Neutral citation number: [2020] EWHC 782 (QB)

Claim No.: F90BM268

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 6 April 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

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Between :

SHARAZ SARFRAZ
(A protected party suing by his brother and
litigation friend Mohammed Sharbarz Sarfraz)

Claimant

- and -

(1) SHAKEEB AKHTAR
(2) ERS SYNDICATE MANAGEMENT LIMITED

Defendants

- - - - - - - - - - - - - - - - - - - -

Richard Hartley QC (instructed by **Express Solicitors**) for the **Claimant**
There being no appearance by the **First Defendant**
Patrick Vincent (instructed by **Keoghs LLP**) for the **Second Defendant**

Hearing date: 30 January 2020
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Approved judgment

I direct that pursuant to CPR PD39A 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.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. During the evening of 16 July 2012, Sharaz Sarfraz, Shakeeb Akhtar and two other men went drinking together in Birmingham. At about 1.00 am the following morning, Sarfraz, Akhtar and one of the other men got into Mr Sarfraz's Volkswagen Golf car. Mr Akhtar drove while Mr Sarfraz travelled in the front passenger seat. No doubt fuelled by alcohol, Mr Akhtar drove too fast and hit the central reservation on the A34 losing control of the car and causing it to roll several times before colliding with a metal gate. Mr Sarfraz suffered a severe traumatic brain injury in the accident. By this action, he sues Mr Akhtar and ERS Syndicate Management Limited, who insured Mr Sarfraz to drive the Golf.

2. The claim against the insurer is brought pursuant to s.151 of the *Road Traffic Act 1988* on the basis that the insurer has a contingent liability to satisfy any judgment that might be obtained against Mr Akhtar. By this application, the insurer seeks to strike out the claim, alternatively it seeks summary judgment in its favour. The application is argued on the sole ground that the insurer's contingent liability is excluded by s.151(4) of the Act.

THE LAW

The application to strike out the claim

3. The court may strike out Particulars of Claim pursuant to r.3.4(2)(a) of the *Civil Procedure Rules 1998* if it appears that the pleading "discloses no reasonable grounds for bringing the claim." The focus of the enquiry under r.3.4 is upon the pleading (per Clarke LJ as he then was in *The Royal Brompton Hospital NHS Trust v. Hammond* [2001] Lloyd's Rep. PN 526, at [106]) and, accordingly, the court must assume the truth of the Claimant's pleaded case. The court must be certain that the case is hopeless before it can be struck out.

The application for summary judgment

4. Rule 24.2 provides:

> "The court may give summary judgment against a claimant … if–
>
> (a) it considers that … that claimant has no real prospect of succeeding on the claim …; … and
>
> (b) there is no other compelling reason why the case … should be disposed of at a trial."

5. While applications under r.3.4(2)(a) and for summary judgment have in common the core assertion that the other party cannot succeed on its pleaded case, there is of course a difference in approach. Whereas the focus of the enquiry under r.3.4 is upon the pleadings, Part 24 requires analysis of the evidence. That said, the court should

be wary of any invitation to weigh competing evidence and make findings upon the papers. Summary judgment is only to be given in clear cases.

Section 151 of the Road Traffic Act 1988

6. Generally, where loss or damage is caused by an uninsured driver, s.151(2)(b) of the *Road Traffic Act 1988* extends the liability of the motor insurer to satisfy any judgment where the liability is required to be covered by compulsory insurance despite any restriction in the policy as to the insured drivers. Such liability is not contractual but is imposed by the Act upon the insurer in the event of judgment against the uninsured driver remaining unsatisfied. Such liability may, however, be excluded under s.151(4) or limited under s.151(8).

7. An "excluded liability" is defined by s.151(4) of the Act as:

> "… a liability in respect of the death of, or bodily injury to, or damage to the property of any person who, at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who–
>
> (a) did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and
>
> (b) could not reasonably have been expected to have alighted from the vehicle.
>
> In this subsection the reference to a person being carried in or upon a vehicle includes a reference to a person entering or getting on to, or alighting from, the vehicle."

8. Even if the liability is not excluded, the insurer may be able to recover from any policyholder or other insured person who caused or permitted the uninsured person to drive the vehicle some or all of the sums paid out in respect of the driving pursuant to s.151(8). The sub-section provides:

> "Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy …, he is entitled to recover the amount from that person or from any person who–
>
> (a) is insured by the policy …, by the terms of which the liability would be covered if the policy insured all persons …, and
>
> (b) caused or permitted the use of the vehicle which gave rise to the liability."

