Neutral Citation Number: 2017 EWHC 710 QB

Case No: **HQ16P00097**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31st March 2017

Before :

Mr David Pittaway QC
(Sitting as a Judge of the High Court)

- -

Between :

John McHugh (Administrator of the Estate of Christine McHugh (Deceased))	**Claimant**
–v-	
(1) Ophelia Okai-Koi **(2) E Sure Motor Insurance Limited**	**Defendants**

- -
- -

Cyrus Katrak (instructed by Irwin Mitchell) for the Claimant
Brian McCluggage (instructed by Horwich Farrelly) for the Defendant

Hearing dates: Tuesday 28th and Wednesday 29th March 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

DAVID PITTAWAY QC:

Introduction

1. This action arises out of a tragic accident on 4th March 2013 when Mrs McHugh sustained fatal injuries in East Barnet Road, London. At the time of the accident Mrs McHugh was sitting on the bonnet of an Insignia motor car being driven by Mrs Okai-Koi out of the Lord Kitchenor public house car park. Mrs Okai-Koi turned right onto the main road where almost immediately there is a pedestrian crossing. Mrs McHugh slipped off the bonnet and struck her head on a Belisha Beacon situated on the pavement. She sustained serious head injuries from which she died. On 6th June 2014 Mrs Okai-Koi was acquitted by a jury at the Harrow Crown Court of causing death by dangerous driving but convicted of causing death by careless driving. She was sentenced to 12 months' imprisonment.

The Evidence

2. The incident arose out of an altercation between Mr and Mrs McHugh, primarily Mrs McHugh, and Mrs Okai-Koi in the car park of the public house. Mrs Okai-Koi had parked her motor car in the car park for a short period whilst she went shopping at Sainsbury's supermarket on the other side of the main road. Mr and Mrs McHugh had been drinking that afternoon in the public house and were inebriated. Mr McHugh arrived at the public house at about 3.30pm and Mrs McHugh arrived about one hour later. Mr McHugh collected his son from school before he went to the public house. He later left the public house to drive to his sister's house close by to collect his nine-month old baby daughter. At about 5.30 pm they met Mr Marriott, Mrs McHugh's nephew, in the public house and celebrated his first day in a new job. Mr Marriott believes he had two pints of lager. He estimates that Mr and Mrs McHugh each had two to three pints of lager during the time he was in their company.

3. At about 6.30 pm Mrs McHugh offered to drive the family, including Mr Marriott, home. They went out into the car park shortly before Mrs Okai-Koi returned from her shopping expedition. Mr and Mrs McHugh's motorcar was parked in an area where there were two designated bays, their car was facing outwards into the car park. On the driver's side, there was a raised cobbled area; on the passenger's side Mrs Okai-Koi had parked her motor car also facing outwards into the car park. Mr and Mrs

McHugh experienced some difficulty getting into their car because of its closeness to Mrs Okai-Koi's motor car, primarily Mr McHugh accessing the baby seat through the rear door of the passenger side. There is conflicting evidence as to whether it was Mr or Mrs McHugh who raised the issue with Mrs Okai-Koi as to whether she was entitled to park in the car park when she was not a customer at the public house. Mrs Okai-Koi told them to *"Piss off"* before getting into her motor car. Mrs McHugh moved her car partially out of the parking space to obtain sufficient access for Mr McHugh to put their baby daughter into the rear baby seat. Mrs Okai-Koi's route out of the car park was partially blocked. She had to carry out a three point turn to negotiate a route to the exit onto the main road. Mrs Okai-Koi says that Mrs McHugh got out of her car and started abusing Mrs Okai-Koi, shouting *"Come out, let's get physical",* kicking the side of the motor car and trying the door handles. She says that she had to drive over the cobbled area; Mr Marriott says that she drove in front of Mr and Mrs McHugh's motor car.

