Neutral Citation Number: [2022] EWHC 2951 (KB)

Appeal No: QA-2021-000227

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM:
THE MAYOR AND CITY OF LONDON COURT
HHJ BACKHOUSE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2022

Before :

MR JUSTICE FREEDMAN

- -

Between:

RUTA KERSEVICIENE

Appellant/Claimant

- and –

(1) MIDE QUADRI
(2) ROYAL & SUN ALLIANCE LIMITED

Respondents/Defendants

and four other appeals

CUCEN v ALI & ANOR	QA-2021-000229
YILMAZ v EUI LTD	QA-2021-000232
KELES v TAYLOR & ANOR	QA-2021-000228
MARDARE v OFFER & ANOR	QA-2021-000233

Philip Coppel KC (instructed by **Ersan Solicitors**) for the **Appellants/Claimants**

Anya Proops KC and Richard Paige (instructed by **DWF Group**) for the **Respondents/Defendants**

Hearing date: 11 July 2022

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Approved Judgment

This judgment was handed down remotely at 4.00pm on Monday 21 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN

MR JUSTICE FREEDMAN :

1. This is an appeal against a decision of HH Judge Backhouse ("the Judge") made on 5 October 2021 where in five claims she refused to debar the Defendants from relying upon a witness statement of James Stevens ("Mr Stevens"). The two grounds of the appeal in respect of which permission to appeal has been granted by Sir Stephen Stewart are that the Judge should have excluded the statements:

    (i) on the ground that they amounted to impermissible expert evidence, which had been adduced in contravention of CPR 35 ("the Experts Argument"); and

    (ii) on the ground that they were unreliable, by reason of their skewed, selective nature ("the Reliability Argument").

2. There are five appeals which stem from five applications made by five claimants in five separate claims, one application per claim. The five cases were claimants claiming damages and losses arising from road traffic accidents. Their claims were for between £5000 and £10,000. They alleged injuries in the nature of neck and back injuries.

3. The applications sought a debarring order at the time of the applications in respect of the first statement of Mr Stevens. By the time of the hearing of the applications, there had been served a second statement of Mr Stevens. The Claimants say that the applications were treated as applying to both witness statements. In fact, only the first witness statement of Mr Stevens was to be evidence at trial, and the second statement contained reasoning relied upon in opposition to the debarring application. The second statement is not relied upon for trial.

4. Mr Stevens was employed by DWF Group ("DWF") as a director and head of organised fraud. His witness statement contained an analysis of claims data collected by DWF in relation to claims submitted by claimants represented by Ersan & Co who acted on behalf of the Claimants in the five above mentioned cases. The parties had been given permission in case management directions to serve further witness statements. There was no direction for expert evidence.

5. Mr Stevens' evidence was to summarise the data arising in about 372 cases which showed that:

    (i) 95% of claims represented by Ersan contain an allegation of psychological injuries;

    (ii) 67% of the claimants were recommended for further psychological examination;

    (iii) 68% of the claimants served a psychological or psychiatric report;

    (iv) in 100% of the reports provided by Doctor Yahli, he diagnosed a recognised psychiatric condition;

(v) 67% of the 207 reports of Dr Yahli provided a recovery period (with intervention) of two years or longer.

6. It is suggested on behalf of the Defendants that these figures are striking e.g. an unusually high reference rate for further examination and highly unusual for recovery periods for relatively minor injuries to be was so long. The Claimants submit that the allegation of fraud is irregular and unfair in that there is a failure to make specific allegations against Ersan & Co, and the nature of the allegations made should have led to Ersan & Co being an additional defendant to a conspiracy claim.

7. The bases relied upon for seeking to debar this evidence were that:

(i) the witness statements were not simply statements of fact, but involved and comprised the product of Mr Stevens having selected data to prove a point;

(ii) embedded in the witness statements were a statistical analysis of data held by DWF;

(iii) the witness statements implicitly involved an expression of opinion based upon that statistical analysis so as to attack the merits of the claims. For example, the statistic about the percentage referred for further psychological examination depends on what would be a reasonable proportion who would be expected to be so referred without which the expert evidence has no validity. Likewise it was meaningless to submit that the recovery period was excessive without expert evidence about what recovery periods were normal;

(iv) it was suggested that there was a selection of the cases which were referred to Ersan & Co, and no evidence of how selection had taken place which could invalidate any statistics.

