

Insight 196

from Horwich Farrelly's Large & Complex Injury Group



WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on the liability decision of the High Court for injuries sustained by a child when hit by a vehicle, reminding us that:

- claimants do actually have to prove liability;
- there is a methodical way to arrive at a reasoned view as to the most probable explanation;
- honest witnesses can be, and are frequently mistaken;
- contemporary accounts given by witnesses are usually preferred to later versions.

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Prove it

Barrow (by his litigation friend and grandfather) and others v Merrett and others [2021] EWHC 792 (QB)

Background

The proceedings concerned claims for damages brought on behalf of three people following an accident in October 2015. The first claimant (Felix), a child aged 11 at the time, sustained severe injuries when he was involved in a collision with a car driven by the first defendant (defendant). The accident occurred when the claimant was crossing the road outside his home on the way to school, resulting in life changing injuries.

The second and third claimants were Felix's parents (Mr and Mrs M), who claimed for the psychiatric injuries they had sustained as a result of what they had witnessed at the roadside and the aftermath. Their claims depended entirely on whether Felix's claim succeeded.

For completeness, Mrs M's car insurer was named as second defendant.

The claim alleged that, as Felix had walked across the road he slipped and whilst he was in the

process of getting back up, he was struck by the car. The allegations of negligence against the defendant included an assertion that Felix's position in the road should have been obvious, such that a reasonable driver would have seen him in time to avoid the collision.

The defence denied liability, asserting that (i) a reasonable driver could not have avoided a collision because Felix had run out into the road at a time during which the defendant's vision had been largely obscured by oncoming traffic, giving insufficient time to brake and (ii) even if the defendant was primarily liable, Felix had contributed to the accident by running out into the road without proper regard for oncoming traffic.

Issues to be decided

1. On the established facts, did the defendant's driving fall below the standard to be expected of a reasonable driver?
2. If it did, did Felix contribute to the accident?



Evidence

Two accident reconstruction experts gave evidence at the trial. There was considerable consensus between them, both as to the nature of the injuries that Felix sustained and the very limited extent to which conclusions could be drawn on body position at the time of impact, including whether he had been running, walking, slipping or in the process of getting up.

Neither the small amount of documentation generated in the immediate aftermath of the accident, nor the physical evidence, such as damage to the car, debris, injury etc. provided any compelling objective evidence to assist.

The only witness to the accident itself called by the claimants was Nicholas, a friend of Felix who was also aged 11 at the time of the accident. Nicholas' version of events altered over the course of the years between the accident and trial, giving five different accounts:

First account: From the attending police officer's Incident Log on the morning of the accident. PC Giles explained to the Court that he made the entries in the log contemporaneously to his conversation with Nicholas and his mother. The relevant excerpts of what he said Nicholas told him at 9.06 on the morning of the accident are as follows:

"W Nicholas STANNARD

Jane STANNARD

Left Denver Maru [Felix's home] with Felix. Crossed road. He forgot something so came to back to H/A. Came back to road. Nicholas said "WAIT THERE'S A CAR". Then ran across road. Slipped and hit car."

Second account: In second-hand hearsay form, recorded in computer records disclosed during the course of the trial but which reflected evidence already given by PC Giles in his witness statement. These record that on 30 November 2015, Felix's grandfather, Hugh Barrow, contacted PC Giles and stated that he had spoken to Jane Stannard and that Nicholas now wished to say that Felix was walking across the road and that he was getting up before he was hit by the vehicle. PC Giles recorded in the notes that he considered this was a 'stark contrast' to the version that Nicholas had previously provided him. He also noted that Mr Hugh Barrow informed him that the family were considering a civil claim which if successful would help pay for Felix's care.

Third account: The first statement that he provided in these proceedings dated 26 November 2018, just over three years after the accident. In this statement Nicholas described how Felix came to the edge of the

road having returned home to collect his rugby boots. Nicholas stated how Felix stopped at the edge of the road, checked both ways and after letting two cars pass from his right, began walking across the road at normal pace. As Felix approached a shiny patch of the road around the centre line he slipped falling back onto his bottom. As he attempted to get up, he was struck by the car.

Fourth account: In a supplemental statement dated 24 February 2020 in which he addressed a suggestion made by the Defendant's accident reconstruction expert, that Felix was falling forward at the time of impact with the car. Nicholas stated he was certain that Felix did not fall forward but was getting up when hit. In order to illustrate Felix's movements, Nicholas demonstrated them on film.

