The importance of factual evidence in proving liability for accident (Whiting v First/Keolis Transpennine Ltd)

08/02/2018

Personal Injury analysis: Emily Formby, barrister at 39 Essex Chambers, points out that Whiting v First/Keolis Transpennine Ltd is a reminder to practitioners of the critical importance of understanding evidence and analysing the relative parties' evidence and assessments of the same.

Whiting v First/Keolis Transpennine Ltd [2018] EWCA Civ 4

What are the practical implications of this case?

This case confirms the need to properly assess whether matters are truly ones of expertise. The appeal was based on an assertion that the trial judge had erred in rejecting expert evidence. However, the Court of Appeal upheld the first instance judge's analysis of the facts. The expert conclusion depended on the facts found. If those facts changed, their conclusions changed.

The case was less a matter of true expert evidence than a matter of fact—where did the claimant fall from the platform to the rails? Was he capable of being seen by the train guard before the signal was given to move off?

Practitioners should pay great attention to the factual matrix behind a case and also ensure that all relevant factual evidence is to hand. Photographs of the station were marked with the claimant's assumed location after the accident and when pulled back onto the platform. Yet the only witness called on the issue said the marks were not made by him and he disagreed with their location. This vital evidence for the defence should have been properly analysed in advance, the evidence discussed with the witness and, ideally, a site visit arranged for him to reconstruct events and mark his own photograph in advance.

Care should also be taken to differentiate between true expert evidence (such as a measured sight line or a calculated distance/time valuation) and evidence based on facts that are to be determined (such as the time it took the claimant to cross the platform—this depends on the direction the claimant walked which was a matter of dispute; different routes would give different data).

This case also demonstrated that evidence of a usual practice can be powerful. The guard gave an outline of his usual practice on arrival at this station. His account was clearly based on accumulated experience rather than recollection of this event. Nonetheless, his estimate of time taken at the station was broadly backed up and confirmed by a timed reconstruction undertaken by the experts. The accuracy of the guard's general recollection of events was supported by the accuracy of his time estimate. Therefore, even if there is not first-hand recollection of an event, a practitioner should still gather as good an account as possible of usual practice and seek to bolster evidence in different ways.

What was the background?

The claimant, Mr Whiting, caught a northbound Transpennine Express train to Chorley in February 2010. He had been at a football match and had a considerable amount to drink. When he got off the train at about 7.30 pm he fell from the platform between two of the carriages onto the line. When the train pulled out of the station it ran over his feet, severely damaging both, resulting in a below-knee amputation of the left leg and amputation of the toes of the right foot. He also suffered serious soft tissue injury to his right thigh.

The defendant had the operating franchise for the Transpennine Express and was responsible for all aspects of the safe running of the trains and also (vicariously) for the acts and omissions of its staff while working.

The claim was brought in negligence, particularly that the train guard failed to keep an adequate observation of Mr Whiting's movements before giving the signal for the train driver to move off.

Since the claimant could not remember the accident and the train guard did not see the claimant fall, much of the evidence required reconstruction including where the claimant fell and how he suffered injury. The guard did not know there was any accident until he arrived at the next station.

The broad allegation by the claimant was that, having got off the train and walking to lean up against a wall at the back of the station, he moved back across the platform and fell between the fourth and fifth carriage. The guard, Mr Stitt, was at the rear of carriage 6 and, while it was his responsibility to check the passengers had cleared the train before moving off, he failed to notice the presence of the claimant before whistling to the driver and moving the train forward.

The claimant blamed Mr Stitt either for failing to notice that the claimant had left the back wall before moving the train and/or failing to look out of his open cab window one last time having got back into the train—that final look would have shown him the claimant moving to the train. It was the claimant's proposition that it would have taken him about 23 seconds to walk from the wall to the edge of the platform and fall. The guard should have watched the platform in this time. The failure to act by the guard was the key allegation.

However, at first instance, the trial judge held that the claimant had actually fallen between carriages 3 and 4 (further forward up the train) which would have taken only about eight seconds to walk to from the wall. Moreover, the gap between carriages 3 and 4 was not visible to the guard from the back of the train. He would not have been able to see the claimant unless he had stuck his head out of the window as it moved off; which he did not do and was not required to do. Therefore, the claim failed.

The appeal was based, primarily, on the contention that the judge had, in reaching his conclusion, rejected agreed expert evidence. Moreover, the guard should have looked out of his window and seen the claimant moving before the train left the platform.

What did the court decide?

The Court of Appeal rejected the appeal—the judgment at first instance remained. The claim was dismissed.

The court reminded itself that although the experts had decided the claimant had fallen between carriages 4 and 5, this was not a matter of expertise but their conclusions based on assumed facts. Assume different facts and their conclusions would be different.

Further, following *Fage UK Ltd v Chobbani UK Ltd* [2014] EWCA Civ 5, [2014] All ER (D) 234 (Jan) (at paras [114]–[115]), Henderson LJ confirmed that appellate courts will not interfere with findings of fact by trial judges unless 'compelled to do so'. It is not a matter of preferring a different view, the appellant court only interferes where it concludes that, 'the process of reasoning and the application of the relevant law, require it to adopt a different view'.

While a judge will only rarely reject the evidence agreed upon by experts on a matter within their technical expertise, not only did the court recall the words of Stuart-Smith LJ in *Liddell v Middleton* [1995] Lexis Citation 1839, 'we do not have trial by expert in this country; we have trial by judge', the court has to consider issues that are broader than or different from those upon which the experts opine.

So, in this case, it is wrong to see it as a matter of expert evidence rather the experts took certain objective facts (such as the time to walk from wall to platform) and applied conclusions to that. But most of the facts upon which data was based were subject to decision by the trial judge—so an estimation of where the claimant fell by reference to an assessment of where he was found was conditional on the evidence of the witness who found him—which the trial judge found to be entirely honest but an approximation: there were no contemporaneous measurements of data marks of photographs of where the claimant was found.

Therefore, the trial judge initially had to decide on the facts and then apply the relevant expert evidence—and on that basis, he concluded that the claimant had fallen further forward than advocated by the claimant, between carriages 3 and 4 where the guard could not see him.

This conclusion based on reasoned assessment of the evidence was unimpeachable.

Finally, the Court of Appeal rejected the suggestion that the guard should have leant out of his window to check the platform was clear before setting off. Had this been done it was agreed that the claimant would have been seen moving toward the platform edge and the train would have been stopped. However, the guidance given at the time was silent as to leaning out of the window and subsequently it was an action expressly forbidden due to danger.

The guard had not breached any instructions by failing to look out, the instructions were not deficient and he gave evidence he considered it a dangerous practice.

Given the unimpeachable factual findings and the analysis of the expert evidence, the Court of Appeal held that the first instance judgment was essentially made on matters of fact and was closely reasoned and not amenable to appeal. The appeal failed. The claimant's accident was not due to the defendant's negligence.

Emily Formby is well known for her extensive personal injury and clinical negligence practice. Within these specialisations she has wide experience acting for both claimant and defendant in all types of claims, both public and private and in related areas such as inquests, court of protection, cost disputes, insurance related issues, fatal accidents and product liability claims. Emily has been recommended as a leading junior in personal injury law and clinical negligence within the Legal 500, Chambers & Partners and Legal Experts directories for many years. She is a CEDR qualified mediator and a recorder appointed to sit in the Crown Court.

Interviewed by Kate Beaumont.

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