

Neutral Citation Number: [2008] EWHC 2386 (QB)

Case No: BM 80066A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

On appeal from the decision of Mr Recorder Eyre
Sitting in Birmingham County Court on 22.2.08
Claim No. 7XQ51775

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 10/10/2008

Before :

MR JUSTICE WALKER

Between :

JASON BATES

Claimant

- and -

Ashley MALYON

Defendant

Mr David Rivers (instructed by Temple Street) for the **appellant**
Mr Corin Furness (instructed by Morgan Cole) for the **respondent**

Hearing date: 23 June 2008 at Birmingham Civil Justice Centre

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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THE HONOURABLE MR JUSTICE WALKER

Mr Justice Walker :

Introduction

1. A fast track trial in this case took place on 22 February 2008 at Birmingham County Court before Mr Recorder Eyre. The case concerned a road accident, fortunately of a relatively minor kind. Neither the claimant Mr Bates nor the defendant Mr Malyon suffered any personal injury. There was damage to the rear of Mr Bates's car, a Citroen, and to the front of the car that Mr Malyon was driving. That car, a Suzuki, belonged to Mr Malyon's father, but for convenience I shall generally refer to it as if it were Mr Malyon's.
2. Both parties agree that Mr Malyon's Suzuki struck the rear of Mr Bates's Citroen. They also agree that prior to the accident Mr Malyon's Suzuki had been in a "stop-start" queue of traffic on Queen's Road, Nuneaton, with traffic lights some distance ahead of him and a retail car park on his nearside.
3. Mr Bates's witness statement said, in substance, that he had been on Queen's Road for some time, he had come to a halt in order to let another car out of the retail car park, and Mr Malyon drove into the back of his Citroen. Mr Malyon's witness statement said, in substance, that (1) his Suzuki and the car in front of him, a Peugeot, had been stationary, (2) when the Peugeot moved forward he was a little slower moving away, and Mr Bates's Citroen started to come out of the car park in front of him despite the gap between Mr Malyon's Suzuki and the Peugeot being too small, and (3) the Peugeot then stopped, and Mr Bates's Citroen stopped so quickly that Mr Malyon's Suzuki ran into it.
4. Although Mr Malyon said in evidence that he did not see damage to Mr Bates's Citroen, he accepted through counsel that such damage had occurred. It was Mr Malyon's case that only after Mr Bates had left did it become clear that the Suzuki was so severely damaged that it could not be driven home. However there was not at trial any claim on behalf of Mr Malyon's father as owner of the Suzuki.
5. The judge held that the claim failed because Mr Bates had not proved his case as to how the accident occurred. Mr Bates now appeals. He does so with the permission of Lewison J. I heard oral argument on the appeal and reserved my decision.

The grounds of appeal

6. Mr Bates's grounds of appeal begin with the following assertions:

The Recorder who dismissed this claim made no findings of fact about how this accident occurred and simply dismissed the claim on reliance of the burden of proof.

7. On the basis of those assertions six specific grounds of appeal are identified. Before turning to them I shall summarise the law on failure to make findings of fact, and I shall examine whether the judge did indeed fail to make such findings and dismiss the claim simply in reliance on the burden of proof.

The law on failure to make findings of fact

8. The relevant legal principles are common ground. They are set out in paragraphs 45 and 46 of the judgment of Wilson J in *Stephens v Cannon* [2005] EWCA Civ 222. Auld and Arden LJJ agreed with Wilson J. Paragraph 45 of the judgment of Wilson J comes at a stage when he had analysed six of the relevant authorities and turns to deal with the seventh:

45. The seventh is the decision of this court in *Cooper v Floor Cleaning Machines Ltd and Crompton* The Times, 24 October 2003. A motor collision resulted in cross-allegations of negligence between the two drivers, namely the claimant and the second defendant. They were the only witnesses. The judge dismissed both claim and counterclaim for failure to discharge the burden of proof. This court held that he had been wrong to do so and that on proper analysis the evidence established the counterclaim. In §3 and §23 respectively Scott Baker L.J. and Thomas L.J. each said that, before resorting to the burden of proof, a court should, as in *Ashraf*, raise with counsel the possibility that such a course might have to be taken. In §3 Scott Baker L.J. said that it would be wholly exceptional, particularly in a road traffic case, for a judge to be entitled to determine an issue by reference to the burden of proof; and in §15 he said that the judge erred in failing to analyse the evidence and that, had he done so, he would have found that the defendants had discharged the burden of proof. In the present case the master was clearly unaware of the exhortation in *Cooper* to invite comment from the advocates before resorting to the burden of proof.

