Neutral Citation Number: [2022] EWHC 2642 (KB)

Case No: G72YJ538

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Nottingham Crown Court
60 Canal Street, Nottingham, NG1 7EL

Date: 25/10/2022

Before :

THE HON. MR JUSTICE TURNER

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Between :

Darren Eaton	**Claimant**
- and -	
(1) The Auto-Cycle Union Limited (trading as ACU)	
(2) Motor Sport Circuit Management Limited	
(3) Stephen Tomlinson and Pamela Redmayne (Sued as the Chairman and Race Secretary of the Preston and District Motorcycle Club)	
(4) Eddie Nelson	
(5) Chris Berisford	**Defendants**

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Bill Braithwaite KC and **Anthony T Goff**
(instructed by **Irvings Law Solicitors**) for the **Claimant**
William Clerk (instructed by **DWF Law LLP**) for the **Defendants**

Hearing dates: 18, 19, 20 July and 22 September 2022

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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 HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. Prior to the accident which gave rise to this claim, the claimant was an experienced and successful motorcycle racer. On 15 October 2017, he was competing in the Freetech 50cc Motorcycles Championship Race at the Three Sisters Race Circuit (or "the circuit") in Ashton-in-Makerfield.
2. Tragedy struck on the second lap. As the claimant was approaching Joey Dunlop Corner, his front wheel made contact with the rear wheel of the motorcycle immediately ahead of him. The impact sent him wide and he was unable to negotiate the corner. He collided with the safety barrier, which comprised a tyre wall, and suffered life changing injuries as a result of the impact.
3. The main thrust, albeit not the entirety, of the claimant's case is that if straw bales had been positioned at the point of impact then he would have avoided serious injury and that the absence of such bales is attributable to the negligence or breach of section 2 of the Occupiers' Liability Act 1957 of the defendants and each of them.
4. Liability is denied and the matter comes before this court on the preliminary issues of breach of duty and causation.

THE ORGANISATIONAL STRUCTURE

5. Founded in 1904, the Fédération Internationale de Motocyclisme ("FIM") is the global governing body of motorcycle racing.
6. The national governing body in the UK is the Auto Cycle Union ("ACU") which is the first defendant in this case. It is authorised to issue permits to organisers of racing on roads under the provisions of The Road Traffic Act 1988 (Motor Racing) (England) Regulations 2017.
7. Individual circuits wishing to hold international class events need an FIM licence. They are referred to as homologated circuits. Those which are not, which include the Three Sisters Circuit, only require a licence from the ACU.
8. The safety standards imposed upon homologated circuits are generally more stringent than those in respect of local circuits governed by the ACU. This is because high level international racing involves larger circuits at which higher speeds are achieved. Thus the ACU is not bound by the standards of the FIM but will, nevertheless, have due regard for FIM standards when laying down national guidance.
9. Mr Nelson, the fourth defendant, was responsible, as track inspector, for inspecting and approving the Three Sisters Circuit on behalf of the first defendant. Without his licenced approval, no racing could take place.

10. The second defendant was the owner and operator of the circuit and the third defendant was the organiser of the event in which the claimant was injured.
11. Finally, the fifth defendant was the ACU qualified Clerk of the Course on the day of the accident. One of his responsibilities was to check that the circuit was compliant with the course licence issued by the first defendant.
12. It is to be noted that all of the defendants are jointly insured and represented as a result of which the need to draw fine distinctions between their respective roles has been diminished.

