehicle, a Ford Focus, later joined the chase. The fatal collision occurred on Clapton Common near the junction with Castlewood Road. The moped was undertaking a white box van on the nearside immediately before the junction. As the police BMW approached the white box van on the offside, the driver of the van moved to the nearside and collided with the moped which then clipped the curb, destabilising the rider and passenger. Both were thrown from the moped and collided with the traffic light pole. Ambulances attended. Mr Johnson went into cardiac arrest and was pronounced dead at the scene. LK suffered serious injuries.

Investigation of the incident

6. Mr Johnson's death was investigated by the Independent Police Complaints Commission ("IPCC") who produced a detailed report dated 24 May 2017. It was based upon statements taken from the police officers in both vehicles and the control room, interviews with the officers, statements from eye witnesses including the van driver, and CCTV footage of the pursuit and the accident. Prepared for the investigation were reports from PC Byron Chandler, the senior instructor with Gloucestershire Constabulary's Driver Training Unit, and PC Hewitt, a senior forensic collision investigator.

The report of PC Chandler

7. PC Chandler analysed the driving of the moped and the police vehicle as shown in the CCTV footage. His analysis includes the following:

"...it is clearly a pursuit in Dalston Lane as the moped turns into Amhurst Road. At this point, the rider cuts the junction and the Pillion clearly looks back at the following Police car which has its Blue lights illuminated. That would be a clear indication to a Subject that the police were requesting them to stop, especially evident as they remain behind them. From this point on Initial Phase Pursuit is instigated. ... From the several camera views on Amhurst Road, the driving of the police vehicle is in no way outside of any exemptions but I would not expect a pursuing vehicle of such a vulnerable moped to be as close as PC Summerson chose to be.

In being close, it not only puts pressure on the moped driver but it reduces the time to react from the Police driver, should the moped take evasive turn or even fall off. As the pursuit turns out of Amhurst Road into Stoke Newington Road, the patrol car can clearly be seen close to the moped, indeed they both pull out from the minor to major road with little view and a small white van can be seen having to break. The moped then enters a bus lane and has to come past a white van which is unloading within it. A Blue car also narrows the route for the moped at this point and the moped takes to the pavement, in full view of the Police vehicle. The Police vehicle is close behind the blue vehicle at this point and it could be viewed as a 'Quartering' maneuver (sic). This is where the police car

influences the direction of a pursued driver by use of a dominant road position. This is a Tactical Phase Maneuver (sic) only. The moped takes to the pavement momentarily here and risk would be deemed high at that point but no Dynamic Risk Assessment (DRA) change is relayed to the Control room operator. This is where both patrol cars are clearly seen together in Pursuit. As the moped returns to the carriageway the BMW is still very close behind. This can be as a result of 'Red mist' from a police driver and that is something that in Pursuits can also be known as 'Target Focus'. In effect the driver in intent on keeping the Subject in sight and not let them get away. This can then lead to something known as 'mirroring' where the Police driver copies every road position and maneuver (sic) that the Subject does. This type of behaviour is suggesting that decision making by the police driver may be affected.

The pursuit continues up into Stoke Newington High Street and Stamford Hill in the same manner until it reaches the junction with Clapton Common. At this point the Moped takes a line to the right of the central reservation and is going down the offside of a dual carriageway against oncoming traffic towards a major junction. In pursuit training scenarios this would be given to highlight immediate risk, it should be an abort of the pursuit and advice is for the Police vehicles to stay on the correct side of the road with minimal blue lights so as not to attract attention from road users who may be in the path of the subject vehicle. There is a motorcycle riding towards the pursuit at this point and also a van and a car which can be seen in the 'Box junction' having to stop. The turn itself is a pedestrian controlled traffic light junction and there are several pedestrians here. The blue vehicle referred to by PC Summerson in his statement holds them up and the moped goes through. No time would have been lost here if the patrol car took the legitimate route through this busy junction and that is what I believe would have been the correct decision. This action by the Police driver would be typical of 'Mirroring' as I mentioned previously.

The camera footage of the actual collision shows to me that the moped at this point made a wrong decision to take to the nearside of traffic, especially the white van as the driver of that vehicle reacts to the Police car which is overtaking on the natural and legitimate side of the van. As the van pulls into the nearside, the moped appears to clip the curb and the catastrophic dismount was the result. The actual crash was down to driver error in my view at that point ..."

8. PC Chandler concludes that the "correct course of action that day would have been to monitor the progress of the moped on CCTV as it was being controlled remotely by

staff and to have deployed TPAC drivers to the incident. Those who did engage in the pursuit should have had sufficient knowledge and understanding of Pursuit policy to abort.”

The report of PC Hewitt

9. PC Hewitt records that he was not asked to comment on the driving of the police officers with regard to policy or training. In his report he offers no comment nor any analysis of the driving of the Officer. It is notable that in his “Conclusions” PC Hewitt comments upon the actions of Mr Johnson and the driver of the van but makes no comment upon the driving of the Officer in the BMW. He concludes that:

“The manner of Mr Johnson’s riding prior to police involvement was reckless and showed a total disregard for the welfare of himself and other road users.”

As to the pursuit he states that:

“Mr Johnson placed himself in a vulnerable position by overtaking vehicles on their nearside where there was little margin for error should something unexpected happen. ... The collision could have been avoided had Mr Johnson simply stopped for police, which he had ample opportunity to do in a safe manner.”

