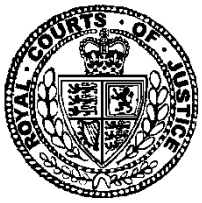

Neutral Citation Number: [2019] EWHC 1481 (QB)

Case No: D90BM156

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 12 June 2019

Before :

HHJ MARTIN MCKENNA

- -

Between :

Andru Mark Davies (a protected person by his litigation friend, Natalie Kay Pitman-Treharne)	**Claimant**
- and -	
Walon Limited	**Defendant**

- -
- -

Stephen Killalea QC & Nicholas David-Jones (instructed by **Hugh James**) for the **Claimant**
Matthew Brunning (instructed by **DWF LLP**) for the **Defendant**

Hearing dates: 20, 21 and 22 May 2019

- -

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.

HHJ MARTIN MCKENNA :

Introduction

1. Andru Mark Davies, the Claimant, who was born on 4th January 1975, was employed by Walon Limited, the Defendant, as an HGV Transporter Driver.

2. During the course of the afternoon of 3rd October 2014 the Claimant, in the course of his employment, was at the Defendant's Portbury depot in Bristol loading vehicles on to a Scania transporter registration number PJ12 FKS (trailer number AST1134) having previously delivered a number of vehicles to sites in Evesham and Staverton.

3. During the evening of the 3rd October 2014, whilst at home where he lived alone, the Claimant developed problems with vision and speech. An ambulance was called by a neighbour and attended at just after 22.30 hours. The Ambulance Report made by the ambulance crew records that the Claimant knocked on a neighbour's door stating that he was going to die and complaining of head pain which was recorded as being non-traumatic. His Glasgow Coma score was 15. He was clutching his head and had vomited twice and was refusing to open his eyes.

4. The Claimant was taken to the Royal Glamorgan Hospital's accident department where he arrived at 23.27 and was seen at 23.50 hours by which time his Glasgow Coma score was 8/15. A CT scan was arranged which demonstrated that the Claimant had sustained an intracerebral bleed in the left parietal lobe of his brain, with mid line shift to the right. By this time, his Glasgow Coma score was 10/15.

5. The Claimant underwent a craniotomy following which a second CT scan showed signs of cerebral oedema and mid line shift and he was returned to theatre for a subdural heamatoma and craniotomy. He was extubated on 14th October 2014. He exhibited severe expressive dysphasia and nominal dysphasia as well as cognitive and behaviour problems. The bone flap was initially replaced on the 7th April 2015 but he developed an infection and it had to be removed on 20th April 2015. In all he remained an in Patient until 13th May 2015 after which he was referred to the Brain Injury Service as an outpatient. He continued to suffer headaches and eventually he underwent a cranioplasty in January 2017.

6. It is the Claimant's case that this accident occurred due to an impact to his head during the afternoon of 3rd October 2014 and in the course of his employment by the Defendant. In short, what is advanced on the Claimant's behalf, is that the accident occurred whilst the Claimant was in the course of securing a vehicle on to the top deck of a trailer using tensional straps and was caused by a dropping by some 35 mm of the bed of the trailer deck which in turn caused it to jolt and a Mitsubishi Outlander vehicle ("the Mitsubishi") to bounce on its suspension which caused a sudden blow to the Claimant's head.

7. Unfortunately the Claimant was working alone and unsupervised at the time so there are no witnesses to whatever may have happened during the course of that afternoon and no report was made of the accident to the Claimant's employers although the Claimant did himself make a note in a document titled "Non-Depot Delay Slip" where he wrote "*banged my head three time".* That note was not submitted to the Defendant for understandable reasons given that the Claimant

remained hospitalised until the 13th May 2015. Nor, again for perfectly understandable reasons, is there any explanation for the reference in the note to the Claimant having banged his head a total of three times which, on the face of it, is inconsistent with the mechanism of the injury advanced on the Claimant's behalf. A possible theory is that the Claimant was confused at the time he wrote the note as a result of the head injury sustained but that is conjecture.

