Case No: D10YJ706

IN THE COUNTY COURT AT MIDDLESBROUGH

The Law Courts
Russell Street
Middlesbrough
TS1 2AE

BEFORE:

HIS HONOUR JUDGE GARGAN

BETWEEN:

MARLEY WISE	**CLAIMANT**
- and -	
ADAM HEGARTY	**DEFENDANT (1)**
ALPHA INSURANCE A/S	**DEFENDANT (2)**

Legal Representation

Claimant not present nor represented
Mr Adam Hegarty (First Defendant), Litigant in Person
Mr Mark Robert (Counsel) on behalf of the Second Defendant

Other Parties Present and their status

Mr Street - Telematics expert witness on behalf of the Second Defendant

Judgment

Judgment date: 9 July 2019
Transcribed from 12:01:12 until 12:10:16
from 12:45:54 until 13:03:15

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His Honour Judge Gargan:

1. This is a claim for damages for personal injury arising out of a road traffic accident which is alleged to have occurred on 7 February 2016. On the face of the pleadings, the Claimant was driving her Honda Civic motor car along Burn Road in Hartlepool when she was overtaken by the Defendant's vehicle which lost control and collided with her, as a result of which she sustained modest personal injuries, soft tissue injuries, and she also makes a substantial credit hire claim.

2. The First Defendant, Mr Hegarty, served a defence in which he accepted that there had been a collision at or about the time, date and place alleged. However, he said that he did not overtake the Claimant's vehicle as alleged or at all and that he was always in front of the Claimant's vehicle. He had lost control, spun through 180 degrees and come to a stop on the Claimant's carriageway; having spun round so that he was facing towards her vehicle it appeared to be a head on collision.

3. The litigation proceeded on that basis for some time but, in late 2017, there was an application by the Defendant's insurance company, now the Second Defendant, Alpha Insurance, to be made a party and the defence put forward was that the Claimant's case was tainted by fundamental dishonesty, indeed more than tainted by it, it was a wholly dishonest claim because:

    a. there was telematics evidence that the accident did not occur because firstly, the Defendant's vehicle was not at the agreed scene and secondly, the data showing its movement showed that it had not been involved in an accident; and
    b. there were substantial social media links between the Claimant and the occupants of her vehicle and the Defendant.

4. The Defendant was given leave by District Judge Sendall to be joined and to rely on that evidence and on 18 December, District Judge Thomas gave the Claimant and the First Defendant permission to file and serve additional witness statements dealing with the allegation of fraud. No such evidence has been served or filed by either Claimant or First Defendant.

5. The claim has been listed for trial today since December 2018. I am satisfied the Claimant knew of the hearing date because on 31 December, her solicitors, Garvins, wrote to her, informing her of the hearing date and asking her to confirm if it was a date she could attend and indicating that if she could not, they would apply to have it changed, and they have not applied to have it changed. Further, in June, Garvins made an application to be removed from the record as the Claimant's solicitors. That application came before me on 27 June when I allowed the application and made an order removing them from the record. Sadly, due to pressure of work at the court, that order was not sealed until 8 July. However, on 28 June, Messrs Garvins, who knew of the result of the application, both wrote and emailed the Claimant, reminding her of the hearing date and informing her that they would not be able to represent her and that she should seek alternative representation. Further, on 4 July, the Defendant's solicitors sent the Claimant both a letter and the trial bundle. Therefore, I am satisfied that the Claimant knows of today's date and the hearing. She has not attended.

6. In the circumstances, on the face of it, there is no way the Claimant can prove her claim. In most situations where a claimant does not attend, that claim is simply

dismissed and there is no trial. However, in this case, Mr Roberts, for the Second Defendant, Alpha Insurance, asks me to conduct a trial on the issue of fundamental dishonesty.

7. I raised concerns as to whether that was appropriate and Mr Roberts was able helpfully to refer me to the case of *Alpha Insurance A/S v (1) Lorraine Roache (2) Brendan Roche* [2018] EWHC 1342 (QB), a decision of Mrs Justice Yip, in which Mr Roberts appeared for the successful Appellant. The circumstances in that case were that the Second Claimant, who was accused of fundamental dishonesty, served a notice of discontinuance, or perhaps both Claimants served a notice of discontinuance, but in any event, a notice of discontinuance was served the day before trial.

