motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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Katherine Ann Irving v Morgan Sindall plc [2018]

The appellant had a road accident in which her car was written off. She suffered a whiplash injury that healed in 4 weeks. The other driver admitted liability. The appellant needed a vehicle to commute to work and hired a replacement on credit while awaiting a cheque from the insurer to buy another car. The respondent insurer took over 4 months to make the necessary payment and the hire charges reached £20,000.

Although general damages had been agreed, the credit hire claim went to trial. In cross-examination, the appellant stated that the hire company had told her when she signed the agreements that the hire charges would be covered by the third party insurer. She said that her lawyers told her that she was in a no win no fee situation and she never thought she would have to pay any hire charges.

The trial judge concluded that for the charges to be recoverable from the insurer he would have to be satisfied that the appellant was obliged to pay them, but, on her own evidence, which was the only evidence he had, she was not obliged, and so the credit hire charges could not be recovered. The issue on the appellant's appeal was whether she was entitled to recover the hire charges when her liability to the credit hirer was found to be contingent.

There was uncertainty as to the jurisprudential basis for the judge's conclusion. The court had proceeded on the basis that the appellant's liability to pay the charges was contingent upon her recovering damages against the other driver, and that if she failed to recover, she would have no personal liability to pay. There was, however, no evidential basis for the judge to decide that the hire was "free". The appeal court held that the trial judge was wrong to conclude that the assurances given to the appellant compromised her claim for credit hire charges against the respondent insurer. Accordingly, the appeal was allowed.

Idris Farah (by his litigation friend) v Ahmed Abdullahi & Others [2018]

The claimant was injured by a car driven by an unidentified driver. The insurer obtained a declaration from the court that it was entitled to avoid the policy for material non-disclosure.

The insurers refused to accept service on behalf of the unidentified driver and the claimant applied without notice for an order, under CPR 6.15, that the insurer accept service of the proceedings on the unidentified driver's behalf. The application was supported by *Cameron v Hussain [2017]*, in which it was held that there was no procedural bar to issuing proceedings against an unidentified driver. The master granted the application. The insurer applied to set aside the order on the basis that, since it had avoided the policy, it was not liable under s. 151 of the Road Traffic Act 1988 to meet the claim, and so *Cameron* did not apply.

The court found in favour of the claimant. Section 151 provided that insurers had to meet judgments in respect of insured third party liabilities, even if the insurer was not liable to its insured as a matter of contract (such as where the driver was a friend or partner of the insured, but was not named on the policy). The effect of s. 151 could be avoided by s. 152(2) if the policy had been obtained by misrepresentation or failure to disclose material facts, however, s. 152(2) had been held incompatible with Directive 2009/103; *Fidelidade* followed. In any event, the test in *Cameron* did not rest on the existence of a s. 151 liability. It was held that, in light of authorities such as *Fidelidade*, the claim against the unidentified driver was capable of conferring a real benefit on the claimant. Furthermore, notwithstanding its avoidance of the policy, the insurer would still have to indemnify the claimant because the MIB would be liable to satisfy any judgment in the claimant's favour and that liability would fall to be met by the insurer pursuant to art. 75.

The claimant was prima facie entitled to proceed against the unidentified driver; *Cameron* followed. It was also held that the court's permission did not have to be obtained before proceedings could be issued against an unnamed defendant and justice was better served by service on an insurer rather than by dispensing with service altogether.

AXA Insurance UK plc v (1) Financial Claims Solutions Ltd (2) Mohammed Aurangzaib (3) Hakim Mohammed Abdul [2018]

The respondents had issued proceedings seeking damages following two road traffic accidents allegedly caused by persons insured by AXA. The two sets of proceedings were issued in the name of five fictional claimants and in relation to accidents which had never occurred. The claims were supported by fake hire agreements and fake medical reports. AXA obtained judgment in Part 20 proceedings against the respondents for deceit and unlawful means conspiracy. Compensatory damages were assessed in the region of £24,950, which represented the cost of AXA's investigations to expose the fraud.

The judge rejected AXA's claim for exemplary damages, concluding that it did not fall within the second category described in *Rookes v Barnard [1964]* as those "in which the defendant's conduct has been calculated … to make a profit for himself which may well exceed the compensation payable to the plaintiff". AXA appealed, submitting that the judge failed to recognise that the case was one in which the respondents considered that the profit through fraudulent insurance claims would probably exceed the damages at risk if the fraud were uncovered, thus clearly falling within the second category.

It was held that although exemplary damages remains anomalous and the exception to the general rule, the second category was clearly satisfied. The respondents' object was to extract large sums from AXA through fraudulent insurance claims, where, if the fraud was discovered before it succeeded, any compensatory damages would be limited to the costs of investigating the fraud, which would probably be a much lesser sum, as proved to be the case.