46. From these authorities I derive the following propositions:

(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.

(b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.

(c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a

disputed issue.

(d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.

(e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary.

9. In *Verlander v Devon Waste Management* [2007] EWCA Civ 835 Auld LJ revisited what had been said by Wilson J in *Stephens*. In a judgment with which Rix and Moses LJJ agreed, Auld LJ commented on the analysis of Wilson J in *Stephens* as follows:

19. Perhaps I can, without damage to that analysis, summarise it by reducing it to two main propositions. First, a judge should only resort to the burden of proof where he is unable to resolve an issue of fact or facts after he has unsuccessfully attempted to do so by examination and evaluation of the evidence. Secondly, the Court of Appeal should only intervene where the nature of the case and/or the judge's reasoning are such that he could reasonably have been able to make a finding one way or the other on the evidence without such resort.

...

24. When this court in *Stephens v Cannon* used the word "exceptional" as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence, conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his case. The burden of proof remains part of our law and practice -- and a respectable and useful part at that -- where a tribunal cannot on the state of the evidence before it rationally decide one way or the other.⁵ In this case the Recorder has shown, in my view, in his general observations on the unsatisfactory nature of the important parts of the evidence on each side going to the central issue, particularly that of Mr Verlander, that he had considered carefully whether there was evidence on which he could

rationally decide one way or the other. It is more than plain from what he has said and why, that he concluded he could not. Further, more detailed analysis by him of the evidence and rehearsal of his views on it would, in my view, have been otiose.

What the judge said and did

10. Mr Bates justifies the assertions at the outset of his grounds of appeal by reference to two paragraphs in the transcript of the judge's oral judgment. I shall call them "the crucial paragraphs":

11. I have to say that I do not find the fact finding exercise in this case an easy one. I take account of what Mr Furness says, that the burden of proving the case lies on the claimant. However, the burden of proof is a tool on which fact finding tribunals should not place excessive reliance particularly when the two protagonists have both given evidence. I am conscious that over-reliance on the burden of proof can be seen as an opting out of the fact finding exercise.

12. That said I do find that the burden of proof does assist me in this case. In order for the claimant to succeed I have to be satisfied that it is more likely than not that his account of how the accident occurred is correct. I have to say that on the material before me both scenarios are possible ones and there is little by way of objective or independent evidence to assist me. I am, however, influenced by the apparent concentration of damage and I am accordingly not able to say that I am persuaded that it is more likely than not that the accident occurred in the way that the claimant alleges. That being so I must dismiss the claim.

11. At trial, and on appeal, Mr Bates was represented by Mr David Rivers, and Mr Malyon was represented by Mr Corin Furness. In his skeleton argument accompanying the grounds of appeal Mr Rivers simply asserted that the crucial paragraphs amounted to a decision not to make any findings of fact and to resort to the burden of proof. By contrast Mr Furness in his skeleton argument for Mr Malyon contended that the judge effectively found as a fact that the damage to the rear of Mr Bates's Citroen was concentrated to the offside and that this led him to reject Mr Bates's account of the accident.
12. On examining the crucial paragraphs my initial assessment is that on the face of those paragraphs there is considerable force in the contention advanced in the skeleton argument of Mr Furness. The cases cited by Mr Rivers stress that circumstances must be exceptional before a judge says that it is impossible to resolve which of two accounts is right. The judge in this case did not say that. He said that in deciding whose account

was right he was influenced by the apparent concentration of damage.