How the accident occurred

10. The main record of the pursuit and collision is a compilation of the CCTV recording. It begins at 11:10 when the moped turns into St Peter’s Street; it ends at 11:51:37 when the collision occurred.
11. The facts of the pursuit and the collision have been set out in various reports. Following the production of the IPCC report, Simon Ringrose, the unit head of the Special Crime and Counter Terrorism Division of the CPS, made the first CPS decision on 9 January 2018, namely that there was sufficient evidence to prosecute the Officer for the offence of dangerous driving but that it would not be in the public interest to do so. His analysis of the CCTV footage provides the factual basis for the following summary of events:
- 11:10 – The suspect moped was seen on CCTV turning into St Peter’s Street. His presence was noted by an officer working in the CCTV department of Islington Council, a call was put out to the police control room, information became available that the moped had been involved in a snatch theft that morning. This was confirmed on review of the CCTV.
 - About 11:35 – Two police community support officers saw the moped in Provost Street, on seeing them the moped turned and made off at speed. On CCTV a sighting of the moped took place on City Road, it travelled across a pedestrian bridge and into a nearby estate.

- 11:46 – Hackney Council’s CCTV shows the moped riding down the middle of Stamford Road towards Kingsland Road, it passed a vehicle on the nearside turning onto Kingsland Road. The moped travelled down the wrong side of Kingsland Road for about 9 seconds before moving over and turning into Dalston Lane. The moped speed was estimated as twice the 20 miles per hour speed limit.
- In Dalston Lane the moped is seen to undertake a car and lorry and cross the path of an oncoming vehicle by driving on the wrong side of the road. In heavy traffic the moped mounted the pavement for 61 metres and crossed the junction with Laurel Street without stopping. At that point there is no suggestion that the moped was being pursued by the police.

The pursuit

- 11:47:47 – The Officer’s marked police BMW is seen with blue flashing lights to emerge into Dalston Lane travelling in the same direction as the moped. The control room was contacted to confirm that the officers were in pursuit of the moped. The moped is again seen to drive on the wrong side of the road in Dalston Lane, the passenger turns to look back.
- 11:48:46 – At Pembury Junction the moped passed a number of vehicles on the nearside and emerged on the pavement before turning into Amhurst Road. The police BMW passed other vehicles on the offside also turning into Amhurst Road about a second or so behind.
- The pursuit continued along Amhurst Road and the police BMW appeared to be close behind the moped, traffic is seen to move over to make way.
- Both the moped and the BMW turn into Stoke Newington High Street and the moped attempted to pass a blue car on the nearside. As this happened the car moved over, possibly as a result of seeing the police car, which resulted in the moped mounting the pavement causing a pedestrian to jump out of the way before it rejoined the road.
- 11:49:51 – The BMW fell in behind the moped and was joined by a marked police Ford Focus. Although the moped was able to make its way through the moderately heavy traffic the BMW had to wait for gaps.
- The moped went straight across the junction onto Stamford Hill with the BMW in pursuit. The BMW went through on an amber light. The Ford Focus was some ten seconds behind and went through on a red light.
- The moped and BMW both pass a central refuge on the nearside and at this point the moped and BMW are parallel with each other although separated by traffic. The BMW was on the offside and travelled on an unused central part of the road. At the next central refuge the BMW was forced to go around on the wrong side of the road causing an oncoming vehicle to move to its nearside.
- The moped and BMW continue in convoy towards the junction with Clapton Common, both travel on the offside of a central reservation. At this point the Ford Focus is about 24 seconds behind.

- The moped and BMW entered Clapton Common, crossing into the southbound lane and pass through a pedestrian crossing the wrong way with a green light for pedestrians. The BMW was held up momentarily by stationary traffic. The Ford Focus is later seen and travels the wrong side of a central refuge.
- The pursuit continued along Clapton Common, the BMW was trying to catch up with the moped. The traffic was moderate. The moped was undertaking vehicles on the nearside. The BMW was overtaking vehicles on the offside which caused the driver of a white box van to move slightly to the nearside. This move caused the moped to hit the curb and nearside wing mirror of the van. As a result Lewis Johnson lost control of the moped and collided with a traffic light pole.
- The two officers immediately got out of the BMW and attended to both Lewis Johnson and the passenger. Lewis Johnson was pronounced dead at 12:48 by a doctor from the Helicopter Emergency Medical Service.

The first decision of the CPS

12. In a nine-page letter Mr Ringrose identifies the two-stage test to be performed by the CPS following completion of the IPCC investigation and a review of the evidence. Applying the Code for Crown Prosecutors, the first stage is the evidential test. The Crown Prosecutor must be satisfied that there is sufficient evidence for there to be a realistic prospect of conviction against each defendant on each charge. The Prosecutor must consider whether the evidence can be used and is reliable, and also what the defence case might be and how it is likely to affect the prosecution case.
13. A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict. This is a different test to the one applied by the criminal courts: a jury or bench of magistrates should only convict if it is sure, beyond reasonable doubt, that a defendant is guilty.
14. If the evidential test is met, the second stage is reached. The Crown Prosecutor must decide whether a prosecution is in the public interest. He or she must balance the factors for and against a prosecution carefully and fairly. A prosecution will usually take place unless the factors tending against prosecution clearly outweigh those in favour. A prosecution will only start, or continue, if both evidential and public interest tests are met.
15. Having set out requirements of the two-stage test, Mr Ringrose continued:

“The function of the CPS is not to decide whether a person is guilty of a criminal offence, but to make fair, independent and objective assessments about whether, according to the Code, it is appropriate to present charges for the criminal court to consider.”
16. Mr Ringrose set out his detailed analysis of the driving of the moped and the police BMW and then considered the relevant driving offences as follows:

“Causing death by dangerous driving/dangerous driving and causing death by careless driving

I firstly considered the standards of the officer’s driving. In my view the relevant aspects of his driving can be summarised as follows:

- At all times the BMW made use of blue lights and sirens.
- Driving at speed close to the moped in front.
- Driving at excess speed. The BMW reached a speed of 55mph.
- Passing through an amber light.
- Driving on an unused central part of the road and driving the wrong side of a central refuge causing an oncoming car to move to the nearside.
- Driving on the offside of a central reservation.
- Driving through a pedestrian crossing the wrong way with a green light for pedestrians.
- Driving that straddles the central line in the road.
- Driving in the opposite lane.

Although section 87 of the Road Traffic Regulation Act 1984 and regulation 36 of the Traffic Signs Regulations 2002 give police vehicles, being used for police purposes, immunity from prosecution for speeding and red lights, they do not give an officer licence to drive dangerously or carelessly.

In my opinion it is highly likely that a reasonable jury, properly directed, would conclude that aspects of the officer’s driving did amount to dangerous driving. Specifically, the driving on the wrong side of the central reservation and through a pedestrian crossing the wrong way with a green light for pedestrians. I believe that this driving could be considered to fall far below what would be expected of a competent and careful driver and that it would be obvious that there was a danger of injury to a person or of serious damage.

As far as the other aspects of the driving are concerned I am not satisfied that the threshold for dangerous driving is met. Although the speed was at times excessive, the hazards to other road users and pedestrians did not in my view cause an obvious danger. At all times he was using his blue lights and sirens as a

warning. Although not determinative, the evidence from the bystander witnesses does not support a view that the driving as a whole was dangerous.

I am also satisfied that the totality of the driving of the officer fell below the standard expected of a competent and careful driver. In my opinion, a competent and careful driver would not have driven in the manner set out above (speeding, wrong side of central refuge/reservation, tailgating etc ...) and consequently his driving did not reach the required standard....”

Mr Ringrose then considered the issue of causation:

“... Although it is clear that the officer’s car did not make any contact with the moped I have considered whether the manner of his driving played a part in causing Lewis’ death by bringing it about rather than simply creating the occasion for the fatality.

It is too simplistic to describe causation by saying that ‘but for’ the officer’s driving the collision would not have happened. It is necessary to look in more detail at the evidence surrounding the collision.

The evidence indicates that Lewis was aware of the police car behind him and was attempting to evade arrest. In my opinion the manner in which he rode was his own choice. His fatal injuries were caused when he hit the curb and the white van, lost control of the moped and collided with the traffic lights. He could and should have stopped as he was required to do and was not being forced to drive dangerously. I was also satisfied that immediately prior to the fatal collision the officer was not driving in a way that could be considered dangerous or even careless.

Although the officer’s driving could be seen as providing the ‘situational context’ for what happened it did no more than play a part in creating the occasion for the fatal collision. Lewis did not lose control of his moped and collide with the traffic light as a result of taking evasive action to avoid the police car. Lewis had a reasonable alternative to driving away from the police and at any time during the pursuit he could have stopped safely.

In the circumstances of this case it cannot be established that the officer caused Lewis’ death and therefore an essential ingredient of the offences of causing death by dangerous or careless driving is incapable of proof.”

17. Mr Ringrose went on to consider whether it would be in the public interest to prosecute the Officer for the offence of dangerous driving. In concluding that it

would not be in the public interest, he had particular regard to the CPS Guidance on charging offences arising from driving incidents and in particular the section dealing with drivers of emergency service vehicles and drivers in emergencies as follows:

“The Guidance makes it clear that the starting point is that it is very unlikely to be appropriate to proceed with a prosecution on public interest grounds if a police officer ... commits a driving offence while responding to an emergency call.

Although the officer was not answering an ‘emergency call’ he was trying to prevent and detect serious crime, in accordance with the legal duty on the police to prevent crime. Although I concluded that his driving, or at least aspects of it, could be considered dangerous I do not consider that his culpability is high.”

On this basis, Mr Ringrose concluded:

“In my assessment the dangerous driving took place over a short period in the context of a pursuit. It is well documented that moped related crime is prevalent and high profile. The public expect such suspects to be pursued by the police and I believe that the officer’s actions and the manner of his driving in pursuing the moped were justified.”

The 2 October 2018 review decision

18. Following receipt of the decision, solicitors acting on behalf of the family of Lewis Johnson sought a formal review pursuant to the Victim’s Right to Review (“VRR”). In admirably clear and relevant detail, the solicitors’ request for a review analysed the evidence, the CPS Guidance and the case law relevant to the specific driving offences and the test to be applied.
19. The review decision was made by Mr Frank Ferguson, Head of Special Crime, Deputy Head, Special Crime and Counter Terrorism Division. It contains the following:

“... following a careful and fully independent consideration of all the available evidence, I have concluded that the decision not to prosecute this case was in fact correct. In other words, I do not consider the original decision to be wrong. This means that the police Officers involved in the incident will not be charged with any criminal offences. ...