8. The Claimant's own recollection of the events in question is unreliable as a result of the head injury he sustained and his lack of capacity resulting in his being a protected party with the litigation being pursued on his behalf by his litigation friend.

9. Notwithstanding that lack of capacity, the Claimant has made a witness statement and did give oral evidence, with Counsel for the parties very sensibly having agreed in advance a suitable approach to that evidence having regard to his status as a vulnerable witness. In particular, Counsel for the Defendant limited his cross-examination to key issues such as the work method for loading vehicles and strapping them down, the Claimant's recollection of the events of the day and his differing accounts of what had happened over time and particular care was taken with the nature and content of questioning.

10. The Defendant for its part does not accept that the incident could or did happen in the way contended for, still less that it resulted from any negligence on its part and, in the alternative, alleges contributory negligence.

11. Pursuant to the order of District Judge Griffith dated 21st February 2018 this Court is only concerned with the preliminary issues "*of liability, contributory*

negligence and causation (the question of whether the Claimant's brain injury was caused by the alleged accident on 3rd October 2014)".

The Evidence

12. On behalf of the Claimant the Court has had the benefit of hearing factual evidence from the Claimant himself and from two neighbours, Layton Davies and Louisa Evans whose evidence was limited to the Claimant's presentation at home on the evening of 3rd October 2014.

13. On behalf of the Defendant the Court has had the benefit of hearing factual evidence from Harvey Parsons and Tim Guntert who, between them, were responsible for training the Claimant on the use of car transporters over a two week period and from Ian Calton who was on part of the same training course (run by Harvey Parsons) as the Claimant and from Simon Todd whose evidence principally related to the Claimant's movements on the day in question by reference to relevant paperwork. The Court has also read the evidence of Trevor Stutt, a fleet engineer employed by the Defendant which related to the maintenance history of the transporter which the Claimant was operating on the day in question and from which it is clear that there were no maintenance issues with the transporter.

14. In terms of expert evidence, the Court has had the benefit of reading reports, including joint statements, from experts in three disciplines:

    Engineering; Mr Rawden for the Claimant and Mr Carless for the Defendant;

Neurosurgeons; Mr Redfern for the Claimant and Mr Maurice-Williams for the Defendant and

Neuro-radiologists; Dr Annesley-Williams for the Claimant and Dr Paul Butler for the Defendant.

15. The Court has also read a report from Professor Rodger Wood, a neuropsychologist instructed on the Claimant's behalf.

16. It is common ground that the Claimant commenced his employment with the Defendant on the 4th August 2014 prior to which he had spent a number of years in the Army. He had held an HGV licence for 16 years but he had not previously driven a car transporter. He had an engineering background.

17. On the commencement of his employment, the Claimant underwent a two week period of training initially with Mr Guntert at Widnes and in the second week (10-15 August) with Mr Parsons at Henstridge. Mr Calton was also trained by Mr Parsons at the same time as the Claimant and in fact was the only other trainee on that course.

18. On 3rd October the Claimant made a delivery of vehicles to premises in Evesham and then at Staverton. He then drove his transporter to Portbury Docks near Bristol and is recorded as having first of all gone to the Mitsubishi loading area at 16.12 where he loaded a total of 3 vehicles and then at 16.38 he went to the Vauxhall loading area where he loaded a further 4 vehicles over the next 48 minutes. He then parked the transporter at 17.31 in the main Portway site and drove to his home in Pontypridd using his own vehicle arriving, according to neighbours, at about 7pm. He subsequently collapsed at about 22.30.

The mechanics of the injury

19. As I have recorded it is the Claimant's case that the injury occurred when the Claimant was in the course of securing the Mitsubishi on the upper deck of the trailer.

20. Unless the front of the upper deck had been left in its loading position when the Claimant completed his delivery at Staverton, prior to loading the Mitsubishi on to the upper deck, it would have been necessary to lower the rear portion of the upper deck into its loading position. The deck is supported by a deck locking system that involves spring loaded steel "locking pawls" projecting into and resting on a series of steel ladder rack slots. Levers at the top of a control panel coupled with red buttons are used and the raising and lowering of the deck is powered by an on-board diesel powered donkey engine.