THE BACKGROUND

13. An account of the developing trends in circuit safety generally and the safety history of the Three Sisters Circuit in particular is necessary in order to place the state of affairs on the day of the accident in its proper context.
14. On 20 April 2012, Mr Nelson's Course Inspection Report listed, as required additional protective devices, the provision of straw bales; all were to be positioned upright against a tyre wall at various locations identified on a plan of the circuit. One such location coincided with the location of the point at which the claimant's accident was later to occur near the Joey Dunlop Corner. On the strength of his inspection, Mr Nelson permitted a track licence to be issued for the years 2012, 2013 and 2014 conditional, *inter alia*, upon compliance with the requirements identified in the body of his report.
15. At the time of this report, straw bales were, and had been for very many years, recognised at all levels of the sport to make a valuable contribution to the effectiveness of safety barriers. The list of FIM homologated protective devices comprised five categories from A to E. Type C included straw bales wrapped in a fire-resistant bag. Type D comprised car tyre barriers covered with a conveyor belt. Type E covered simply car tyre barriers. I am satisfied that the intention was to list the devices in descending order of perceived safety.
16. However, following a re-appraisal of the relative merits of the types of protective devices appropriate for homologation, the FIM set its face against the continued use of straw bales. By a letter dated 23 February 2016, widely distributed to its members and other interested parties, the FIM stated:

> "We also remind you that, as from 2018, the straw bales will be prohibited on the FIM homologated circuits." [Emphasis in original]. Within the description of type C devices was incorporated:
>
> "*NB: As from 2018, straw bales will be forbidden.*"

17. Mr Nelson returned to inspect the circuit and reported his findings on 19 April 2016. At this stage, the FIM ban on the use of straw bales had yet to come into force and, in any event, the circuit was not required to adhere to the homologated standards. Mr Nelson continued to stipulate the provision of straw bales "upright against" the tyre barrier in the vicinity of the Joey Dunlop Corner. By an addendum to this report, dated 15 March 2017, Mr Nelson authorised the extension of the ACU licence to cover the years 2017 and 2018 subject to the work which he had recommended having been carried out.
18. On 30 April 2017, a race was held at the circuit and photographs of the event close to Joey Dunlop Corner were taken. They reveal an unsatisfactory lay out with straw bales propped up against the tyre wall; not upright, as Mr Nelson had specified, but at a significant angle to the vertical.
19. During the course of a race meeting of 8 – 9 July 2017, a serious accident on the circuit prompted the third defendant Motorcycle Club to conduct a safety review the results of which were reported upon on 31 July 2017. The report makes for unhappy reading. A number of safety concerns were raised. Those relating to safety barriers record that they have rotted and degraded badly. The tyres were, for the most part, unbanded. Attention is drawn to the fact that the FIM was to ban the use of straw bales on the circuits over which they had jurisdiction in 2018. The report concludes that the items listed were critical and would have to be remedied before the meeting in September 2017.
20. On 9 August 2017, following a track inspection carried out on the day before, Mr Nelson also expressed concern about the condition of the safety barriers. A photograph taken on the day of the inspection illustrates the ramshackle condition of the tyre barrier at Joey Dunlop Corner. He stipulated that the tyre barriers would have to be re-aligned as cylinders and then banded together. He declared that, until all the work had been done to an acceptable standard, no track licence would be issued for any ACU events on the circuit.
21. On 23 August 2017, an inspection was carried out by the Motor Sports Association to determine whether or not it should issue a permit in respect of a Kart Club race meeting which was due to be held over the following weekend. The conclusions of this report were broadly favourable, noting that "the improvement achieved is significant". The tyres had been re-aligned and neatly stacked but, it is to be noted, that they had not yet been banded.
22. Mr Nelson returned to the circuit on 4 September 2017 and issued an interim report on his findings on 7 September 2017. He noted that there was still work to be done to the tyre wall on the left to the approach to Joey Dunlop Corner but was satisfied that, on the whole, the perimeter circuit

was vastly improved from when he had last inspected. Significantly, he agreed that any straw bales around the circuit could now be removed. In evidence he explained that he had taken this decision following consultation with one Paul King, the ACU road race chairman and member of the FIM committee. Although not strictly bound by FIM requirements, the ACU was paying them due regard. He also explained that when straw bales had previously been deployed that, unless they were positioned vertically, they would be liable to present a ramp rather than, as intended, a barrier. This is why in his earlier reports he had specified that they should be placed in an upright position.