8. On the face of it, that would normally bring the proceedings to an end. However, the CPR 44 PD 12.4 provides:

> "(a) (that) the court will normally direct with issues arising out of an allegation that the claim is fundamentally dishonest be determined at the trial;
> (b) where the proceedings have been settled, the court will not, save for exceptional circumstances, order that issues arising out of an allegation that the claim was fundamentally dishonesty be determined in those proceedings;
> (c) where the claimant is served notice of discontinuance, the court may direct issues arising out of an allegation the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4"

I need not read (d). The point being that even when notice of discontinuance is served, the court may direct that issues arising out of an allegation that a claim was fundamentally dishonest can still be determined.

9. In my judgment, if such an order can be made where the claim has been discontinued, it can necessarily be made where the claim has not yet been determined and the Claimant has simply failed to attend. Therefore, I give permission to Mr Roberts to call evidence on the issue of fundamental dishonesty, which I will determine as part of the process and as part of his application that the claim be dismissed and/or struck out.

(proceedings continue)

10. My judgment at this stage follows on from what I have already said in giving permission for this hearing to take place and I would want the judgments to be joined up were there to be any future challenge to my findings.

11. I am now invited to determine the question of fundamental dishonesty. The case of both Claimant and First Defendant is that the material collision occurred at 11.30pm or thereabouts on Sunday 7 February at the junction of Stockton Road and Burn Road.

12. On the issue of fundamental dishonesty, I have heard only the oral evidence of Mr Street and I have read the hearsay statements of *Keisha Clarke (?)*, which deals with the social media evidence.

13. The principal difficulty for the Claimant comes from the evidence of Mr Street. This is telematics evidence. What that means is that the Defendant's vehicle had a box fitted to it which provided information about where the vehicle was going, where it was parked, the speed at which it was travelling and whether or not it had been in any untoward incidents where G forces had been applied to it. Anyone who watches insurance advertisements on television will be familiar with this form of box because it is advertised as a means by which younger drivers might reduce their premium by allowing insurers to have access to their style of driving and see the distances they are travelling, the times at which they are travelling, the speed at which they are travelling and the extent to which they have near misses by heavy braking or rapid accelerating and the extent to which there are impacts, whether those give rise to accidents which cause claims or give rise to accidents which are concealed. Further, such a box provides useful information if there are legitimate claims because it enables the insurers to assess the speed at which their vehicle was travelling and rebut allegations of speeding, for example, if the information supports such an argument. That is the type of device that was fitted to this vehicle.

14. Mr Street works for the company that analyses or holds the data and he has analysed the data for 6 February, 7 February and 8 February, so the date of the accident and one day either side. As to the material travelling time, Mr Street has been able to identify that there was an "ignition off event" reported by the device at 11.19pm on 7 February. What that means is that the vehicle stopped travelling because the ignition was turned off just before 11.20pm. It did not move again until 5.23pm the following day, something which is confirmed by what are called "wake up events", they being reports made by the box every four hours when the vehicle is not in use just to confirm its position. Therefore, the vehicle was not active at the alleged time of the accident.

15. Further, Mr Street is able to pinpoint where it was inactive and that is on Midlothian Road, Hartlepool TS25. That is some 2.7 miles away from the point of the alleged accident as the crow flies, which indicates it will be slightly longer if someone was actually driving it. However, the car cannot have been at the scene of the accident, according to the telematics data, at the time the accident occurred. I have had to consider the reliability of that evidence and Mr Street has explained that generally, a firm fix can be given to a vehicle's position if four satellites confirm that position. In this case, some 15 to 19 satellites have confirmed the vehicle's position on Midlothian Road and Mr Street contends that that makes the position evidence highly reliable.

