Beyond the PI Update

RTA Issues

OBJECTIVES:

Provide an update on the law & review recent personal injury cases on road traffic accidents and take a close look at Indemnity and MIB issues:

INSURANCE INDEMNITY – MEANING OF "USE"

UK INSURANCE LTD v HOLDEN
QBD (Merc) (Judge Waksman QC) 19/02/2016
[2016] EWHC 264 (QB)

On Saturday 12 June 2010, Mr Thomas Holden, the First Defendant and a mechanical fitter employed by the Second Defendant[1] ("Phoenix") was working overtime at Phoenix's premises. The day before his car had failed its MOT due to corrosion on its underside. Having completed his first piece of work that day he asked his employer if he could use the loading bay at the premises to do some work on the car which would hopefully enable it to pass the MOT. His employer agreed. His intention was to weld some plates onto the underside of the car to deal with the corrosion.

He disconnected the car battery so there were no live circuits which the welding equipment might interfere with. He then used a fork-lift truck to push the car up on its side so that he could get at the underside. He used a grinder first to prepare the underside and then successfully welded a plate under the driver's side. He then reconnected the battery, started the car and moved it round the other way before disconnecting it again and lifting it up once more but now with the underneath of the passenger side exposed.

At this point he started to weld, but then his phone went and he stood up to take the call. As he did so, he saw flames inside the car. What had happened was that sparks from the welding had ignited flammable material inside the car including the seat covers. The fire spread and set alight some rubber mats lying close to the car.

[1] R & S Pilling Ltd trading as Phoenix Engineering

The fire then took hold in Phoenix's premises and adjoining premises and substantial damage was caused before it was extinguished.

Phoenix's insurer was AXA. It has paid out to Phoenix and the owner of the adjoining property in excess of £2m. Being subrogated to Phoenix's rights, AXA made a claim against Mr Holden in the name of Phoenix for an indemnity in respect of the sums it has paid out. If Mr Holden had any insurance in respect of the claim, it was only by reason of his ordinary car insurance effected with the claimant, UK Insurance Limited. The insurer applied for a declaration that the car insurance policy it had issued to Mr Holden did not cover the damage he had caused to property belonging to Phoenix while repairing his car.

The policy with the claimant provided cover for an individual who had an accident "in your vehicle" which killed or injured someone or caused damage to "their property" or "their vehicle". It stated that it provided the minimum cover required under UK and EU law. The insurer contended that its policy did not cover accidents involving the car on private premises or while it was being repaired,

There were five issues:

1. the interpretation of the policy's coverage clause;

2. whether cover was limited to accidents arising from using the car "on a road or other public place", as in the Road Traffic Act 1988 s.145(3);

3. if so, whether that was compatible with the coverage required by Directive 72/166 art.3(1);

4. whether repairs constituted "use" of the car;

5. if so, whether that use caused the accident.

On the first issue the judge held that the policy clause was poorly worded. It did not only cover damage to property belonging to someone injured or killed in the

accident. It properly covered personal injury or death, or damage to someone's property, or damage to someone's vehicle. The phrase "an accident in your vehicle" was too narrow; the policy covered accidents caused by the vehicle even if the insured person was not in it or driving it at the time. The judge suggested that a better wording would be "an accident involving your vehicle". Section 145(3)(a) referred to liability for damage "caused by or arising out of the use of a vehicle" and the coverage clause had to comply with that.

On the second issue the judge noted that the policy did not expressly limit coverage to roads, suggesting that use of the car elsewhere was covered. It had to comply with the minimum third party cover in the Act, but it could be more generous[2]. The Act contained an explicit limit to roads, which was not repeated in the policy. The policy's certificate excluding coverage of races and track days suggested that other activities not on public roads were not excluded. The judge held that the policy covered the accident location.

It was not necessary to decide the third issue however the judge pointed out that *Vnuk v Zavarovalnica Triglav dd*[3] had not ruled on whether the Directive applied only to public roads, although it implied that cover could extend further than where the accident happened on a road. The key question in *Vnuk* had been whether the use was consistent with the normal function of the vehicle. If it was then cover was required even though private premises were involved. That definition of "use" had to be read into the Act if possible. The Act contained the word "use", but expressly limited the coverage obligation to roads and other public places.