23. In accordance with Mr Nelson's instructions, the straw bales which had previously been in place were removed in time for the next meeting on 10 September 2017. No complaints were made by any rider or official about their absence.

24. The claimant's accident took place during the next meeting on 15 October 2017. Photographs taken at the scene shortly after depict a tyre barrier contained within a conveyor belt and attached thereto by bolts. There are no straw bales. Some of the tyres have been banded together but most appear to be loose. In this respect, at least, the terms upon which Mr Nelson had granted the licence had not been entirely fulfilled.

THE CLAIMANT'S CASE

25. It is contended on behalf of the claimant that on the morning of the race steps ought to have been taken to address the deficiencies in the tyre wall. These could and should have involved the re-introduction of straw bales which, had they been deployed, would have saved the claimant from serious injury. Alternatively the race should have been cancelled or the claimant warned of the danger.

THE EXPERTS ON BREACH

26. Mr Parrish gave evidence on behalf of the claimant. He described himself as a "rider, driver, team manager, owner and commentator in many fields of motor sport".

27. Mr Jowitt gave evidence on behalf of the defendant. He is a qualified engineer with experience in accident reconstruction and the examination of safety fence systems following collisions.

28. Unhappily, Mr Parrish cut a rather sorry figure in the witness box. Quite simply, he lacked the necessary expertise to substantiate and justify his conclusions. It thus came as no surprise to me that the claimant's written closing submissions placed no specific reliance upon any part of his evidence.

29. At the centre of the claimant's case, as originally framed, was the assertion that the straw bales should never have been removed because they were safer than tyre barriers. However, I am sorry to say that, Mr Parrish's evidence to this effect was entirely devoid of scientific foundation or logical analysis.
30. Mr Jowitt, in contrast, performed laboratory tests which demonstrated that straw bales are significantly stiffer than a tyre wall. Accordingly, in this regard, the deployment of straw bales would have made the barrier generally less rather than more safe. Mr Parrish was simply unable to counter these findings having carried out no tests of his own.
31. Understandably, colleagues of the claimant from the motorcycling fraternity gave evidence that they had greater confidence in the safety of straw bales than of tyre walls. After all, they had all became used to the deployment of straw bales over the many years of racing experience. I do not doubt the sincerity of their views. However, their assessments were, as one would expect, not based upon science but upon anecdote and instinct and were thus unreliable.
32. My conclusions on this issue are also consistent with the introduction of the FIM ban on straw bales for homologated tracks which was due to come into force shortly after the claimant's accident. Prior to this change in FIM's approach, I am satisfied that straw bales had been considered to be safer than tyres and thus ranked at Type C2 in the list of protective devices as opposed to Type D which covered car tyre barriers covered by a conveyor belt. But, by the time of the claimant's accident, it was imminent that straw bales would be banned under the FIM rules. Needless to say, they were no more safe in 2017 than they would have been in 2018 and it is fair to assume that the timing of the ban was simply to give those responsible for track safety an adequate opportunity to comply.
33. In the event, there really was no plausible evidence before me that the safety of the barrier in the vicinity of the accident had been compromised by the removal of the straw bales.

THE CLAIMANT'S RESIDUAL CASE

34. The central contention now relied upon by the claimant is that the unbanded tyres were not compliant with the terms of Mr Nelson's licence. I am in no doubt that this was the case. The contemporaneous photographs amply demonstrate that a significant proportion of the tyres had not been banded.
35. However, I am satisfied that the central need for banding related to the risk that loose tyres would be liable to be displaced in the event of a collision and create a hazard on the track. It could not be argued on the evidence that the fact that the tyres were unbanded made any difference to the injuries sustained by the claimant. Indeed, counsel for the claimant conceded that

it could not be asserted that the lack of banding made the difference between the actual injury sustained by the claimant and no injury or a lesser injury.