Reasons

Summary of the Facts

Shortly before midday on 9th February 2016, Lewis was riding a moped with his friend [LK] as pillion passenger. They were suspected to have been responsible for a serious of snatch

thefts, involving the use of a moped. Over a period of approximately 3 minutes the moped was pursued in and around Stoke Newington by a marked police BMW driven by Officer A. There was a shorter period of time when Officer B appeared to join the pursuit behind Officer A's vehicle.

The pursuit came to a tragic conclusion on Clapton Common when Lewis attempted to overtake a box-van but lost control of his vehicle. The BMW was overtaking the box-van when the van moved towards the side to make way for the police car. The moped came into contact with the curb and the van before Lewis lost control and collided with a traffic light post. Both Lewis and [LK] fell from the moped and suffered serious injuries in a collision with a traffic light post. Lewis sadly died as a result of the injuries he sustained. Officer B's vehicle was not present when the collision occurred.

Full Code Test

Officer A – The Evidential Test

I am satisfied that there is sufficient evidence to prove that the manoeuvre of Officer A was one of the causes of the sequence of events which resulted in the collision. However, the evidence does not support the proposition that Officer A was driving dangerously at that time nor that Lewis drove the moped in the manner he did as a result of pressure brought about by the pursuit. CCTV evidence reveals that Lewis drove dangerously before the pursuit commenced and without any pressure from other road users. The manner of Lewis' driving continued in a similar fashion during the pursuit.

Apart from an isolated manoeuvre (see below), I am not satisfied that there is a realistic prospect of conviction for any offences of dangerous driving by Officer A during the earlier stages of the pursuit. A driver is permitted to take advantage of precedence afforded by other road users and with emergency warning lights on, the opportunity to do so is more likely to arise. In such circumstances, driving on the wrong side of the road will not necessarily amount to a standard of driving that falls far below that of a careful and competent driver. Further, I do not consider there to be a realistic prospect of conviction for dangerous driving based upon the BMW being driven too close behind the moped. The overall pursuit, prior to the point in time when the vehicles reached Clapton Common, was not, in my view, dangerous. However, at one point during the pursuit, Officer A drove close behind the scooter and ended up bearing down on a traffic island and, at the last moment, swerved onto the wrong side of a busy road, causing a silver Mercedes to swerve out of its path. The driving at this point does not

present as measured or particularly controlled and, in my view, was dangerous.

However, none of the earlier driving had any bearing on what happened at Clapton Common. At the time that the moped commenced its undertaking manoeuvre, the BMW was overtaking, several car lengths behind, on the legitimate, right hand side of the road. While oncoming vehicles afforded precedence to Officer A's vehicle they were not forced to do so by the manner of his driving. Accordingly, there is not a realistic prospect of proving that Officer A's standard of driving fell far below that of a competent and careful driver. It cannot therefore be proved that the BMW was driven dangerously in the critical moments leading up to the collision.

It is unlikely that a jury would conclude that Officer A's overtaking manoeuvre in the prevailing circumstances amounted to dangerous driving. The police car cannot be said to have been too close to the scooter at the crucial time, and had moved to the far right of the carriageway when overtaking, which gave sufficient space for the other vehicles. This precludes the prosecution either for causing the death of Lewis by dangerous driving, or causing serious injury to [LK] by dangerous driving.

I have concluded that the fact PC Summerson was not an accredited TPAC driver and that the pursuit was not authorised (or in accordance with police operating practice) is irrelevant to the consideration as to whether the driving was itself dangerous. The dangerousness or otherwise of the driving has to be determined by reference to the driving itself. A dangerous manoeuvre undertaken by a TPAC driver during unauthorised pursuit is still dangerous. Similarly, a manoeuvre that is not dangerous is not rendered so by the fact that the pursuit is undertaken by an unaccredited driver during an unauthorised pursuit.

Carrying out an overtaking manoeuvre which resulted in the van moving into the path of the scooter, may provide some evidence of carelessness; which is driving below the standard of a reasonably competent and prudent driver. However, on balance I do not believe it likely that a jury would be satisfied beyond a reasonable doubt that the manoeuvre amounted to careless driving. This is because it was not necessary for the van driver to move and the decision was made without pressure from the police car. I cannot therefore conclude that the original decision was wrong about this. ...”

The law

Driving offences

20. Causing death by dangerous driving is an offence contrary to section 1 of the Road Traffic Act 1988.

21. Section 2A of the Act provides:

“(1) For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—

(a) the way he drives falls far below what would be expected of a competent and careful driver, and

(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

(2) A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

(3) In subsections (1) and (2) above ‘dangerous’ refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.”

22. The test set out in section 2A is an objective one. In applying the objective standard of what could be expected of a competent and careful driver, a driver’s special skill or lack of special skill was not a circumstance to which the court could have regard pursuant to section 2A(3): *R v Bannister* [2009] EWCA Crim 1571, [2010] 1 WLR 870.

23. Causing death by careless driving is an offence contrary to section 2B of the Act. Section 3ZA of the Act provides that a person is to be regarded as driving carelessly if the way he drives falls below what would be expected of a competent and careful driver.