4. Mrs Okai-Koi says she stopped at the exit; a pedestrian who drew a plan in the police report shows the car short of the exit. She says she stopped to put on her seatbelt and to collect her thoughts. Both Mr and Mrs McHugh appear to have believed that Mrs Okai-Koi was deliberately blocking their exit from the car park. Mr Marriott says that Mrs Okai-Koi was not there for more than a minute before the altercation began again. There is conflicting evidence as to whether it was Mr or Mrs McHugh who went up to Mrs Okai-Koi but it may have been in response to their realization that she was using her mobile phone to phone the police. Mrs McHugh circled the car, railing abuse at Mrs Okai-Koi, repeatedly kicking the motor car and trying the door handles. Mr McHugh walked up to the driver's side and started banging on the window, shouting and swearing. Mr McHugh tried to get his fingers into a small section of the window that Mrs Okai-Koi had wound down to tell him that she was phoning the police. Mr McHugh says that they believed that Mrs Okai-Koi was deliberately blocking their exit from the car park. Mrs Okai-Koi saw Mr McHugh run to the back of the motorcar. She thought he had gone to get something to break into the motor car. She says that she was terrified and was in a full-blown panic and needed to flee the scene. Mrs McHugh, who was a large lady, climbed onto the bonnet, possibly on and off several times, as if to prevent Mrs Okai-Koi from leaving the car park. Mrs Okai-Koi described her state of mind as *"fight or flight"*.

5. Mrs Okai-Koi then panicked and drove off out of the car park, knowing that Mrs McHugh was on the bonnet of the motor car. She says that she checked the road left and right before moving off in first gear, turning right onto the main road. Almost immediately as she turned onto the pedestrian crossing, Mrs McHugh slipped off the bonnet and struck her head on the Belisha beacon, sustaining fatal injuries. The accident reconstruction report prepared by Mr Stephen Sayer, a retired police officer, considers that Mrs Okai-Koi was travelling at about 10 to 15 mph. Mrs Okai-Koi did not stop after the accident and drove to a friend's house. She says that she was unaware that Mrs McHugh had been injured or killed. She was in a state of shock and did not realize she was driving in first gear for several hundred yards. When she was interviewed, she read a short statement prepared by the on-duty solicitor and gave a *"no comment"* interview. She gave evidence at the Crown Court trial, a transcript of which was available to me.

Findings of Fact

6. Mr McHugh gave his evidence in a dignified manner but, perhaps understandably, has a patchy recollection of events, no doubt because of the tragic accident that occurred and his own intoxication. He does not, for example, have any recollection of driving to collect his baby daughter from his sister's house or, indeed, his daughter being present at the scene. Where there is a difference between the evidence of Mr McHugh and Mr Marriott as to what occurred, I prefer the evidence of Mr Marriott who gave his evidence in a straightforward and careful manner. He did not seek to minimize Mr and Mrs McHugh's state of intoxication or the events that occurred. I am also satisfied that Mrs Okai-Koi gave a truthful account of the events that she saw from her own perspective. Where there were differences between what she said at the criminal trial and this court, I accept the evidence that she has given before me.

7. From the evidence that I have heard I am satisfied that both Mr and Mrs McHugh, particularly Mrs McHugh, were very intoxicated at the time of the incident. Mr McHugh admits to having drunk three pints of strong lager and says that he drinks about one pint an hour. It is possible that he had drunk more but I am unable to say how much. Mr Marriott said that his uncle was drunk and unfit to drive a motor car. He says that Mr McHugh had two to three pints of lager whilst he was in their

company. Mr McHugh is unable to say how much his wife had drunk because she had been talking to her own circle of friends in the public house. Mr Marriott described her as being very drunk. The subsequent forensic analysis showed that she had 137mg/ml of alcohol in her bloodstream, one and a half times over the drink drive limit.

8. I consider that it was probably Mr McHugh who first raised with Mrs Okai-Koi the question of whether she had parked too close to their motor car. In fact, on the driver's side Mrs Okai-Koi could get in and out of her motor car. I suspect that the real problem was the access to the baby seat on the rear passenger side. Although Mrs Okai-Koi's response was unhelpful in telling Mr McHugh to *"Piss off"*, I am satisfied that Mrs McHugh became the protagonist of the altercation that then followed with Mrs Okai-Koi. Mr Marriott agreed in evidence that his aunt reacted disproportionately to the circumstances because of her own intoxication. I have not heard any evidence to suggest that after Mrs Okai-Koi's initial exchange with Mr McHugh, she responded to the sustained abuse and actions, largely of Mrs McHugh, and to a lesser extent of her husband. There is a suggestion that at one stage she may have raised her fist or two fingers at Mr and Mrs McHugh, however, the evidence overall is that she remained calm and, as she says, tried to avoid eye contact with either of them.

