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Neutral Citation Number: [2023] EWCR 1

IN THE CENTRAL CRIMINAL COURT

T20220571

Date: 28/06/2023

Before :
MR JUSTICE FRASER

Between :

R (OFFICE OF RAIL AND ROAD)
- and -
ALFRED DORRIS **Defendant**

- and –
THE SECRETARY OF STATE FOR TRANSPORT
(appearing by the RAIL ACCIDENT INVESTIGATION BRANCH)
Interested Party

Hearing date : 2 June 2023
Trial dates: 17 May 2023 to 19 June 2023
Mr Ashley-Norman KC and Ms Jung
(instructed by the **Office of Rail and Road**) for the **Prosecution**
Mr Bennett and Mr Mackay (instructed by **Blackfords LLP**) for the **Defendant**
Mr Hill (instructed by **the Government Legal Department**)
on behalf of **the Interested Party**

Judgment on Disclosure Order

Mr Justice Fraser:

Introduction

1. This is an application by the prosecuting authority, the Office of Rail and Road ("ORR") for an order in respect of disclosure of certain expert reports, and potential reference to them in public, that came into existence as part of the investigation by the Rail Accident Investigation Branch ("RAIB") into the Croydon tram disaster that occurred on 9 November 2016. This material is protected from disclosure without order of the court for reasons that will become clear. This ruling follows a hearing on 2 June 2023; the ORR and RAIB were notified orally at the hearing what the decision was, and an order was then made. However, until completion of the trial of Mr Dorris, it was sensible not to provide these detailed written reasons in a public judgment as they include (potentially) what might be misinterpreted as comment on the expert evidence.

2. At a few minutes after 0600 hours on 9 November 2016 a tram on the Croydon tram network, tram 2551 being driven by Mr Alfred Dorris (the defendant in this trial) on Route 3, entered the Sandilands' tunnel complex travelling in the direction from Lloyd Park towards the Sandilands junction. The weather was extremely bad with heavy rain, and the tunnel was said by witnesses to be "darker than usual". The lighting in the tunnel was extremely poor and was said by another witness involved in the tram network to be "past its serviceable life"; water had entered the electrics and the system did not work as intended. Further, there were a large number of bulbs that had shorted out, or failed, and these had not been replaced. There were no signs or other speed restrictions in the tunnel.

3. The experts in the trial of the defendant agreed that the assorted defects and issues within the tunnel (which included but were not limited to the defective lighting) were the likely explanation of what occurred to the defendant when he became disoriented and confused whilst he was driving the tram.

4. As a result of what happened, tram 2551 was going too fast when it entered the Sandilands curve, which is a sharp left hand bend just before the Sandilands junction. Its wheels lifted, and the tram overturned and derailed, at high speed. The effects of this were catastrophic. Seven passengers lost their lives, having been thrown through the air inside the tram, through the glass windows of the tram (those windows not being made of toughened or sufficiently impact-resistant glass) and being hit by and trapped under the tram itself, which continued along on its side before it came to a stop. 19 other passengers suffered life-changing injuries, and of the total number of 69 passengers in tram 2551, only one escaped injury. The event was a significant and tragic transport disaster.

5. The Department of Transport has a number of departments or agencies which are concerned with transport disasters in which fatal accidents occur. The one that deals with rail and tram disasters is RAIB. There are equivalent ones with similar responsibilities for maritime issues, the Marine Accidents Investigation Branch ("MAIB"), and for aviation, the Air Accidents Investigation Branch ("AAIB").

6. Specific regulations govern investigations by each of RAIB, MAIB and AAIB. I shall only deal in detail with those that concern RAIB.

The statutory framework

7. There is a statutory regime within which RAIB performs its role. This is contained in the Railways and Transport Safety Act 2005 ("the 2005 Act"), EU Directive 2004/49/EC ("the EU Directive") and the Railways (Accident Investigation and Reporting) Regulations 2005 ("the 2005 Regulations"). The 2003 Act established RAIB as the independent railway accident investigation body for the UK, and was part of the response to the recommendation of the public inquiry which was held into the collision of two trains at Ladbroke Grove in October 1999, an event which became known as the Paddington railway disaster in which there were 31 fatalities and over 400 passengers seriously injured. This rail disaster followed closely after another multi-fatality rail disaster at Southall in September 1997, just a few miles away.

