

JERSEY / JUDGMENT

Nott -v- Strzelecki [2014]

JRC 155A (11 August 2014)

[2014] JRC 155A

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judgment

the master:

Introduction

1. This judgment represents my reasons for allowing the plaintiff to adduce expert evidence in the field of the road accident investigation, albeit limited in the manner I describe.

Background

2. The plaintiff's claim is for damages arising out of a road traffic accident between the plaintiff and the defendant which occurred on Bagatelle Road, St Saviour on 9th July, 2010. As a result of the accident the plaintiff alleges he has suffered various injuries. The plaintiff has not worked since the date of the accident. 3. One of the issues between the plaintiff and the defendant is who was responsible for the accident. The plaintiff in summary alleges that the defendant drove into the plaintiff's vehicle. The defendant contends he was undertaking a reasonable manoeuvre to reverse into a property on Bagatelle Road and that the plaintiff drove his vehicle into the defendant's vehicle. The precise location of where the accident took place on Bagatelle Road is also in dispute. The defendant also alleges in the alternative contributory negligence against the plaintiff. The Legal Test 4. The issue of admissibility of expert evidence was most recently considered by me in *Blackmore v Amplus Limited*

[2014] JRC 086 where I followed *AG v Bhojwani*

[2009] JRC 207A . I cited an extract from *Bhojwani* the relevant part of which for the purposes of his application is as follows:- "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This may be divided into two parts:- (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in

the area , and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."(emphasis added) 5. In relation to the present application, it was agreed that evidence in the field of road traffic accident assessment is sufficiently organised and recognised to be accepted as a reliable body of knowledge or experience which could render the opinion of such an expert of assistance to the court. It was further accepted that the proposed expert had the requisite qualifications and experience in the field of road traffic accident investigation. The issue therefore concerns only part (a) of the first question in Bhojwani . The report of Mr Paine 6. The report the plaintiff wishes to adduce was produced by Mr Ian Paine and is dated 14 th August, 2011. I was informed that a copy of this report had been provided to the defendant's insurers some time ago. The report is a comprehensive document and fulfils all of the necessary requirements of an expert's report by identifying who instructed Mr Paine, what evidence he had reviewed, his qualifications and experience, his duties to the court, the location of the accident and an analysis of the different recollections of the plaintiff, the defendant and an independent witness. 7. Mr Paine also quite properly states that the opinion that he gives was dependent upon witness statements provided to him and in particular photographs taken by the plaintiff immediately after the collision. He was also able a year later to examine the plaintiff's vehicle. 8. While Mr Paine did not attend the accident itself and only produced his report some sixteen months after the accident, he nevertheless gives his opinion as to what occurred based on contemporaneous photographs taken by the plaintiff. In particular he draws conclusions based on the location of a skid mark, photographs of damage to the plaintiff's vehicle and photographs of the plaintiff and the defendant's vehicle immediately after the accident. The Defendant's Objections 9. The defendant's primary objection to Mr Paine's report is that the Jurats in this case will be able to form a view about what happened based on their own knowledge and experience. It was contended that the plaintiff's claim is a straightforward one arising out of a collision between two vehicles. The cost and complexity of experts in the field of road traffic investigation was not required for the Jurats able to form a view what happened for an accident involving two vehicles, given their knowledge of Bagatelle Road, driving in Jersey and their experience as Jurats. The case was no different from my decision in Blackmore v Amplus Limited where I decided that an employment expert was not necessary in order for the Jurats to decide the future earning capacity of Mr Blackmore. 10. Advocate Williams also referred me to a decision of the English Court of Appeal in Smith v Fordyce

[2013] EWCA Civ 320 . At paragraph 40 of that decision the Court of Appeal concluded that the analysis and conclusions of the trial judge could not be faulted and stated as follows:- "In approaching the evidence of the accident reconstruction experts, the judge reminded

himself that their function was limited to furnishing him with the necessary scientific criteria and assistance based upon special skill and experience not possessed by ordinary laymen. He added that "Attempts by the experts themselves to interpret the evidence, a fortiori with mathematical precision, are to be viewed, at the very least, with extreme caution." 11. Advocate Williams further observed that there was little of substance in the present case for experts to consider and that anything they did consider, in particular the contemporaneous photographs taken by the plaintiff, could equally be considered by the Jurats. He further suggested that it was far too late in the day for anyone to be able to respond to an incident that occurred nearly four years ago when the only observations the expert might be able to make were about photograph evidence. 12. In the alternative Advocate Williams complained that, if I was minded to allow the plaintiff to call Mr Paine, the report, as currently drafted, went beyond any scientific assessment of the contemporaneous photographs as it also drew conclusions and made observations about the witness statements given by the plaintiff and the defendant as well as a third party witness. Decision 13. In deciding to allow the plaintiff to adduce expert evidence, I reminded myself that the key issue was whether the Jurats would be able to form a sound judgment without the assistance of witnesses possessing special knowledge or experience. 14. In this case I consider that, although the Jurats might be able to reach a view without the assistance of an expert in road traffic accidents, there is a possibility of Jurats not being able to form a sound judgment on the cause of the accident without the benefit of expert

analysis.

