



Neutral Citation Number: [2023] EWHC 41 (KB)

Case No: G09CA003

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

The Civil Justice Centre, Manchester

Date: 16 January 2023

Before :

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

Between :

CONRAD HETHERINGTON **Claimant**
(by his litigation friend Deborah Hetherington)

- and -

ANNA ELIZABETH BLYTHE **Defendant**

Mr Braithwaite KC and Mr Barnes KC
(instructed by **Thompsons Solicitors) for the **Claimant****
Mr Allen KC (instructed by **Horwich Farrelly Limited) for the **Defendant****

Hearing dates: 12th, 13th and 14th December 2022.

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

His Honour Judge Bird :

1. On 14 April 2017 (Good Friday) at around midday, Mr Hetherington suffered serious and life changing injuries in a RTA. The day was described by the defendant in a police interview as a “nice fine sunny day”. Whilst the circumstances leading up to the collision and its precise mechanics have been the subject of detailed evidence and argument, there is no doubt that he came into contact with a car driven by Anna Blythe as he crossed the B5037 just outside Carlisle. Mr Hetherington was 37 years old at the time. The extent of his injuries is such that he now lacks capacity. This is the trial of preliminary issues of liability and contributory negligence. Mr Hetherington has no recollection of the circumstances of the accident.

The scene

2. The B5037 Newtown Road is a busy road which runs to the West from the centre of Carlisle towards the A689 ring road. The accident occurred some 100m from the main road into the Cumberland Infirmary a little more than a mile outside the centre of Carlisle between the junction with Wood Street and the junction with Bright Street. The road is lined with a mixture of residential and commercial property.
3. Mrs Blythe was travelling in the single westbound lane. She was alone in the car and there is no suggestion that she was distracted. She was not prosecuted for any driving offence following the collision. The access road to the Infirmary was on her right. About 50m from the site of the accident Mrs Blythe passed a Spar convenience store to her left. There is a long parking bay in front of the Spar store (the “Spar bays”) which ends about 35m from the accident site. Wood Street was then on her left, some 25m from the site of the accident.
4. After Wood Street, to Mrs Blythe’s left as she drove, was a small residential building housing 4 flats, numbers 85 to 91 Newtown Road. The building has 2 entrances. One for flats 85 and 87 and one for flats 89 and 91. The entrance to numbers 89 and 91 leads onto a short pathway, through an opening in a low brick wall onto the pavement. It is agreed that Mr Hetherington left this entrance, travelled down the short pathway, onto the pavement and onto the road and began to cross it (this route is what I refer to in this judgment as the “line of crossing”). The collision happened at some point after he entered the road and before he had crossed into the east bound (northern) lane. The distance across the full width of the road at that point is 9.946m. The distance to the mid-way point of the road marked by the broken line is 4.857m. It follows that the east bound lane is a little wider than the west bound lane.
5. Beyond the residential building, on Mrs Blythe’s left, had she continued to drive, is the junction with Bright Street. A little beyond Bright Street, about 21m from the line of Mr Hetherington’s crossing there are more parking bays on the same side of the road immediately in front of a row of terraced houses (I will refer to these bays as the “further bays”).
6. Mr Hetherington was thrown forward of the line of crossing by around 11m as a result of the impact. The extent of his lateral movement (across the road in the direction of his original travel) is not agreed. The experts agree that Mrs Blythe braked at or about the point of impact and at that point was travelling between 25.6 mph and 26.6 mph. The braking distance is agreed to be 9.91m.
7. Mrs Blythe’s car came to rest straddling the centre white line at an angle of around 15 degrees facing towards the nearside kerb (the kerb from which Mr Hetherington had started to cross).

8. Moving west from the line of crossing the road gently curves to the right. The centre line also therefore followed a curve.