8. The overall purpose of the 2005 Regulations is to enable RAIB properly and fully to investigate fatal accidents, with the main aim being prevention of what happened that led to the accidents in questions. This "lessons learned" priority and approach to these important investigations, by necessity, requires the fullest possible amount of information gathering. These investigations are usually carried out by inspectors of RAIB, but pursuant to Regulation 6(1) of the 2005 Regulations, the Chief Inspector of RAIB may appoint a person who is not an inspector to participate in an investigation being performed by RAIB. There is an obvious advantage to this provision, as it means that if expertise is required for an investigation (or a particular part of an investigation) and RAIB does not possess that expertise "in-house", it can obtain such expertise as is required from elsewhere.

9. Regulation 10 of the 2005 Regulations protects certain classes of material. Regulation 10(3) provides that, except by order of the Court under Regulation 10(5), RAIB shall not be required to disclose to anyone "(d) the notes made by [a] person appointed under Regulation 6(1)" and "(e) working documents of the branch". Thus both the work-product of such an external expert, and working documents created by RAIB itself, are protected from *any* disclosure without a court order.

10. A "relevant court" for the purposes of Regulation 10(4) is defined in Regulation 10(10), as being in England & Wales, the Crown Court or High Court. For RAIB therefore, such an order can be made either by the Crown Court or the High Court. As a matter of interest, this is different to the regime for the MAIB and AAIB whereby only the High Court has the power to make such an order.

11. Returning specifically to the 2005 Regulations that govern railways and trams, Regulation 10(4) applies the same confidentiality restriction to those appointed under Regulation 6:

> "(4) Except by order of a relevant court a person who assists the Branch under regulation 6(1)…shall not disclose to anyone any of the evidence or information described in paragraphs (2) or (3) which the Branch is precluded from disclosing save by order of a relevant court. This paragraph shall similarly apply to evidence or information provided to such a person if it is such that, if provided to the Branch, would be subject to paragraphs (2) or (3)."

12. Regulation 10(8) provides that:

"(8) A person who assists the Branch under regulation 6(1)…shall not disclose to anyone other than a constable, the safety authority or any other person exercising a power conferred on him by an enactment, or a constable, [the provision relevant to Scotland is omitted], evidence or any other information, to which paragraph (4) does not apply, that he acquires about an investigation through the giving of such assistance without the consent of the Chief Inspector or an inspector acting on behalf of the Chief Inspector."

13. A breach of those disclosure obligations amounts to a criminal offence; this is set out in Regulation 10(9). The mechanism by which disclosure can be permitted is set out in Regulation 10(5), which provides that:

"(5) No order may be made under paragraphs (2), (3) or (4) unless the court is satisfied that disclosure is in the public interest, having regard in particular to any adverse impact such disclosure may have on the investigation by the Branch to which the evidence or information relates, upon any future investigation and upon public safety."
(emphasis added)

14. Immediately after the Croydon tram crash RAIB commenced an investigation. As part of that, RAIB contracted TRL Ltd ("TRL"), a consultancy organisation, to obtain factual information and to provide professional opinion on matters relating to human factors. In the context of an RAIB investigation, the phrase "human factors" refers to those environmental, organisational and job factors, and human and individual characteristics, which influence behaviour in a way which can affect safety. RAIB inspectors involved in contracting TRL knew that TRL would fulfil some of its obligations under this contract by commissioning other experts as sub-contractors. RAIB appointed TRL under the provision in Regulation 6(1) which is explained at [8] above.

15. This is therefore what was done. One of the experts involved through TRL was Professor Wann. As part of commissioning TRL to undertake this work, the then-Chief Inspector of Rail Accidents, Mr Simon French, appointed TRL in writing on 6 March 2017 under Regulation 6(1) of the 2005 Regulations as a person who was not an inspector to conduct or participate in investigations by RAIB. The court has seen that document, which was attached to a witness statement explaining the situation, and this document was called "088.6.105 L to A. Wilson-Law re appointment to assist.pdf" and also given an exhibit number ("the appointment letter"). The purpose of the appointment letter was to enable TRL to have access to evidence and information that was protected under the 2005 Regulations, and to contribute to the overall outcome of the inspection and the report or reports produced by RAIB.