The court also held that the possibility of criminal or contempt proceedings being brought against the respondents was irrelevant to the question of whether an award of exemplary damages should be made. Given the seriousness of the respondents' conduct, and the need to deter them and others from engaging in "cash for crash" fraud, which adversely affects all policyholders, the court, in allowing the appeal, found that the appropriate award of exemplary damages was that each of the first, second and third respondents should be liable to pay £20,000.

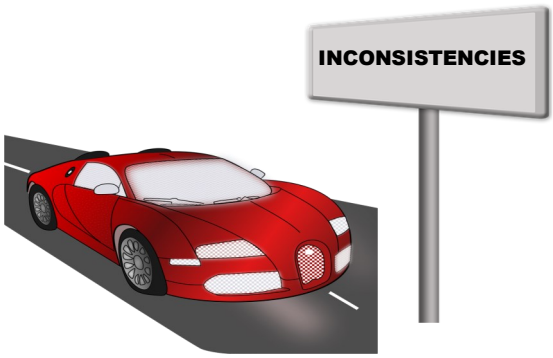
Mirajuddin Molodi v (1) Cambridge Vibration Maintenance Service (2) Aviva Insurance Ltd [2018]

The claimant sought damages for a whiplash injury which he claimed to have suffered in February 2015 when his car collided with a van driven by an employee of the defendant. The defendant accepted liability, but challenged causation, alleging that the collision was so minor that it could not have caused the claimant any injury. Although the claimant saw his GP the day after the accident, he did not seek any treatment thereafter and, in his CNF, he confirmed that he had not taken any time off work or sought any medical treatment. He was examined by a medical expert at the end of March and the resulting medical report indicated that he had an ongoing whiplash injury, that he had to take time off work in consequence and that he had been involved in only one previous accident.

Although the defendant was challenging causation, the court did not follow the special directions applicable to "low velocity impact" cases. The case was, instead, allocated to the fast track and the defendant was not permitted to obtain its own medical evidence. At trial, the defendant pointed to a number of inconsistencies in the claimant's case, which included the claimant having been involved in at least 5 previous road traffic collisions and that whilst he was seeking £1,300 to cover the cost of repairing his car, the repairs had actually cost £400. The judge found that it was plausible that the claimant had suffered a whiplash injury as a result of the accident, but that he had exaggerated the seriousness of the injury to some degree. The claimant was awarded £2,750 for PSLA and £400 for the repairs. The defendant appealed, arguing that even though it had not pleaded dishonesty, the judge should have found fundamental dishonesty on the part of the claimant and should have dismissed the claim under s. 57 of the Criminal Justice and Courts Act 2015.

It was held that it was unfortunate that the case had not followed the procedure set out in *Casey v Cartwright [2006]* for "low velocity impact" cases. Medical evidence was at the heart of whiplash claims and the history in relation to previous accidents went to a fundamental question of causation. It was held that the judge, at first instance, had taken a far too benevolent approach and the claimant's evidence was demonstrably inconsistent, unreliable and untruthful. He had clearly lied about the number of accidents he had previously been involved in and was seeking £1,300 for a £400 loss.

There were also fundamental inconsistencies between his evidence at trial and what was contained in the CNF. The defendant had proved, on the balance of probabilities, that the claimant had been fundamentally dishonest. The appeal was allowed and the claim was dismissed.

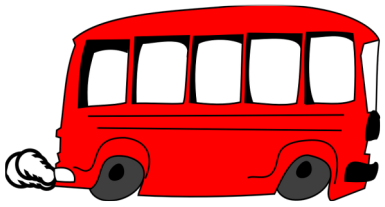


Marrett-Gregory & Another v Metroline Ltd & Another [2018]

The claimants brought a claim through the estate of the victim who, aged 90, had been on a bus which was owned by the first defendant bus company and driven by its employee. The victim had intended to get off the bus at a bus stop located in the left-hand lane immediately after a box junction. The bus was in the left hand lane. The second defendant was in her car in the right hand lane. The bus driver braked suddenly as the victim rose from his seat and he was thrown with considerable force along the lower deck of the bus, where he struck his head and died as a result of his injuries.

The first defendant contended that the bus driver had stopped because of the second defendant's negligent driving. The claimants contended that both defendants had driven negligently. They both denied liability. The evidence at the hearing included still and moving images from cameras on the bus and near the junction. The bus driver gave evidence, as did another passenger who had similarly been thrown forward. The second defendant relied on an earlier statement given to the police.

