REGINA

-V-

COLIN WRIGHTON

NOTE

1. The Crown – after detailed and anxious consideration of this case - propose to offer no evidence against the Defendant. In view of the severity of the charge and the issues raised, I propose to set out the matter in some detail.

2. The facts are undisputed – on the 8th August 2006 this Defendant was responsible for the death of Joseph Tobias Tweddell, known as 'Toby'. He was born on the 4th July 1981. Toby's parents are both alive, as are his brother and sister and he was due to be married to Jenny Crisp. They had been together since they were 19 years old, and she described Toby as intelligent and charismatic; they were both in good employment, having recently returned from a lengthy period of travelling, and they were looking forward to life together. The victim impact statements from Mr. and Mrs. Tweddell and Miss Crisp are heart rending. In view of what I say later, Mr. Tweddell's remarks are mature and prescient –

I don't know whether Toby's death was an accident or a crime…whatever the outcome…the driver who ran into the back of Toby caused his death and I imagine this is a life sentence for any driver; any sentient human being would surely carry the burden of remorse for such an event for the rest of their lives…I want to reach out beyond this driver to all those future drivers who may kill someone. Road death is a blind spot of our society…if 20 people die in a train crash it is a national disaster, yet (statistically) that many people die on our roads every 2 days throughout the year.

3. So far as the facts are concerned, the Defendant was behind the wheel of his 35 tonne lorry at the Liverpool end of the M62 motorway approaching the rocket interchange, at about 8.30 a.m. The lorry appeared to drift onto the hard shoulder of the M62, then back onto the inside and middle lane. There was no alteration in the lorry's speed, which later tachograph tests showed was a constant – governed – 56 mph. There was no evidence of braking. There was a build up of stationary traffic on the motorway, and the lorry crashed into the rear of the first stationary vehicle, a Toyota Hilux. The force of the impact caused the line of vehicles to crush together; one witness described the scene 'as if a bomb had gone off'.

Tragically, the Nissan Micra being driven by the deceased was forced into the rear of a Ford pickup vehicle. Mr. Tweddell was freed from the wreckage by the emergency services, but he had suffered catastrophic injuries and he died in hospital at around 2.00 p.m. on the 8th August 2006.

4. The Defendant escaped any significant injury. He dismounted from his cab, and then tried to get back in it. He said to a paramedic (page 37) who attended at the scene 'What have I done…how am I going to live with myself'. The paramedic checked his blood pressure, pulse, pupils and blood saturation and stated 'none of the results indicated anything wrong with him'. During the journey to Whiston he was remorseful and in shock. At Whiston there is conflicting evidence of his behaviour, varying from blasé to distressed. When the Defendant was examined by Doctor Rostron he said that he had very little memory of the crash, that he didn't know if he had lost consciousness. He was described as upset and anxious and said 'why did it happen'. His employer collected him from the hospital. Significantly, when asked by the police about the Defendant's driving, his employer, Mr. Jackson, described him as professional, pleasant and conscientious about his work. When the police interviewed the Defendant, in November 2006, he claimed that he must have blacked out at the wheel. Evidence excluded the condition of the vehicle from contributing to the crash, and the Defendant's mobile telephone telephone records have been examined, and exclude any such activity leading up to the impact.

5. The Defendant pleaded not guilty at the plea and case management hearing herein on the 25th May 2007. A medical defence was flagged at that stage, but with no

supporting evidence. In anticipation of such a report the Crown Prosecution Service, on my advice, undertook two enquiries;-

a. We obtained copies of the Defendant's general practitioner records, and
b. Retained a 'sleep expert', Professor Horne; he is the author of a paper 'Falling asleep at the wheel: observations and guidelines for police forces'. His concluding remarks are *'usually, little can be gained by asking drivers involved in sleep related crashes whether they remember being sleepy or fell asleep. Such information is most unreliable, especially if obtained more than a few hours after the crash. Evidence in support of this type of crash has to depend on more objective information'*

6. Subsequently, the defence expert evidence was received, a report from Dr. Pulakal. He narrates that the Defendant would feel tired most days, and used to take a 20-30 minute sleep during the day. If he felt sleepiness coming on when driving, he would pull over and take a short nap to refresh himself before continuing his trip (page 3 of report). He mentioned this on two occasions to his g.p., who the consultant said 'provided reassurance.' The Defendant thought no more about cat-napping because this is common practice among truck drivers. Examination of the gp records shows the following important entries-

29th March 2005 – he contacted the surgery for assistance, when he stopped driving owing to buttock pain. He actually telephoned the surgery from his lorry because of his inability to carry on driving. The doctor saw him and prescribed tablets and rest.