16. RAIB were quite properly anxious to ensure that those within TRL who were to be involved understood the situation under the 2005 Regulations, and therefore the person responsible at TRL for accepting the engagement by RAIB signed what was called a "Regulation 6 notice" which acknowledged that TRL would provide assistance under that Regulation, and stated that TRL "understands and accepts the limitations of the request and restrictions imposed by the Regulations, in particular the constraints and penalties under Regulations 10 Disclosure of evidence". TRL also stated that it would ensure that all the limitations, constraints and penalties would be communicated to all the people working for TRL in connection with the investigation.

17. TRL thereafter became centrally involved in the investigation. This included TRL using Professor Wann as an expert who visited the location, took measurements and other details, and prepared a detailed analysis. This process led to the creation of the following documents, which were given the following names.

    1. RAIB TRL1a report, with no date on its face, but which can be traced to be dated 12 May 2017 ("Document 1"). This document has also been referred to as a "working draft";
    2. Draft Project Report 3936 TRL1:Human Factors, dated 30 May 2017 ("Document 2");
    3. TRL ref: 12361/035/TL dated in February 2018 ("Document 3"). This latter report was prepared for the British Transport Police ("BTP"). This drew heavily on Document 2 and contained many passages from it.

18. RAIB issued both an interim report, and a final report, into the disaster, and this was heavily relied upon at the inquest that was held between May and July 2021. At the end of that inquest the jury returned a narrative conclusion incorporating accidental death in respect of each of the seven fatalities. The Crown Prosecution Service ("CPS") had decided in October 2019 not to prosecute any of Transport for London ("TfL"), Tram Operations Ltd ("TOL") or Mr Dorris with corporate manslaughter, gross negligence manslaughter or any other of the more serious offences which are within the remit of the CPS to consider.

19. After that, sometime in early 2022, the ORR decided to charge each of TfL, TOL and Mr Dorris with health and safety offences. TfL and TOL indicated their intention to plead guilty at a hearing before the District Judge on 10 June 2022. He committed each of TfL and TOL to the Crown Court for sentence under section 14 of the Sentencing Act 2020, and Mr Dorris was sent to the Crown Court for trial. He was arraigned on 8 July 2022 in the Crown Court at Croydon, and the case was transferred to the Central Criminal Court. That trial commenced on 17 May 2023 and, as at the date of handing down this ruling, he had very recently been acquitted by the jury by an unanimous verdict on 19 June 2023.

20. As part of the prosecution case against Mr Dorris, Document 3 was served upon him as part of the expert evidence that the ORR would rely upon against him at trial. Professor Wann is a psychologist and (either additionally or as a sub-set of that field) also a visual effects expert. That document formed part of the prosecution case against the defendant.

21. Documents 1 and 2 were protected under the Regulations. Document 3 was not protected, although it became there were serious issues and difficulties with this document for reasons that will become clear. The ORR did not initially know of the existence of Documents 1 or 2.

The unauthorised disclosure to date

22. The defence instructed their own expert, Professor Groeger, who is also a psychologist and his areas of expertise are either synchronous with or overlap those of Professor Wann. His report was dated 23 January 2023 and was served upon the prosecution. The views of Professor Groeger were very favourable to the case of Mr Dorris as set out in his defence statement, namely that as a result of the conditions and infrastructure of the

Sandilands tunnel complex, he had become disoriented. Professor Groeger, who gave evidence at both the Ladbroke Grove and Southall rail disaster inquiries, agreed that this was the most likely explanation of the crash. His report was sent to Professor Wann sometime in April 2023. There is no explanation available for why a document such as this, served in January 2023, took 3 months to make its way to Professor Wann.

23. Regardless of that, and as might be expected, Professor Wann was asked for his views. These were communicated to the prosecution at a consultation for that purpose on 5 May 2023. As at that point in time, the only information and reports that the prosecution had from Professor Wann was Document 3, which had been served on the defence. However, shortly prior to that meeting, Professor Wann informed an officer of the ORR that there were two other reports which predated Document 3, and also that Document 3 did not in reality represent or include his full views. These, he went on to explain in consultation with the ORR legal team, were more fully and accurately set out in Document 1 and particularly Document 2. There were certain passages in these documents which qualified or more accurately explained his views, and these important passages had been removed or deleted and did not appear anywhere in Document 3. The reason why those deletions had been made were then unknown, and were only clarified as relating to RAIB confidentiality when a statement was obtained from TRL during the trial.