21. The red buttons are engaged using the knee whilst the levers are hand operated. In order for the top deck to be in a safe and secure position after operation of these controls the red push buttons need to be engaged by the operator's knee until the deck is fully settled in or "bottomed out". When positioning the deck, the operator should move the deck to a little above the intended position then lower the mechanism to a small extent to ensure full engagement, if not it is suggested that a situation can arise in which the locking pawl may not be fully engaged but merely resting in a precarious position on the edge of a rack aperture slot which is a distance of about 35mm above the intended engagement position. This is what is contended happened in this case, relying on the engineering evidence of Mr Rawden.

22. Having operated the controls to lower the top deck the operator would then reverse the Mitsubishi in to position at the front of the top deck that is to say nearest to the tractor. It is then necessary to secure the Mitsubishi to the deck with tensioned straps. Three hooks have to be inserted into perforated holes in the transporter deck to get the straps in to position before they are tightened.

23. It is fair to say that the Claimant's evidence as to what happened has evolved over time. For example, when he saw Mr Redfern in November 2015 he indicated that he had no recollection of the events in question. It was initially pleaded on his behalf that his head had been crushed between the Mitsubishi and the deck of the trailer. That case has however been abandoned in the light of the medical evidence. In his witness statement the Claimant suggested that he was lying down on his side with his knees on the deck and reaching under the Mitsubishi and round its tyre in order to attach a hook when there was a sudden jolt and he had a memory of his head being stuck momentarily between the sill of the Mitsubishi and the beam or lip of the trailer bed. This was because a hook had become detached in the course of trying to fit the strap and needed to be put back in to place. In order to see what he was doing he was reaching under the Mitsubishi with his head close to the wheel and the underside of the vehicle.

24. In his oral evidence he recalled that he was on his knees attaching the straps when he became aware that the first hook had become loose. He described how he lent forward with his left hand whilst steadying himself with his right hand on the tyre of the Mitsubishi and demonstrated what he was doing with the assistance of a model which he had made and brought to court for the purpose.

The next thing he knew was coming round with his head stuck between the tyre of the Mitsubishi and the beam or lip of the trailer-bed. He felt dizzy but it was not painful. He recalled going to the front of the cab of his transporter and looked in the side mirror to see if there was any sign of blood. He then continued to load vehicles, first at the Mitsubishi area , then at the Vauxhall area, did his paperwork, parked up and then drove home in his own vehicle.

25. The Claimant was asked whether once he had unloaded the last of the vehicles at Staverton he needed to change the deck height before driving on to Portbury to which he replied no he only needed to pick the back up, that is to say the rear section of the deck which, when lowered, enabled vehicles to be driven on and off the top deck.

26. Layton Davies explained that he was a neighbour of the Claimant and lived in the same block of flats and indeed on the same landing as the Claimant and had known him for a number of years. His wife had taken delivery of a parcel for the Claimant earlier in the day and so when he saw the Claimant pulling up outside the block of flats he went out to meet him in order to hand the parcel over to him. He met the Claimant at his front door. They had a brief conversation during which the Claimant said he had a bad head and that he had had a bump at work. He did not give any further detail. The Claimant added that he was therefore going to have a quiet night in.

27. The next Mr Layton Davies knew was around midnight when there was a banging on his door and the Claimant was on the floor in his underpants and clearly in a lot of pain. He was asking for help and referring to his head. He was not coherent so Mr Layton Davies' wife called for an ambulance. When

the ambulance arrived, he helped the ambulance crew take the Claimant down to the ambulance and it was he who gave the ambulance crew the Claimant's name and other details as noted on the Ambulance Report. At the time, he did not link the Claimant's earlier reference to a bang on the head at work to what was happening to the Claimant and could not recall whether he was asked whether there was a history of trauma (the ambulance team having recorded "*head pain non-traumatic*" in their report.)