9. As drafted, s.151(8) appears to allow the insurer to obtain an indemnity from the policyholder or other insured person in such circumstances. The sub-section should, however, be read down such that where the insured person might be entitled to the judgment, the insurer's recovery must be proportionate and determined on the basis

of the circumstances of the case: *Wilkinson v. Fitzgerald* [2012] EWCA Civ 1166, [2013] 1 W.L.R. 1776.

10. Accordingly, where an uninsured driver causes loss or damage through driving on a road or other public place:

    10.1 A policyholder or other insured person cannot recover compensation from the insurer for loss or damage to the vehicle itself. Such liability will be excluded in contract and is not imposed under s.151(2) because it is not a liability which is required to be insured under s.145 of the Act: see ss.145(4)(c) and 151(2).

    10.2 Anyone who suffers other loss or damage, including personal injury, can recover compensation from the insurer provided it is not an excluded liability under s.151(4).

    10.3 Where the policyholder or other insured person caused or permitted the uninsured driving then the effect of s.151(8) is that any such recovery may be restricted to a proportion of the full loss or damage.

THE FACTS

11. One might infer from the brief account at the start of this judgment that Mr Sarfraz, recognising his own unfitness to drive through drink, had allowed his friend to drive the Golf. Indeed, there is evidence that could properly support such inference:

    11.1 The third man in the car, Shoaib Ali, made a police statement on the day of the accident in which he recalled Sarfraz and Akhtar arguing over who should drive. He does not mention Mr Sarfraz seeking to prevent Mr Akhtar from driving and simply records that he told Mr Akhtar to slow down.

    11.2 In his own police statement, Mr Sarfraz recalled Mr Akhtar taking the keys from his pocket and insisting that he was fine to drive. He added that he "stupidly" agreed to let Mr Akhtar drive on the basis that he did not seem drunk and he insisted that he was insured. Further, he recalled telling Mr Akhtar to slow down, but importantly did not assert that he sought to prevent Mr Akhtar from driving.

12. Against this:

    12.1 Mr Sarfraz concluded his police statement with these words:

    > "I did not give my keys to Shakeeb, he took them from my pocket. I did not give him permission to drive but was to (sic) drunk to do anything to stop him, so I just got into the car."

    12.2 Further, in evidence in the Crown Court, Mr Sarfraz denied that he had allowed Mr Akhtar to drive his car and asserted that he had said "No way are you taking my car."

13. It is not, however, either party's case that Mr Sarfraz gave drunken consent to his friend to drive his car. The insurer specifically pleaded at paragraphs 14(d)-(h) of its Defence:

> "(d) On leaving Megabowl at or around 01:00, the Claimant decided that, due to his consumption of alcohol, he was not in a fit state to drive the Vehicle. He intended to return home by taxi, and subsequently to pick up the Vehicle from Megabowl car park the following day.
>
> (e) At some point, whilst in the car park at Megabowl, the First Defendant took the keys to the Vehicle. He did so without the permission of the Claimant.
>
> (f) The First Defendant subsequently got into the driver's seat of the Vehicle, again without the permission of the Claimant, and started the engine.
>
> (g) Because the First Defendant was taking the Vehicle without the permission of the Claimant, the Claimant got into the front passenger seat of the Vehicle.
>
> (h) The First Defendant drove the Vehicle away from Star City. The Claimant remained a passenger in the front passenger seat of the Vehicle."

14. By his Reply, Mr Sarfraz expressly admitted paragraph 14 of the insurer's Defence. Accordingly, while the insurer pleaded a secondary case at paragraph 15 in the event that the Golf was driven with Mr Sarfraz's consent, it is common ground that the trial will proceed on the agreed basis that Mr Akhtar took the car without authority. Mr Sarfraz added, at paragraph 7 of his Reply, that:

> "[he] got into the vehicle with the sole intention of stopping the First Defendant from driving the same. Unfortunately, he was unable to prevent this and was at all material times an unwilling passenger. He could do nothing to stop the First Defendant from driving."