24. Professor Wann provided the prosecution team with both Documents 1 and 2. He did not tell them that these documents were confidential and protected under the Regulations, or that his work-product contained in both those documents had been produced for TRL and/or for RAIB as part of their investigation and/or that the material could not be disclosed by him to them in that way. It became clear that he had either never fully appreciated the constraints upon him in this respect, or if he had ever known or realised, he must have forgotten.

25. The prosecution, with the trial immediately on the horizon and about to start within a matter of a couple of days, did what they were bound to do under their duty as prosecutors, which is they disclosed this recently received material to the defence. There is an alternative available to the prosecution in terms of disclosure, which is to apply for a Public Interest Immunity certificate ("PII"); absent doing that, information such as this must be disclosed. The option of claiming PII is only available if the prosecutor comes into possession of material that should otherwise be disclosed but he or she is satisfied that disclosure would create a real risk of serious prejudice to an important public interest. However, that test was not met here and, particularly given the way the documents came into the prosecution's possession – earlier drafts by an expert of what he considered to be his expert opinion – I do not consider that the ORR or its counsel can be criticised for acting as they did.

26. Professor Wann, concerned as he was at the apparent difference of his views in the report served upon the defence (Document 3) and his earlier different views in both Documents 1 and 2, prepared a "Note of Clarification" document dated 8 May 2023 ("Document 4"). That was served upon the defence to explain the different views in Document 3, compared to the earlier documents. It drew heavily upon Documents 1 and 2 and therefore the parties were agreed that it too was protected under the Regulations.

27. An expert owes an overriding duty to the court to give their independent opinion on the matters upon which they are instructed, and which fall within their sphere of expertise. The current Criminal Procedure Rules make it crystal clear what an expert must do. That word is used advisedly – must. Rule 19.4 states "an expert's report must" and then lists the 11 separate requirements. They are mandatory requirements, and go to the whole landscape within which the expert performs their task when giving evidence in criminal proceedings. Rule 19.4(1)(j), the tenth requirement, is that the report must "contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty". There is no suggestion in this case that any of the experts did anything other than comply with this duty; however, it is obvious that in giving his evidence in court, Professor Wann would potentially be drawing on his evidence of his own investigation that was conducted shortly after the tram disaster.

28. It is also well known that the description of the obligations of an expert in civil litigation set out in the classic case on this subject by Cresswell J, namely ***National Justice Cia Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")*** [1993] 2 Lloyd's Rep 68, 81 also apply to expert evidence in the criminal jurisdiction. This was made clear in ***Harris*** [2005] EWCA Crim 1980 and ***B(T)*** [2006] EWCA Crim 417. The approach set out in ***The Ikarian Reefer*** have been expanded upon and explained in different civil cases since. As a single example of further explanation of what this approach requires in practice from experts, I set out in ***ICI Ltd v Merit Merrell Technology Ltd*** [2018] EWHC 1577 (TCC) at [237] some specific requirements. These included:

> "1. Experts of like discipline should have access to the same material. No party should provide its own independent expert with material which is not made available to his or her opposite number.
> 2. Where there is an issue, or are issues, of fact which are relevant to the opinion of an independent expert on any particular matter upon which they will be giving their opinion, it is not the place of an independent expert to identify which version of the facts they prefer. That is a matter for the court.
> ….
> 4. The process of experts meeting under CPR Part 35.12, discussing the case and producing an agreement (where possible) is an important one. It is meant to be a constructive and co-operative process. It is governed by the CPR, which means that the Overriding Objective should be considered to apply. This requires the parties (and their experts) to save expense and deal with the case in a proportionate way.
> 5. Where late material emerges close to a trial, and if any expert considers that is going to lead to further analysis, consideration or testing, notice of this should be given to that expert's opposite number as soon as possible. Save in exceptional circumstances where it is unavoidable, no expert should produce a further report actually during a trial that takes the opposing party completely by surprise.
> 6. No expert should allow the necessary adherence to the principles in ***The Ikarian Reefer*** to be loosened.
> It is to be hoped that expert evidence such as that called by ICI in this case, and also in ***Bank of Ireland v Watts Group plc*** [2017] EWHC 1667 (TCC), does not become part of a worrying trend in this respect. There are some jurisdictions where partisan expert evidence is the norm. For the avoidance of any doubt, this jurisdiction is not one of

them. Not only experts, but the legal advisers who instruct them, should take very careful note of the principles which govern expert evidence."