28. Louisa Evans recalled that she saw the Claimant as he arrived home and asked him if he would be popping over for a coffee which he often did but the Claimant declined saying that his head was killing him and he just wanted to go to bed.

29. I have no hesitation in accepting the substance of the evidence of Mr Layton Davies and Ms Evans, both of whom were truthful witnesses doing their best to recall the events of the night in question and I am satisfied on the balance of probabilities that at about 7pm the Claimant did complain to them that he had suffered some sort of injury at work earlier that afternoon.

30. When considering what, if any weight the Court should attach to any particular piece of the Claimant's evidence I have had at the forefront of my mind the fact that he is a vulnerable witness by virtue of his injury and that any inconsistencies in his evidence are readily attributable to the effects of the injury. I have also borne in mind the contents of Professor Wood's report and noted that he has opined that the Claimant continues to have difficulties focusing and sustaining attention and that this feeds in to problems of memory; that he has a tendency to think discursively and to talk about matters which are only tangentially related to the subject matter of the discussion and that the Claimant can be

muddled about what he has been told, by who and in what context and has difficulty placing events in time and in chronological order. I also have regard to the fact that the Claimant has spent a great deal of time thinking about what happened, has dreamt about it and has read a great deal about it with the inevitable consequence that his memory will have been affected by what he has read and dreamt about.

31. It was also suggested on behalf of the Claimant that he presents better than his mind is actually performing. I entirely accept the force of that submission. That said, his evidence as to the events leading up to his finding himself lying between the tyre of the Mitsubishi and the lip or beam of the deck of the trailer was clear and unequivocal. He clearly indicated that he did not put his head beneath the sill of the Mitsubishi and his description of how he was kneeling and supporting himself with his right hand as he stretched forward with his left hand is entirely consistent with how he would have been trained to attach the belts as described by Mr Parsons in his evidence. Moreover, it was clear from the evidence of Mr Parsons and Mr Calton that the Claimant was the sort of person who would faithfully follow the instruction he was given.

32. That evidence from the Claimant coupled with his recollection of checking in a side mirror whether he was bleeding from his head leads me to conclude on the balance of probabilities that somehow or other the Claimant did indeed hit his head whilst trying to attach a belt to the Mitsubishi. The real issue is whether on the balance of probabilities the cause of his so doing was the sudden and unexplained dropping of the deck and, if so, whether it can be said that that was

caused by any negligence on the part of the Defendant. There is also the issue of whether that injury was causative of the brain injury.

Did the accident occur in the way contended for by the Claimant?

33. Mr Rawden summarises his conclusions as follows at paragraph 6.1:-

> "*In my view, it is credible that a locking pawl could come to rest at a precarious position on the edge of a rack aperture slot, and then without support from the hydraulic system, suddenly drop later in time probably to the next slot below, a distance of 35mm. The engagement of the pawl then will bring the dropping deck in such circumstances to a sudden halt, at which point the vehicle on board such as the Outlander, will continue to lower or bounce downwards on its suspension until the springs (within the suspension arrangements) sufficiently compress to overcome the gravitational effect of the sudden stopping of the vehicle. In effect, the vehicle would bounce the same way as it does when travelling over an undulation or depression in a roadway. Based upon the evidence I have seen in particular in the absence of a relevant causative defect this would appear to be overwhelmingly the most likely cause of the accident.*"

34. It is submitted on behalf of the Claimant that this is entirely feasible as an explanation. That may be so, but is it probable? Mr Carless' opinion was to the contrary. He suggested that the deck locking mechanism provided a positive and well lubricated engagement between the locking pawl and the slot. So far as Mr Rawden's theory was concerned he commented as follows at paragraph 41 (c) of the joint statement:-