Fifth account: In cross-examination at trial he was asked about what, if anything, he said to PC Giles shortly after the accident. Nicholas strongly disputed that he had told PC Giles anything other than his name and address, certainly not any details of the accident. He accepted that some of the information contained in PC Giles' logbook attributed to him were correct, namely that Felix had gone back home, returned to the road and that he had warned him about cars. He denied that he had told PC Giles that Felix ran, slipped and hit the car. The remainder of Nicholas' evidence was broadly consistent with the version provided in his November 2018 statement.



Gestmin

In *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd* [2013] All ER (D) 191 (Nov), the court observed that, in complex commercial claims, the existence of substantial amounts of contemporaneous documentation would often provide a more reliable source of evidence than the recollection of witnesses proffered in a courtroom many years later. Leggatt J's made a number of detailed observations, some of which the Judge here considered more relevant than others as below:

- 1. People generally lack insight into just how unreliable memory can be.** Two common errors giving rise to this lack of insight are that people wrongly believe that the more vivid a sense of recollection is, or the more strongly expressed, the more likely it is to be right;
- 2. Memories are fluid and malleable.** Memory does not operate like a camera but rather can be dramatically influenced by external information;
- 3. The process of civil litigation itself subjects memory to powerful biases.** A desire to assist a party, or not to prejudice them as well as a desire to give a good impression can be powerful but subtle factors impacting on the reliability of memory;
- 4. The effect of giving evidence can also materially impact on memory.**

Judge's assessment of the evidence

Before looking at the evidence in this case in detail Richard Hermer QC (sitting as a Deputy High Court Judge) noted:

"A court attempts to reconstruct the most probable answers to the core questions by applying established forensic tools to such evidence as is available. It looks at



the evidence in its totality, it seeks to understand the relevant layout of the scene, identify any objective facts that might act as lodestars by which more subjective opinion and recollection can be tested, scrutinises carefully the accounts of witnesses of fact and experts, both in the witness box and in earlier written statements – and it applies to all of this a fair dose of common sense."

He went on to find that the first statement made by Nicholas was likely to be the most accurate. His detailed analysis is as follows:

"I consider that support for this conclusion can also be derived from the account that PC Giles recorded Nicholas gave to him immediately after the accident. Whether that account was given direct by Nicholas, or by his mother recounting in his presence what he had just told her, is ultimately immaterial. The source of the information could only have been Nicholas. I conclude that Nicholas (either directly or through his mother in his presence) told PC Giles that he warned Felix about the cars, that Felix ran into the road and slipped before being hit.

This account did not include any description about falling to his bottom and being hit whilst trying to get back to his feet. I accept of course that some caution has to be exercised over an initial account provided by an eleven year old child who has just witnessed a horrifying incident but the clear evidence of PC Giles satisfied me that the record he made was accurate and was not tainted by any of the criticisms of it levelled by the claimant.

I am of course aware not only that Nicholas and his mother disputed the accuracy of part of PC Giles note but that Nicholas subsequently provided a significantly different account of what he recalled. This included, by the end of November 2015, Mrs Stannard indicating to Felix's family

that her son's recollection was that rather than running, Felix was walking across the road and was hit whilst trying to get up. This was the message conveyed to PC Giles by Felix's grandfather.

That evidence is also broadly consistent with the contents of his statement in these proceedings and his evidence at trial. I am satisfied however that the evidence is mistaken in so far as it relates to Felix walking rather than running, and also in so far as it depicts Felix slipping as described (be it on a wet/oily patch or otherwise) and falling onto (or towards) his bottom and then attempting to get up over a number of seconds. The evidence is inconsistent with that of Mr Gent, Mrs Merrett and with his initial account, which I find to be more reliable sources.

This conclusion does not, as [claimants' counsel] suggested, require me to find that Nicholas was deliberately intending to give a false history of what occurred. Nicholas struck me as an articulate and intelligent young man seeking to do his best to recall what would have been a truly harrowing experience. His evidence to the court would have been one of very many occasions in which he was asked to recount what occurred and he would have been under no doubt of the significance of it to Felix's case.