29. Further, there are additional duties upon experts instructed for the prosecution, and these are contained in the CPS Guidance for Experts on Disclosure, Unused Material and Case Management (which was updated on 30 September 2019). These include at Part 3 the disclosure obligations of all expert witnesses, and at Part 4 the disclosure obligations of prosecution experts. This states at 4.2 and 4.7:

"4.2 Unused material is relevant material that is not used as evidence. During the course of any investigation material is generated. Some of it is used as evidence and other material is not used. The material that is not used as evidence is known as unused material. Unused material is material that is relevant to the investigation but which does not actually form part of the case for the prosecution against the accused. Even though the material may not be used as evidence, it is important that for the purposes of disclosure this material is recorded, retained and where necessary revealed to the defence.
…
4.7 There are three key obligations arising for you, as an expert, as the investigation progresses in order to discharge your obligations. Your understanding of these and your delivery of them is the key to you adequately fulfilling your disclosure obligations. The relevant steps are to **retain**, to **record**, and to **reveal**."
(emphasis present in original)

30. Therefore, it can readily be seen that it would be difficult – if not simply impossible - for Professor Wann to comply with these duties, particularly given the length of time that had passed since the incident and the investigation, without any reference to Document 4, and without potential reference to Documents 1 and 2.

The need for an order

31. RAIB became aware of these matters when the court sought an explanation by way of witness statement as to how the deletions had or could have been made which led to Document 3, and in the course of ORR investigating this, the protected status of Documents 1 and 2 was realised.

32. Professor Wann and Professor Groeger, meanwhile, intended and were required to hold a meeting to consider what matters they could agree. Given by that stage Professor Greoger had been handed a copy of the "Note of Clarification" document by the defence solicitors, it would have been wholly artificial for that meeting to have taken place without Professor Wann being able to consider and refer to Documents 1 and 2. This was particularly important given, when he came to give his evidence in person, he understandably in relation to a number of questions simply could not remember, given the length of time that had elapsed since he did the work, namely a period of over 6 years. Equality of arms between parties, and particularly experts, is important, and in order for the experts' meetings to be effective Professor Groeger needed to be permitted to consider Documents 1 and 2 in the meeting too.

33. Accordingly, a hearing was held at the Central Criminal Court on Friday 19 May 2023 – before the experts meeting – for RAIB to make oral submissions by their counsel (at that hearing this was Mr Manknell) firstly as to the status of the documents, and

secondly as to whether and how the court should consider the matter. This led to an order that permitted disclosure but ONLY for the purposes of the experts' meeting, and with Professor Groeger giving certain confidentiality undertakings. As this was unfolding during the hearing of an ongoing criminal trial, this was a practical but short term solution; and Professor Groeger, who had been heavily involved in the Cullen inquiry into both the Paddington and Southall train disasters, could be relied upon to act professionally and not disclose protected material.

34. Following that joint meeting an agreement between experts was made and the written agreement drawn up. It was obvious, based on the contents of that document and the likely passage of the experts' cross-examination to come, that at least the existence and potentially some of the contents of Professor Wann's 2017 work would need to be referred to. Another hearing was therefore held on 2 June 2023 at which RAIB was again represented by counsel to consider whether a further order was to be made.

35. There was no opposition from either the ORR or from the defendant as to the correct order that should be made; essentially they both agreed that in the interests of a fair trial for the defendant, some limited reference to the 2017 material might be required. However, there is more to the making of an order for disclosure of protected material than the prosecution and defence being agreed that one would be of utility. The interest in persons providing full and frank information to investigators, knowing that such material would be kept confidential, is an important one and cannot be trumped merely by the agreement of the parties in a particular case. It is protected by statute.