In my judgment, having read his report, Mr Paine does possess special knowledge which enables him to interpret the contemporaneous photographs to explain the cause of the accident in a manner which Jurats might not necessarily be able to do so. In reaching this view, I am not saying that Jurats would not be able to draw such conclusions following cross-examination and submission but on the facts of this case I am concerned that any conclusion the Jurats might reach may suffer in comparison to a decision reached with the additional benefit of the special knowledge of an expert in road traffic accidents. 15. I am also of the view that expert evidence is not to be interpreted as only allowing a scientific analysis. I consider it is sufficient to allow expert evidence to be adduced, as long as the other criteria in Bhojwani are met, if the expert possesses special knowledge or experience in the area concerned. Special knowledge or experience may involve matters of judgment because of an individual's expertise and is not necessarily limited to scientific criteria. 16. I do not therefore regard the case as being equivalent to Blackmore . In Blackmore the issue was about the plaintiff's future earning capacity, where I reached the view that the Jurats were able to form their own assessment with the benefit of medical expert evidence, statistical information and the plaintiff's own evidence. In this case, by contrast, I consider an expert in the field of road traffic accidents may assist the Jurats in their deliberations. 17. In exercising the discretion vested in me, I have also reached the view it would not be appropriate in this case to prevent the plaintiff from adducing expert evidence relevant to

liability in circumstances where liability is in issue between the parties and where, if the plaintiff is successful on liability the amount of damages the plaintiff might recover is not insubstantial.

18. However I accept Advocate Williams' alternative submission that the expert evidence the plaintiff should adduce is to be limited to an analysis of what is shown by the contemporaneous photographs taken by the plaintiff. This is because the report produced by Mr Paine goes far beyond an analysis of the contemporaneous photographs and also makes observations on the witness statements of the parties and the independent witness, as well as making observations about the defendant's compliance with the Highway Code. These are matters for submission and for the Jurats to decide and are beyond the scope of expert evidence. As noted in Bhojwani the role of the expert is to assist the Jurats; while at times the line may be a difficult one to determine, it is not the role of an expert to usurp the functions of the Jurats which I consider has occurred in parts of Mr Paine's report.

19. In reaching this view, I wish to make it clear that I do not wish to discourage road traffic investigators from evaluating an accident. Such an evaluation, in particular if carried out quickly, may well assist a party's legal advisor or an insurance company to decide whether or not to bring or resist a claim. However such analysis may go beyond the limits of what is expert evidence, which is where care should be taken to differentiate between a general review for insurers and advisors and what is permissible expert evidence to help the Jurats.

20. The expert evidence the plaintiff should adduce should not therefore go beyond an analysis of what conclusions can be drawn from the contemporaneous photographs about what led to the accident. This may cover analysis of any skid or tyre marks and damage to the plaintiff's and defendant's vehicle. Any analysis of any witness statements however is a matter for cross-examination and submission. Accordingly, the observations at paragraph 10.15, 10.21, 10.22, and the final sentence of 10.23, 10.28, 10.30, the first word of 10.31 and paragraphs 10.34 to 10.51 of Mr Paine's report go beyond the scope of expert evidence and are matters for submission and for the Jurats to decide. In light of these observations the summary conclusions drawn by Mr Paine in paragraph 11 should also be rewritten.

21. I accept that any expert the defendant may wish to call will only be able to analyse the contemporaneous photographs having regard to the witness statements already produced. Although Advocate Williams suggested that the limited information and passing of time might restrict the ability of the experts to reach definitive agreement or to reach anything more than provisional views, if that is the position it can be put in cross examination and submission. It is not a reason to prevent the plaintiff adducing evidence on what conclusions he says can be drawn from the photographs. In addition, I would be in error to reach a view that conclusions cannot be drawn by an expert simply because the photographs were taken some time ago. Either the experts will be able to draw conclusions from the photographs or they will not. That is a matter of evidence. If the defendant contends that conclusions cannot be drawn then that is a matter to be weighed in the balance when the Jurats reach their decision.

22. In addition, in this case, any difficulties the defendant might face in part have been contributed to by the stance taken by the defendant's insurers. During the course of argument, a letter from the defendant's insurers was produced to me dated 5 th November, 2010, informing the plaintiff's English solicitors that the defendant's insurer's investigations into liability were complete, with liability being denied. This letter was sent four months after the accident. The defendant's insurer has therefore had plenty of opportunity to analyse the

accident, examine vehicles and obtain its own report. Indeed, it appears that some form of investigation was carried out because a witness statement from the defendant was produced which was taken by a Lee Crockett who also attended the scene of the accident and took various photographs. The plaintiff's report from M. Paine was obtained in response to this letter and was produced some nine months later. This is not therefore a case where the defendant, through his insurers, is only now able to analyse what occurred. 23. The plaintiff's application is therefore granted on the basis that the evidence adduced by the plaintiff's expert is limited in the manner set out in this judgment. 24. The costs of this application shall be costs in the cause on the basis that while I have allowed the plaintiff to adduce expert evidence, I have done so in a manner that is limited. I therefore regard costs in the cause as a fair reflection of the outcome of the plaintiff's application. Authorities *Blackmore v Amplus Limited*

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