36. It follows that it would have been illogical for those responsible for track safety to seek to resolve the hazards presented by the condition of the tyre barrier by re-introducing straw bales the purpose of which would not mitigate such hazards. Moreover, I am satisfied on the evidence that putting such bales in position would have rendered the barrier not more but less safe.

37. In addition, as I have already noted, when straw bales had been required by Mr Nelson on earlier occasions he had specified that they should be positioned upright against the tyre wall and not at an angle to the vertical. There was no requirement the bales should be any higher than the tyre wall. The photographs show that the bales had been wrongly stacked at an angle earlier in the year and, by happenstance alone, were higher than the tyres. If, contrary to my primary view, there was a case for re-introducing straw bales, then they could have been positioned in a way which presented no more forgiving an obstacle to the claimant's course than did the unadorned tyre barrier. The height of the bales above the tyres was not identified to be a safety consideration.

38. It is further alleged by the claimant that the run-off area between track and barrier was inadequate and/or that recticel or similar barriers should have been provided. Neither allegation was very fully explored in evidence. However, I accept Mr Jowitt's evidence that there are products available which are designed to collapse through air or sponge rubber but that this may cause pocketing and allow them to be dragged along. I am not satisfied that the provision of such or similar products was required to discharge the defendants' duty of care in this case. Furthermore, there is no evidence upon which I can safely conclude that the length of the run-off was shorter than should reasonably have been provided as long as the barrier was adequate.

THE LEGAL ANALYSIS

39. Although, there was a voluminous bundle of authorities relied upon by the parties there was, ultimately, no real dispute that the duty in this case was one to take such care as was reasonable not to expose a participant in any given race to a risk over and above that inherent in the sport of motorcycle racing. No purpose would be served by reviewing the caselaw which lies behind this uncontroversial proposition.

40. Although not formally conceded by the defendants, I am in no doubt that the persisting unsatisfactory state of the unbound tyres in the barrier amounted to a breach of duty. However, the scope of the duty of which the

defendants were in breach was directed towards the elimination of the risk thereby created and the reintroduction of straw bales would simply not have addressed this.

41. The position is analogous to that described by Lord Hoffman in ***South Australia Asset Management Corporation Respondents v York Montague Ltd*** [1997] A.C. 19:

> "A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.
>
> On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct."

42. In this case, if the race had been cancelled the claimant would, like the mountaineer, not have sustained his injury. However, his injury was not caused or exacerbated by the factor which would have justified cancelling the race.

43. In ***Meadows v Khan*** [2022] A.C. 852, the Supreme Court confirmed that the SAAMCO approach was not confined to economic loss claimed in the context of commercial disputes. Put simply, on a claim in negligence a defendant is only liable in damages in respect of losses of a kind which fall within the scope of his or her duty of care. At paragraph 33, the court observed:

> "Lawyers have focused on the scope of duty question since the decision of the House of Lords in SAAMCO but the question was not conjured up in that case and arises in a wider context. As Lord Sumption JSC pointed out in Hughes-Holland [2018] AC 599, paras 21–24, it is an established principle that the law addresses the nature or extent of the duty of the defendant in determining the defendant's liability for damage. Thus, in Roe v Minister of Health [1954] 2 QB 66 Denning LJ said that the questions of duty, causation and remoteness run continually into one another and continued (p 85):

> "It seems to me that they are simply three different ways of looking at one and the same problem. Starting with the proposition that a negligent person should be liable, within reason, for the consequences of his conduct, the extent of his liability is to be found by asking the one question: Is the consequence fairly to be regarded as within the risk created by the negligence? If so, the negligent person is liable for it: but otherwise not.""

44. In this case, I am satisfied that the injuries sustained by the claimant were simply not within the risk created by the negligence.
45. Furthermore, I am not satisfied that if the claimant had been told about the removal of the straw bales he would have chosen not to race. Many of his colleagues continued to race on the course at meetings after the accident in the full knowledge of the removal of the bales and I am sure that the claimant, but for his accident, would have followed suit.
46. If he had been successful in establishing liability, I am not satisfied that he would have been found to have been contributorily negligent. He was entitled to rely upon the defendants to provide a safe course and, in the absence of more obvious hazards than the removal of the straw bales, it would be a counsel of perfection to expect him either to raise the issue or decline to race.

