



Albion Chambers PERSONAL INJURY NEWSLETTER

Down on the farm: uninsured drivers on private land

Lewis v Tindale, MIB and Secretary of State for Transport [2018] EWHC 2376 (QB)

If you are wandering on private land and are struck by an uninsured party you will be compensated for any injury suffered, thanks to The Hon. Mr Justice Soole's ruling on the 14 September 2018 in the High Court. The duty of the Motor Insurers Bureau (MIB), the body responsible for compensating the victims of uninsured drivers, has thus been extended. This ruling ensures that victims of accidents on private land are protected and adequately compensated.

In June 2013 in dramatic pursuit, farmer Mr Tindale, followed suspected thieves in his uninsured 4 x 4 vehicle. He drove from his home on public roads, moving onto a footpath neighbouring a flood bank, before deliberately driving through a barbed wire fence into a marshy field. He struck Mr Lewis, the claimant, who was walking on the private land in Lincolnshire. Mr Lewis's neck was broken as a result of the collision, and he was left quadriplegic.

Whilst not contesting Mr Tindale's liability for the injuries, the MIB, who were co-defendants in the matter, did not accept that it had a duty to compensate Mr Lewis pursuant to the Uninsured Drivers Agreement 1999 (UDA 199), as the accident occurred in a private field, and not on a road or other public place (Section 145 of Part VI of the RTA 1988).

The Hon. Mr Justice Soole confirmed that any judgment Mr Lewis may subsequently obtain against the defendant, is not a liability which is

required to be insured under Part VI of the 1988 Act.

The Judge also considered two further issues:

■ Was the MIB obliged to satisfy any such judgment Mr Lewis may obtain, pursuant to the 2009 EU Motor Directive?

■ Do the provisions of the relevant Directive have direct effect against the MIB?

The answer to both these questions was a resounding yes.

Under Article 3 of the 2009 Directive member states must take all appropriate measures to ensure the compulsory insurance "in respect of the use of vehicles normally based in its territory".

At paragraph 96, The Hon. Mr Justice Soole writes: "the CJEU has made it unequivocal that the obligation of compulsory insurance extends to the use of vehicles on private land. This is implicit in *Vnuk* and explicit in subsequent decisions".

The CJEU decision in *Farrell v Whitty* [2017] EUECJ C413/15 (*Farrell 2*) was examined, along with other case law, and Mr Justice Soole importantly confirms that: "the MIB is an emanation of the state for the full measure of the Article 3 obligation" [para 101], and that "in my judgement in each case the effect of European law is to treat the designated compensation body as if the obligation imposed on the state had been delegated to it in full" [para 131].

In terms of the limit of compensation, the Judge concluded that whilst not making a ruling on whether the European principle of equivalence requires unlimited

cover, "Article 3 does have direct effect to the extent of at least the minimum requirement of €1m per victim (Article 9)" [para 100]. He did admit that he had not had sufficient time to explore this aspect fully.

MIB must therefore pay Mr Lewis a minimum of €1m in damages, however it is anticipated that the claimant's legal team will soon advance arguments that the MIB's liability should be "unlimited".

This decision may well have implications for those living in rural communities. It is clear, that private or public, insured or not, the courts will not tolerate injured parties being left without recourse to adequate remedy.

Emily Heggadon

Contempt of Court

Parties beware!

The case of *Calderdale and Huddersfield NHS Foundation Trust v Sandip Singh Atwal* [2018] EWHC 961 (QB) demonstrates the very real difficulties parties can find themselves in if they exaggerate in personal injury proceedings, above and beyond a finding of fundamental dishonesty.

The defendant suffered injuries that were negligently treated at Huddersfield Royal Infirmary in 2008. The original injuries were a laceration of the lower lip and two fractured fingers. The allegation that was made in these proceedings was that the defendant had pursued a fraudulent clinical negligence claim, by exaggerating the continuing effect of his injuries to such an extent that the Hon. Mr Justice Spencer had to consider whether to commit the defendant for contempt of court.

The defendant was claiming for disabilities that were inconsistent with his medical records. He was claiming large sums for future loss of earnings and future care. He alleged he could not work. The Trust undertook video surveillance and reviewed social media postings, corroborating the suspicion that the defendant was fraudulently exaggerating the claim. The defendant accepted the Trust's part 36 offer of £30,000, approximately £800,000 less than his claim, as a result of the evidence discovered by the Trust and the subsequent amendment of the pleadings to allege fraudulent exaggeration. The claim was settled. The Trust then brought committal proceedings in November 2016.

