Guildhall Chambers Personal Injuries Claimant Seminar
17th November 2009

MIB CLAIMS WORKSHOP ANSWERS

John Snell and Matthew Porter-Bryant

Rubens and Jenson - Issues

Volenti

The MIB may argue that by getting into the car when he knows the driver to be drunk Ruben's has consented to the risk of injury and is wherefore *volens*. However the maxim volenti non fit injuria is excluded from road traffic claims by s149 Road Traffic Act 1988:

"(2)…any antecedent agreement or understanding between [driver and passenger] (whether intended to be legally binding or not) shall be of no effect so far as it purports or might be held:

(a) To negative or restrict any such liability of the user in respect of persons carried in or upon the vehicle as is required by section 145 of this Act to be covered by a policy of insurance, or
(b) To impose any conditions with respect to enforcement of any such liability of the user.

(3) The fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negativing any such liability of the user."

However the fact that Rubens consented to being carried thereby exposing himself to a foreseeable risk of injury will go to contributory negligence. A trawl through Bingham and Berryman's and Current Law suggests a standard deduction to be around 25% although where the claimant actively encourages the drunk driver to drive a higher deduction may be appropriate (see for example *Donelan v General Accident* [1993] PIQR P205 – 75%).

Illegality – Ex Turpi

Can it be said that Rubens should not recover simply by virtue of his conduct? There are a number of different formulations of the defence. From principles of 'public policy' and 'immorality' (see eg *Pitts v Hunt* [1991] 1 QB 24 where the claimant was a pillion passenger on a motorcycle joyriding and terrorising members of the public) to arguments that a 'duty of care' is not owed in the face of illegal acts (see eg *Vellino v CC Greater Manchester Police* [2001] EWCA Civ 249 where the claimant was a prisoner being chased. He jumped out of the window injuring himself and brought an action against the police).

In *Gray v Thames* [2008] EWCA Civ 713 the Court of Appeal held (at para 20):

> "where it is not suggested that the cause of action arose out of an illegal act, the question seems to us to be whether the relevant loss is inextricably linked with the claimant's illegal act or, as Beldam LJ put it [in *Cross v Kirkby*], so closely connected or inextricably bound up with his criminal or illegal conduct that the court should not permit him to recover without it appearing to condone that conduct."

(Gray was successfully appealed to the House of Lords – [2009] UKHL 33 albeit their Lordships focused on other matters of principle).

Drinking to excess and encouraging drinking will not suffice; that would be volenti. But there are two potential problems for Rubens. His encouragement for Jenson to drive faster may be deemed to be an encouragement for him to drive recklessly which is likely to be regarded as illegal (or immoral?) conduct. On these facts though Rubens is probably not encouraging Jenson at the time when the 'loss' occurs. He may therefore be able to argue that his conduct is not 'inextricably' linked.

Of more difficulty for Rubens is the issue of the burglary. If Rubens is found to be acting illegally (and on our facts he is borderline) then the accident is likely to be deemed to be linked to Jenson's apparent desire to get away (see also the MIB exclusions discussed below).

Insurance Position

The MIB may argue that Jenson "knew or ought to have known that" the vehicle was being driven without a policy of insurance in place (6(1)(e)(ii)) and thereby avoid meeting any unsatisfied judgment secured against Rubens.

In *White v White* [2001] UKHL 9 the question was considered in a case where the claimant was driven by his brother. His brother had not passed his test let alone obtained insurance. It was held that the Uninsured Drivers Agreement had to be construed restrictively. A claimant with actual knowledge of the insurance position will always fall foul of the exception. As regards 'constructive knowledge' the exception will apply to a claimant who (per Lord Nicholls):

"had information from which he drew the conclusion that the driver might well not be insured but deliberately refrained from asking questions lest his suspicions should be confirmed…Such a passenger as much colludes in the use of an uninsured vehicle as a passenger who actually knows that the vehicle is uninsured" (para 16).

