motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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EUI Limited v (1) Stephen Dodd (2) Adam Tyrrell (3) Mark Fitzpatrick [2018]

Three men (the respondents) were involved in a fraudulent insurance claim arising out of a staged motor vehicle accident in June 2012. They had been present at the scene of the staged accident, had been aware of what was going on and had participated in attempting to defraud the insurance company. The matter had come to light when another individual made a confession in September 2014, by which time the respondents had submitted claims, attended medical examinations and issued proceedings against the insurance company. When suspicions were raised by the insurance company, the respondents replied that their claims were genuine and the first and third respondents signed statements of truth. After the confession, all three respondents made full admissions. None had previous convictions and were all working men with families. The insurance company applied for the committal for contempt of court of the respondents.

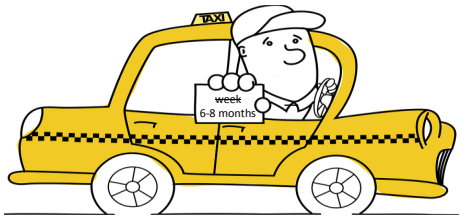
The court took a very serious view of the fraudulent claims. The justice system depended on honesty and, therefore, false claims had to attract prison sentences, which were an important deterrent given the ease with which fraudulent claims could be made. The court took account of the fact that there had been a significant delay between the time of the accident and the contempt proceedings, the fact that the claims had not gone to trial, that no evidence had been given on oath and the full and early admissions made by the men.

Although they had been of good character and the fraud had been an isolated incident, there had been distress and shame caused to their families as a result of their actions. The first and third respondents were sentenced to 9 months imprisonment, reduced to 6 months in light of mitigation, and the starting point for the second respondent was 6 months, which was reduced to 4 months imprisonment.

Liverpool Victoria Insurance Company Limited v Khan & Others [2018]

A taxi driver was involved in a road traffic accident caused by an insurer's customer. The taxi driver approached the manager of a claims company to make a personal injury claim against the insurer. The claims manager arranged for the taxi driver to instruct the lawyer and the lawyer instructed a doctor to examine the driver.

The doctor reported that the driver's injuries were not serious and he had recovered within a week. The lawyer told the doctor that the driver was still suffering from medical problems and asked if he could amend his report to a prognosis of recovery over the following 6 to 8 months. The doctor directed his secretary to make the amendments. However, the original report was included in the evidence bundle submitted to the insurer, who investigated further. The insurer sought an order committing the defendants (which included the lawyer, manager of the claims company, doctor and a paralegal) for contempt of court for being involved in falsifying a personal injury claim.



The court was satisfied to the criminal standard of proof that the lawyer had committed multiple civil contempts of court by falsifying documents to exaggerate his client's personal injury claim. The doctor was also held in contempt by recklessly acceding to the lawyer's direction to amend the report without caring if the amendments were clinically justified or that the court was misled as a result. However, none of the allegations made against the manager were made out, nor were those against the paralegal who was a very junior member of the lawyer's firm who had acted solely on the direction of the lawyer. The paralegal had not acted dishonestly or recklessly. Accordingly, there was judgment for the claimant insurer in part.

Andrew Graeme Waring v Mark McDonnell [2018]

The claimant and defendant had been cycling in opposite directions when they collided head on. They both sustained personal injury and pursued claims for damages. The court gave judgment for the claimant and dismissed the defendant's counterclaim. The defendant, relying on *Ketchion v McEwan [2018]* argued that he was protected by qualified one-way costs shifting (QOCS) and that any order for costs made against him could not be enforced. The claimant argued that *Ketchion* was not binding and was wrongly decided. He argued that nothing in the rules afforded the defendant the benefit of QOCS protection in his capacity as defendant to the claimant's claim.

It was held that the defendant was not entitled to QOCS protection. He was not an unsuccessful claimant in the claimant's claim, he was an unsuccessful defendant, and nothing in the CPR afforded him the benefit of QOCS protection in that capacity. The court expressly disagreed with the finding in *Ketchion.* The judge in that case had found that the reference to "proceedings" in CPR 44.13 was to both the claim and the counterclaim but, in the instant case, it was held that the word "proceedings" was synonymous with "a claim". As such, the defendant only had the protection of the QOCS regime in respect of his claim for damages and did not benefit from it in relation to claimant's claim.

Kelly Wallett v Michael Vickers [2018]

The claimant was the partner of a man killed in a road traffic accident. The deceased and the defendant had been driving alongside each other on a dual carriageway at almost twice the speed limit. Each was determined to be the first to reach the point where the road narrowed to a single lane and refused to give way to the other. The deceased lost control of his vehicle and crashed, sustaining fatal injuries. It was found that the defendant's driving had made a material contribution to the fatal injuries sustained by the deceased, but that the claim was barred by the principle of *ex turpi causa* because the parties had been engaged in the criminal joint enterprise of dangerous driving. The claimant appealed against the recorder's finding. The claimant submitted that a joint enterprise required an intention to encourage or assist in the commission of an offence by the other and that there was no valid basis for the recorder to have concluded that the deceased had intended to encourage the defendant to drive dangerously. The claimant submitted that the recorder should have held that the deceased's own fault could be taken into account by a reduction for contributory negligence.

It was held that the relevant question was whether there was a criminal intent for the purpose of joint enterprise; *McCracken v Smith [2015]* followed. Although the recorder had said there was sufficient evidence to determine the intention of the parties, he had not spelled out what he had found the parties' intention to be.

There was no express finding that the necessary mental element for the deceased's liability to the defendant's dangerous driving had been proved. Rather than working together to achieve a shared objective, each man was seeking to achieve his own objective, which would mean frustrating the other.