Causation

24. In *R v L* [2010] EWCA Crim 1249 Toulson LJ (as he then was) reviewed the authorities relevant to the issue of causation and stated:

“9. Those authorities establish or recognise these principles: First, the defendant’s driving must have played a part not simply in creating the occasion for the fatal accident, i.e.

causation in the ‘but for’ sense, but in bringing it about; secondly, no particular degree of contribution is required beyond a negligible one; thirdly, there may be cases in which the judge should rule that the driving is too remote from the later event to have been the cause of it, and should accordingly withdraw the case from the jury.

...

14. In Barnes Hallett LJ commented that:

‘...in principle, the distinction between dangerous driving which creates the circumstances of a fatal collision and dangerous driving which is the actual cause of a death may not be an easy concept to grasp.’

We agree.

15. Nor is it made easier by saying that the degree of contribution is immaterial, provided that it is non-negligible, i.e. not to be disregarded. That principle was laid down in Henningan, where the court was not concerned with successive incidents or the question of remoteness. Nobody disputes that a defendant’s negligence need not be the sole cause of the fatality. However, in a case of successive incidents the question whether the defendant’s conduct crossed the notional dividing line between creating the circumstances in which the second incident occurred and causing the fatality, is, by its nature, a fact-sensitive exercise and one which is essentially a question of degree, whatever language is used to describe it.”

The standard of review

25. In *L v Director of Public Prosecutions and Another* [2013] EWHC 1752 (Admin) Sir John Thomas PQBD (as he then was) referred (at [6]) to the “very strict self-denying ordinance” that the courts will adopt towards the constitutional position of the CPS as the independent decision-maker to whom prosecutorial decisions are entrusted. In the context of the then new VRR procedure, he continued:

“9. It must, of course, be for the Crown Prosecution Service to decide upon the type of review of the decision that is made. Some cases will call for very detailed review; others can be dealt with in short order. What is important to the future conduct of such cases is to recognise that the CPS now has this procedure in place. It has this consequence. It is highly likely that where a review has taken place, and the review can be seen to be careful and thorough, proceedings for judicial review to challenge the decision will be the more difficult to advance. ...

...

12. ... if there has been a review in accordance with this procedure, then, it seems to me, that the prospect of success will, as I have said, be very small.”

26. In *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin) the court reiterated the constitutional principle identified in L by Sir John Thomas and continued:

“45. An authoritative statement of this principle, and its application to cases of this type, was given by Lord Bingham of Cornhill in *R (Corner House Research) v SFO* [2009] 1 AC 756 in the following passages:

‘30. It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: ...

31. The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the Officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised ...

“the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.”

Thirdly, the powers are conferred in very broad and unrestrictive terms.

32. Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do

his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way.'

46. We distil the additional propositions from the authorities and the principles underlying them:

(1) particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse: *L* at [32].

(2) a significant margin of discretion is given to prosecutors
L: at [43].

(3) decision letters should be read in a broad and common sense way, without being subjected to excessive or overly punctilious textual analysis.

(4) it is not incumbent on decision-makers to refer specifically to all the available evidence. An overall evaluation of the strength of a case falls to be made on the evidence as a whole, applying prosecutorial experience and expert judgment."

27. In *Campaign Against Antisemitism v Director of Public Prosecutions* [2019] EWHC 9 (Admin) the court referred to the particular experience and expertise of the CPS in making judgments about how disputed evidence is likely to be received at trial. The court nevertheless held that the margin allowed to the decision-maker and the deference this court will give to prosecutorial decisions depend upon the circumstances of the case. Where the issues involve disputed evidence of primary fact, the decision-maker's experience and expertise in considering how that evidence will be received at trial and predicting the verdict at trial will be a particularly powerful factor: this court will be slow to hold that the decision-maker's assessment is irrational. However, if the issue is essentially one of law, the decision-maker's experience and expertise are of less force, and this court will more readily be prepared to find that an error of law (see [15]).

The claimant's case

28. Irrationality. The essence of the claimant's submission is that:

- i) There was a failure by the reviewing lawyer to take any or any adequate account of the evidence of PC Chandler;
- ii) Whilst the CCTV footage appears to have been viewed, the conclusion the reviewing lawyer reached, that only on one occasion was the Officer driving dangerously, cannot sensibly be sustained and is irrational on the basis of the footage.

The perversity and irrationality of the reviewing lawyer's decision in respect of the Officer's driving is illustrated when compared with the first CPS decision (9 January 2018) which identifies a number of incidences of dangerous driving and concludes that a jury was highly likely to find that to be the case. No account appears to have been taken of this conclusion, there is no attempt to rationalise the reviewing decision in disagreeing with it.