Which can be distinguished from actions that:

"can be described broadly as carelessness or 'negligence'. Typically this would cover the case where a passenger gave no thought to the question of insurance, even though an ordinary prudent passenger, in his position and with his knowledge, would have made enquiries. He 'ought' to have made enquiries, judged by the standard of the ordinary prudent passenger. A passenger who was careless in this way cannot be treated as though he knew of the absence of insurance." (para 17).

Lord Cooke described the cases where the exclusion applied as those involving actual knowledge and "wilful blindness".

Lord Scott dissenting felt that the question of 'ought to have know' should cover those situations where the passenger has been negligent adding "A

construction of 'ought to have known' that excludes negligence would, I respectfully suggest, be incomprehensible to the lawyers up and down the land who have to make our law work" (para 55).

See also *Akers* [2003] EWCA Civ 18 where the evidence was that the claimant had been involved in a conversation where concerns regarding lack of insurance were raised. He was found to have constructive knowledge and so the exclusion applied.

In this case the relevant factors include:-

- Previous prosecution.
- Variety of different cars – what sort of cars were they, could Jenson conceivably afford the insurance?
- Rubens was 'not surprised' when he learned the truth. But is that different from knowing?

The fact that a previous prosecution arising from drink driving occurred (from which a ban would inevitably follow) places Rubens in some difficulty but on the dicta of White he may just avoid the exclusion…but it is a close run thing.

Using the vehicle in the course of a crime

6(1)(e)(iii) covers those cases where "the vehicle was being used in the course of or furtherance of a crime". Again, the MIB will need to establish that Rubens 'knew or ought to have known' of the position.

Simply loading up the car may not be enough but the suspicion that he may have committed a burglary coupled with Ruben's perception that Jenson wanted to flee the scene is likely to place him in some difficulties. However, the fact that he asks Jenson to stop may save him.

The exclusions in 6(1)(e) are directed toward the claimant who at the time of the use giving rise to the relevant liability was *voluntarily* allowing himself to be carried in the vehicle and, either before the commencement of his journey

in the vehicle or after such commencement he could reasonably have expected to have alighted from it.

In *Pickett v Roberts* [2004] EWCA Civ 06 the claimant (who was being driven in her own car by her boyfriend) declared 'For God's sake stop the car' when the driver started performing handbrake turns. The driver stopped and she unclipped her belt but before she could exit the vehicle the driver sped off and was then involved in an accident injuring the claimant passenger.

Chadwick LJ held that the exhortation of the claimant was "not sufficient to amount to an unequivocal repudiation of the common venture to which consent was given when the protestor entered the vehicle." (para 25). May LJ agreed. Dissenting Pill LJ was of the opinion that the claimant had given a plain indication of her lack of consent to the handbrake turns which presented a "much higher risk to that which she had consented to".

Here, Ruben's exhortation is probably not sufficient. Also one must look closely at what he is actually withdrawing his consent to. If it is simply that he has got bored with the driving (to which he initially consented if not encouraged) then on the basis of Roberts that may not be enough.

The Farmer's Field

The liability of the MIB is in respect of accidents occurring as a result of the use of an uninsured motor vehicle being used "on a road or other public place" (see s143 Road Traffic Act 1988). Arguably therefore the MIB may argue that the injury was sustained following use of the vehicle on private land.

The point may well be determined by whether the travel through the field was part of the accident that occurred on the road or instead whether on the facts the car is being 'joy ridden' across the field.

Alternative Facts (a)

If by virtue of the exhortation Rubens is deemed to have withdrawn his consent, Rubens can argue that while he knew of the insurance position at the time of the accident, he was in fact not allowing himself to be carried.