9. I am satisfied that initially Mrs McHugh was abusive towards Mrs Okai-Koi and kicked the car on several occasions and tried the door handles. I am also satisfied that she was spoiling for a fight and said words to the effect *"Come out, let's get physical*", otherwise I can see that there would have been no good reason to try the door handles. There is a small issue as to whether Mrs Okai-Koi drove behind or in front of Mrs McHugh's car. On the balance of probabilities, I accept Mrs Okai-Koi's evidence that she drove over the cobbles at the rear of Mr and Mrs McHugh's motor car. Mr Marriott was sitting in the back of Mr and Mrs McHugh's motor car and I consider that he was mistaken on this issue.

10. After Mrs Okai-Koi moved off she stopped close to the exit of the car park. She says it was close to the division between the tarmac and concrete of the pavement. I have been shown a plan drawn by a pedestrian who put the motor car slightly further back. I have concluded that the motor car stopped close too but not right up the exit of the

car park. Whatever the reason for Mrs Okai-Koi stopping, Mr and Mrs McHugh jumped to the conclusion that it was done deliberately to obstruct their exit from the car park. I am satisfied that Mrs Okai-Koi did stop to put on her seat belt and also to collect her thoughts after being subjected to a verbal assault from Mrs McHugh. I have concluded that Mrs McHugh continued to rail abuse at Mrs Okai-Koi and started kicking the car again and attempting to open the doors. I believe that Mr McHugh joined in on the driver's side probably once his wife shouted that Mrs Okai-Koi was using her mobile telephone to call the police. I am satisfied that Mrs Okai-Koi did wind down the driver's window a short distance to tell him that she had phoned the police and that Mr McHugh did try and force his fingers into the gap.

11. I accept that it must have been a frightening experience for Mrs Okai-Koi and that she panicked because of a genuine fear that Mr and Mrs McHugh would try and break into the motor car before the police arrived. I accept that she observed Mr McHugh going behind her motor car and that she thought he was going to fetch something to break into the motor car. The fatal misjudgment, however, on Mrs Okai-Koi's part was to drive off, knowing Mrs McHugh was sitting on the bonnet. Difficult although it may have been, she should have waited until the police arrived. The police report includes reference to a special constable who arrived on the scene as the accident occurred. In my view Mrs Okai-Koi should not have attempted to drive off onto a busy main road, which presented an inherent danger to Mrs McHugh and other road users.

The Law

12. As I have said Mrs Okai-Koi was acquitted by a jury at the Harrow Crown Court of causing death by dangerous driving but convicted of causing death by careless driving. The conviction is admissible in evidence for the purpose of proving that Mrs Okai-Koi committed the offence, ***Civil Evidence Act 1968***, section 11. I am informed by Mr McCluggage that the defence advanced at Mrs Okai-Koi's trial in the criminal proceedings was necessity. Whilst the jury acquitted Mrs Okai-Koi of the charge of causing death by dangerous driving, they clearly rejected the defence put forward in respect of the offence of causing death by careless driving.

13. It is worthwhile mentioning that there are three elements to the defence of necessity, first, that the commission of the offence was necessary, or reasonably believed to have been necessary, ***R v Cairns*** [1999] 2 Cr App R 137 CA, ***R v Safi (Ali Ahmed)*** [2004] 1 Cr App R 14 CA, for the purpose of avoiding or preventing death or serious injury to the person or another, second, that necessity was the sine qua non of the commission of the offence, and thirdly, the commission of the crime, viewed objectively, was reasonable and proportionate having regard to the evil to be avoided or prevented, ***Archbold*** 17-132.