8. The second witness statement stated at para. 6:

> *"The [Defendants'] common position on the Debarring Application is that it is obviously without merit and should be refused for the following summary reasons:*
>
> > *(a) The Evidence [ie Stevens WS1] reveals an obviously troubling pattern in relation to the presentation of a significant number of claims who are represented by Ersan &Co, including the instant claims.*
> >
> > *(b) More specifically, on its face, the Evidence [ie Stevens WS1] strongly indicates that all of the claims have been cynically managed so as to contrive an outcome whereby in every case, and irrespective of the true circumstances of that case, the Claimant is*

> *presenting a claim that they have suffered psychiatric harm as a result of the relevant index event..."*

II The Judgment

9. The relevant ratio of the judgment is at para. 25 and following. The Judge accepted that there were no comparators showing the experience of other firms. The Judge said this at para. 26 *"It may be that the lack of statistics from claims handled by other claimant firms lessens the weight which the court gives to Mr Stevens' statement in any particular case. A Judge reading it may say, "well, that is all very interesting but what does it show, where does that take us?", but in my judgment that does not render the statement inadmissible."*

10. The Judge said at paras. 28 - 29 the following:

> *"28.…it does not seek to draw conclusions as to whether the figures are markedly higher or different. It may be that that will be one of the defendants' submissions, but that is not the evidence. It is simply a series of calculations taken from data in documents given to DWF by Ersan & Co, and in my judgment it is wrong to characterise this statement as trying to give expert evidence. It is, I conclude, similar fact evidence. Looking at the test, it may not ultimately be probative, that is very much a matter for the trial Judges, but I am satisfied that it is capable of tending to prove fundamental dishonesty and so is admissible, and in my judgment it would be contrary to the overriding objective to shut it out.*
>
> *29. The statement is simply a series of calculations about various stages of the process during Ersan & Co's handling of these claims, and in particular the way in which medical evidence has been obtained…."*

11. The Judge then considered the different options available to the Claimants to challenge this evidence in the remainder of para. 29 which can be summarised as follows:

    (i) to rebut the statement so as to challenge the accuracy of the calculations, but save for some minor errors, that had not been done;
    (ii) to apply for permission to call expert evidence so as to rebut the evidence. (Indeed, the Claimants said that they would not oppose the Defendants seeking permission to call expert evidence);

    (iii) to make submissions to the trial judge about the methodology, unreliability or lack of weight to be given to the statement.

12. The Judge concluded at para. 30 as follows:

> *"...I do not consider that it would be detrimental to that process to allow Mr Stevens' statement to form part of the overall evidence. As Ms Proops said, it is for the court ultimately to assess all the evidence in each individual case and come to a conclusion as to whether the claimant proves their case in whole or in part or is found to be fundamentally dishonest."*

III Similar fact evidence

13. The characterisation of the evidence in Mr Stevens' statement is or has similarities to similar fact evidence. It is to introduce into the case other similar motor accident cases where a similar pattern is alleged in support of the allegation of fundamental dishonesty. The Court was therefore reminded about the circumstances in which in a civil case similar fact evidence is admitted. Principles are to be found in the decision of the House of Lords in *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534. There is a useful summary of the above case especially at para. 67 of the judgment in *Springwell Navigation Corp v JP Morgan Chase Bank* [2015] EWCA Civ 1602 at [67] as follows**:**

> *"The law relating to these matters is now relatively straightforward. The judge applied the principles set out in the judgments of this court in O'Brien v Chief Constable of South Wales [2003] EWCA Civ 1085. Although the Chief Constable appealed, the House of Lords made the principles for admissibility even simpler when it dismissed his appeal (see the report at [2005] UKHL 26; [2005] 2 WLR 1038). There is a two-stage test: (i) Is the proposed evidence potentially probative of one or more issues in the current litigation? If it is, it will be legally admissible. (ii) If it is legally admissible, are there good grounds why a court should decline to admit it in the exercise of its case management powers? Lord Bingham suggested at para 6 three matters that might affect the way in which a judge exercised his/her discretion in this regard:*
>
> > *(i) That the new evidence will distort the trial and distract the attention of the decision-maker by focussing attention on issues that are collateral to the issues to be decided;*
> >
> > *(ii) That it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice;*