The main allegations of contempt were that:

- the defendant interfered with the administration of justice by making false statements to experts;

- the defendant interfered with the administration of justice by making false statements of truth in support of his witness statement and schedule of loss and damage.

In relation to the first allegation, the Trust was required to prove that the defendant deliberately tried to deceive the experts through a false representation of his symptoms, either by physically or verbally falsely representing

them. They also had to prove that the defendant intended to interfere with the administration of justice and the conduct must have been likely to interfere with it.

In relation to the second allegation, CPR 32.14(1) specifies that making a false statement supported by a statement of truth, without honestly believing it to be true, is grounds for contempt of court proceedings. The Trust had to prove that the statement was false, it had or would have been likely to have materially interfered with the course of justice, the defendant did not honestly believe the truth of the statement at the time it was made and he also knew it was likely to interfere with the course of justice. The burden of proof is on the Trust who makes the allegations and they must be proven to the criminal standard. The two forms of contempt set out in relation to each allegation overlap in this case.

The defendant was found to have made the following false statements in relation to being unable to DJ. He told a medical expert he had no confidence in his speech due to his lip injury and he had lost confidence in his DJ abilities. He asserted in his schedule of loss and damage that he could no longer perform the task due to a loss of strength and dexterity in his hands. The Judge found that both limbs of the test for contempt were satisfied to the criminal standard. The social media and surveillance

evidence proved that the defendant had lied. He was still performing as a DJ and he released a music video showing him using the turntables and dancing.

In relation to his job as a courier, the defendant was found to have deliberately lied when he told a medical expert he could not do any lifting. Again, the surveillance evidence, gathered 10 to 11 months later, disproved the defendant's reports to the expert. He was not inhibited in any way in the footage. The defendant also lied when he told the care expert that he was unemployed and predominantly used his left hand for lifting. However, the footage of his delivery driving activities (having put in his witness statement he had difficulty driving) had already been captured. The Judge was satisfied to the criminal standard that contempt was proven.

The defendant was sentenced to three months' imprisonment for each allegation proven, to run concurrently. This demonstrates the consequences of being untruthful in personal injury cases and the lengths opponents will go to in order to catch someone in a lie. Parties to a personal injury claim should be mindful to potential contempt proceedings in addition to fundamental dishonesty. This is a stark warning about the power of social media and surveillance.

Lucy Taylor

Bellman v Northampton Recruitment Ltd [2018] EWCA Civ 2214

A worrying development in vicarious liability

The happenings at work Christmas parties, often driven by generous quantities of alcohol, are not infrequently a cause of embarrassment and regret for those involved. For the Claimant in *Bellman (a protected party by his litigation friend) v Northampton Recruitment Limited*, however, the night ended in tragedy and life-changing injuries. The facts of the case are highly unusual and raise the issue of the scope of vicarious liability in circumstances where an employee's wrongful conduct occurs outside the workplace and outside office hours. The decision of the Court of Appeal,

published in October 2018, arguably expands the limits of vicarious liability for violent behaviour on the part of an employee, albeit in perhaps rather narrow circumstances.

Background

The Claimant was a sales manager at the Defendant Company, Northampton Recruitment Limited ("NR"). In December 2011 NR held its annual Christmas party at a golf club in Northamptonshire which was attended by NR's employees, their partners and a few invited guests.

The party itself passed without incident, but as things were winding down, John Major, the managing director

of NR, offered to pay for taxis for anyone who wished to go on to the nearby Hilton Hotel for further drinks. This was not a pre-planned extension of the party, but a group of between 13 and 15 of the original 24 attendees took up the offer. Most, but not all, of those who went on to the Hotel were in fact staying there overnight at NR's expense.

Upon arrival at the Hotel, the group sat in the lobby discussing a variety of topics and most continued to drink alcohol, largely paid for by NR. As time went on, the conversation turned to work matters. The Claimant mentioned a new NR employee and how it was understood that he was being paid substantially more than anyone else. Mr Major became annoyed at being questioned about this new employee. He summoned the employees present and proceeded to lecture them on how he owned the company; he was in charge and made the decisions; he would do what he wanted to do; and he paid their wages.

