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Lyum Campbell v Advantage Insurance: [2021] EWCA CIV 1698

NOTE ON COURT OF APPEAL JUDGMENT

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Background

1. In **Campbell v Advantage Insurance Co Ltd [2021] EWCA Civ 1698** the Claimant was a rear seat passenger who suffered catastrophic brain damage in a road traffic accident caused by the Defendant driver who was unfit to drive due to alcohol and drugs.

2. The Claimant had been out with two brothers. He was celebrating his birthday and a successful job interview. All the men had drunk champagne and numerous shots at a club. At about 1-2am on 9th August 2016, at the invitation of the bouncers the Claimant was taken out of the club by his friends who took hold of him and walked him to a 3 door Seat Ibiza motorcar. He was put into the front passenger seat. His friends left him in the car where he fell asleep. About an hour later, they returned. They tried to start the car but failed. One of the friends went to get some jump leads and was gone for about 15-25 minutes, when he returned the motorcar was gone. It was subsequently involved in a head on collision with a lorry when it veered onto the wrong side of the road. At the time of the accident the Claimant was lying unbelted on the back seat and his head came into contact with the rear of the driver's seat.

3. Sadly the Defendant driver was killed in the collision and his brother, the remaining witness to events of that evening, killed himself before the trial was heard but had provided witness statements to both parties. The Claimant was unable to give evidence owing the extent of his injuries. The only live evidence was from experts.

4. The Claimant argued that he was so drunk he had not appreciated the driver's ability to drive was impaired. He had been helped into the motorcar and had subsequently 'passed out' so he had not had capacity to consent to being driven. The Defendant insurer contended for a reduction for contributory negligence for a failure to wear a seatbelt and because the Claimant knew or ought to have known the driver was unfit to drive.

Judgment at first instance

5. HHJ Robinson, sitting a section 9 judge of the High Court, held that the Claimant knew that the Defendant driver was unfit to drive due to alcohol. He applied the presumption of capacity set out under s.1 of the Mental Capacity Act 2005 ('the MCA'). He inferred that the Claimant had consented to the journey by voluntarily moving into the backseat albeit with some assistance. He went on to find, in the alternative, that if the Claimant was too drunk to appreciate the Defendant driver's inebriated state, applying an objective test, he should have appreciated that fact. He reduced the Claimant's damages by 20% the same deduction as was applied in **Owens v Brimmell [1977] QB 859.**

6. HHJ Robinson held that whilst the Claimant was capacitous to decide whether to use his seatbelt or not, his failure to do so did not attract a reduction for contributory negligence for a failure to wear a seatbelt on the grounds that it was not established that there would have been any difference to the outcome.

Argument on appeal

7 The Claimant sought to appeal the trial judge's findings on 10 grounds which were distilled by the Court of Appeal into 4 areas:

(i) Whether the judge was correct to apply the MCA test given the Defendant's burden to prove its contention of contributory negligence?

(ii) Whether the judge had made impermissible finding of facts by holding that the Claimant's movement from the front to rear seat was voluntary and demonstrated consent?

(iii) Whether it was correct to apply an objective test to the issue of contributory negligence in circumstances where a Claimant was alleged to be too drunk to appreciate the drunkenness of the driver?

(iv) Whether the reduction of 20% was permissible in all the circumstances.

1st issue – the application of the Mental Capacity Act 2005

8 The Claimant contended at trial that he was not capacitous to consent to being driven by the driver, hence he was not at fault for being present in the motorcar with an impaired driver.

9 HHJ Robinson applied s.1(2) of the Mental Capacity Act 2005 which states: "A person must be presumed to have capacity unless it is established he lacks capacity" The evidence did not indicate that the Claimant was incapable of appreciating the amount the Defendant driver had to drink or the effect on his ability to drive.

10 On appeal the Claimant criticised the Judge's approach by contending that he had inverted the burden of proof that rests with the Defendant when advancing an allegation of contributory negligence. It was also suggested that the MCA was not the correct framework through which to determine the issue of whether the Claimant was aware of the Defendant driver's fitness to drive.