15. Finally, the evidence in support of the insurer's application stresses that it is common ground that "at no point did the Claimant permit or consent to the First Defendant driving the Vehicle." Thus, whatever my suspicions, I must assume for the purpose of this application that Mr Akhtar drove the Golf without Mr Sarfraz's authority such that s.151(4) is potentially in play but s.151(8) does not arise.

AN EXCLUDED LIABILITY?

16. On these assumed facts, the insurer argues that its contingent liability is excluded under s.151(4) because Mr Sarfraz was injured at a time when he was allowing himself to be carried in the car and that he then knew or had reason to believe that the vehicle had been unlawfully taken. Against that, Mr Sarfraz relies on the proviso to the sub-section and argues that liability is not excluded since:

    16.1 he did not know and had no reason to believe that the car had been unlawfully taken until after the commencement of the journey;

    16.2 once the journey commenced, he could not reasonably have been expected to have alighted from the vehicle; and

    16.3 in any event, he did not "allow" himself to be carried in the car.

17. The second point is common ground; the insurer accepting that Mr Sarfraz had no reasonable opportunity to get out of the car once Mr Akhtar drove off. The first and third points are, however, very much in dispute.

Knowledge or reason to believe that the car was "unlawfully taken"

18. Plainly one cannot know or have reason to believe a state of affairs before it has happened. Therefore, the important question is when, for the purpose of s.151(4), was the Golf unlawfully taken.

19. In his written submissions, Patrick Vincent, who appeared for the insurer, submitted that the expression "unlawful taking" in s.151(4) was a reference to the offence of taking a motor vehicle without authority contrary to s.12 of the *Theft Act 1968*. Section 12 provides:

> "… a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it"

20. In oral argument and in his supplemental written submissions, Mr Vincent took a different tack and submitted that the unlawful taking might not necessarily be the commission of the s.12 offence but a tortious act of conversion. He argued that Mr Akhtar's actions in taking the keys and getting into the car were themselves acts of conversion such that the car was unlawfully taken before it was driven off. Further, he argued that the extended definition of "being carried" provided by the final sentence of s.151(4) demonstrated that the sub-section can apply where someone gets into a car that has not yet moved. He submitted that, otherwise, liability to a joyrider who knowingly allowed himself to be carried in a car taken without authority could not be excluded under s.151(4) unless such person had a reasonable opportunity to get out of the car after the start of the journey.

21. Mr Hartley QC, who appeared for Mr Sarfraz, argued that s.151(4) focuses attention on the status of the vehicle and that it cannot be said to have been "taken" until it had moved. He submitted that the words "unlawfully taken" in s.151(4) must be construed consistently with the offence under s.12. Relying on *R v. Diggin* (1980) 72 Cr. App. R. 204 (CA), he argued that the offence, and therefore any unlawful taking under s.151(4), is only committed when the car actually moves.

22. In *McMinn v. McMinn* [2006] EWHC 827 (QB), [2006] R.T.R. 33, Keith J treated the words "stolen or unlawfully taken" in s.151(4) as referring to the corresponding criminal offences under the *Theft Act 1968*. The matter was not, however, the subject of full argument.

23. The primary offence under s.12 is only committed once the offender "takes" the vehicle. The verb necessarily involves some movement of the vehicle and the offence

is not committed merely by an unauthorised taking possession or control: *R v. Diggin* (supra). Anything short of voluntarily putting the car into motion might amount to the inchoate offence of attempting to take the vehicle without authority, but would not be sufficient to found a conviction under s.12. That is not, however, to say that where two joyriders break into a car and travel together, the one travelling as passenger has a defence to a criminal charge since both joyriders in such situation would be liable for having taken the car.

24. In my judgment, it is properly arguable that the expression "unlawfully taken" in s.151(4) is, on its true construction, a reference to the vehicle having been taken without authority contrary to s.12 of the *Theft Act 1968*. Irrespective, however, of whether the sub-section is referring to such criminal offence, the verb "to take" is used in the past tense in s.151(4). Accordingly, I am satisfied that it is properly arguable that the Golf cannot be said to have been "unlawfully taken" until it was driven away, and that taking possession of the keys, sitting in the driver's seat and even turning the key are all acts that fall short of actually taking the car.

25. I am not dissuaded from that view by Mr Vincent's submission that such construction of s.151(4) would mean that the liability to a second joyrider might not be capable of being excluded unless he had a reasonable opportunity of getting out of the car before suffering injury. The answer to such a scenario, which does not arise for decision in this case, might in my judgment be provided by the common-law defence of *ex turpi causa* and not by stretching the natural construction of the sub-section.