13. If this initial assessment is right then the principal case advanced by Mr Bates on appeal simply fails to get off the ground. In a further skeleton argument Mr Rivers identified six reasons for contesting the analysis put forward by Mr Furness. I shall comment on each in turn, making reference to oral argument where appropriate.
14. The first reason advanced by Mr Rivers accepted that the judge's observation, "I am, however, influenced by the apparent concentration of damage", was a factual observation. However, it was immediately preceded by an account of the role of the burden of proof in such cases followed by an observation that in this case the burden of proof did assist the judge. As to this, it is not suggested by Mr Rivers that the judge's account of the role of the burden of proof amounted to a mis-statement of the law. The judge's comment that the burden of proof assisted him is explained in the remainder of paragraph 12 of the judgment. It is linked to the standard of proof. On the material before him, the apparent concentration of damage made it impossible for him to accept the account given by Mr Bates. As Mr Furness observed in oral argument, this is not a case where the judge simply threw his hands into the air.
15. The second reason advanced by Mr Rivers complained at the lack of an express finding that the judge preferred the case advanced by Mr Malyon on the damage. In an earlier passage in his judgment he had said that the need for an entire replacement rear bumper would support the account by Mr Bates. On the other hand the list of other items which were replaced gave "some support" for Mr Malyon in his assertion that the damage was to the rear offside "though it is far from conclusive". Thus, submitted Mr Rivers, the most that the judge had done was to find that the damage was supportive of either parties case. As to this, however, I consider that Mr Furness is plainly right when he says that a finding of a concentration of damage on the right hand side of the rear of Mr Bates's Citroen plainly assisted Mr Malyon. The need to replace the entire bumper did not show that there was damage to the left hand side of the rear of the Citroen, or even to the centre: it merely showed that there was damage to the bumper and it was replaced. There was no evidence that if damage were only to the right hand side of the bumper there would be no need to replace the entire bumper. The judge rightly said that the concentration of damage to other items was not conclusive, but as Mr Furness observed all that was needed was that on balance this point was more consistent with the account given by Mr Malyon.
16. The third reason advanced by Mr Rivers notes an observation by the judge in an earlier paragraph of his judgment that Mr Malyon "saw little damage" immediately after the accident. It is right that under cross examination and when questioned by the judge Mr Malyon said that that at the time he did not see damage to Mr Bates's Citroen. He also said, however, that he and Mr Bates spoke only briefly after the accident, simply exchanging telephone numbers, that they were both "shaken up", and that Mr Bates was in a hurry to depart. On his own account, Mr Malyon did not appreciate that the damage to his Suzuki was so serious as to mean that he would not be able to drive home. The judge pointed out that Mr Malyon was a young and inexperienced driver. The criticisms of the account that Mr Malyon gave were criticisms of entirely subjective evidence, and the judge rightly stressed the importance of giving weight to objective evidence.

17. A further suggestion was made in this regard that any damage other than to the right hand side of the rear of the Citroen would be inconsistent with Mr Malyon's case. That does not assist Mr Rivers, however, as there was no evidence of damage to the left hand side of the rear of the Citroen.
18. The fourth reason advanced by Mr Rivers asserted that a finding of fact about the damage did not and could not amount to a finding of fact about how the accident occurred. I do not understand this submission. The judgment makes it clear that the judge is influenced by the concentration of damage with the result that he finds that the accident did not occur in the way Mr Bates said it did. The judge made clear at the outset of his judgment that he had to find between two apparently honest accounts. By finding against the account given by Mr Bates the judge was necessarily finding in favour of the account given by Mr Malyon.
19. The fifth reason advanced by Mr Rivers expressed surprise at any contention that the judge decided "whose fault this accident was and made adequate findings about what happened." Mr Rivers asserts that this cannot be detected in the judgment and that it appears to have escaped the attention of the judge who granted permission to appeal. For the reasons given earlier, I consider that these matters follow clearly enough from what is said in the judgment. Assertions by Mr Rivers as to what did or did not "escape the attention" of the judge granting permission to appeal are inappropriate here – quite apart from anything else, the grant of permission to appeal involves only an assessment of arguability made on the papers and made before the arguments have been fully developed.
20. The sixth reason advanced by Mr Rivers acknowledges that the judgment contained a summary of each party's case and a recognition by the judge of the importance of independent objective evidence. Neither of those matters, submits Mr Rivers, makes this a case in which the judge made a finding about how the accident occurred. The finding as to how the accident occurred, however, is present in the crucial paragraphs relied upon by Mr Rivers: see my analysis earlier. Nothing in those paragraphs is inconsistent with the judge's summary of the cases of the parties and the finding is strongly supported by the judge's observations about the importance of independent objective evidence.
21. For these reasons I conclude that Mr Furness is right to submit that this is a case where the judge reached a conclusion as to the facts, and thus the considerations which arose in the cases cited by Mr Rivers do not arise here. I add that in my view the matter can be tested by asking what the position would have been if there had been a cross claim by Mr Malyon's father as owner of the Suzuki. The consideration identified by the judge as the determining factor, namely the location of the damage, would inevitably have led the judge to find in favour of a cross claim for damage caused to the Suzuki. There is no question in the present case of the court finding itself in the exceptional position where, because the court has not been able to make a finding of fact, both claim and counter-claim are dismissed.
22. It follows that the principal basis upon which this appeal has been mounted is misconceived. However there was also a suggestion that the judge had failed to give