CAUSATION

47. In consequence of my conclusions on the issue of breach of duty, it is not strictly necessary for me to make a finding as to what would have occurred as a matter of fact had straw bales been in place. Although, I do not intend to analyse the issue in the same level of detail as would have been appropriate had the matter not been of merely hypothetical significance, I will at least articulate my conclusions in broad terms.
48. In order to do this it is necessary first to identify the counter-factual scenario. In this regard, I repeat that for there even to be an argument that the outcome would have been worse for the claimant then it would be necessary to assume that the straw bales would have been stacked at an angle to the vertical contrary to Mr Nelson's specifications and/or would have to have been a different height to the tyre barrier. The medical experts agreed that if the claimant had struck a barrier comprising straw bales positioned so as to present the same barrier as tyres would have done in the same place then the injuries sustained would have been similar. Since the height of the bales (beyond that of the tyre wall) would not have been considered to be relevant to the issue of safety and the angle from the vertical actually less safe then the exercise of determining how the accident actually happened is academic.

49. Relying upon the evidence of Mr Jowitt and Mr Way, consultant spinal and orthopaedic surgeon, the defendants contend that the claimant sustained his injury as he went over the front of his motorbike and hit either the barrier or the ground. However, I prefer the evidence of Professor Ollivere, consultant spinal and orthopaedic surgeon called on behalf of the claimant on this topic. I find that it is more likely than not that the claimant struck the barrier to his left and then front in such a way that the top of his body was higher than the barrier and the bottom was lower. As a result the top edge of the barrier provided a fulcrum over which his spine was bent thus giving rise to the trauma to his thoracic spine which is accepted to be a relatively rare phenomenon. It is less likely that there was sufficient time and space within which the claimant could have rolled over and struck the barrier or ground with his back.

CONCLUSION

50. I conclude:
    (i) The only relevant respect in which the track was in breach of duty was in the failure to comply with the safety requirement laid down by Mr Nelson to bind the tyres in the tyre wall together;
    (ii) The central purpose of binding the tyres was to prevent loose tyres from escaping onto the track and causing danger to those participating in the race;
    (iii) Binding the tyres would not have presented a more yielding and forgiving surface to a rider colliding with the barrier (if anything, the surface would be less so);
    (iv) Mr Nelson's decision to abandon straw bales as a component part of safety barriers on the track was entirely justified. Indeed, although he was not strictly bound by the FIM standards, he may have been subject to criticism for not taking the prompt opportunity of his inspection to abandon the deployment of straw bales in anticipation of the introduction of the FIM ban;
    (v) Reintroducing straw bales would not have been an appropriate or even rational response to the risk posed by unbound tyres. Indeed, it would probably have made the barriers less rather than more safe;
    (vi) I am satisfied that there was an impact between the claimant and the upper edge of the tyre barrier and that this determined the unusual anatomical location of his injury. However, the height of any straw bale above the level of the tyre wall would have been a matter of mere happenstance. A straw bale the upper edge of which was positioned level to the tyre wall would not have led to a better outcome;

(vii) Criticisms relating to the absence of recticel or similar material were not justified on the evidence;

(viii) Criticism of the length of the run off was also not adequately supported on the evidence.

51. It must follow that this claim fails. It would not, however, be right for me to lose this opportunity to pay tribute to the restrained and dignified way in which the claimant has pursued this claim. I saw at first hand the level of well earned affection and loyalty which he had inspired in his colleagues in the racing world. He has demonstrated an extraordinary level of courage and determination in the face of life changing injuries. Nevertheless, the shortcomings in his legal case were, however skilfully presented, irremediable.