The Claimant challenged Mr Major regarding the new employee and Mr Major responded by punching the Claimant,

who fell down. The Claimant, who was bleeding from his left eye area, got up and held out his hands in a gesture of surrender and asked Mr Major, who had been a longstanding friend, to stop. Mr Major, who had been held back by others present following the first punch, then broke free and hit the Claimant again with a “sickening blow” with his right fist. The Claimant was knocked out and fell straight back, hitting his head on the marble floor. This second assault caused the Claimant to sustain a serious brain injury.

The Claimant brought a Claim for damages against NR on the basis it was vicariously liable for the actions of Mr Major.

The matter came for trial on liability before HHJ Cotter QC sitting as a High Court Judge over three days in November 2016. The Judge dismissed the Claimant’s claim having decided that NR was not vicariously liable for the conduct of Mr Major on the basis that there was insufficient connection between the position in which Mr Major was employed and his wrongful conduct to make it right that NR should be liable under the principle of social justice. The full judgment can be found at [2016] EWHC 3104 (QB).

In summary, however, the Judge found that the incident at the hotel arose in the context of entirely voluntary and personal choices by those present to engage in a “heavy early hours drinking session” after the works event had ended. He further held that the fact that the conversation had veered into a discussion about work could not provide a sufficient connection to support a finding of vicarious liability against the company.

The Claimant appealed the decision on the grounds that the Judge had been wrong to hold there was insufficient connection.

Appeal

The matter came before Irwin, Moylan and Asplin LJ in the Court of Appeal in July 2018, with the Court unanimously allowing the appeal. Delivering the lead judgment, Asplin LJ applied the two-stage test set out in the judgment of Lord Toulson in the Supreme Court in *Mohamud v W M Morrison Supermarkets PLC* [2016] AC 677:

- What “field of activities” have been entrusted by NR to Mr Major? (i.e. what was the nature of his job?); and
- Is there sufficient connection between the position in which Mr Major was employed and his wrongful conduct

to make it right for the employer to be held liable under the principle of social justice?

Asplin LJ firstly examined the field of activities entrusted to Mr Major, noting it was necessary to address the issue broadly: context, circumstances, timing and location were all relevant, but none were individually conclusive. She concluded that, looking at the matter objectively on the facts as found by the Judge, Mr Major’s remit and authority within NR were very wide.

As regards the second limb of the test, Asplin LJ held that the Judge was wrong not to find any sufficient connection. She concluded that although the party and subsequent drinking session were not a seamless event and attendance by employees was voluntary, Mr Major was not merely “a fellow reveller” and that he was “present as managing director of NR”. She added that:

“Even if Mr Major had taken off his managerial hat when he first arrived at the hotel, it seems to me that he chose to don it once more and to re-engage his wide remit as managing director and to misuse his position when his managerial decisions were challenged. He purported to exercise control over his staff by “summon[ing]” them and expounding the extent and scope of his authority. In the light of the breadth of his field of activities, NR’s round the clock business and Mr Major’s authority to do things “his way”, it seems to me that NR’s employees who took part in the drinking session can have been in no doubt at that stage, that Mr Major was purporting to exercise managerial control over them”. [see para 27 of the Judgment]

Discussion

At first look, this judgment may cause employers some anxiety in that it appears to be a significant extension to the limits of vicarious liability. On closer inspection, however, the decision is not so much an extension to the existing law but an application of the broad approach to be taken in line with the Judgment of the Supreme Court in *Mohamud*. In that context, it is likely that any extension to the limits of vicarious liability is likely to be very narrowly drawn and confined to the particular facts of this case.

Indeed, in his short concurring judgment, Irwin LJ sought to emphasise how unusual the facts were in this case and how limited the parallels would be. He was also clear that liability will not arise merely because there is an argument about work matters between colleagues

which leads to an assault, even when one colleague is markedly more senior than another. He also emphatically pointed out that not authority for the proposition that employers became “insurers for violent or other tortious acts by their employees.”

Philip Smith

Albion Chambers Personal Injury and Clinical Negligence Team

Team Clerk
Stephen Arnold



Derek Perry
Call 2006



Simon Emslie
Call 2007



Alun Williams
Call 2009



Philip Smith
Call 2012



Charley Pattison
Call 2013



Lucy Taylor
Call 2016



Emily Heggadon
Call 2017

Any comments made or views expressed on the law within any articles in this newsletter are the views of the writer and are not necessarily the views of any other member of chambers and should not be relied upon as legal advice.