The evidence

9. I heard expert evidence from Mr Sorton (for the claimant) and Dr Walsh (for the defendant).
10. I heard factual evidence from a number of witnesses. I will set out a summary of their written evidence:
 - a. Mrs Blythe. Her main statement was given on 10 June 2017 before these proceedings were commenced. She also gave a statement to the police on 4 June 2017. In her police statement, she recalls passing cars parked outside the Spar store. She became aware of a *“a running person coming in from my left hand side.....[he] just came from nowhere. I tried to swerve, but then as I was braking [his] head hit the windscreen and bounced [off]”*. In the witness statement provided a few days later she describes the pedestrian *“running at the car from [her] left hand side”*. As soon as she saw the pedestrian her recollection is that she braked and *“swerved to the right.”* At paragraph 61 of the statement, Mrs Blythe says this: *“The point of impact to my vehicle was the front and bonnet and windscreen I think to the driver’s side of the vehicle”*.
 - b. Peter Heggie has provided 4 statements, one to the police on 16 April 2017 and others in the litigation in November 2020 and June 2021. In the police statement Mr Heggie explains that he was driving directly behind Mrs Blythe. He recalled parked cars outside Spar. He noticed Mrs Blythe move towards the centre line at the same time as Mr Hetherington came onto the road from the nearside pavement: *“he seemed to be bounding across the road as if trying to beat the traffic...it was almost as if the male was throwing himself in front of [Mrs Blythe’s car]”*. In his later statements Mr Heggie describes the claimant as moving into the road in a strange way, *“not walking or running but sort of bounding”*. In statements given in June 2021 and November 2020 he describes that the claimant *“ran from the nearside pavement”* and that he saw him *“run into the road”*.
 - c. Jillian Hewitt has provided 3 statements. The first was given to the police on 25 April 2017, others were given in 2020 and 2021. She was travelling in the opposite direction to Mrs Blythe and Mr Heggie and in my judgment had a good view both of Mr Hetherington and of the front of Mrs Blythe’s car. She describes the traffic as *“busy but slow moving”*. In the police report she says that her attention was drawn to *“what I thought was a child in the [other] lane running out into the path of [Mrs Blythe’s car]. The child clipped the front passenger corner of the car and then his whole body just hit the windscreen and he was thrown off into the road”*. In her witness statements for these proceedings she notes that the claimant is not a child but an adult. Her evidence is *“at the time of the accident....I had thought that the person that had run into the road was a child, as I didn’t think an adult would run into traffic in such a way”*.
 - d. Mark Ormerod was a police officer at the time of the accident. He has now retired from the police service after 22 years’ service. He compiled the collision report. There was some discussion about the report and the symbols that appear on it. The experts do not rely on the diagram, and it was not drawn as part of the forensic examination. I need say no more about it or about his evidence.

- e. Sergeant Stephen Wakefield is recently promoted. He was the collision investigator. He prepared a detailed report (to allow decisions to be made about any prosecution) which is dated 12 June 2017. He took photos at the scene before the Defendant's car was moved and recorded the scene by reference to surveyed data points. The report was prepared without reference to any witness or other documentary evidence. Sergeant Wakefield noted the windscreen damage and pointed out that, although the vehicle was dirty, there were no wipe marks (or clean marks) on the bonnet. There was no physical evidence to indicate the initial point of impact with the car body. Appended to the report are 18 images, representing a relevant selection of the images captured on the day of the accident. Some show scratches to the nearside front wing of the car and others show a wipe mark to the nearside valance (the lowest part of the car immediately forward of the front wheels). Further photographs taken by Sergeant Wakefield at the scene show the wipe marks on the valance. There is no mention of the valance wipe marks within the body of the report.
- f. Sergeant Hill was at the scene shortly after the accident. He made notes in which he recorded both fact and opinion. He was not responsible for any forensic investigation and there was no suggestion that he was qualified to conduct such an investigation.

Oral evidence

11. Before considering the oral evidence, it is helpful to remind myself of some basic propositions as follows:
 - a. It is likely that the closer to the events in question a record of what happened was made, the more reliable that record will be.
 - b. How a witness statement is taken can affect its reliability.
 - c. The recollection of a witness who was traumatised by the events they recall is likely to be less reliable than the evidence of witnesses who were not so traumatised.
12. Mr Heggie told me that he recalled seeing Mr Hetherington on the pavement and recalled that he was *"bounding, moving at a pace that was faster than walking but slower than running"*. He recalled that Mr Hetherington ran into the *"front corner wing of the car"* and that the wing of the car *"threw him into the air"*. He recalled a sense of disbelief at someone running from the pavement into traffic. He had no recollection of seeing Mr Hetherington pause in the road. In re-examination he told me *"as far as I can remember he ran into the car from the pavement"* and was *"positive he had been caught by the front wing"*.
13. Mrs Hewitt told me she did not see Mr Hetherington come into the road from the pavement. She recalled that he *"hit the side of the car"* and was clear that he *"ran into the passenger side corner of the car"*.
14. Mrs Blythe told me that the collision and her braking occurred *"pretty well simultaneously"*. She was clear that she did not see him at any point on the pavement. Her evidence was that Mr Hetherington *"ran into the wing of the car behind the headlight"*. When asked why she had told the police that he ran into the *"path of her car"* she doubted she had said that. She recalled that there were cars in the Spar bays and in the further bays.
15. Sergeant Hill frankly accepted that he had not had *"a good look at the car"* and explained that the officer charged with carrying out a thorough inspection of the car was Sergeant Wakefield.