> "*There is currently no evidence of the particular sort of damage to a locking pawl and/or a slot that could result in a locking pawl only partly entering a slot. There is also no evidence of a blockage at any of the slots that could result in a locking pawl only partly entering a slot and Mr Carless finds it difficult to envisage a blockage that could result in precarious engagement of a locking pawl. The witness marks in the grease at the backs of the slots (shown in the photograph above), which were present at all relevant slots at Mr Carless' inspection in December 2015, are indicative of full engagement of locking pawls in to the slots, suggesting that this scenario did not occur.*"

35. Moreover he commented further at paragraph 42 as follows:-

> "*….in the event of precarious engagement of the deck lock, which is unlikely as described above, the disturbing dynamic force of a vehicle being loaded on to the deck would almost certainly be sufficient to dislodge any precariously engaged pawl and precipitate dropping of the deck to the next slot while the driver was still inside the vehicle. It is far less likely that a pawl would release from a precarious position after a relatively heavy vehicle had been loaded and while the driver was then securing the vehicle to the deck. To illustrate, the relevant Mitsubishi Outlander weighed approximately 1,800kg whereas the Claimant likely weighed less than 100kg."*

36. There is no evidence of any problems with any component of the transporter which could have caused a sudden dropping of the deck thus excluding an earlier theory of a problem being caused by a leakage of hydraulic fluid. Nor is there any evidence of damage to the deck lock slots or to the pawls. Moreover the evidence shows that the vehicle remained in use without incident or repair from 3rd October until 20th October 2014 when it underwent a routine service with nothing untoward being discovered. Whilst not determinative that is nevertheless a significant fact.

37. There is also no evidence of the sort of precarious engagement advocated by Mr Rawden having happened subsequently or prior to the events in question. Mr Calton in his second witness statement did refer to his never having known a deck lock to fail but that it was not unheard of but that was in the context of operator error in not having pushed the levers forward appropriately.

38. Mr Carless was in my judgment a careful and considered witness who was careful not to rule out entirely possible causes even where he considered them to be unlikely. He was in short, an impressive witness. He indicated that he could not envisage a scenario whereby the deck lock could have become lodged

in a precarious position and then remained so after the loading of a vehicle and then somehow became dislodged subsequently. To my mind the point which he makes about the likely effect of disturbing dynamic forces of a vehicle being loaded is compelling – all the more so if, as the Claimant indicated in his evidence if that evidence is accepted, the transporter was in fact unloaded at Staverton then driven to Portway and the Mitsubishi loaded all since the last time the relevant part of the deck was raised. Moreover, and to be fair to be Mr Rawden, he too accepted that if the transporter had been driven to Portway with the deck in the raised position that would substantially undermine his theory. Mr Rawden's explanation that the loading of the vehicle could have made the already precarious position of the pawl more precarious still such that a later minor disturbance could have caused the pawl to release lacked credibility. Furthermore, any dropping of the deck could only occur if there had been a combination of faults or failures involving the deck lock and the hydraulics.

39. In my judgment, accepting as I do the thrust of the evidence of Mr Carless on this point, the likelihood of precarious engagement, whilst theoretically possible, is so remote as to be discountable.

40. It follows in my judgment that any injury caused to the Clamant was not caused by any sudden drop of the trailer deck. Whilst I am satisfied on the balance of probabilities that the Claimant did indeed bang his head during the course of the afternoon of 3rd October, it is much more likely that the cause was the Claimant simply overbalancing whilst trying to re-engage the first hook which had become dislodged and no question of negligence on the part of the Defendant arises.

41. There is no need for me therefore to go on to consider the evidence as to the nature and extent and adequacy of the training given to the Claimant and the like. Had it been necessary for me to decide the issue of negligence, however, I would have had no hesitation in concluding that there was no breach of duty on the part of the Defendant on the facts of this case. The training provided by Mr Parsons, as described by him and indeed by Mr Calton and indeed supported by the evidence of the Claimant, was plainly detailed and comprehensive and the suggestion that the Claimant ought to have been positively instructed not to place his head beneath or in close proximity to the sill of the Mitsubishi is unreasonable and unsustainable. To my mind there is nothing in the difference in wording between the documents entitled respectively SSW09 and ASSW09.