> *(iii) That consideration must be given to the burden which its admission would lay on the resisting party."*

14. The first two of these considerations were said to be particularly potent when trial was to be by jury. In relation to the third of these matters, Lord Bingham referred at para 6 to:

> *"the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections."*

15. In *O'Brien*, in respect of the first stage of the inquiry, Lord Bingham said at para. 4 the following:

> *"That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probable can scarcely be denied. If an accident investigator, an insurance assessor, a doctor or a consulting engineer were called in to ascertain the cause of a disputed recent event, any of them would, as a matter of course, inquire into the background history so far as it appeared to be relevant. And if those engaged in the recent event had in the past been involved in events of an apparently similar character, attention would be paid to those earlier events as perhaps throwing light on and helping to explain the event which is the subject of the current inquiry. To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow. If such a person would, or might, attach importance to evidence such as this, it would require good reasons to deny a judicial decision-maker the opportunity to consider it."*

16. In *O'Brien*, in respect of the second stage of the enquiry, Lord Bingham said at para. 5 as follows:

> *"5 The second stage of the inquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted. For the party seeking admission, the argument will*

> *always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.*

17. In *O'Brien*, Lord Phillips at para. 53 said the following:

> *"…I would simply apply the test of relevance as the test of admissibility of similar fact evidence in a civil suit. Such evidence is admissible if it is potentially probative of an issue in the action."*

18. At paras. 54-56, Lord Phillips identified considerations to be borne in mind in deciding whether as a matter of discretion to admit evidence or cross-examination as to collateral issues. These included the need for proportionality and expedition, whether the evidence is likely to be relatively uncontroversial and whether its admission is likely to create side issues that unbalance the trial.

IV The Claimants' submissions

19. The Claimants submitted that the Judge was wrong to conclude that the first statement of Mr Stevens ("WS1") was a purely factual account of similar facts. It was not. It was a tendentious statistical analysis designed to show that the claims were a "fundamentally dishonest contrivance."

20. The submissions of the Claimants included the following:

(i) this evidence is an implied opinion that the statistics demonstrated untruthfulness and a propensity to false claims. Contrary to the central conclusion of the Judge, WS1 comprised statistics selected by Mr Stevens in order to opine on propensity;

(ii) WS1 constituted opinion evidence in all but name — Mr Stevens selected statistics that in his opinion support the conclusions he invites the Court to reach.

(iii) statistics is a well-recognised body of expertise: there is a Royal Statistical Society, there are chartered statisticians and there are university departments dedicated to statistics.

(iv) such evidence should only be admitted by an expert having statistical expertise or being capable of giving evidence of statistical analysis;

(v) Mr Stevens has no relevant expertise, and his statements were not subject to the declarations of an expert and the overriding duty to the Court as referred to in CPR 35.3(1) and in PD 35 para.3;

(vi) to the extent that the Court can receive evidence of patterns of conduct, this is the exclusive domain of an expert. It is a matter of opinion to what extent the events demonstrate a pattern, not least in the choice of events;

(vii) there was no evidence as to how cases were allocated to DWF by the insurers and whether they were representative of cases as a whole;

(viii) even if they were representative, there were no comparable data or other way for the Claimants or the Court to test whether the percentages were unduly high or otherwise explicable by reference to factors other than the assumptions made by Mr Stevens in his second witness statements;

(ix) even if the statistical analysis in Mr Stevens' evidence were legally admissible as similar fact evidence, given the unreliability of Mr Stevens' analysis the only correct application of principle at a case management stage was to debar their admission on the basis that their prejudicial effect overwhelmed their evidential utility;

(x) Mr Stevens acknowledged that he had made some errors, but he evaluated them as not making any significant difference: since he had no expertise, he was not in a position to make this evaluation.

21. The Claimants submitted that it is not self-evident in this case what inferences are to be drawn from the statistical evidence or whether there is any significance in the similarity of facts such as is sufficient in kind to be probative. Absent probative value, the evidence should be excluded.