36. As Singh J (as he then was) observed at [3] in ***Chief Constable of Sussex Police v Secretary of State for Transport, British Airline Pilots Association*** [2016] EWHC 2280 (QB):

> "However, Mr David Manknell appeared on behalf of the Secretary of State in order to assist the Court and also to point out the strong policy considerations which lie behind the legislative scheme in this area and which tend to militate against disclosure of the sort of materials which are in issue in this case. The Secretary of State submits that the disclosure of the material sought in this case would have a significant and adverse domestic and international impact on future safety investigations, something which the Court is required to weigh on one side of the balance. However, the Secretary of State recognises that there are other interests which must be weighed on the other side of the balance, in particular the public interest in the effective investigation and detection of crime by the police." (emphasis added)

37. I would also add to that, there is also an obvious public interest in the defendant having a fair trial, and the experts appearing as witnesses being able to comply with their duties to the court and to give their truthful evidence before the jury, even if that requires reference to historic material from their earlier investigation which – as here - is protected.

38. There is also a corresponding issue related to that principle in this particular case, and that is the delay between the incident – 9 November 2016 – and immediate investigation on the one hand, and the date of the trial and the oral evidence on the other. In this case that period is 5 months short of seven years. The type of detail present in Documents 1

and 2 simply would not (and in the event obviously was not) retained by any expert in their head over such a period of time.

The principles

39. These are set out in two decisions in particular, namely ***Chief Constable of Sussex Police v Secretary of State for Transport, British Airline Pilots Association*** [2016] EWHC 2280 (QB) to which I have already referred at [36] above, and also ***BBC v Secretary of State for Transport*** [2019] EWHC 135 (QB). This case again considered the issue of air cockpit footage taken during the final flight of a Hawker Hunter aircraft which crashed on 22 August 2015, during an air display as part of a RAFA air-show at Shoreham in Sussex, coming down on a busy road and killing 11 people. The pilot, who was performing low-level aerobatics, survived the crash and was prosecuted on 11 counts of manslaughter. For completeness, he was acquitted. The first case was a Divisional Court decision (Lord Thomas LCJ and Singh J, as he then was) concerning release of protected material retained by the AAIB to the police for the purposes of the criminal investigation; the second decision was made by the trial judge, Edis J (as he then was) after the footage had been played to the jury as part of the criminal trial of the pilot. The BBC and other broadcasters wanted release of the footage to them for broadcast purposes. As one might expect, the second decision drew heavily upon the reasoning in the first decision. Edis J had posed himself the following question at [2]:

> "Am I satisfied that disclosure of the Go-Pro cockpit film to the media will produce benefits which outweigh the adverse domestic and international impact which it might have on any future safety investigation? In answering that question, I must take into account the fact that the film is being used in a public court as evidence in support of 11 manslaughter allegations and has already been played to the jury in open court. It is therefore the additional adverse impact of disclosure to the media which I am required to weigh against the benefits of disclosure."

40. He decided that the benefit of disclosure to the media did not outweigh the adverse impact on future safety investigations, in particular when considering the UK's international obligations under Annex 13 (Aircraft Accident and Incident Investigation) to the Chicago Convention on International Civil Aviation 1947. There are further detailed considerations in that judgment, in particular the interplay between Annex 13 and EU Regulation No 996/2010 (which has direct effect in the UK) which it is not necessary to consider here.

41. Obviously there is a difference in that case to this one, because that case related to and concerned material which had been played to the jury in open court. It therefore engaged the very important principle of open and transparent justice, and the ability of the press fully to report court proceedings. The protected material had not been created by an expert as part of his or her investigation, it was contemporaneous material of the factual events under consideration by the jury that had been captured on what is called a Go-Pro video which was mounted in the cockpit. In the instant case, the protected material consists of the work product including records of (relatively) contemporaneous investigations by an expert, together with an explanation some years later of how that expert's views had changed and why. The expert evidence as a whole was to be adduced to the jury as part of the prosecution case against the defendant in a criminal trial.

42. Notwithstanding those differences, I consider that the test required which is stated at [27] by the Divisional Court is the same. That is "whether the benefits of disclosure outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation". The test is framed in terms of the wider public interest, not just the interests of justice in any particular trial. I accept the submissions made by counsel for RAIB that an "interests of justice" argument does not trump all others.