42. I am reinforced in my conclusions by a consideration of the medical evidence. Each of the medical experts concedes that the cause of the Claimant's brain injury could have been traumatic or spontaneous but, for the various reasons they rely on, Mr Redfern and Dr Annersley-Williams take the view on the balance of probabilities that the cause of the injury was traumatic whilst Mr Maurice-Williams and Dr Butler conclude to the contrary.

43. Mr Redfern in his report opines that the cause of the injury was the Claimant's head being crushed when the Mitsubishi bounced on the bed of the transporter. In his oral evidence he modified that view to a blow of some force as the Claimant's head came into contact with some part of the trailer. As the blow to the head was on the right side, the haematoma represented a contre-coup injury. Symptoms then developed over the course of the evening. Mr Redfern based

his view on a number of factors including in particular the explanation he was given of the Claimant having received a blow to the head; the evidence that the Claimant had suffered an episode of confusion which he considered to be consistent with trauma; the Claimant's recollection of having checked his head in the cab mirror for bleeding and negative investigations, consistent with trauma, including digital subtraction angiography which excluded an underlying aneurysm or arteriovenous malformation.

44. His view was however predicated on there having to have been a very significant force transmitted through the Claimant's skull, if only briefly.

45. Mr Maurice-Williams, by contrast, expressed the view on the balance of probabilities that the injury was a spontaneous intracerebral haemorrhage unrelated to any head injury. He believed that if a head injury had precipitated bleeding into the brain then it was most unlikely that the Claimant would have been able to complete his work loading Mitsubishi and then Vauxhall vehicles on to the transporter and then drive the very considerable distance from Bristol to Pontypridd. He also drew support from the CT scanning which did not show any sign of any injury and in particular the absence of any sign of injury to the opposite side of the brain as might have been expected if the intracerebral haemorrhage represented a contre-coup injury. In the circumstances, Mr Maurice-Williams concluded that the likely cause of the bleed was an underlying vascular malformation which most probably was subsequently destroyed by the force of the haemorrhage since angiography was negative and no vascular malformation was found at surgery. He pointed out that such vascular malformations could be destroyed by the force of haemorrhage such

that nothing would be seen on an angiography or at the time of surgery. He also noted that there were no external signs of injury reported and that the Ambulance Report recorded that it was a non-traumatic event.

46. So far as the neuro radiologists are concerned, Mr Butler's evidence was that the imaging showed no evidence of craniocerebral trauma such as scalp soft tissue swelling, a skull fracture or intracranial haemorrhage and that the image findings were compatible with a spontaneous haemorrhage. Notwithstanding the lack of evidence of trauma, Dr Annersley-Williams expressed the view that the cause of the Claimant's injury was trauma to the head putting forward a theory, for which there is frankly no evidential basis, that the reason for the absence of evidence of trauma was the glancing nature of the blow from the rounded protuberance of the plastic moulding of the sill of the Mitsubishi. If the injury were not caused in this way but by impact with the metal wheel arch of the Mitsubishi her opinion is undermined.

47. The difficulty with the Claimant's case on causation is the dichotomy between the need for there to have been a blow of sufficient force on the one hand and on the other the absence of any evidence of soft tissue injury, coupled with the delay in the onset of serious symptoms and the evidence of the activities undertaken by the Claimant after the injury was sustained including the loading of vehicles and the drive home from Bristol to Pontypridd coupled with the explanation put forward by Mr Maurice-Williams for the absence of any evidence of vascular malformation. For my part I have no hesitation in preferring the evidence of Mr Maurice-Williams and Dr. Butler to that of Mr Redfern and Dr. Annesley- Williams.

Disposal

48. It follows in my judgment that this claim should be dismissed.

49. I trust that the parties will be able to agree the terms of an order which reflects the substance of this judgment.

50. Finally, I would like to take this opportunity to thank Counsel for all their considerable assistance in this case.