Rather than wishing the other to drive dangerously, it was highly probable that each would have preferred the other to give way. There was, therefore, no basis for any finding that the deceased had intended to encourage the defendant to drive dangerously. It was held that the recorder's finding of a criminal joint enterprise could not stand. The court further held that the deceased bore a greater responsibility for the collision and, allowing the appeal, the claimant's damages were reduced by 60% to reflect the negligence of the deceased.

EUI Limited v Charles & Others [2018]

A pre-action disclosure application was made by a motor insurer (the applicant) against the respondents who had been involved in road traffic accidents with drivers who were insured by the applicant.

Following the accidents, each respondent hired a vehicle from a credit hire company and entered into agreements allowing the companies to manage the claims and pursue recovery of the hire charges. Credit hire companies generally charged more than regular hire companies due to the additional credit element. Case law has determined that claimants are limited to recovering only the basic, lower rate charged by mainstream suppliers, unless they can demonstrate that they were 'impecunious' and unable to afford hire charges without making unreasonable sacrifices. The applicant sought disclosure of documentation relating to the respondents' bank statements and pay slips for 3 months prior to the period of hire. According to the applicant, the credit hire company generally showed little willingness to engage with insurers prior to litigation and claims for significant hire charges had been intimated. The respondents disputed the court's jurisdiction to order pre-action disclosure under CPR 31.16(3) and CPR 25(2).

It was held that although the instant applications were unusual, the court could permit them to be made if they were consistent with the overriding objective to deal justly with the issues at proportionate cost. The court found that since the claims had been intimated on the basis of charges that included credit hire costs, the documents requested were relevant to an issue likely to arise out of those claims. Moreover, the issue of impecuniosity became relevant as soon as the claims were intimated and went directly to the basis of the assessment of damages. The court held that it was not onerous for the respondents to provide the documents requested and the overriding objective was best served by allowing informed offers to be made at the earliest stage in the interests of avoiding unnecessary litigation. The application was granted.

BTA Baltic Insurance Company AS v Baltijas Apdrosinasanas Nams AS (Case C-648/17) [2018]

On 24 October 2008, a passenger of a motor vehicle (the first car), parked in a supermarket car park in Latvia, opened their car door and scratched the side of a nearby parked car (the second car). The driver of the first car acknowledged that he was to blame and confirmed that his passenger had scratched the second car with the back door of the first car. The owner of the second car then made a claim on their own insurance policy. After deducting the policy excess, his Latvian motor insurer paid him €67.47.

The second car's insurer then decided to ask the insurer of the first car (another Latvian motor insurer) to reimburse those costs, but they refused on the ground that the accident had occurred when both vehicles were stationary and was not an "insurable event" within the meaning of Latvian Law on compulsory civil liability insurance for owners of motor vehicles. Almost 10 years later, the dispute came before the European Court of Justice (ECJ).

The ECJ ruled that the liability arising from the facts fell within the duty to insure "the use of vehicles" under Article 3(1) of the First Directive. Accordingly, motor insurers could, in principle, be liable for losses involving stationary vehicles. The ECJ referenced various decisions, including *Vnuk*, and concluded that opening a vehicle's door amounted to use of the vehicle which was consistent with its function as a means of transport and was not affected by the vehicle being stationary and in a car park at the time of the accident.

Lewis v Tinsdale & The Motor Insurers' Bureau [2018]

The claimant was walking on private farmland and suffered serious injuries when he was struck by an uninsured 4x4 vehicle. The claimant suffered catastrophic spinal cord injuries and was left tetraplegic. Proceedings were issued not only against the driver but also against the MIB. He obtained judgment against the driver, who was debarred from defending liability.

The issue for the court to determine was whether the MIB had any liability to indemnify the claimant and the case was set down for a preliminary trial on that issue.

The court agreed with the claimant that the European Court of Justice's decision in *Vnuk [2016]* and subsequent decisions made it clear that the 2009 EU Directive required compulsory insurance for vehicles on private land. It was found that this should apply directly against the MIB, which was an 'emanation of the state' in accordance with the European Court's decision in *Farrell v Whitty [2018]*. The judge held that the *Farrell* case superseded existing high court authority that the MIB was not an emanation of the state and found the MIB liable to indemnify the claimant to at least the minimum requisite cover of EUR 1 million. The MIB are appealing the decision.

OBI v Patel & Another [2018]

The claimant, a pedestrian, was the victim of a road traffic accident in August 2013 when she was struck by a vehicle. She suffered very serious bilateral injuries to her legs.

Proceedings were issued in July 2016 and the defendant accepted liability. The issue of quantum proceeded. There were two case management conferences, and in April 2018 the claimant's rehabilitation documents were disclosed to the defendant who, in July 2018, made an application for permission to rely on three experts' reports; one dealing with the claimant's employability (her having been employed as an underwriter at the time of the accident), one dealing with the claimant's physiotherapy needs and another dealing with the claimant's life expectancy. Two orthopaedic surgeons had stated that the claimant would be compromised in the job market, but that she could do part-time work of a sedentary nature.

The court refused permission to rely on the reports. It held that the defendant's conduct had gone against the spirit of modern litigation. That was because the defendant had not notified the claimant that he intended to obtain experts reports and was silent on the issue at both case management conferences. The court had to be able to identify at the case management conferences what expert evidence was needed, which would give the court the opportunity to instruct a single joint expert if necessary, and the defendant had deprived the court of that opportunity.

The court was also not convinced that there was any need for experts in the disciplines the defendant had proposed and the trial date would be lost if the evidence was permitted. The court held that the case could be properly run on the existing evidence and there was no justification for the delay in the defendant obtaining and then disclosing the expert evidence, save a tactical approach.

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:

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