The court rejected the submission that the word "including" could be read in before "on a road" in s.145(3)(a) saying that was a potentially significant addition to the scope of the Act. Accepting that the court should construe primary legislation to be compatible with EU law where possible, the judge concluded that it should not cross

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[2] *British Waterways v Royal & Sun Alliance Insurance Plc* [2012] EWHC 460 (Comm), [2012] Lloyd's Rep. I.R. 562 applied.
[3] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146, [2016] R.T.R. 10

the line between interpretation and amendment[4]. Nevertheless section 145(3)(a) was incompatible with art.3(1) of the Directive[5].

In relation to issue 4 the court held that the definition of "use" suggested some activity performed by the vehicle qua vehicle[6]. The court considered various Canadian and Australian cases on whether repairing a car constituted "use"; the Canadian cases allowed that approach, but the court found it too broad. Repair of a vehicle was held not to amount to use. While it was normal and necessary to repair a car from time to time, it was not a normal function of a car to undergo repair. The repair undertaken in this case was not "use". The car was not being operated in any way but was immobile and partly off the ground. The judge held that the policy did not cover the claim.

Had it been necessary to decide, what was caused by or arose out of "use" it was held to be a question of fact and degree in each case[7]. The judge decided that It was artificial to suggest that the fire arose out of Thomas Holden's use of the car because he had driven it into the loading bay. The fire was caused by the allegedly negligent repairs, namely using grinders and welders without taking precautions regarding flammable materials in the car. Accordingly the Policy did not respond to this particular claim and UK was entitled to the declaration sought.

[4] *Churchill Insurance Co Ltd v Wilkinson (*C-442/10) [2013] 1 W.L.R. 1776 considered.
[5] *Vnuk* applied.
[6] *Vnuk* considered.
[7] *Dunthorne v Bentley* [1996] R.T.R. 428 considered.

MIB QOCS & COSTS

HOWE v MOTOR INSURERS' BUREAU
QBD (Stewart J) 22/03/2016
[2016] EWHC 884 (QB)

On 30 March 2007 Michael Howe, was rendered paraplegic. He was driving in France and collided with a wheel which came off a lorry ahead of him. Investigation by the French authorities drew a blank as to the identity of the lorry from which came the wheel or its driver or its insurer.

Mr Howe informed the MIB of the accident later in the year. The MIB handled the driver's claim on behalf of its equivalent French organisation (the FDG). Negotiations between the parties continued for some years, with the driver being medically examined and the FDG making interim payments. In 2014, the FDG refused an interim payment as the amount the driver had already received matched its overall offer to him. The driver issued proceedings in December 2014.

On 22 March 2016 Stewart J held[8] that that the requirement under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 reg.13(1)(b) for a driver to make a request for information from the MIB under reg.9(2) was not a necessary ingredient in the cause of action to found a statutory claim against the MIB.

However the claim was dismissed as being time-barred. The claimant was ordered to pay 85% of the MIB's costs. The issue was whether his claim was for damages for personal injury within the meaning of r.44.13 so as to limit the costs recoverable by the MIB.

The judge held that the rationale for the qualified one-way costs shifting regime was to protect those who had suffered injuries from the risk of facing adverse costs orders obtained by insured or well-funded parties, which would deter injured persons

[8] [2016] EWHC 640 (QB)

from making compensation claims[9]. The purpose had to be borne in mind when interpreting the words of r.44.13 that's[10].

Stewart J. referred to *McGregor on Damages* and stated that it made it clear that "damages" were simply an award of money for a civil wrong. To retain the requirement of a wrong was entirely necessary as it was an essential feature of damages. He pointed out that actions claiming money under statute, where the claim was made independently of a wrong, were not actions for damages.

The judge held that as no breach of duty or any other wrong had been alleged against the MIB, a claim based on reg.13 was not a claim for damages for personal injury within the meaning of r.44.13. Regulation 16 was consistent with that analysis; it enabled recourse to the court to recover a sum due under the Regulations as a civil debt, which was recoverable by statute independently of any breach of duty or other wrong by the MIB.

Mr Justice Stewart held that on the clear construction of r.44.13, the claimant's claim was not one for damages for personal injury. Whether the non-applicability of the qualified costs regime offended the EU principles of equivalence and effectiveness was not for the instant court to determine. Accordingly, the claimant did not have protection under the qualified costs regime.

[9] *Wagenaar v Weekend Travel Ltd (t/a Ski Weekend)* [2014] EWCA Civ 1105, [2015] 1 W.L.R. 1968 considered.
[10] *Bloomsbury International Ltd v Sea Fish Industry Authority* [2011] UKSC 25, [2011] 1 W.L.R. 1546 followed.