I consider that the disparity between what occurred and what he later recalled is best explained by many of the factors identified in *Gestmin* as capable of degrading the quality of recall. Similarly, whilst I found his mother, Mrs Stannard to be an entirely honest witness, I consider that her recollection of the key events in particular what Nicholas is likely to have told her immediately afterwards is less likely to be correct than the record made by PC Giles at the time. This is a case, like very many, in which various witnesses can all give honest but nevertheless conflicting accounts of a given event.

There are a number of additional factors that in my judgment make Nicholas' recollection less reliable than that advanced on behalf of the Defendant. One is that the mechanism of the fall described by Nicholas, namely of one of Felix's legs violently slipping forward causing him to fall towards (or onto) his bottom, does not ring true, or is at least less likely than slipping forward whilst running.

Although in his statement Nicholas referred to a slippery patch in the middle of the road, none was identified by the police who attended and examined the scene, nor are any visible in the photographs. The unchallenged evidence of PC Wheeler was that the road surface was damp but drying. In these circumstances it seems difficult to understand why a person walking across the road would slip in the manner described by Nicholas. A person to my mind is much more likely to slip, or fall, or stumble when running and/or when appreciating in a split second that they are in danger of colliding with an oncoming car.

I also do not consider it likely that if Felix was in the road for more than a few seconds that Nicholas would have failed to warn him, or the approaching traffic, as to the risk of an impending collision. I am of course mindful that Nicholas was only aged 11 at the time and that the events lasted no more than a small number of seconds.

Nevertheless, Nicholas evidence was that at the point at which Felix fell he was already aware of Mrs Merrett's car approaching him. If Felix was in the road and struggling to regain his stance in the following seconds, I consider it likely that Nicholas would have taken steps to either warn Felix or to have taken some steps to warn the approaching cars of his presence in the road."



Conclusion

The judge made it clear that while *Gestmin* was not of direct application to the approach he should adopt to the evidence, Leggatt J's insightful reflections on the fragility of human memory did serve as a beacon to any court seeking to navigate through a trial in which conflicting accounts were given of the same event by witnesses. Those valuable insights served to underline the caution that should be attached to evidence given in the witness box, or in statements generated for the purpose of litigation, as to events which occurred a number of years beforehand - all the more so, when the events were highly traumatic and lasted only a few seconds. *Gestmin* served to remind the court that often (but not always) accounts given at the scene would be more reliable than versions given some time later as part of litigation.

Gestmin was not setting down a fixed rule of interpretation applicable to all commercial cases, let alone all cases in which there was a dispute of fact. Each case remained to be determined in its particular context on its particular facts. The evidence of eyewitnesses to a single event such as a collision was almost always likely to be highly relevant to the assessment of what occurred, and certainly was in the present case.

Second, and critically, in the present particular case, the evidence of the experts, in so far as it was intended to express opinions as to the likely cause of the collision, was itself almost entirely dependent on the veracity of the recollection of witnesses.

Having found that the first statement made by Nicholas was likely to be the most accurate he went on to make it clear that these were honest witnesses, however their evidence had been influenced by precisely the type of factors identified in *Gestmin*.

He concluded that the most probable series of events was that Felix had run across the road back towards Nicholas into the path of oncoming traffic. He had done so after a vehicle had just passed him from his left, thereby obscuring him from the defendant's vision. Felix had probably slipped, and his body had fallen into the path of the defendant's car. She had been afforded no realistic opportunity of avoiding the collision.

The court had been able to reach its primary findings without direct assistance of the evidence of the reconstruction experts. Its conclusions fell within the bounds of what both experts considered possible. It was, therefore, not necessary to determine which of the analysis of the experts the court preferred, because neither contended that the conclusions that the court had drawn from the lay evidence and primary facts would be incompatible with 'the science'.

On the facts, Felix failed to establish that the defendant was legally responsible for the accident and the claim was dismissed.

The claims brought by his parents also fell to be dismissed because they were entirely dependent on liability being established in Felix's own claim.

Commentary:

This decision is of course based on the facts and not surprising in the circumstances. However, the review of elements of *Gestmin* serves as a useful reminder of how important it is to secure detailed witness evidence at the earliest opportunity and to obtain any and all contemporaneous notes of first attenders as early as possible.

Rightly, it was not necessary for the young witness to be found to have been deliberately intending to give a false history of what occurred for his later versions to be discounted.

This was a tragic accident for all concerned, but it was just that, an accident.