22. The Claimants submitted that expert evidence is required, and without such evidence, it should be inadmissible. They draw attention to cases where expertise is required for various purposes of direct application or providing useful analogies, including:

(i) to ensure and explain that the sample selection has been picked by a method that is properly representative of the whole: *Imperial Group plc v Phillip Morris Ltd* [1984] RPC 293 at 302; *Customglass Boats Ltd v Salthouse Brothers Ltd* [1976] RPC 589 at 595.

(ii) to ensure and explain that the sample size is sufficient for that which is sought to be proven: *Imperial Group plc v Phillip Morris Ltd* [1984] RPC 293 at 302.

(iii) to ensure and explain that the comparators (if required) are sufficient in quantity and quality to sustain the conclusion sought to be drawn from the similarity.

(iv) to explain the normal distribution, variance, significance level and other standard statistical measures of reliability, so that the Court can decide for itself, with the benefit of the expert opinion, whether and to what extent the similarities are probative of the fact necessary to the success of the claim.

23. The Claimants submitted as follows in their skeleton argument that:

(i) The Judge made a mistake in believing that (a) she could discern, without any qualifications in statistics, whether any statistical assumptions were embedded in the account provided in WS1, and that (b) without more a trial judge, unaided by expert evidence, would be able to discern the evidential value of WS1.

(ii) The consequences of this were said to be as follows at paras. 39-40:

"39. This had the consequence for the Judgment that:

> *(1) the Judge failed to recognise that the selection of data for analysis is central to the science of statistics;*
>
> *(2) without any expert statistical material before her, the Judge was unaware of other basic statistical concepts that impinge on the reliability of numbers and the conclusions that can be drawn from them, including study design, imputation of missing data multivariate analysis, normalisation, weighing, sensitivity analysis and so forth;*
>
> *(3) the Judge was unphased by the absence of any comparator in Mr Stevens' analysis, characterising it as a matter "going to weight"; and*
>
> *(4) the Judge was indifferent to the statement being used to support an allegation of fraud, when that should have made her particularly careful before leaning over in favour of admissibility.*

40. The Court cannot know whether the claimed propensity has been proven by the similarity of the facts selected by the Respondents as reported in Stevens WS1 without normative evidence whether the facts selected are endeictic of the claimed propensity."

(iii) On this basis, the evidence was not relevant, or the Defendants were unable to establish that the evidence was arguably relevant in that the inferences sought to be derived from the statistics could not be drawn without more. It is not sufficient to base relevance on unsubstantiated assertions of an opinion nature. Further, there are case management reasons to exclude the evidence at this stage. If admitted, it puts a burden on the party not bearing the burden to prove that the information is not probative by expert evidence in circumstances where this ought to have been adduced by the Defendants, but at this stage the Defendants have failed or elected not to do so.

V The Defendants' submissions

24. The Defendants submitted that Mr Stevens' evidence is factual only without any statistical analysis. It is a series of incontrovertible facts based on various cases being conducted by Ersan. There is no sample selection, but these are the cases which are being run. There is a consistent pattern which does not require statistical analysis. The story is so striking that without expert evidence, a court is entitled using common sense to discern that there is a manifest exaggeration of claims. Otherwise, why would there be such a large number of seemingly minor claims referred to psychiatrists/psychologists? Why would it be that such a large proportion are said to have symptoms for 2 years or more? Any judge experienced in minor claims would be able to see a pattern. The obvious inference is that the claims are invented or exaggerated.

25. In support of the submission that Mr Stevens simply records matters of fact, the Defendants highlighted the following facts, namely :

(i) all of the claims concern minor road traffic accidents;

(ii) all the claims have been brought through the low value claims portal;

(iii) the vast majority of the claims (95%) include claims for psychiatric damage (including notably claims for psychiatric damage brought on behalf of children aged between 1 and 4 years old);

(iv) they all otherwise contain a number of similar if not identical features in terms of the evolution of the medical referrals/assessment process;

(v) 58% of all claimants underwent a First-Tier medical examination at the same address, and in a building leased by Ersan, with the majority of

the assessments being undertaken by doctors from within the same very small pool of doctors; and

(vi) the majority of the cases culminated in the production of an "expert" report from a Dr Yahli, in which it is uniformly concluded, effectively irrespective of the facts of the particular case, that the individual claimant has suffered a psychiatric injury.