However, the MIB may still be able to avoid liability. The liability of the MIB arises in respect of those accidents where the driver was bound to have in place a policy of insurance protecting against third party risks. In Pickett the Court of Appeal noted, obiter, that for the purposes of the Road Traffic Acts the driver of the vehicle is not a 'third party' vis-à-vis the owner. As such obligations to insure against injuries to either party may not arise under ss143 and 145 of the 1988 Act and so the MIB may not be liable to satisfy any judgment (applying *Cooper v MIB* [1985] QB 575).

Alterative Facts (b)

Assuming that Rubens owns the vehicle and therefore obviously knows of the insurance position, any claim brought by him is likely to fail. However, in respect of a claim brought by his dependents the position is different since they were not being carried in the vehicle at the relevant time and so they are not caught by the exclusion. Any claim brought on behalf of the deceased (for example PSLA if death was not instantaneous) will be precluded however.

This outcome was approved by the Court of Appeal in *Phillips v Rafiq* [2006] EWCA Civ 74. It was noted, no doubt to the chagrin of the MIB, that the result was only possible as a result of a change in wording between the 1988 and 1999 Uninsured Drivers Agreements. It is understood that a new agreement is being drafted as we speak which closes the loophole!

Mr. Jones and his daughter

Mr. Jones walks into your offices on 5th November 2009, wanting advice in relation to two different accidents.

First, he tells you that his 16 year old daughter was knocked off her bicycle by a car 5 years ago when she was 11 years old. Apparently, the car swept past too close, brushing her saddle-bag and causing her to wobble into a ditch where she suffered a broken arm and damage to her bicycle. The car did not stop and there is no means of identifying it.

1. Is there a potential claim under the Untraced Drivers' Agreement 2003 for her personal injuries?

   Yes, but only if the accident was reported to the police. If the claim is for personal injury only, then the police must have been notified within 14 days after the occurrence. See Clause 4(3)(c).

2. What is the time limit under the 2003 Agreement for the bringing of a personal injury claim?

   Under the 2003 agreement which came into force on 14th February 2003, it is a condition precedent that the application to the MIB must have been made not later than 3 years after the accident.

   The daughter's claim is out of time according to the terms of the 2003 Agreement.

   However, in *Byrne v. MIB* (2008) the Court of Appeal held that, in order to comply with European Law, the Untraced Agreement should be subject to a limitation period no less favourable than that which applied to the commencement of court proceedings by a minor under the Limitation Act 1980. Thus, Miss Jones should be able to bring a claim at any time up to her 21st birthday.

   By a supplementary agreement which came into force on 1st February 2009, the 2003 Untraced Agreement has been amended in respect of all accidents occurring after 1st February 2009. For all such accidents, the

time limit for a personal injury claim is now the same as under the Limitation Act 1980.

3. Is there a potential claim under the 2003 Agreement for damage to the bicycle?

Yes, but the inclusion of property damage alters the relevant time limits so care is necessary. If the claim includes property damage then the police must have been notified within 5 days of the occurrence. Furthermore, if the claim includes property damage, then under the 2003 Agreement as it came into force in February 2003, the claim to the MIB must be made within 9 months of the accident. That time limit has not been amended by the 2009 supplementary agreement. Accordingly, it will not be possible to claim the property damage for Miss Jones.

4. What is the excess for a property damage claim under the 2003 Agreement?

There is a property damage excess of £300 under the 2003 Untraced Drivers Agreement.

Second, Mr. Jones tells you about an accident in which he was involved 3 years and 1 week ago. He was proceeding down the A4 when a car coming in the opposite direction turned across his path with no warning. The driver of the other car, who was not insured, was killed in the accident: his car glanced off Mr. Jones's car and hit a tree. Mr. Jones suffered property damage limited to £250 and serious psychiatric injuries which have prevented him from returning to work. He has been to another firm of solicitors who 3 weeks ago issued, but did not serve, a Claim Form naming the deceased driver as Defendant. No notice has been given to the MIB.

5. Was it acceptable to issue proceedings against the deceased driver?

No. The claim should have been issued against the personal representatives of the estate of the deceased driver: CPR 19.8.