MIB INDEMNITY – DEFUNCT FOREIGN INSURER

WIGLEY-FOSTER v WILSON & MOTOR INSURERS BUREAU
CA (Civ Div) (Gloster LJ, David Richards LJ, Sir Robin Jacob) 16/05/2016
[2016] EWCA Civ 454

The claimant Jade Wigley-Foster was a passenger in a Greek-registered vehicle driven by the first defendant Natasha Wilson. Wilson had consumed excessive alcohol. The vehicle, which was rented, was involved in a collision, causing the claimant to suffer serious injuries.

The vehicle was insured by a Greek company which had appointed a claims representative in the UK in accordance with Directive 2000/26. In May 2009, the claimant brought a claim for compensation against the Greek insurer through the claims representative but no reply was received within the three-month period after the claim was made.

In September 2009, the claims representative reported that the car rental company had brought proceedings in Greece and that it could not comment on the personal injury case at that time.

In February 2010, the licence of the Greek insurer was revoked and its insolvency was reported.

In October 2010 the claimant brought a claim against the MIB, which denied liability.

It was determined as a preliminary issue that, subject to the liability of the driver being established under Greek law, the MIB was not liable to compensate the claimant under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003. The court held that neither the Directive nor the Regulations were intended to compensate an injured party in circumstances where the insurer had become insolvent.

On appeal, the parties agreed as a revised preliminary issue the question whether, subject to the liability of the driver, the Bureau was liable to compensate the claimant following the failure by the insurer or its UK representative to provide a reasoned reply in time where the insurer's licence had been revoked by reason of its insolvency.

The Court of Appeal held that It was not in doubt that, because the Greek insurer's claims representative had not provided a reasoned reply to the claim within three months, the claimant was entitled to notify and subsequently pursue a claim for compensation against the MIB from the beginning of September 2009. Nor was it in doubt that the MIB was obliged to respond within two months of receiving that claim.

In addition they held that if the Directive had been intended to compensate claimants in the event of an insurer's insolvency, it was inconceivable that it would not have so provided. Dealing with claims in the insolvency of an insurer was a matter left entirely to domestic legislation.

The obligation of the compensation body appointed in accordance with art.6(1) of the Directive to deal with compensation claims for loss or injury resulting from accidents occurring in another Member State than that where the injured party resided arose only in the particular events specified in that provision. It did not follow that, where the obligation of the compensation body was triggered by the occurrence of one of the specified events, it later ceased by reason of the insurer's subsequent insolvency.

In this case, the claimant's right to notify and pursue a claim against the Bureau arose precisely because the circumstances specified in art.6(1)(a) had occurred. Namely that there had been no reasoned reply to the claim made against the Greek insurer's claims representative within three months. The accrual of that right did not arise because of any insolvency on the part of the Greek insurer. Indeed, the insolvency had not yet occurred at that time. It was therefore not open to the MIB to argue that the subsequent insolvency deprived the claimant of her right against it.

The court confirmed that the relevant time for considering whether the insurer was

an authorised insurance undertaking within the meaning of art.2(a) of the Directive was the time of the accident giving rise to the claim. Insurers might cease to be authorised to carry on new business without becoming insolvent. They stated that it would be odd if that were to have the effect of terminating the rights of injured parties under art.6.

The appeal was allowed and the preliminary issue determined in favour of the claimant.

MIB & EX TURPI CAUSA

BEAUMONT v FERRER
CA (Civ) (Moore-Bick LJ; Longmore LJ; Beatson LJ) 19/07/ 2016
[2016] EWCA Civ 768

David Ferrer was a very experienced, self-employed licensed taxi driver in Salford. He owned and drove a Nissan Serena minivan. He received work from Swan Taxis. In the early evening of 27 July 2009 Ferrer received a call from his control room, asking him to collect a fare from 109 Tootal Drive, Salford.

The booking had been made from the house of the parents of Connor Emery, then aged 11. David Ferrer arrived at the address, and found six youths waiting for him at the bus stop across the road. They were the first claimant, Joseph Beaumont, then aged 17, the second claimant, Lewis O'Neill, also then aged 17 plus two boys aged 13, one aged 14 and another 17 year old, Luke Bullcock. Ferrer was asked to take the youths to "Urbis", in Manchester city centre.