14. It is a general rule of public policy that the use of a civil action to initiate a collateral attack on a conviction is an abuse of the process, however, in ***McCauley v Hope*** (1998) CA (unreported), the Court of Appeal allowed an appeal against a successful application for summary judgment in a road traffic accident case where a conviction for careless driving had been pleaded. Sir Patrick Russell, delivering the first judgment, said:

"*In my judgment section 11 is at the very heart of this appeal and, I would go as far as to say, is the beginning and end of it. Section 11(2) provides "in any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the UK or by any court martial there or elsewhere (a) he shall be taken to have committed that offence unless the contrary is proved." The closing words of that section "unless the contrary is proved" provide, in my judgment, the clearest possible mandate to a defendant in a road traffic accident case to attack his earlier conviction provided he has some good cause for doing so and can discharge the burden of proof to a civil standard that the section imposes on him."*

15. Mr McCluggage, however, submits that he is not relying on necessity in these proceedings which he accepts was rejected by the jury. He says that he can, to use his words, sidestep the conviction, and rely upon the circumstances of the events that occurred as not amounting to negligence. He relies on ***Marshall v Osman*** [1983] 1 QB 1034, 1038 F-G, ***North v TNT Express (UK) Ltd.*** [2001] EWCA Civ 853, and ***Scott v Gavigan*** [2016] EWCA Civ 544, all cases where, in unusual circumstances, no negligent driving was found.

16. I do not accept Mr McCluggage's well-argued submissions. The standard of due care and attention in criminal proceedings is an objective one, described in ***Archbold*** at 32-54, as *"fixed and impersonal, governed by the essential needs of the public, fixed in relation to the safety of other users of the highway,* ***McCrone v Riding*** *[1938] 1 All ER 157,* ***Taylor v Rogers*** *[1960] Crim LR 270, DC.* Mr Katrak draws my attention to ***Scott v Warren*** [1974] RTR 104 CA, which is authority for the proposition that the obligation of the driver in criminal law cannot be the subject of a more stringent test than in civil law. On the basis of the conviction, and indeed my own view of the evidence, I am satisfied that Mrs Okai-Koi did not exercise the degree of care that a reasonable, competent and prudent driver would exercise in the circumstances. Mrs Okai-Koi panicked and, as she described it, *"bolted"* when she should not have done, knowing that Mrs McHugh was on the bonnet of the motor car. It was inherently unsafe to do so, both tragically for Mrs McHugh, and for other road users on a busy main road. The fact that I have reached that conclusion should not in any way undermine my conclusion that Mrs McHugh was the protagonist of this altercation, whilst very intoxicated.

17. Mr McCluggage also submits that the maxim ex turpi causa applies in this case. He describes a terrifying attack by Mr and Mrs McHugh, particularly Mrs McHugh, both verbal and physical, comprising a number of criminal offences of affray, assault, harassment and breaches of public order, all directed against Mrs Okai-Koi. He has referred me to definitions of these offences in the relevant sections of ***Blackstone's Criminal Procedure***. Mr McCluggage submits that Mrs McHugh's conduct was sufficiently gross as to bring her within the maxim ex turpi causa. He relies on the level of fear that Mrs McHugh experienced, particularly immediately prior to moving off when she saw Mr McHugh approaching from behind the motor car and also the presence of Mrs McHugh on the bonnet. He accounts for her actions as a lapse of judgment occasioned by her state of mind that she was being attacked by Mr and Mrs McHugh, whom she believed were likely to break into the vehicle to cause her violence. I have already concluded that there is no evidence to suggest that Mrs Okai-Koi did anything provocative at this stage. In fact, Mr McHugh described her in evidence as staring stony faced out of the windscreen with her hands on the steering wheel.

18. Mr McCluggage has referred me to the latest Supreme Court decision on ex turpi causa, ***Patel v Mira*** [2016] UKSC 4, where Lord Toulson said:

"[120] The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

19. As to Lord Toulson's first consideration, I have already found that Mr and Mrs McHugh's behavior was highly culpable, but I do not consider that the denial of the claim, on the grounds of public interest, would be enhanced in circumstances where Mrs Okai-Koi was also convicted by a jury of causing death by careless driving. Mrs Okai-Koi sought to defend the charge of causing death by dangerous driving in the criminal proceedings on the basis that her actions were motivated by necessity. The jury acquitted her of that charge but convicted her of causing death by careless driving, thereby rejecting the defence of necessity in respect of that charge. As I have already said it was a fateful misjudgment on her part that she moved off, knowing that Mrs McHugh was on the bonnet. The jury were clearly satisfied, to the requisite standard of proof, that Mrs Okai-Koi's driving fell below that of a reasonable competent, prudent and careful driver, notwithstanding the circumstances in which she found herself. There were in my view, two causes of Mrs McHugh's accident, her

own and her husband's criminal conduct and Mrs Okai-Koi's decision to move off with Mrs McHugh on the bonnet.