26. There are some mathematical calculations, but they are unassailable. There is no question of cherry picking: the analysis is of the entirety of the cases in which Ersan was acting. There is nothing which comprises some statistical analysis or which requires expert evidence.

27. The Defendants submitted that:

(i) The Judge rightly concluded that (save for a small number of words which have since been excised from Mr Stevens' statement) the evidence amounted to a straightforward, factual account of matters known to Mr Stevens, and was otherwise of a kind that it could properly be given by a lay witness. There is no basis for impugning the Judge's decision on this issue.

(ii) The Judge rightly dismissed the argument that the evidence should be excluded because it was selective and hence unreliable "statistical" evidence. It was not for the reasons set out above. However, if it was, then the Claimants would have the opportunity to put that case to Mr Stevens at trial in the ordinary way. The appropriate course in all the circumstances was for the issue of the reliability and wider probative value of the evidence to be assessed at the conclusion of the trial and not before.

(iii) The suggestion that it is only experts who can provide evidence disclosing a pattern of conduct is hopeless. There is no principled reason why a lay witness cannot in an appropriate case give evidence showing a factual pattern of conduct.

(iv) If that were not the case, the decision would have an impact on other cases such that expert evidence would always be required, which would have serious consequences for insurers seeking to defend high volume cases believed to be based on fundamental dishonesty.

(v) There was no statistical evidence or analysis "embedded" in the witness statements, rather there were incontrovertible statements of fact, the significance of or inferences from which could be tested at trial. The percentages simply required a calculator and did not require any expertise.

(vi) There are cases requiring expert evidence often of a highly technical nature e.g. in the case of *R v Clark* [2003] EWCA Crim 1020 about sudden and unexpected deaths of infants and *R (on the application of Independent Meat Suppliers v DEFRA* [2017] EWHC 1961 (Admin) about the stunned slaughter of sheep. This is not such a case where the court and those with experience of these minor motor collisions are able to make assessments without expert evidence.

(vii) The evidence revealed a troubling picture of uniformity in respect of minor road traffic accidents, which may amount to an inauthentic, cynical conveyor belt claims process. It is sufficient for the evidence to exhibit features of an assembly line process without having to prove the abnormality of the figures.

(viii) It will be open to the trial judge having heard all of the evidence to conclude that the evidence sheds no light on the authenticity of claims, but this is not a reason to exclude the evidence at this stage. The evidence will assist the judge in making an assessment as to whether the claims have been manufactured dishonestly.

(ix) The evidence is relevant to a material issue in the case, namely that of fundamental dishonesty. There are no case management reasons to exclude it, and it would be unfair to the Defendants to do so. In any event, the time at which to consider whether it is to be admitted or not is at trial and not at this interim stage of the action.

28. The Defendants referred to a body of case law about the approach of the courts to evidence. The cases were fact specific and did not contain legal principles which the Court needs to refer for the purpose of this judgment.

VI Discussion

29. I first consider the Experts Argument. As regards the expert evidence, on the information which was before the Judge, there is at least a cogent argument that the evidence ought to be the province of an expert and not of a solicitor with the assistance of paralegals in a law firm. It is at least arguable that the evidence is not purely factual, but that there might be statistical assumptions embedded within the information. At this stage, the Court cannot make a definitive conclusion, but it is a real possibility that, without a statistician and/or further information, a Judge might not be able to make findings of the kind which are invited in the second statement of Mr Stevens.

30. A related question might be as to what weight the evidence has without a comparator. It may be that there would be a surprise about some of the statistical conclusions e.g. how long the recovery would be or the percentage of cases with psychological or

psychiatric consequences. The question is what weight to attach to these findings without having further evidence e.g. comparators or some other expert evidence.