29. In finding as irrelevant the fact that the Officer was not TPAC trained, the decision fails to understand the importance of it, in that it contextualises what the Officer was doing, for example the red mist and target focus, concerns which TPAC officers are trained to avoid. The pressure put upon Mr Johnson is something a TPAC trained police driver would understand. The Officer, in undertaking an unauthorised pursuit for which he was not trained, was reckless.
30. In reviewing the issue of dangerous driving the totality of the driving should have been considered, in particular the pressure placed upon Mr Johnson by the manner of the Officer's driving. The CCTV footage alone demonstrates that it is clearly dangerous. The conclusion that "...none of the earlier driving has any bearing on what happened at Clapton Common" demonstrates that the decision-maker had failed to consider or understand the evidence of PC Chandler and is limiting himself to the nature of the driving at the time of the accident. It is apparent from the CCTV footage, reinforced by PC Chandler's views, that the manner of the Officer's driving was clearly affecting the manner in which Mr Johnson and other road users drove, thereby substantially increasing the risks. The reviewing lawyer failed to consider any of this in line with the CPS' own Guidance.
31. The decision, having initially concluded the Officer's driving did contribute to the accident, irrationally argued that it did not "... because it was not necessary for the van driver to move and the decision was made without pressure from the police car." This finding is said to be fundamentally flawed. The box van moved, as vehicles commonly do, to the nearside due to the Officer intending to overtake on the offside, to conclude otherwise is perverse. Further, the Officer had experience of the moped driver undertaking on the inside earlier in the pursuit.
32. The decision failed to address the lesser charge of causing death by careless driving. In the context of the evidence this is unexplained and irrational.
33. The Officer was not responding to an emergency as the first decision accepted. The CPS Guidance relied upon (in respect of emergency services) did not apply to the Officer's pursuit. The decision fails to address this issue even though the 9 January 2018 decision in part did so and the VRR letter requested that it be addressed.

The defendant's case

34. The question for the decision-maker was whether objectively the Officer's driving which is reviewable by reference to CCTV footage was dangerous. The standard expected of the competent and careful driver is an objective one, evidence of a particular skill or lack of it is irrelevant: *Bannister*. A fatal accident was caused by the moped voluntarily committing a very dangerous undertaking manoeuvre against successive vehicles in a moving line of traffic. The police vehicle was seeking to

overtake but at some distance behind. There was nothing inherently dangerous about the police driving and nothing dangerous in the circumstances.

35. The decision letter demonstrates that the reviewing lawyer considered the whole of the driving throughout the pursuit. The point was made by the reviewing lawyer that the police driver was permitted to take advantage of precedence afforded to him by other road users so that driving which might be dangerous in some circumstances was not in this particular case. This was a reasonable conclusion. The decision concluded that the matters identified by the claimant as to the alleged dangerous driving of the Officer took place at an earlier stage in the pursuit and were not causative of the accident. The conclusion was not irrational, it was obvious and compelling.
36. The assertion that the deceased's driving was affected by the pressure created by the police BMW in pursuit is speculation. The decision considered the question of pressure and concluded that in fact the moped was driven in a similarly dangerous fashion both before and during the pursuit. This gives rise to the inference that the final movement was undertaken willingly rather than brought about by pressure.
37. The contention that the decision failed to look at the totality of the driving and instead irrationally separated it out into specific instances is not made out:
 - i) The decision did have regard to the totality of the driving;
 - ii) Consideration of the question of causation compelled the decision-maker to analyse whether specific parts of the driving were causative of the accident, a matter which would fall to be considered in any criminal trial as the decision-maker was found to reach conclusions as to whether all the driving or only part of it was causative;
 - iii) The conclusions that were reached were wholly supported by the evidence.
38. The reviewing decision did not irrationally conclude that the Officer's driving was not the cause of the van moving to the nearside. The van sought to give the police Officer and his BMW precedence, the Officer's driving was not such that it forced the van into making a particular manoeuvre.
39. The alleged irrational failure to take account of PC Chandler's evidence is not made out. The decision had regard to all the evidence, it is unnecessary for a decision letter to summarise the entirety of it.
40. The charge of causing death by careless driving was expressly considered in the final paragraph of the decision letter.
41. The decision-maker was not wrong to conclude that the pursuit was in the context of an emergency, it was undertaken in the context of trying to arrest individuals in respect of offences which had recently been carried out, the pursuit was in the context of serious crime, sufficiently serious to justify arrest. Ultimately the issue of public interest in prosecuting a brief isolated incident of dangerous driving in the context of a pursuit was a matter of judgment for the prosecutor and an example of what the courts have recognised to be decision making of a polycentric character.

The interested party's submissions

42. Without wishing to detract from the quality of the submissions made on behalf of the interested party, it is fair to record that, in substance, they reflect those made by the defendant. Relying on the authority of *Campaign Against Antisemitism* (above) it is contended that the question to be addressed by the court is “has the decision-maker asked the right questions and informed himself properly?”

Discussion

43. We begin with the premise that the court, in considering a challenge by way of judicial review to a prosecutorial decision, will apply a very strict self-denying ordinance. The case law is clear: the courts will rarely interfere with a VRR decision, in particular when it is careful, detailed and thorough. Further, following *Bannister*, we accept that the training or authorisation of the Officer is not relevant to the objective test to be applied in considering whether his driving should result in a criminal charge.
44. We have been assisted by the quality of the submissions of the parties, written and oral. During the course of the hearing counsel, on behalf of each of the parties, sought to identify evidence and interpret sentences or aspects of the review decision in order that the court might better understand the specific evidence relied upon, the scope of and the reasoning of the review decision. Following the hearing counsel on behalf of the Officer, of his own volition, filed additional written submissions which further sought to interpret the findings and reasoning of the review decision. It is telling that the further submissions state:

“...the Officer recognises the Court’s criticisms of the brevity of the decision letter, albeit such brevity is not fatal provided the letter evidences the underlying rational decision-making process; ...”

The submission concludes:

“While [the reviewing lawyer] might have provided a somewhat less succinct account of his analysis, there is no ground whatsoever for the Court to conclude that [the reviewing lawyer]’s decision-making was irrational.”