The six youths had in fact already agreed among themselves that none of them would pay the eventual taxi fare. The plan was to 'jump the taxi', at an appropriate opportunity at or near their destination and make off without paying the fare.

When they reached the city centre, three of the youths got out of the taxi and ran off without paying. Ferrer then drove on. Beaumont and O'Neill exited from the taxi as it was moving, fell and sustained serious injuries. The two claimants brought a claim in negligence against the defendant taxi driver. Their case was that Ferrer owed a duty of reasonable care to his passengers, all comparatively young people, to ensure their safety and well being.

The claimants also argued that the doctrine of ex turpi causa did not apply, as there was no relevant turpitude: no offence under the Theft Act 1978 s.3[11] had been committed, as Ferrer left the scene before he gave the group time or opportunity to

[11] Making off without payment

pay the fare. Finally they stated that even if they were engaged in criminal conduct leading to their injuries, the doctrine of ex turpi causa did not apply in the circumstances of the case in particular because their offending was not of such gravity that it should engage the public policy of ex turpi causa.

Mr Justice Kennet Parker[12] held that Ferrer had done nothing to put either claimant in the position where they were poised to exit the taxi, and he did nothing to lead to their decisions to leave the moving taxi. He accepted that the execution of the criminal joint enterprise, with three youths already having left the taxi and run away, put Ferrer in a dilemma. He concluded that he drove on partly because he wanted to do something to impede the youths left in the taxi from exiting and making off without payment. However fear also played a part (he had been stabbed during an attack by another group of youths).

For the claimants it had been argued that at that point Ferrer should have allowed all the youths to leave the taxi and resigned himself to the inevitable loss of the fare and the great unlikelihood of any of the offenders being apprehended and sanctioned for their wrongdoing. The judge held that even if he should have followed that course and in not doing so was at fault, the failure followed from the criminal intentions and actions of the youths. His view was that any degree of fault was simply overwhelmed by those intentions and actions.

In addition the judge found that even if Ferrer was in breach of his duty of care by driving on as he did, that breach did not cause the injuries suffered by the claimants. The conduct of each of them in jumping or stepping out of the taxi broke the causal connection between such fault and the damage. He concluded that this was a case where justice was served by holding that the claimants in substance brought about the injuries themselves.

The judge also held that the two claimants had committed an offence under s.3 of the 1978 Act by participating in a joint enterprise pursuant to which their co-conspirators had already taken off without payment. He concluded that the correct

[12] [2014] EWHC 2398 (QB)

approach to deciding whether the doctrine of ex turpi causa applied was to ask whether the criminal act was no more than the occasion for the damage or whether the damage was caused by the criminal act in which case the doctrine would apply[13].

Mr Justice Kenneth Parker concluded that this was a plain case where the damage was caused by the criminal conduct of the claimants. That conduct was not carried out on the spur of the moment. There was a plan jointly to "jump" the taxi, and that plan was put into effect. Three of the group had already left the taxi and taken off before the defendant drove on. Both claimants had at that point every opportunity to recognise their dishonest intent, to reseat themselves in the taxi and to travel on safely. Instead, they deliberately chose to follow their companions in the carrying out of the joint criminal enterprise, and in each case chose to jump or step out of the moving taxi. Their only reason for doing so was to evade payment of the fare.

The judge held that applying ex turpi causa here tended strongly to promote the public policy that underpinned the doctrine. Dishonest evasion of a taxi fare should not be dismissed as just another inevitable expense of the driver, but should be seen for reasons of public policy as a pernicious and reprehensible practice that tended to erode the efficiency, and raise the costs, of a service that was valuable to the community. It could also risk public disorder if taxi drivers, responding to a crime that was easily perpetrated but difficult to police, resorted to their own counter measures.

Unsurprisingly he concluded that in the circumstances, both claimants were in any event precluded by the doctrine of ex turpi causa from succeeding in their claims. The claims were dismissed and judgment entered for defendant. The claimants appealed.