reasons, or adequate reasons, on particular aspects of the case. For that reason, and in deference to the sustained arguments of Mr Rivers, I shall make short observations on the specific grounds of appeal. As will be seen, my conclusion is that none of these grounds assist Mr Bates, and that in large part they make no allowance for the importance in a fast-track trial of focusing on the essentials.

Ground one: exceptional circumstances required

23. This ground of appeal focused on an assertion which, in broad terms, is common ground: namely, that only in wholly exceptional circumstances will it be appropriate to make no findings of fact. That is merely a broad brush way of describing the specific principles quoted earlier. For the reasons that I have identified, this is not a case in which the judge failed to make findings of fact, and accordingly this ground of appeal fails.

Ground two: point not raised with counsel

24. Ground two complained of a failure by the judge to consider whether this was an exceptional case and to invite counsel to address him on the point. This is premised upon the assertion that the judge failed to make findings of fact about how the accident occurred, and as the premise is false this ground of appeal does not arise.

Ground three: lack of explanation

25. This ground of appeal complained that the parties had been left without a judicial determination of what happened and that Mr Bates had been left with an understandable grievance that he had no idea of why he lost. For the reasons I have given, however, there was a judicial determination. It was that the objective evidence about damage led the court to conclude that the claimant's account of what happened was not correct. As to the assertion that Mr Bates "has no idea of why he lost", for the reasons I have given the judge's reasoning was clear enough. I hope that in the light of the present judgment the reason why Mr Bates lost will be crystal clear.

Grounds four to six: general

26. The case for Mr Bates was not merely that the judge wrongly failed to make findings of fact and resorted to the burden of proof. It was also asserted that the judge could only have determined – and thus on appeal I should determine – that the account given by Mr Bates was right. Grounds four, five and six were relied on in this regard. An analogy was sought to be made with the well known decision of the Court of Appeal in *Baird v Thurrock District Council* [2005] EWCA Civ 1499. In that case the Court of Appeal recognised that a judge does not have to deal with each and every pointing issue: see the judgement of Ward LJ at paragraph 23. The judge must, however, grapple with things that are fundamental. On analysis, for the reasons I give below, there was no failure by the judge to deal with the fundamental points.

Ground four: contrast in consistency

27. Ground four made a number of assertions. They included assertions that Mr Malyon's explanation was demonstrably wrong, which I shall deal with under ground five, and assertions about the damage that was caused, which I shall deal with under ground six. The remainder of ground four made claims that the account given in evidence by Mr Bates was clear and consistent whereas that of Mr Malyon was inconsistent. The first of these claims is simply wrong, for the account given by Mr Bates in oral evidence was inconsistent with a sketch plan drawn by him much earlier. As to the evidence of Mr Malyon, Mr Rivers sought to paint a picture in which Mr Malyon accepted in oral evidence that the Peugeot was stationary at all relevant times, and thus gave evidence which was inconsistent with his witness statement. This suggestion is not in my view borne out by a fair reading of the evidence of Mr Malyon under cross examination, and I can see nothing in the transcript which would have led the judge to imagine that this was intended to be the case advanced on behalf of Mr Bates. It is true that early in his cross-examination Mr Rivers put to Mr Malyon that "at the time" the Peugeot was stationary and had come to a complete halt. Mr Malyon agreed. That is indeed exactly what Mr Malyon said in his witness statement had been the position at two stages. The first was before the queue of traffic started to move again. Mr Malyon's witness statement said that thereafter the traffic ahead started to move off again "and the car ahead of me moved off in turn." As Mr Furness pointed out, it was never suggested in cross-examination that this assertion about the Peugeot moving forward again was incorrect. There was a second stage at which Mr Malyon said that the Peugeot came to a halt and accordingly was stationary. At that second stage Mr Malyon said that Mr Bates's Citroen, which was coming out of the car park, stopped quickly and "I was unable to stop in time." During the course of his cross-examination Mr Malyon gave a demonstration of what he considered had happened. It was not suggested to him in cross-examination that his demonstration was inconsistent with what he had said in his witness statement.