45. During the course of the hearing we sought to understand exactly what evidence would have been before the reviewing lawyer. We understood that the CCTV and the IPCC report would have been before the lawyer and that this would have contained the reports of PC Chandler and PC Hewitt. Counsel for the defendant could say no more than “all the evidence” would have been before the reviewing lawyer.
46. The review decision was in response to the detailed and analytical letter sent by solicitors acting on behalf of the family of Lewis Johnson, which followed a careful, detailed and analytical decision of the CPS. In our judgment, the review decision should have responded in kind to such detailed, focussed analysis. It did not. Further, in giving reasons for an adverse decision, the reviewing lawyer should have identified

the significant parts of the evidence which had been viewed, read and considered. The review letter failed adequately to do so.

Absence of a proper analysis of the driving of the Officer and the moped

47. Given the facts of this case and the issues raised, the review decision should have provided an analysis of the driving of the Officer and the moped derived from the best evidence, the CCTV footage. The purpose of such analysis would have been to make clear the basis upon which findings of fact were made which related to the charging of any driving offences. Within the review decision the facts are summarised in two relatively short paragraphs. We accept that there is later reference to earlier driving but it lacks detail and any proper analysis.

The evidence of PC Chandler

48. Within the decision letter there is no reference to PC Chandler's analysis of the Officer's driving and, in particular, to his observations as to the effect which the Officer driving too close would have upon the driver of the moped, the pressure which such driving would place upon Lewis Johnson nor the additional pressure placed upon the moped by the "quartering" manoeuvre of the police vehicle. PC Chandler is an independent and experienced senior driving instructor. He had relevant knowledge and experience which the reviewing lawyer did not possess. His analysis and conclusions were directly relevant to the issue of whether the Officer's driving played a part in bringing about the fatal collision, in particular whether such driving created a pressure on the driver of the moped.
49. Mr Gritt, on behalf of the Officer, submitted that the references in the review decision to TPAC accreditation and authorisation demonstrated that the reviewing lawyer took PC Chandler's report into consideration, as his report covers these topics. PC Chandler's report is, however, nowhere mentioned nor analysed in the review decision. The mere mention of TPAC accreditation and authorisation cannot reasonably be regarded as evidence that other, relevant parts of PC Chandler's report were adequately considered.
50. Given the relevance of PC Chandler's evidence to the issue of causation, the failure to deal with it in the review letter or, alternatively, to provide reasons why it was not relied upon, goes beyond the discretion to be afforded to an expert decision-maker in reaching a multi-factorial conclusion. We are of the view that the failure to take account of the evidence of PC Chandler or to give any reasons why it was not relied upon is irrational.

Causation

51. The earlier driving is summarised thus: "...none of the earlier driving had any bearing on what happened at Clapton Common." Following the authority of *R v L* (above) it was incumbent on the reviewing lawyer to consider not only the driving immediately before the collision but also whether the earlier driving of the Officer had played a part in bringing about the fatal collision. The test is a low one, namely no degree of contribution is required beyond a negligible one. The decision-maker regarded the moped's earlier, dangerous driving as relevant to whether charges should be brought against the Officer. That may be so, but in our judgment the earlier driving of the

Officer was also a relevant factor to be taken into consideration in relation to the issue of causation.

52. Whether a putative defendant's conduct crosses the dividing line between creating the circumstances of a fatal collision and causing the fatality is a fact-sensitive exercise and essentially a question of degree. If the only question were whether the review decision had drawn the line in the right place, then we would not (absent irrationality) seek to interfere. However, our concern is that firstly, the decision-maker has discounted the Officer's earlier driving and, in so doing, interpreted the legal concept of causation too narrowly. The interpretation of the criminal law lies within the expertise of this court and does not usurp any constitutional independence of the CPS. The issue being essentially one of law, the decision-maker's experience carries less force. In our judgment, the broad and unqualified proposition that none of the Officer's earlier driving had a bearing on the collision amounts to a misdirection of law and one that is susceptible to judicial review on conventional error of law grounds.
53. Secondly, we do not understand how the earlier driving can be dismissed in one sentence. It fails to take account of material and relevant evidence from an independent, senior and experienced police instructor, a failure which is compounded by the absence of a detailed analysis of the driving as shown in the CCTV footage. The irrational failure to take account of the evidence of PC Chandler is another factor upon which we rely in concluding that the identified sentence, dismissing the relevance of the Officer's earlier driving, represents a misdirection of law.
54. Further, we accept the claimant's submission that the reviewing lawyer provided no rationalisation in his decision for his disagreement with the findings of the first CPS lawyer as to incidences of dangerous driving by the Officer.

The evidence of the van driver

55. The review decision identifies the fact that the Officer manoeuvred his vehicle in such a way as to be one of the causes of the resultant collision. Five paragraphs later in the decision, the reviewing lawyer accepts that the overtaking manoeuvre may provide some evidence of carelessness. However, he states that he did not believe it likely that a jury would be satisfied beyond reasonable doubt that the manoeuvre amounted to careless driving because "it was not necessary for the van driver to move and the decision was made without pressure from the police car". The review decision contains no reference to the evidence of the van driver. The evidence recorded as given at the scene and in a police interview by the driver of the van was that he was just moving off from a stationary position when he heard the police sirens, he saw there was a police car behind him overtaking a line of traffic, he moved slightly to the nearside and almost immediately heard a bang.
56. The action of the driver of the van when moving to the nearside was not unreasonable given the approach of a police vehicle with sirens operating. In our view it was also foreseeable, and should have been foreseeable to the driver of such a police vehicle. To dismiss or discount an issue of careless driving upon the basis that it was unnecessary for the van driver to move and that he did so without pressure from the police car does not properly reflect the evidence of the van driver.