31. There is an assumption, particularly shown in the second statement of Mr Stevens referred to above, that the statistical evidence demonstrates fundamental dishonesty. That assumption may not be made out. It depends on whether a court can infer that the claims were invented or exaggerated because of the large percentage in which small claims came with alleged psychological or psychiatric consequences or because of evidence about the alleged duration of such consequences. Without more, there are real questions as to what can be inferred from such evidence.

32. Despite these serious reservations, I consider that the evidence of Mr Stevens should not be excluded (beyond the minor excisions of the Judge). First, I do not consider that the evidence is necessarily implied opinion evidence. On the basis of the evidence before the Judge, there was no evidence about embedded assumptions that invalidated (rather than reduced the value of) the evidence. It may be true that there is a risk that there are embedded assumptions in the evidence which could not be recognised. That is not to accept without more the proposition that that is the case or that the evidence is entirely invalidated as opposed to requiring cautious assessment or that its value is reduced rather than negated. Second, the evidence might be used as regards medical witnesses or other professionals to test their method in the context of an assertion that there has been invention or exaggeration of claims. Third and related to the second point, I do not exclude at this stage the possibility that in the context of the evidence as a whole, the analysis will show that there is a method of creating or inflating claims, and that the schedule containing the other cases including the percentages will be a useful tool to that end.

33. The evidence can be tested at trial as to whether in fact it is on analysis implied opinion evidence and not factual evidence at all. In that event, the Court at trial can decide that it has no weight in that (a) it has not been given by experts, (b) it has not had the transparency which experts are required to bring to their evidence, and (c) as facts by themselves without comparators, it is not determinative of the issues before the Court. That is not a reason to exclude the evidence at this stage, but it may have the effect that at trial, it will be decided that it carries no weight or does not prove the matters which the Defendants say are to be inferred from the same. All that can be said at this stage is that the evidence may be probative at trial. It is sufficiently probative to admit the evidence at this stage, but it will be for the Court at trial ultimately upon the evidence as a whole to consider whether the evidence should be admitted or excluded, and, if admitted, what weight to attach to it.

34. I now consider the Reliability Argument. This is related. Without more, it may be that the evidence will carry no weight because it was not subjected to the statistical rigour of statisticians or other experts. As the Judge at para. 28 of her judgment stated, the evidence may not ultimately be probative. That is very much a matter for the trial Judge. I agree with her. I have more reservations than she did as to whether the evidence is capable of tending to prove fundamental dishonesty. I entertain doubts as to whether without being in the context of other evidence, the analysis of Mr Stevens could by itself tend to show fundamental dishonesty. However, I conclude that there is sufficient in this evidence of Mr Stevens as may support a case

of fundamental dishonesty, whether together with expert evidence (if that is permitted and adduced) or when put to professionals such as lawyers or doctors about the way in which the cases have been assembled. In addition to this, I do not exclude the possibility that the evidence will come to life at trial so that even without more, the trial judge may conclude that the analysis does tend to show fundamental dishonesty. Given this, I agree with the Judge that it would at this stage be "c*ontrary to the overriding objective to shut it out."*

35. Returning to the subject of similar fact evidence, the Defendants are entitled to seek to run a case of similar fact evidence or evidence akin to this. They do so by seeking to derive patterns from a much larger body of evidence. This tends to show that the evidence is relevant, going to the pleaded case of fundamental dishonesty. It is not at this stage conclusively shown to be relevant, but it is sufficient to justify the evidence being admitted at this stage. Given prima facie relevance, the two stage process required in respect of similar fact evidence can be tested at trial, by which time the evidence of Mr Stevens will be capable of being viewed in the light of the evidence as a whole. At this stage, I am satisfied that there is a real prospect that the evidence will be probative (the first stage). I am also satisfied there are no case management reasons such as overall fairness which should bar the evidence being admitted (the second stage). It will then be for the Judge at trial to assess in the light of the evidence the correct approach to the evidence when seen against the evidence as a whole, and having regard to the two stage consideration applicable in cases of similar fact evidence.

VII The relationship between Mr Stevens' evidence and expert and other factual evidence

36. As regards expert evidence, the Claimants had a third ground of appeal that the Judge wrongly refused to make as a condition of the non-debarring order that the Claimants be given leave to adduce expert evidence on the matters addressed in the evidence of Mr Stevens. Sir Stephen Stewart dismissed the application for permission for the reasons set out in paras. 21 and 30(6) of the skeleton argument on behalf of the Defendants opposing permission. There has been no attempt to re-open that refusal, and the appeal has been run by reference to the two grounds on which Sir Stephen Stewart did give permission, namely the Experts Argument and the Reliability Argument.