Ground five: Mr Malyon's description of the accident

28. This ground of appeal identifies two particular features of Mr Malyon's account. The first is an admission that he did not see Mr Bates's Citroen, which he accepted was there to be seen, until a second or two before the impact. As to that, Mr Malyon's account was of an accident occurring when Mr Bates's Citroen was suddenly driven into a space which had become available because Mr Malyon was slow off the mark when the Peugeot started to move, which the Citroen could have squeezed into if the Peugeot had kept moving, and which the Citroen did not fit into because the Peugeot came to a halt again. Thus on Mr Malyon's account there was no reason for him to be aware of the Citroen until a second or two before the impact. The second matter relied upon was Mr Malyon's evidence that he was travelling at about two miles per hour before seeing Mr Bates's Citroen, yet was still unable to stop and believed that the collision was a forceful one. The judge, I am sure, had this point well in mind. He was searching for objective or independent evidence. He found that evidence in the location of the damage. It is in my view plain from his judgment that he regarded this objective evidence as being of such strength as to outweigh points made by Mr Rivers in relation to Mr Malyon's subjective account of what occurred. I add that it does not seem to me that there was any evidence before the judge which would have enabled him to say that

the admitted damage to the Citroen could not have been caused by a low speed impact.

Ground six: damage

29. The specific point made in relation to this ground concerned documentary evidence in the form of an engineers report. It is convenient under this head, however, to deal also with criticisms made in ground four of Mr Malyon's evidence about damage.
30. As to the engineers report, there was a small diagram on which there was a single arrow. That arrow pointed to the rear of the Citroen, and was centrally placed. The report stated, "... the point of impact is shown in the above diagram."
31. There is no difficulty - especially in a case where, as here, the damage to the Citroen is agreed - in drawing inferences from the location of the vehicle parts that were replaced. The fact that parts on the right hand side of the rear of the car were replaced logically points to damage having occurred in that area. There is no need for expert opinion in that regard. By contrast, however, an assertion as to "point of impact" made by the engineer in circumstances where it is clear that the engineer was not present at the time the impact occurred must, if it is intended to be read as an assertion of the engineer's judgment as to where impact occurred, be a matter of opinion. In the absence of permission to rely upon opinion evidence, there was no basis upon which this could assist Mr Bates. In any event it is by no means clear that it was intended by the engineer to serve the purpose which is now suggested. The engineer may merely have been recording the information that was communicated when the repairs were requested, or may merely have been recording that the impact was towards the rear of the car.
32. That leaves the complaint about Mr Malyon's oral evidence concerning damage. Mr Rivers complains that the judgment refers to Mr Malyon saying that immediately after the accident he saw little damage, whereas Mr Malyon's evidence was that he saw no damage to the Citroen. I do not consider that there is any significance in the difference between "little" and "no" in this context. As indicated in my analysis of the third reason advanced by Mr Rivers for saying that there was no relevant finding of fact, the account given by Mr Malyon might be expected of an inexperienced young driver who, as he said, had only a brief conversation with Mr Bates at a time when both were shaken and did not insist that the two of them stop to make a proper examination to identify damage to the two vehicles. Here, too, the judge was concerned with a point forcefully advanced by Mr Rivers but which relied on criticism of a subjective account. It is a fair inference that in the judges view this point was outweighed by the objective evidence as to the location of the damage.

The grounds of appeal generally

33. This appeal has involved a painstaking analysis by counsel of written and oral evidence and an oral judgment, all of which were dealt with in a fast track trial that occupied less than a morning. A fast track case must be dealt with in a proportionate way. In his judgment the judge dealt with the fundamental points, and in a fast track case it is in my view quite inappropriate to criticise him for failure to go into the minutiae.

Conclusion

34. For all these reasons I conclude that the appeal fails.