Later entries show treatment for a skin condition and sciatica, and waking at night with chest pain.

23rd May 2006 – he is noted as 'feeling tired all the time.' The doctor organised blood tests, to investigate potential diabetes and thyroid problems, which were negative.

26th July 2006 – a skin infection and a note 'feeling a little unwell last week and sleepy? due to brewing infection.' He was given antibiotics.

The notes of his attendance on the 8th August state '? Blackout…denies previous episodes with blackout but just tired episodes.'

Dr. Pulakal's report (page 4) shows that the Defendant scored in the abnormal range so far as a so-called 'sleepiness scale test' is concerned. This is a subjective test, reliant on a patient's answers. Verification of an abnormal sleep pattern is gained from objective tests, known as an oximetry test and a monitored sleep study; this latter study monitored by polysomnography. The results showed poor quality sleep and frequent but short periods of awakening (page 5). The expert's opinion is that the sleep study findings - with clinical features of obesity, heavy snoring, witnessed apnoeic episodes, nocturnal choking, unrefreshing sleep and excessive daytime sleepiness - confirms a diagnosis of moderate obstructive sleep apnoea.
'Sleep apnoea' is marked by obstruction of the upper airway during sleep. This causes pauses or breaks in a person's breathing, preventing air from entering the lungs and forcing the person to wake briefly to reinitiate breathing before falling asleep again. The person is unaware of this and the interruption to breathing can happen hundreds of times a night…during the apnoea people come out of the deep sleep and wake momentarily or sleep lightly. The period of wakefulness is so brief that even though it may happen hundreds of times a night, a person will not remember it. As far as they are concerned, they have had an uninterrupted good night's sleep but are unrefreshed, continue to feel excessively tired during the day and wonder why they are tired. Worringly, the expert quotes that in the UK about 300,000 middle-aged men suffer from this syndrome – obstructive sleep apnoea - but more than 80% remain undiagnosed and untreated. He states that this sleep disorder remains among the most under diagnosed and under treated medical conditions and 'awareness among the public and within the medical profession is low.'

At the time of the crash, the Defendant was about a stone heavier than when he was examined – he would have been about 20 stone – which would have led to more severe apnoea. The expert cannot of course say exactly what happened, but comments (page 12) – patients with sleep disorders may not be as aware of impending sleep, unlike the healthy population…patients with obstructive sleep apnoea are often only aware of the severity of the sleepiness retrospectively. At page 14 of the report he says that many gps do not think about sleep apnoea as a possible cause for tiredness in

the first instance. 'I would not have expected for all doctors to think about the possibility of sleep apnoea in this given situation.' He knows of many patients making multiple visits to their surgeries and hospitals before a diagnosis is made.

7. Professor Horne has been abroad, and the Crown took advice on this report from Doctor Irshaad Ebrahim, a consultant neuropsychiatrist in sleep disorders at St. Thomas Hospital, London. He reviewed relevant papers and Dr. Pulakal's report and agreed with the conclusion. He also told me that in a survey he conducted of several hundred lorry drivers in South Africa, 25% of them were suffering from a medical sleep disorder. Following a telephone conference, he submitted the following addendum;-

-----Original Message-----
From: Ian Harris <harris@exchangechambers.co.uk>
To: Centre Administrator <Info@londonsleepcentre.com>
Sent: Sat Sep 29 14:31:08 2007
Subject: RE: Colin Wrighton Medical report from Dr. Irshaad Ebrahim

Dear Dr. Ebrahim,

Thank you for your report and assistance. As discussed, can you confirm for me the following details, following our discussions;-

1. That you have no reason to doubt the accuracy and integrity of the tests conducted by Dr. Pulakal, and that there is no point in the prosecution seeking an adjournment of the case so that you can conduct your own examination.
2. That the sleep study and oximetry tests are totally objective.
3. That in response to the question "should the defendant have been driving", your view/opinion is that he did the right thing, he went to his gp and had no advice not to drive.
4. That a lot of general practitioners fail to recognise or are ignorant of sleep apnoea, and thus fail to refer potential sufferers for consultations.
5. That your advice to the crown prosecution service would be to 'drop the case'.