11 The Court of Appeal dismissed this argument finding that it was the Claimant who had framed the discussion in his pleadings in terms of 'capacity' (paragraph 28). The common law reflected the presumption of capacity subsequently encapsulated within the MCA, see Masterman-Lister v Jewell [2003] 1 WLR 1511. The judge's approach did not amount to an impermissible reversal of the burden of proof in relation to the issue of contributory negligence (paragraph 30).

2nd issue – the alleged speculation

12 The trial judge held that the Claimant's movement from front seat passenger to rear seat passenger could have happened in one of two ways, he voluntarily moved of his own volition or he was helped into the rear by the driver whilst their friend went to get some jump leads. He found the latter was more probable on the basis of the Claimant's weight and size and the fact that co-operation would be required to move from the front to back in a 3 door motorcar.

13 The Claimant sought to criticise the trial judge's findings on the basis that there was no evidence as to how the movement from the front to rear passenger seat had actually occurred hence it was pure speculation. There were too many "unknown unknowns" and "known unknowns" to safely reach settled findings of fact or draw reasonable inferences.

14 The Court of Appeal held the trial judge's findings of fact (and inferences) were not impermissible speculation. He was aware of the limitations of the evidence. The trial judge had specifically directed himself as to whether he had moved from "the zone of reasonable inference in the hinterland of speculation" and concluded he had not. His findings regarding the movement and motivation from the front to rear of the Seat motorcar were permissible and no justiciable errors had been established of the type that would permit the Court of Appeal to interfere.

3rd issue – objective test for assessing contributory negligence

15 The Court of Appeal held that the test for assessing contributory negligence is an objective standard (paragraph 36). There is no obvious reason why a different standard should apply between the Claimant and the Defendant driver.

16 A line of Australian authorities indicated a subjective approach to drunk driver passenger cases following **McPherson v Whitfield [1996] 1 Qd. 474** but this co-existed another line of authorities led by **Morton v Knight [1990] 2 Qd. 419** which upheld the orthodox position of an objective test. **McPherson** and **Morton** were both considered by the High Court of Australia in **Joslyn v Berryman [2003] HCA 34** I in which the **Morton** line was approved.

17 The Court of Appeal considered **Owens v Brimmell [1977] QB 859** and endorsed the notion that someone who allows themselves to be a passenger in a motorcar driven by the driver who is unfit through alcohol is guilty of contributory negligence.

18 The Claimant, however, contended that the formulation of the legal test by Watkins J was restrictive to only the two scenarios as set out at 866H-867A:

> "Thus, it appears to me that there is widespread and weight authority for the proposition that a passenger who may be guilty of contributory negligence if he rides with the driver of a car who he knows has consumed alcohol in such quantity as is likely to impair to a dangerous degree that driver's capacity to drive properly and safely. So, also, may a passenger be guilty of contributory negligence if he, knowing that he is going to be driven in a car by his companion later, accompanies him upon a bout of drinking which has the effect, eventually, of robbing the passenger of clear thought and perception and diminishes the driver's capacity to drive properly and carefully."

19 The Claimant argued on appeal that since the trial judge had found the Claimant had not pre-arranged to go on a drinking spree with the Defendant driver and because he was too inebriated to appreciate the Defendant driver was unfit to drive neither of the scenarios envisaged in Owens applied. The Court of Appeal held the principle of assessing contributory negligence was wider than the two paradigm examples proposed by Watkins J and that on a careful reading of Owens the facts of the case itself did not fit directly into either of Watkins J's own paradigms, the objective test was to be applied to the facts of each case (paragraph 41).

20 The Court of Appeal endorsed Charlesworth and Percy's (14th Ed.) commentary that 'A person the worse for drink cannot demand a higher standard of care than a sober person or plead drunkenness as an excuse for not taking the same care when drunk, as would have been taken when sober" (see judgment paragraph 50).

4th issue – apportionment

21 The Claimant sought to argue that distinctions should be drawn between Claimants that plan to go out on a drinking spree (which the trial judge explicitly found was not the case), Claimants who find themselves accepting lifts from drunk drivers on the spur of the moment and those Claimants who are simply too drunk to appreciate what they are doing. It was suggested this was relevant to the degree of fault (culpability) under s.1(4) of the Law Reform (Contributory Negligence) Act 1945 . The Claimant sought to argue that **Owens** was a pre-arranged 'pub crawl' case and that the 20% applied in that case should therefore not apply in the present claim where the trial judge had explicitly found no such agreement occurred.