16. Sergeant Wakefield accepted that he had not referred to the valance wipe mark in the body of his report. He told me that he had wiped within the wipe mark to determine if it was fresh. The test wipe lifted no road grime. It was agreed that that supported the view that the valance wipe mark was recent. He also explained that he had not referred to the valance wipe mark in his collision report because there was enough for him to conclude how the accident occurred without the need to refer to the mark. He described it as “moderately irrelevant”.

Fact finding and issues

17. The key factual issues for me to decide are these:

- a. Where did Mr Hetherington first make contact with the Defendant’s car?
- b. At what speed was Mr Hetherington moving when first contact was made?
- c. Where was Mrs Blythe’s car at the point of impact?
- d. Could Mrs Blythe have avoided the impact?

18. In order to determine those issues, I bear in mind the basic propositions recorded above. The primary evidence comes from those who directly observed the events. The expert evidence, whilst not primary evidence, is useful as a means of corroborating primary evidence and (if there is no primary evidence in respect of any relevant matter) to fill any gaps.

Where did Mr Hetherington first make contact with the Defendant’s car?

19. The live evidence was consistent that the point of impact was the front nearside wing, so that Mr Hetherington in effect ran into the side of Mrs Blythe’s car. Mrs Blythe’s early accounts paint a different picture and refer to the claimant being in front of the car at the point of impact. Mrs Hewitt’s early evidence is entirely consistent with a side impact. In my judgment she had the best view of the collision.
20. The physical evidence also supports the oral evidence I heard. The absence of wipe marks on the bonnet of the car and the absence of any damage to the front of the car both suggest, in my judgment, a side impact. The wipe mark on the valance, which I accept was created in the collision, also supports the version of events given in oral evidence.
21. I am satisfied that the wipe mark was caused by Mr Hetherington’s leading foot and that the force of the impact “*threw him into the air*” as Mr Heggie recalled it. I accept Dr Walsh’s evidence that if the foot that struck the valance was the following (rather than the leading) foot, Mr Hetherington would have been brought into contact with the bonnet of the car. He would not have been thrown “*into the air*” but down onto the bonnet, because his centre of gravity would have been much further forward.
22. The windscreen damage is also in my view consistent with a side impact and the valance wipe mark being made by the leading foot. Mr Hetherington’s second point of impact was the windscreen.
23. Mr Sorton’s opinion is that Mr Hetherington was (a) struck “*roughly centrally by the front of the car*” and was (b) probably stationary at the point of impact. I deal with (b) in the next section of this judgment. I reject (a). There is in my view no evidence to support it.
24. I find that Mr Hetherington collided with the front nearside wing of the car. This finding requires me to reject Mrs Blythe’s early evidence about the point of impact. I have no

difficulty in doing so without the slightest criticism of her evidence.

At what speed was Mr Hetherington moving when first contact was made?

25. The early accounts are consistent about speed. Each describes Mr Hetherington as running. Mr Heggie's early evidence describes a "*bounding*" motion but in the context of Mr Hetherington seemingly attempting to "*beat*" the traffic. In the statement he gave to the Defendant's solicitor he describes "*running*" but on the statement given to the claimant's solicitor says Mr Hetherington was neither running nor walking.
26. In my judgment the clearest evidence that the claimant was running comes from Mrs Hewitt. Her initial thought that the claimant was a child because an adult would not run into traffic in that way, was in my view compelling and convincing.
27. Dr Walsh has been able to calculate an approximate speed for Mr Hetherington of 4.6 m/s or just over 10 mph. Dr Walsh's finding is based on the distance Mr Hetherington's centre of gravity moved from the point of impact as I have it to be to the point at which his head hit the windscreen and on the speed of the car (which he takes as 25.6 mph) at impact. To sense check the speed Dr Walsh refers to data from studies undertaken by Zebala published in 2012 which put 4.6 m/s somewhere between running and sprinting for a man of Mr Hetherington's age.
28. Mr Sorton's opinion (see (b) above) is that Mr Hetherington was stationary at the point of impact. I have no difficulty in rejecting that evidence.
29. I am satisfied that Mr Hetherington was travelling at a speed of around 4.6m/s at the point of impact. That finding is consistent with Dr Walsh's careful and considered evidence and with the witness evidence. It is also consistent with the position at which Mr Hetherington came to rest after the collision.