57. We were directed to no authority suggesting that the test of causation involves the question as to whether it was necessary for the van driver to move rather than simply foreseeable that he would do so. No test of necessity may be derived from *R v L* and we see no principled reason to discount the foreseeable reaction of the van driver. No reason is given in the review decision for the absence of consideration of the van driver's evidence. In our judgment, the review decision ought to have dealt with the van driver's evidence in the consideration of causation. The failure to do so amounts in our judgment to a reviewable error of law.

Difficulties identifying the evidence relied upon by the reviewing lawyer

58. In addition to the absence of analysis and a failure to take account of relevant evidence we had difficulty understanding exactly what evidence was being relied upon. One example of the difficulty of interpreting this decision is the first sentence of the first paragraph following “–the Evidential Test”. It reads: “I am satisfied that there is sufficient evidence to prove that the manoeuvre of Officer A was one of the causes of the sequence of events which resulted in the collision.” We sought to clarify what the reviewing lawyer meant by “the sequence of events”. Initially, Mr Mably QC, on behalf of the defendant, stated that it was the movement of the van, followed by the movement of the moped which resulted in the collision. Having considered the matter further, Mr Mably QC stated that it also included the police BMW overtaking the box van and accepted it was a three-stage manoeuvre. This review decision had been sought by the family of Lewis Johnson. It is important that they should be able to understand what is being said and the reasons for conclusions made. If lawyers who have studied this letter many times are still grappling with what exactly it means, it cannot be regarded as a detailed and thorough assessment and one which provides a sound evidential and legal basis for the decision made.
59. The reviewing lawyer did identify one aspect of what was described as “non-causative dangerous driving” of the Officer earlier in the pursuit at the traffic island. Applying the public interest test and the CPS Guidance on charging offences arising from driving incidents, the reviewing lawyer concluded that the Officer was responding to circumstances that could properly be described as a police emergency. He stated:

“The officer was responding to serious offending which was, and continues to, cause the public grave concern. The alleged offences had just occurred and there was a clear risk that such offending may well be repeated in the near future if not prevented.”

The lawyer does not identify the evidence upon which he relied in finding that “the alleged offences had just occurred”. In answer to questions from the court as to the evidence upon which this assertion was based, counsel on behalf of the defendant and the interested party each pointed to a different piece of evidence, one such did not support the assertion that the offences had just occurred. Relevant to this question was the knowledge possessed by the Officer. In a statement he said “...I have heard over the Personal Radio that there was a sighting of a white moped that was possibly involved in several Robberies in the Boroughs of Hackney and Islington on Hackney Road, E2.” We cannot easily reconcile the Officer's statement with a statement that the alleged offences had just occurred. This was but another example of the court and

counsel attempting to identify the evidence upon which the reviewing lawyer had relied in reaching his decision.

Conclusion

60. We have found this a troubling case. A police pursuit took place over a period of approximately four minutes. CCTV footage and the reports of those, other than the reviewing lawyer, identify dangerous driving on the part of the moped and the Officer who was the pursuing driver in the police BMW. A death has occurred. The family of Lewis Johnson are concerned to understand why it is no prosecution for any offence will take place in respect of the driving of the Officer. The Officer has been a serving officer for many years: we do not underestimate his own anxiety in respect of any possible charges arising out of this pursuit which resulted in a fatality.
61. It is clear to the court that the IPCC and the first CPS lawyer demonstrated care and thoroughness in seeking to analyse the driving of the moped and the police vehicle before reaching any conclusions in respect of the same. For the reasons given in [43] to [59] above we find that the reviewing lawyer did not bring to his task that same care, thoroughness and detail. We are conscious that a broad common sense approach should be taken to the reasoning in a review decision, but when statements are made which are not easily identifiable in the evidence, that is a matter of concern. It is also reflective of the wider concern which the court has as to the care, thoroughness and detail which went into the writing of this review decision. This is not overly punctilious textual analysis, but based upon:
 - i) An absence of identification of the evidence considered and relied upon;
 - ii) An absence of an adequate analysis of the relevant CCTV footage;
 - iii) A misapprehension as to the legal principles governing causation in the context of the offences of dangerous and/or careless driving;
 - iv) A failure to refer to and/or take account of the relevant evidence of an experienced and independent police driving instructor;
 - v) A failure to provide reasons for departing from the conclusions of the first CPS decision as to incidences of dangerous driving by the Officer;
 - vi) A failure to deal with the evidence of the van driver.
62. For these reasons, this application for judicial review succeeds. We have limited our consideration to the evidential test in the Code for Crown Prosecutors. In the event, there has been no need for us to reach a decision on whether the review decision properly and reasonably applied the public interest test.
63. Accordingly, we quash the decision of the CPS reviewing lawyer made on 2 October 2018. We remit this matter to the defendant in order for another review decision by a different lawyer to be made in accordance with the judgment of this court.