22 The Court of Appeal noted that in **Owens** Watkins J had found the men had given little if any thought to the possible consequences of becoming drunk (paragraph 41) hence it was not a pre-arranged drinking and driving scenario.

23 The Court of Appeal held that apportionment of contributory negligence, like findings of fact, were "very much a decision for the trial judge to make". It was correct that the Defendant driver should bear the substantial part of responsibility but nothing in the judgment indicated that the trial judge had exceeded the ambit of reasonable disagreement. There was no suggestion from the Court of Appeal that it would have reached a different conclusion on the facts.

Implications of the judgment

24 This appeal was an important one from the perspective of the insurance industry. If successful, it was likely to have led to many Claimants successfully arguing they were simply too drunk to appreciate the danger of being a passenger in a motorcar with a drunk driver. The judgment affirms **Owens v Brimmell** and the wider principle of the application of an objective standard of the reasonable, prudent person when considering the issue of contributory negligence. It is the first Court of Appeal judgment explicitly to affirm **Owens** and importantly confirms that the logic of **Owens** is not restricted to the two paradigm examples cited by Watkins J.

25 It is clear from the judgment that alcohol cannot be used as a shield to avoid criticism for actions which viewed in the sober light of day are worthy of some blame. Save where specific internal characteristics relevant to a Claimant apply such as age or infirmity, the test is objective, the standard of the reasonable, sober individual. By extension the same principle is likely to apply to other intoxicants such as drugs.

26 The finding relating to the issue of the MCA may be specific to the claim and the fact that it was the Claimant who brought MCA 'capacity' into the discussion surrounding contributory negligence. Underhill LJ states that he would not have found it necessary or useful to refer to the MCA in determining the issue of contributory negligence. Dingemans LJ also pointed out, however, by that the presumption of capacity in the Act reflects the common law.

27 As Underhill LJ observed, at paragraph 53, where a Claimant is unconscious and placed into a car with a drunken driver such conduct will evidently not constitute contributory negligence. He goes on to say that there may be extreme cases where a person is not totally unconscious but may be in a state where they are incapable of making a voluntary decision although delineating where the line sits between voluntary and involuntary conduct or between consent and no consent will be a fact sensitive question for the trial judge.

28 Appeals regarding findings of fact are overwhelmingly fact specific. This case is no different. In cases concerning drink drivers there is often a dearth of reliable or sometimes (sadly) live testimony regarding the events of the evening. Trial judges often have to attempt to piece together the events of the evening through the application of the primary facts and permissible judicial inference. This judgment affirms the Court of Appeal's support for trial judges engaged in this exercise and the well known maxim that only facts or inferences which are plainly wrong will be overturned. The trial judge's direction to himself to question whether he had moved from "the zone of permissible inference into the hinterland of speculation" was an important safeguard in his judicial decision making.

29 This the first appeal where a Claimant has sought to argue for a reduction of less than 20% in this jurisdiction. The background to the appeal is of interest because at first instance the Defendant contended for more than 20% on the basis that (a) societal attitudes to the acceptability of driving under the influence of alcohol have hardened significantly since **Owens** (b) this was a serious case in which the Claimant had allowed himself to become progressively drunk with the driver and had been in the motorcar with him on the way to the club when he knew he had drunk alcohol (c) in

Meah v McCreamer [1985] 1 All ER 367 the drunk driver was said to have been manifesting the conventional symptoms of a driver who had been drinking excessively but his blood alcohol level was less than that of the driver in the present claim.

30 The judgment reaffirms the basic principle that the Court of Appeal will not overturn findings of contributory negligence where there is an identifiable error of law, a failure to take into account a relevant matter and/or the apportionment exceeds the ambit of reasonable disagreement, see paragraph 35 **Jackson v Murray [2015] UKSC 5.**

31 The Court of Appeal was not required to consider whether the reduction ought to have been higher. This remains an area of contention but it seems reasonably clear that 20% is likely to be seen as the minimum floor for consideration of the argument going forwards.

Chris Kennedy QC and Matthew Snarr appeared on behalf of the Defendant driver's insurance company, Advantage Insurance Co Ltd.