The Court of Appeal confirmed that the taxi driver had been in breach of his duty of care to his passengers. His choice was either to let the remaining three of his passengers out of his vehicle or to drive them to the nearest police station. Although

[13] *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 A.C. 1339, *Hewison v Meridian Shipping Pte Ltd* [20021 EWCA Civ 1821 *Revill v Newbery* [1995] EWCA Civ 10, and *Joyce v O'Brien* [2013] EWCA Civ 546, [2014] 1 W.L.R. 70 considered.

it was entirely understandable that he did not want to lose his comparatively modest fare that was not an excuse for driving off with an open door when the claimants were not wearing their seat belts. In the circumstances, the judge below had been wrong to say that it was not reasonably foreseeable that the claimants would position themselves with a view to jumping out of the taxi. They held that was regrettably all too foreseeable once the first three youths had put their part of the criminal enterprise into effect.

They then turned to causation and the ex turpi causa maxim, Lord Hoffmann had suggested in *Gray v Thames Trains Ltd*[14] that it might be preferable to treat the issue as simply one of causation:

1. Could one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant?; or

2. Was the position that, although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant?

The Court of appeal had no doubt that the former proposition applied here. Even it if could be said that the claimants' injuries would not have happened but for the tortious conduct of the defendant, they were in reality caused by the claimants' own criminal acts of making off without payment[15]. Accordingly, there should be no recovery.

The appeal was dismissed.

[14] *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 A.C. 1339
[15] *Gray* considered

SMITH v STRATTON & MOTOR INSURERS' BUREAU
CA (Civ Div) (Moore-Bick LJ, Laws LJ, Elias LJ) 08/12/2015
[2015] EWCA Civ 1413

Smith was one of three passengers in a car driven by the first defendant. The vehicle had been involved in a collision following a police chase, and Smith suffered a severe brain injury. He claimed damages from the first defendant, whose motor insurers were found to be entitled to avoid the policy for non-disclosure and misrepresentation. The first defendant was therefore uninsured, and the MIB became prima facie liable to meet any unsatisfied judgment against him.

The MIB claimed that Smith had been involved in a joint enterprise to supply drugs at the time of the accident, and consequently sought to avoid liability under cl.6 of the MIB Compensation of Uninsured Drivers Agreement 1999. This released it from liability to a claimant who had voluntarily allowed himself to be carried in a vehicle used in the course of crime or to avoid lawful apprehension. In addition the MIB stated that the "ex turpi causa non oritur actio" maxim, prohibiting actions founded on illegality.

Smith did not give evidence on the basis that he had no memory of the accident or events surrounding it. The first defendant, who was then in prison, did not give oral evidence, but the MIB had obtained a witness statement from him stating that he and the car's passengers had been dropping off drugs when they were spotted by the police and tried to escape. The judge took account of evidence that all four of the car's occupants had drugs convictions, all were unemployed but two were carrying a total of £365 cash, and that the first defendant had driven off at speed after seeing the police.

His Honour Judge Saffman (sitting as a Judge of the High Court) held that the cumulative effect of the evidence was enough to satisfy him that the MIB had proven to the relevant standard that the appellant had been involved in drug dealing on the evening of the accident, so as to engage the exclusion in cl.6 of the agreement. The

judge cited the test for the application of this maxim as formulated by my Lord Elias LJ in *Joyce v O'Brien*[16] at paragraph 29 as follows:

> "…where the character of the joint criminal enterprise is such that it is foreseeable that a party or parties may be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal objectives, and the risk materialises, the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise."

He concluded that the maxim was applicable since the purpose of the joint enterprise had been to supply drugs and the use of a car was integral to that purpose, and that the effort to evade apprehension gave rise to an obvious risk of injury, so that the accident had been caused by the criminal act, rather than being incidental to it. The judge consequently ruled that the MIB was not liable to meet any judgment against the first defendant.

Smith appealed and contended that the finding that he was involved in supplying drugs was not open to the judge, who had been wrong to take the first defendant's hearsay evidence into account, and that the judge had wrongly applied the ex turpi causa maxim.

The Court of Appeal held that the judge had rightly regarded the various points cumulatively. His conclusion was not only open to him, it was one they would also have reached. In particular, he had been wholly entitled to attach weight to the first defendant's statement: statements against interest tended to be true. The factual conclusion was correct. The judge had also correctly cited and applied the ex turpi causa maxim, Joyce considered.

Although the exclusion in cl.6 of the agreement had been held to be incompatible with EU law but that did not assist Smith[17]. They held that it might give rise to a

[16] 2013] EWCA Civ 546, [2014] 1 W.L.R. 70

damages claim against a Member State under EU law, but it did not touch on the issues in these proceedings.

The appeal was dismissed.

[17] *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172, [2015] 3 All E.R. 329 considered.