37. Since Sir Stephen Stewart adopted the reasons set out in paras. 21 and 30(6) of the Defendants' skeleton argument in rejecting this third ground, I shall set out these paragraphs in full:

> *"21. After the Judge had given judgment on the Debarring Application, the Claimants' counsel made an oral application to adduce expert evidence in response to JS1. That application was refused on the basis that there was no formal application to adduce expert evidence before the Court and, if the Claimants wished to rely on expert evidence at trial, then they should make a formal application and, in that context, set out the precise details of the expertise of the expert*

> *in question and what issues the expert would be addressing. The Judge made clear that, were such an application to be made, it would be considered at a hearing where all the relevant issues could be considered. Thus, contrary to the impression given by the PTA Skeleton, the Judge did not finally debar the Claimants from adducing expert evidence but instead merely insisted they make the application in the proper way."*
>
> *...*
>
> *"30(6). The Judge was perfectly entitled to refuse the Claimants' oral application for permission to adduce expert evidence, which application was made only after the Judge had ruled on the Debarring Application. The Judge's decision on this issue constituted an entirely unimpeachable exercise of the Court's case management powers, and indeed any other decision would have led to injustice to the Defendants given that the "off the cuff" nature of the application meant its precise scope remained obscure. Relevantly, and contrary to the impression created by the PTA Skeleton, the Judge did not absolutely refuse permission for the Claimants to adduce expert evidence. Instead, she refused to countenance the informal application made by the Claimants' counsel at the hearing (without notice to the Defendants), making clear that, if an application to adduce expert evidence was to be made by the Claimants, it should be made in the proper way and should, in that context, make clear the nature of the required expertise and the issues which the expert would address."*

38. I have to express concerns about how this matter came before the Judge and where the matter now is. It would have been desirable for the question about the admissibility of the statements of Mr Stevens to be heard together with an application about expert evidence. That said, the approach of the Judge in rejecting the Claimants' informal oral application to allow expert evidence made in the wake of the Claimants' unsuccessful debarring application was understandable and sound. There had been no written application before the Judge. Since the rejection of the third ground by Sir Stephen Stewart, there has been no application on the part of the Claimants to renew the oral application. It might have been preferable for the application to debar to be dealt with in the context of expert evidence being considered. This is not a criticism of the Judge, but it is a comment both as regards the Defendants and the Claimants.

39. The evidence of Mr Stevens might have carried more weight and the submissions more conviction in the event that it had been accompanied with expert or other evidence adduced by the Defendants supporting the probative nature of the evidence of Mr Stevens and/or with evidence about a comparator. Without this, the Court has accepted that Mr Stevens' evidence should not be ruled out, but without any clear picture as to how the evidence will advance the case of fundamental dishonesty. It suffices at this stage that it might advance the case.

40. Likewise, the Claimants' debarring application might have carried greater weight if there had been expert evidence to support the Experts Argument and the Reliability Argument. Since the dismissal of the debarring application, the Claimants have placed before the Court an intended expert's report. That is now too late, and there has not been an application to admit the new evidence. Although *Ladd v Marshall* [1954] 1 WLR 1489 might not apply with the same rigour as after a trial, it is informative by way of analogy, and there is no reason why such evidence could not have been adduced before the first instance court.

41. It is particularly unfortunate that these matters were not before the County Court because the current scenario is that the admission of the evidence of Mr Stevens without the expert evidence means that there is a role reversal. It is for the Defendants to prove the fundamental dishonesty. Yet the Claimants now face the prospect of having to decide whether as part of an attempt to neutralise Mr Stevens' evidence, they ought to have expert evidence in order to meet it. If an application is made to adduce expert evidence by the Claimants (or indeed by the Defendants), the Judge in the County Court hearing such an application may wish to consider whether such expert evidence should be admitted whether to do justice between the parties or for the Court to be able to appraise whether Mr Stevens' evidence has probative value or for any other reason.