If there are no personal representatives of the estate of the deceased, then it is necessary to follow the procedure agreed between the Official Solicitor and the MIB in March 2003. Immediately following the issue of the Claim Form, the claimant should notify the MIB and enquire if the MIB is willing to be appointed to represent the estate of the deceased. If the MIB agrees, then an application to the Court should be made to appoint the MIB as representative. If the MIB does not agree, then the claimant must approach the Official Solicitor to act as representative. See the White Book notes at 19.8A.2.

6. Should the MIB be made 2nd Defendant to these proceedings?

Yes. The Notes for the Guidance of Victims of Road Traffic Accidents, attached to the 1999 Agreement, specifically state at paragraph 5.3 that the MIB should be joined as a defendant unless there is good reason not to do so. Further, the Notes set out the prescribed form of words to be used in the Particulars of Claim when joining the MIB as a defendant.

7. The 1999 Uninsured Drivers Agreement provides at clause 9.1 that proper notice of the bringing of relevant proceedings in the case of an uninsured driver must be given to the MIB "*not later than 14 days after the commencement of those proceedings*". When are proceedings deemed to have been commenced – upon issue of the Claim Form or upon service of the Claim Form?

Proceedings are deemed to have been commenced on the date upon which the Claim Form is issued. See the interpretation section of the 1999 Agreement.

In this case therefore, there has been a failure to give notice in accordance with clause 9.1 because proceedings were commenced 3 weeks ago and the MIB has not yet been informed.

8. What notice does the 1999 Agreement require a Claimant to give to the MIB?

Clause 9.2 requires the Claimant to serve a copy of the sealed Claim Form, a copy of any accident insurance available to the Claimant, copies

of any correspondence with the Defendant, a copy of the Particulars of Claim, copies of the medical evidence and Schedule served with the Particulars of Claim and any other information which the MIB may reasonably specify.

9. If the current proceedings are defective, is Mr. Jones now limited to a professional negligence claim against his other solicitors?

No. Following *Horton v. Sadler* (2006) it is no longer necessarily an abuse of process to re-issue proceedings outside the limitation period so as to avoid falling foul of the conditions precedent within the 1999 Agreement. Provided it is not an abuse of process, the Court will apply the Limitation Act 1980 in the ordinary way.

In *Richardson v. Watson* [2006] EWCA Civ 1662 the Court of Appeal exercised the discretion under s.33 of the Limitation Act 1980 to disapply the limitation period, holding that the MIB had suffered no prejudice.

Contrast *Williams v. MIB* [2008] EWHC 1334 in which it was held in the High Court that it would be inequitable to exercise the discretion under s.33 to disapply the limitation period 7 years after the limitation period had expired.

Provided fresh proceedings are quickly issued on behalf of Mr. Jones, there should be no prejudice to the MIB and the proceedings and the limitation period should be set aside under s.33.

10. What is the property damage excess under the 1999 Agreement for Mr. Jones' accident?

There is a £300 excess so Mr. Jones will not recover anything for his property damage.

11. What is the property damage excess for any accident occurring after 7.11.08?

From 7.11.08 there is no excess at all. The maximum property damage claim has been increased from £250,000 to £1 million.

12. Mr. Jones has been provided with a hire car by Helphire while his car is being repaired. Can the hire charges be recovered from the MIB?

This issue is currently unresolved. In *McCall v. MIB* [2008] EWCA Civ 1263 the Court of Appeal held that it was appropriate to refer to the ECJ the questions whether the MIB was an emanation of the state and whether there as an obligation upon the MIB to pay hire charges.

The issue only arises because in such a situation the hirer does not in fact pay any hire charges as they are either recovered from the defendant or from an insurer. The MIB is arguing that MIB has no liability because it is a claim for the benefit of someone other than the injured party – clause 6.1(c).

Plainly, if Mr. Jones had hired and paid for a car in the ordinary way, the hire charges would be recoverable from the MIB as losses caused by the accident.