I look forward to your reply - an acknowledgment by e-mail agreeing the above points will be sufficient,

Again, many thanks for your help and expertise,

Kind Regards,

Ian Harris
Exchange Chambers
Liverpool

0151 236 7747

From: Irshaad Ebrahim [Irshaad.Ebrahim@londonsleepcentre.com]
Sent: 29 September 2007 15:01

Ian

Thank you for your email. Your recollection of my views is accurate and I confirm this now by email.

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8. Archbold describes the defence (2007, chapter 32 –22) in this way, in driving cases –

In an ordinary case, once it has been proved that the defendant was in the driving seat of a moving car, there is prima facie an obvious and irresistible inference that he was driving it. No dispute or doubt will arise on that point unless and until there is evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car. If he lapses into a coma, is stunned by a blow on the head or attacked by a swarm of bees, it can be said that he is no longer driving. If he falls asleep it is a question of fact whether driving in the circumstances was reckless: Hill v. Baxter[1958] 1 Q.B. 277,42 Cr.App.R. 51, DC. If his loss of control results from an epileptic fit, a defence of automatism will be tantamount to a plea of insanity: R. v. Sullivan [1984] A.C. 156, HL; R. v. Burgess [1991] 2 Q.B. 92,93 Cr.App.R. 41, CA. Similarly, if the loss of control is due to a hyperglycaemic episode caused by diabetes: R. v. Hennessy 89 Cr.App.R. 10, CA…

The defence of automatism ought not to be considered at all until the defence has adduced at least prima facie evidence: Hill v. Baxter, ante. Once a proper foundation is laid for automatism, the matter becomes at large and must be left to the jury. The legal burden comes into play and requires that the jury be satisfied beyond reasonable doubt that the act was a voluntary act: Bratty v. Att.-Gen. for Northern Ireland[1963] A.C. 386, HL.

Bratty was followed by the Court of Appeal in later cases; the Crown in this case cannot medically contradict the defence expert evidence, thus on a balance of probability the defence is established, and I cannot satisfy a jury so that they can be sure that the Defendant was not suffering from sleep apnoea.[1] Legally, I cannot negative non-insane automatism beyond reasonable doubt. The police accident

[1] R v Burns 58 Cr.App. R 364 (see Archbold 2007, 17-86.

reconstruction expert – a very experienced officer – Paul Hulme (exhibit pages 11) stated, in November 2006 '*…the movement of the lorry drifting across lanes and the driver failing to apply the brakes would give extremely strong support to the fact that the driver has either suffered a medical condition such as a black-out or he has simply fallen asleep.'* The decision has been taken by the application of the criminal burden and standard of proof.

9. It was on Friday last, the 28th September that the decision was taken, in the light of all of the facts that this case should not proceed to trial. An initial view that the Defendant should not have been driving because he had previously complained of sleepiness was dealt with by Dr Ebrahim as set out earlier. There is no evidence from any witness or other driver that the Defendant's driving had previously given any cause for concern owing to his tiredness, and he himself was of the view that cat-napping was part and parcel of his work since it is common practice. Thus an alternative possible route to proving dangerous driving wasn't evidentially available. Although the decision and responsibility rests on me, as Trial Counsel, I was ably assisted by Mr. Hopkins, my instructing solicitor, his caseworker Mr. Challinor, and the investigating officer Sergeant Sue Allen. At my request the family liaison officer Constable Nolan also attended the conference, and the family have been consulted. A copy of this note will be provided to all concerned.

10. If this case stimulates wider public and medical appreciation about sleep disorders, then perhaps some positive factors can emerge from such a senseless waste of a human life. I end as I began by citing Mr. Tweddell senior who calls for more education about driving and the causes of road death in the hope that other parents won't have to go through his family's suffering in future cases.

Ian Harris
Exchange Chambers
Liverpool

30/09/2007