42. The case advanced by the Defendants has been that the Claimants may seek to answer the evidence of Mr Stevens by applying to adduce expert evidence. It does not follow that the Defendants will not oppose the application for expert evidence. The logic may be that depending upon the nature of the application and the kind of expert evidence proposed, the Defendants should be entitled to oppose such an application not in order to frustrate justice but because of issues thrown up by the application e.g. a challenge about the nature of the expertise or a concern about the relevance of the evidence or case management issues analogous of the kind referred to by Lord Bingham in *O'Brien* above.

43. It is a matter for the Judge in the County Court to decide upon an application to adduce expert or factual evidence to deal with the evidence of Mr Stevens. Without fettering that consideration of the Judge in the County Court, there are certain observations to make.

44. First, the Court may wish to take into account that if the parties had presented their cases in a more satisfactory way, the question of expert evidence and factual evidence would have been considered together. There may be an argument that the danger of the bifurcation of expert and factual evidence will be to create unfairness. I have rejected an argument that the evidence of Mr Stevens should be excluded because it could not properly be evaluated at this stage, and the evaluation can only be at trial based on the evidence as a whole. It follows from the submissions of the Claimants that if they bring a formal application for the admission of expert evidence, they are likely to submit that the evaluation will only be fair in the event that it is in tandem with expert evidence.

45. Second, the proposed expert evidence may not be limited to statistical evidence. It may be that consideration is given to medical evidence as to incidence of psychological or psychiatric consequences attaching to apparently non-major injuries in road traffic accidents, and to period of convalescence. It may be that the County

Court will have to consider an argument that such evidence if properly directed and thought through is potentially of benefit to either party or the Court in assessing the evidence as a whole.

46. Third, it is to be noted that the fact that there might be shortcomings in respect of the evidence of Mr Stevens has not prevented the Court from refusing to debar the Defendants from adducing the evidence. There may also be shortcomings in respect of any proposed expert evidence. The County Court may wish to consider whether any such shortcomings are such as to debar the expert evidence without more, or whether it should, like the evidence of Mr Stevens, be admitted at this stage with a view to having an evaluation at trial.

47. It is in the end for the County Court to consider these matters in the event that there is no agreement to the admission of expert evidence. This litigation is particularly hard fought. Having sat on this appeal and on a previous application for wasted costs, it is entirely predictable that an application will be as fiercely contested as this appeal and the other matters which I have heard thus far. I mention the foregoing as part of active case management as part of "encouraging the parties to cooperate with each other in the conduct of the proceedings": see CPR 1.4(2)(a).

48. The Court would be disposed to give a direction to the parties about relisting a CMC before the Judge with a view to these matters being considered, giving directions for the timing of making of any applications. I do not propose to make any more detailed directions because these are matters for the Judge or whoever is to hear any such CMC in the County Court.

VIII Disposal and concluding observations

49. It follows that I have concluded that the Experts Argument and the Reliability Argument are not so compelling that there is no basis for adducing the evidence of Mr Stevens. The appeal is therefore dismissed.

50. Whilst it will be for the Judge at trial to make of this evidence what they will, there are questions as to the extent to which this evidence assists without more in proving fundamental dishonesty. The Court has not allowed the appeal not because the evidence is clearly factual evidence, but because neither the Experts Argument nor the Reliability Argument is made out sufficiently strongly to exclude the evidence of Mr Stevens at this stage. It will be ultimately for the Judge at trial to assess the evidence. It may be that Mr Stevens' evidence carries some weight in respect of fundamental dishonesty, in which case the Judge will make of it what it merits. Alternatively, the Judge may consider that the evidence is neither probative nor reliable in which case the evidence will go nowhere. It may be that the Judge will find it probative in the context of the evidence as a whole. That is not for determination for now.

51. It is unfortunate that expert evidence was not canvassed in advance of the hearing before the Judge. The Judge was justified in refusing to make an order without a formal and carefully thought out application for expert evidence. If sought by either party, the matter should go back to the County Court in respect of expert and any other evidence to meet or to accompany the evidence of Mr Stevens.

52. I should be grateful if the parties would draw up a suitable order.