26. While that conclusion is sufficient to dismiss this application, lest I am wrong, I nevertheless consider Mr Sarfraz's further argument as to whether he "allowed" himself to be carried in the car.

Allowing himself to be carried

27. Even if the Golf should be regarded as having been unlawfully taken at some moment before it was driven away (whether upon Mr Akhtar snatching the keys, getting into the driver's seat or firing up the ignition), Mr Hartley argued that Mr Sarfraz's actions in getting into the car to seek to prevent its being taken cannot properly be described as "allowing" himself to be carried. He submitted that the expression "allowing himself to be carried" necessarily requires some element of consent and that the offence under s.12 is not simply committed by being in a stolen car.

28. Mr Vincent pointed to the closing words of s.151(4) and argued that anyone who gets into a car is, for the purposes of the sub-section, allowing him or herself to be carried. This, he argued, is common sense and reflects the reality that a person who gets in a car that they know to have been stolen or unlawfully taken cannot subsequently decide that they are an unwilling passenger when they see the blue flashing lights of a police car through the rear window. Further, Mr Vincent argued

that it was perfectly possible for an owner not to consent to the taking of his car but still, on climbing into the car, to be allowing himself to be carried.

29. Several different factual scenarios were postulated in the course of argument to test the proper construction of the sub-section:

29.1 I posed the example of an owner who interrupts a joyrider just as he breaks into his car and seeks to drive away. If such an owner gets into the car in an attempt to defend his property and prevent the criminal from taking the car, can he really be said to be allowing himself to be carried in his car? Mr Vincent accepted that the owner in such a case would have a claim because he would be objecting to the driving of his car.

29.2 Mr Hartley gave the extreme example of a man who has been kidnapped and argued that he could not be said to be allowing himself to be carried in the offender's car.

29.3 Mr Hartley posed the further example of a police officer trying to get into a car to arrest a thief but falling back and suffering injury as he struck the kerb. Such officer plainly was not allowing himself to be carried, despite the expanded definition of "being carried" at the end of the sub-section.

30. In my judgment, there must be some permissive element implied by the word "allowing" both in the criminal offence under s.12 and in s.151(4). As Mr Hartley rightly argues, the test is not mere presence in the car. On any sensible construction, the true owner, the kidnap victim and the police officer in the examples postulated above cannot be said to have been allowing themselves to be carried.

31. While Mr Vincent did not rail against this conclusion, he sought, however, to draw a distinction between these examples and the evidence in this case. For the reasons already explained, such analysis can properly be undertaken on a summary judgment application but not under r.3.4. In doing so, Mr Vincent highlighted the evidence that I recite at paragraphs 11-12 above, and observed that Mr Sarfraz's case was put carefully in the Reply in that he pleaded that he got into the car "with the sole intention of stopping [Mr Akhtar] from driving" but that there was nothing that he could do and that he was an "unwilling passenger." There was, Mr Vincent remarked, no assertion that he said or did anything to prevent Mr Akhtar from taking the car. Further, Mr Vincent pointed out that Mr Sarfraz had not himself made a statement in response to this application and that his solicitor, Robin Patey, asserted in an earlier statement made in connection with limitation issues that Mr Sarfraz has little recollection.

32. Mr Vincent's distinction comes perilously close to challenging the agreed factual basis that the car was taken without Mr Sarfraz's authority. While the evidence that Mr Sarfraz sought to stop Mr Akhtar from driving is thin, I am not prepared to determine the point summarily and accordingly I assume for the purposes of this application in Mr Sarfraz's favour that he will establish at trial that his sole purpose in getting into the car was in order to prevent Mr Akhtar from taking the Golf. Upon

that basis, it is in my judgment properly arguable that he was not "allowing" himself to be carried in the car.

CONCLUSIONS

33. For these reasons, I conclude that the insurer has failed to establish that there is no arguable basis of claim. In my judgment, it is properly arguable that the contingent liability imposed by s.151 was not excluded because:

    33.1 the car was not unlawfully taken until it was driven off and there was no reasonable opportunity thereafter for Mr Sarfraz to alight before the accident; and

    33.2 in any event, Mr Sarfraz did not, on the assumed facts, allow himself to be carried in the car.

34. This application is therefore dismissed.