The cameras showed the second defendant's car turning towards the left in relation to the hatched box junction. The bus driver anticipated that she was going to cross his path, so braked fiercely to avoid a collision. It was held that the second defendant had breached the Highway Code by entering a box junction before her exit was clear and by failing to check her wing mirror and indicate before changing lanes. Her driving fell below the standard of a reasonably competent driver and was causative of the accident. Negligence was established. There was also concern as to the bus's speed as it approached the junction. As the bus approached the hatched area it was going too fast.



Also, given the width of the bus and the width of the lanes, there was limited room and the possibility that the bus might have to stop. It was held that the excessive speed had contributed to the accident and negligence was established.

There was, however, no contributory negligence on the part of the victim. Just before the accident, he had both hands on the handrail. The force of the braking was shown by the fact that the other passenger had been thrown forwards from her seat. The second defendant was held 75% liable and the first defendant 25% liable.

Susan McIntosh v Barry Harman [2018]

The claimant was looking at night for a missing elderly woman and was driving a marked police car along an unlit semi-rural road. She noticed a group of people congregated on a driveway on the opposite side of her direction of travel and, wanting to speak to them, she drove across the road and parked facing oncoming traffic. The headlights and blue lights were switched off to avoid dazzling pedestrians and oncoming traffic. The car's 'takedown' lights on its roof were illuminated. The defendant was driving a car from the opposite direction. There was a brow caused by an undulation of the road around 120 to 130 metres in front of the police car. A dashboard camera in the police car recorded the defendant's car approaching, its headlights being obscured by the brow, reappearing and then colliding head on with the police car. The claimant contended that the police car had been obvious, the defendant had had ample time to stop or drive around her and it was his negligence that caused the accident.

The defendant's case was that he had seen what appeared to be headlights from an oncoming vehicle, so he dipped his headlights and reduced his speed. He said it was only in the final seconds before the collision that he had been able to identify that the police car was stationary and in his path. The defendant contended that the claimant should not have parked where she did and should have activated the blue lights or hazard lights.

The court did not accept that it was reasonable for the defendant to continue to assume that there were oncoming headlights right up to immediately before impact and should have appreciated that there was a hazard in his path within seconds of clearing the brow. The fact that he did not indicated that he had not been paying proper attention and/or was travelling too fast to react appropriately. His emergency braking was applied far too late, which caused him to skid in a straight line into the police car. The court found that the claimant's decision to stop her vehicle and pull over could not be criticised. However, she had made an error by turning off her side lights (as well headlights) and it might have been better for her to have turned on the hazard lights. It was held that by turning off the side lights accidentally it had contributed to the defendant's initial and wrong assumption that he was faced with oncoming headlights. Had the side lights been on, the defendant might have been alerted at an earlier point to the presence of the police car and, as such, the level of contributory negligence was 30%.

Accident Exchange Ltd & Another v McLean & Others [2018]

The claimant companies' business was providing replacement cars on credit hire after cars had been damaged in road traffic accidents. They recovered the costs of providing cars, at market rates, from the insurer of the driver at fault. The first two defendants were directors of a company, Autofocus, which specialised in providing evidence of such market rates for court proceedings. It had been established in contempt proceedings against the employees of Autofocus that they had provided numerous reports that falsely understated market rates so that the claimant had recovered less from the insurers than they should have done. The other defendants were solicitors who had carried out credit hire work for insurers. The claimant said that they had been reckless as to the conduct of Autofocus and that they were liable in conspiracy and/or deceit for the claimants' losses which amounted to tens of millions of pounds. The case was listed for a 14 week trial starting in October 2018 and the solicitors estimated their combined costs to the end of trial would be about £19 million, and sought security of about £15 million representing 80% of those costs.

They sought payment in 3 tranches to cover their incurred costs. The claimants argued that there should be no order for costs since that would stifle the claim and also because there had been inordinate delay by the solicitors in applying for security.

In relation to the allegation of stifling, the court had to be fully satisfied that there was no prospect of funds being forthcoming from a third party, such as a creditor or shareholder, and that there had been full and candid disclosure of the resources available. The claimants' business had been financed by a substantial loan, £30 million of which had been converted to equity. The business was owned by an investment fund and there was evidence which suggested that those behind the fund, who stood to benefit if the claim succeeded, would make funds available to comply with an order for security. As for the delay, the court acknowledged that the application could have been made earlier and made a reduction from the amount ordered to reflect the delay. The court ordered security to be given in 3 tranches and the appropriate level of security was 60% of the defendant's costs. In respect of incurred costs, the claimants were ordered to pay only 60% of 60% of the costs to reflect the delay in bringing the application.

If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

Simon Evans at **simone@dolmans.co.uk**

One Kingsway, Cardiff, CF10 3DS

Tel : 029 2034 5531
Fax : 029 2039 8206

www.dolmans.co.uk