20. I have been referred to two road traffic cases, ***McCracken v Smith*** [2015] EWCA Civ 380, and ***Beaumont v Ferrer*** [2016] EWCA Civ 768. I have found the analysis on causation in the judgment of Richards LJ in ***McCracken v Smith*** (supra) particularly helpful, where he states:

"50. If the duty of care analysis formerly applies in the joint enterprise cases had any application here, it would tell decisively against the ex turpi causa defence succeeding. It is clear that the dangerous driving of the bike had no effect whatsoever on Mr Bell's duty of care or on the standard of care reasonably to be expected of him.
51. I find the causation analysis more problematic. In my view the situation cannot be neatly accommodated within the binary approach of Lord Hoffman in ***Gray****. One cannot say that "although the damage would not have happened but for the tortious act of the defendant, it was caused by the criminal act of the claimant" but equally one cannot say 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 accident had two causes, properly so called - the dangerous driving of the bike and the negligent driving of the minibus - and it would be wrong to treat one as the mere "occasion" and the other as the true "cause". Daniel's injury was the consequence of both, not just of his own criminal conduct and not just of Mr Bell's negligence.*
52. I do not think that the fact that the criminal conduct was one of the two causes is a sufficient basis for the ex turpi causa defence to succeed. Our attention has not been drawn to any remotely comparable case where it has in fact succeeded: for reasons I have explained, cases involving a claim by one party to a criminal joint enterprise against another party to that joint enterprise are materially different. In my judgment, the right approach is to give effect to both causes by allowing Daniel to claim in negligence against Mr Bell but, if negligence is established, by reducing any recoverable damages in accordance with the principles of contributory negligence so as to reflect Daniels's own fault and responsibility for the accident.
53. Lord Sumption has spelled out in ***Les Laboratoires Servier*** *that the ex turpi causa defence is rooted in the public interest. The public interest is served by the approach I have indicated. It takes into account both the negligent driving for which Mr Bell is*

responsible and the dangerous driving for which Daniel is responsible. It enables damages to be recovered for the negligence of Mr Bell but not for Daniels's own negligence. I see no reason why the court should apply a "rule of judicial abstention" (Lord Sumption in ***Les Laboratoires Servier****, paragraph 23) and withhold a remedy altogether."*

21. As to Lord Toulson's second consideration, I reject Mr Katrak's submission that a relevant public policy issue in this case is that the denial of the claim would deprive Mr and Mrs McHugh's children of damages, as dependents, because of circumstances for which they were not responsible. In my view that submission is inconsistent with section 5 of the Fatal Accidents Act 1976 which permits me to make a reduction in the award of damages for contributory negligence.

22. As to Lord Toulson's third consideration, I do not consider that the denial of the claim would be proportionate in the circumstances where Mrs Okai-Koi has been convicted of causing death by careless driving and where Mrs McHugh's actions were not the sole cause of the accident.

23. In applying section 1 of the ***Law Reform (Contributory Negligence) Act 1945*** I have taken account of the blameworthiness of the parties and the causative potency of their acts. I have been referred to and considered ***Jackson v Murray*** [2015] UKSC 5, which referred to ***Eagle v Chambers*** [2003] EWCA Civ 1107 and ***Smith v Chief Constable of Nottinghamshire Police*** [2012] EWCA Civ 161. Whereas those cases are authority for the proposition that the attribution of causative potency to the driver usually must be greater than to the pedestrian because a motor car is a potentially dangerous weapon; those authorities also recognize that each case must depend upon its particular facts and the courts obtain little assistance from detailed comparisons of outcomes in other cases.

24. In my view, the highly exceptional circumstances of this tragic accident lead me to the conclusion that Mrs McHugh's share of the responsibility is considerably greater than that of Mrs Okai-Koi. I have concluded that Mrs McHugh behaved in a highly culpable manner as the protagonist of the altercation that took place because she was very intoxicated. For the reasons outlined above, I have concluded that Mrs Okai-Koi

should not have moved off when she knew that Mrs McHugh was on the bonnet but she did so in extraordinary circumstances. In these circumstances, I consider that a just and equitable division of responsibility is 75/25 in favour of Mrs Okai-Koi.