16. Mr Street was then asked about whether there could have been a collision at some other time during the 7 February or, indeed, on the days either side of that date. His evidence is that there is nothing to suggest that there was any untoward incident involving this vehicle on any of those three dates. The box is sufficiently sensitive that it has an accelerometer which measures the extent to which the vehicle accelerates or stops or the G forces which are applied to it. G events can fall into four categories. It is perhaps unfortunate that the first category of event is called a "no event" but there it is. A "no event" deals with incidents where the vehicle continues to move after the incident and is consistent with the vehicle bumping in a pothole or dealing with a road deviation. The second class of event is "static G events" which occur to the vehicle whilst it is stationary; then there are "low G events" which occur when the forces are less than five miles per hour and finally there are "high G events" which are intended to reflect circumstances where there are forces of more than 2 G, which is the level at which airbags would tend to inflate.

17. There were none of the latter events (that is the "high G events") in the profile for the box on the Defendant's vehicle. Further, having looked at the damage to the Claimant's car, no photographs being available of the Defendant's, Mr Street took the view that that sort of damage could not have been caused without a high G event having been recorded. Therefore, if the telematics data is reliable, then this accident cannot have occurred as the Claimant or as the First Defendant suggest.

18. I must then ask what evidence I have about the reliability of the data. Simply this, I have evidence from Mr Street that the box was working throughout the period. When the vehicle is turned off, there is a battery within it which is responsible for the "wake up events". We know that the wake up events were being transmitted after 11.20pm on the day of the accident. Therefore, there is no suggestion that the battery in the box could have been flat and not able to record a G event that occurred after the ignition had been turned off or gone off because of a stall, as was suggested by Mr Hegarty. In those circumstances, Mr Street's evidence is compelling. Nevertheless, I must look at what evidence there is to put into the balance the other way on this issue. However, the answer to that is that there is no such evidence. The Claimant and First Defendant were given the opportunity to put in written evidence to rebut this telematic evidence of fraud and chose not to do so. Further, Mr Hegarty has been given the opportunity of giving oral evidence today in rebuttal, even without such a witness statement, and chose not to avail himself of that opportunity. Therefore, there is nothing to contradict Mr Street's evidence.

19. On that basis, I am quite satisfied that on balance of probabilities, the accident cannot have happened as alleged.

20. Further, it is plain, in my judgment, that there is further evidence to support the allegation that the accident did not happen as alleged and has been invented. There are significant Facebook and social media links between the occupants of the Claimant's vehicle, including the Claimant herself, and the Defendant. They are not direct links but there are a considerable number of linked individuals between all four participants. That may be explained by the fact that all went to the same school and therefore all have multiple friends of Facebook. It is not, for example, a situation where each has only five friends or ten friends or 20 friends. Each has many, many friends which gives scope for everyone you have ever been at school with coming on board as a friend. Nevertheless, those links add weight to the suggestion from the Second Defendant that there has been a fraudulent conspiracy here to invent the circumstances of the accident as such a conspiracy is more likely to be agreed between people who know each other or have common friends.

21. I then remind myself as to what fundamental dishonesty is and, in particular, of the test set out by His Honour Judge Maloney QC, which was approved by the Court of Appeal in *Howlett v Davies & Anor* [2017] EWCA Civ 1696.His Honour Judge Maloney said this, [44] - [45] of his judgment in *Gosling v (1) Hailo & (2) Screwfix Direct* [2014]

> "44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty:

dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.

45. The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty."

So, that is the test.

22. The circumstances here are that there is no evidence of an accident on any of the three days to the Defendant's car. On that basis, I find, on balance, that the alleged collision simply did not take place. It is difficult to think of something which is more fundamental to the claim than there having been a collision between the two relevant vehicles at approximately the time and date alleged. In those circumstances, I am quite satisfied that there has been fundamental dishonesty here on the part of the Claimant.

23. It follows as well that, given the defence that has been put in, and I think I should make this finding, it would come in any event, that there must have been dishonesty on the part of the First Defendant in putting forward his defence which agreed the collision at the date, time and place but just gave a somewhat different explanation as to the circumstances in which it had occurred.

24. So, in my judgment, the appropriate order, subject to any observations that Mr Roberts may have, is that, save that there is a finding of fundamental dishonesty against Claimant and First Defendant, the claim is dismissed.