Where was Mrs Blythe's car at the point of impact?

30. The experts agree that at impact the car was probably straddling the centre line of the carriageway.
31. The evidence is that Mrs Blythe steered to the offside (to the right, towards the centre line) to avoid Mr Hetherington at the same time as braking. At some point she also steered to the nearside. This explains the car's final resting position.
32. The car came to rest straddling the centre line angled towards the nearside kerb (towards the left) at an angle of around 15 degrees. The experts agree the car's position is consistent with a relatively sharp swerve to the left.
33. The experts are unable to assist with the car's movements immediately before the collision. In my view the evidence points clearly to the following (which I find as facts):
 - a. before the collision Mrs Blythe was positioned close to the centre line of the road. She had passed cars parked at the Spar bays and was aware that there were parked cars in the further bays. I am satisfied (and it was not suggested) that there were no cars (and no bus) at the bus stop.

- b. She steered to the offside at the point at which she noticed Mr Hetherington in an attempt to avoid him hitting the car. Mrs Blythe may have swerved a little before she applied the brake. I accept Dr Walsh's evidence that the perceived reaction time for swerving is, on average, around 0.4 seconds quicker than the perceived reaction time to braking. The movement took that car towards the centre line. Given the state of traffic (I accept Mrs Hewitt's description that the traffic was "*busy but slow moving*") Mrs Blythe would need to correct her course to avoid moving into oncoming traffic.
- c. Given the very short time available for Mrs Blythe to react before the collision and the short time between initial impact and the windscreen impact, the steer to the offside and corrective steer must have taken effect at or very shortly after the windscreen impact. Neither the initial manoeuvre nor the corrective measure in my view is relevant to the outcome of this trial.

Could Mrs Blythe have avoided the impact?

34. The experts agree, on the findings I have made, that the collision was unavoidable.
35. Given Mr Hetherington's speed of around 10 mph I find that it is more likely than not that he began his run, not from the kerb but from a point further back and closer to the point at which he left the exit to flats 89 and 91.
36. In support of that finding (and in addition to the speed he had reached at the point of impact) I note that none of the witnesses observed Mr Hetherington when he was on the pavement. This suggests that he was not there for long as so was moving quickly.
37. Mrs Blythe had very little time to react to the entirely unexpected collision. In the time available to her it seems to me that she did what she could to avoid the collision or to minimise its effects. She applied her brakes and began to steer away. On the evidence it is plain, and I find, that the collision was wholly unavoidable.

Liability

38. Having made the findings I have recorded I turn to consider the question of liability.
39. Mr Hetherington's case is that his injuries were caused by Mrs Blythe's negligence. The relevant pleaded particulars of negligence are that Mrs Blythe drove too quickly and failed to brake in time or at all and failed to exercise any or any adequate care whilst driving.
40. In my judgment Mrs Blythe was not negligent. The standard of her driving was in my judgment not below that which could be expected of a reasonably competent driver. Her speed was in my judgment appropriate for the road conditions. She was within the speed limit and moving in traffic. Her road position was perfectly sensible, and it is plain, on the findings I have made, that she had no time at all to react to Mr Hetherington's presence on the road.

Context

41. Given the findings I have made, it is reasonable to consider if there is an explanation for Mr Hetherington's apparently irrational behaviour.

Approved Judgment

42. Whilst I do not rely on these findings to reach the conclusions I have set out, I am satisfied that, on the balance of probabilities, Mr Hetherington was under the influence of either drugs or alcohol when he ran into the road. I also find on the balance of probabilities that he had been upset by an argument at the point he ran into the road.
43. Mrs Blythe recalls being told that Mr Hetherington had been drinking and had an argument with his father or brother. Mrs Hewitt recalls that people who knew Mr Hetherington appeared at the scene and appeared to be intoxicated. Mark Ormrod recalls people at the scene being “quite obstructive” and felt they had been drinking. It is clear from his evidence that they had been with Mr Hetherington in the flat before the accident. I accept all of this evidence.

Conclusion

44. The claim is dismissed.
45. The issue of contributory negligence does not arise. I have no doubt that the claimant was solely responsible for the serious injuries he suffered. Mrs Blythe could have done no more to avoid the collision.
46. I am grateful to all Leading Counsel for their assistance in determining this claim.