43. I also bear in mind that investigations such as those carried out by the AAIB and by RAIB have a single object, as explained at [19] of the decision by the Divisional Court, namely "the prevention of accidents and incidents". I also bear in mind that the wider interests of justice include both the ability of the authorities to investigate potential crime, including serious crime, as well as the centrally important principle that any defendant in criminal proceedings is fundamentally entitled to have a fair trial. That latter principle is not under consideration at all where, for example, the issue is whether to allow the wider public to view material that the jury have already viewed in court. It is however centrally engaged here, where the issue is what material an expert giving evidence before the jury is, or is not, prevented from ventilating in that evidence. In that sense, the balancing exercise in this case is somewhat more substantially weighted towards disclosure than in the other cases.

44. The following matters also apply here, which have to be taken into account in the broader balancing exercise; these are fact specific to this individual case.

    1. The material is the recording of the prosecution expert's earlier investigation, contemporaneous measurements and views which formed part of the crystallisation of his opinion on the matters in issue in a criminal trial (Documents 1 and 2) together with an explanation (in Document 4) of how those views had changed or were different to the expert report served by the prosecution.
    2. A lengthy period of time had elapsed since then until the trial, and he would be unlikely to remember (and indeed as it turned out, could not independently remember) the detail of these without refreshing his memory from the protected material.
    3. In order for equality of arms between experts to be maintained, his opposite number for the defence ought to have access to the same material as he had.
    4. The issues upon which the expert had opined in Documents 1 and 2 could potentially be of central importance to the issues that the jury had to consider in the case, and which were squarely contained in the defence statement served by the defendant (before knowledge of the existence of Documents 1 and 2 was available to either the prosecution or defence). In this respect I do not accept the submissions made on behalf of RAIB on 2 June 2023; however that is not to criticise counsel for that. He had not been present at the trial each day, and could not know the emerging importance of issues such as the wholly inadequate lighting within the tunnel itself, or the earlier warnings of a senior engineer in 2008 of the dangers of drivers becoming disorientated in the Sandilands tunnel. He also could not know of the other experts' agreement that had been reached between Professor Horne and Professor Groeger that disorientation of the driver was a more likely explanation for the crash than the theory that gained traction in the immediate aftermath of the disaster (which was never successfully challenged until this trial, and for which there was no evidence at all) that the defendant had fallen asleep.

45. The balancing exercise necessary in this case comes clearly down on the side of permitting disclosure of Documents 1, 2 and 4. However, that disclosure does not have to be unfettered, and in my judgment should not be. It should be to allow such disclosure as is necessary so that the experts can confidently and fairly give their evidence to the jury, in answering questions both in chief and in cross-examination. Those questions should not unnecessarily explore the protected material, but should be limited – in so far as they concern either of Documents 1, 2 and/or 4 – to what is relevant so that the jury can consider the experts' evidence fully as that evidence is in June 2023, rather than a detailed historical trawl through the evolution of Professor Wann's views from 2017 to date.

46. The jury are likely to be less interested in how his views have changed over time, I would suggest, than what those views are now as at the trial date, of the conditions then in November 2016. For example, one of the other prosecution experts (not involved in the protected material) had only ever been shown, prior to the meeting with Professor Groeger, a non-contemporaneous daytime video of the tunnel and the progress of the tram through the tunnel. He significantly changed his views after having seen the night time video taken by the British Transport Police on 15 November 2016, just a week after the disaster. Why he was only ever sent a daytime video that did not show the inadequate lighting was never explained, and it was certainly not that expert's fault that this was the material he was given to work with.

47. The joint agreements of the experts, of which there were three in total by the end of the evidence in this trial, will have substantially reduced the areas in which the protected material itself would be fundamentally controversial. However, it retained central importance. But limited disclosure had to be ordered so that Professor Wann and Professor Groeger could comply with their oaths to tell the jury the whole truth, and not be inhibited in doing so and concerned that they would be guilty of an offence in so doing.

Conclusion

48. Limited and proportionate disclosure of the protected material in Documents 1, 2 and 4 will be ordered. There is no application by the press for access to it, and that disclosure would be limited to that strictly necessary so that the experts could be uninhibited in the way explained in [47] above.

49. The prosecution, the defence and RAIB were ordered at the hearing to liaise between themselves in terms of the actual wording of the order. If there had been any difficulty or disagreement about its specific terms, that was to be resolved by the court. However, with co-operation and with the principle of limited disclosure having been resolved, this did not prove necessary and a limited order was made in the agreed terms.