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Judgment: approved by the Court for handing down | *Delivered:* **09/01/2009**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2004 No 31965

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BETWEEN:

DONALD CLEARY

Plaintiff;

and

PAUL ROWLAND

First-named Defendant.

and

AND HIGHWAY INSURANCE COMPANY LIMITED

Second-named Defendant.

_____

TREACY J

Introduction

[1] The plaintiff in this case was injured in a road traffic accident which occurred on 2 December 2001 at the Ballinahone Road, Ardmore, Armagh. The plaintiff was having a motor cycle lesson *under instruction* provided by the first-named defendant who carried on business under his own name or as Able School of Motoring.

[2] Paragraph 5 of the amended Statement of Claim states that the road conditions were damp and the first defendant or his servant or agent had mentioned the possibility of black ice on the road at the start of the lesson. The

plaintiff was *instructed* to ride towards his instructor (Christopher Kiernan) along a sloping road and perform an emergency stop. The plaintiff completed this once and was *instructed* to repeat the exercise. As the plaintiff came to do this second emergency stop, while operating at a speed of approximately 15 mph, the motor cycle locked, veered to the right and landed on his right knee in consequence of which he sustained serious personal injuries.

[3] At the material time the first named defendant was insured under a policy of insurance issued by the second-named defendant.

The issues

[4] By Order dated 19 January 2007 the Master ordered that the issue of liability, as between the defendants only, be tried as a preliminary issue: (1) whether the first-named defendant is entitled to be indemnified by the second-named defendant; and/or (2) the question of the second-named defendant's liability, if any, under the provisions of the Road Traffic (Northern Ireland) Order 1981 as amended, as "Road Traffic Act insurer."

The policy of insurance

[5] Before considering the issues it is important to look at the relevant provisions of the policy of insurance. The Policy Document (page 7) under the heading "**SECTION 1 - YOUR LIABILITY TO OTHER PEOPLE**" provides as follows:

> "We will insure you against everything you have a liability at law to pay for damage and claimant's costs and expenses if they arise from a claim caused by an accident while you are driving or in the charge of the insured motor cycle if:
>
> > you kill or injure other people; or
> >
> > you damage their property."

And in the same Section under the subheading "Other People" the policy states:

> "We will also insure the following people.
>
> > Any person you allow to use your motor cycle *as long as your certificate of motor insurance says they can.* A person must not be excluded from driving or using your motor cycle by an endorsement, exception or condition." (italics added)."

[6] The policy document furnished to the court also bears a manuscript entry on the cover page the provenance of which currently remains unclear. It states "plus endorsement to include driving tuition and examination purposes".

[7] Somewhat surprisingly the certificate of motor insurance, although specifically mentioned in the policy document, is not included in the trial bundle. It has now been furnished. In the motor renewal notice the first defendant's occupation is expressly stated as "driving instructor". In the certificate of motor insurance paragraph 5 (entitled "persons or classes of persons entitled to drive") identifies "any person who is driving on the insured's order or with his permission". Paragraph 6 of the same document which is entitled "limitations as to use" states "use for Social, Domestic and Pleasure Purposes and use for Driving Tuition and Examination Purposes . . .". As a matter of pure construction it would appear, irrespective of the court's decision on the preliminary issues, that this insurance contract covers the situation which arose in the present case because the policy document covers any person the first defendant allows to use the motor cycle as long as the certificate of motor insurance says they can. Since the plaintiff was driving the motor bike with the insured's permission and since it was being used for driving tuition purposes it would appear to be covered by the certificate and therefore by the policy.

THE FIRST ISSUE

The plaintiff's contentions

[8] Addressing the first of the issues posed by the Master, Mr Bentley QC submitted that the certificate of motor insurance specifically covers driving tuition and examination. He submitted that the words "in the charge of the insured motor cycle" in the context of driving tuition and examination purposes described in the certificate could only comprehend a situation where a person such as the plaintiff is under the first-defendant's instruction at the relevant time. Accordingly Section 1 of the policy was sufficiently wide to cover the plaintiff's accident and the injuries sustained. He submitted that the first defendant was at all material times in control of the motor cycle which the plaintiff was driving through the actions of the instructor, his servant and agent. In particular, he submitted that the first defendant as the plaintiff's Supervisor for the purposes of driving instruction must clearly be in control of the vehicle and in charge of the same. In this connection he relied on the decision of the divisional court (May LJ, Nelson J) in *DPP v. Janman* [2004] RTR 31 (page 522) where it was held that a person supervising a learner driver would in normal circumstances be in charge of the vehicle concerned.

[9] Alternatively relying on the contra proferentem rule and MacGillivray on Insurance Law, 10th Edition at paragraphs 11-33 to 11-36 it was submitted that if

there was an ambiguity in the insurance policy the relevant wording must be construed against the second defendant.

The second defendant's contentions

[10] Mr Gerald Simpson QC submitted that the use of the words "while you are . . . in the charge of the insured motorcycle if you . . . injure other people" made it clear that the insurance was to cover the actions of the first-named defendant as *rider* of the motorcycle; and that for the insurance policy to operate to cover a liability the insured must -

(a) be driving *or in charge*; and
(b) the actions of the insured, while driving or *in charge,* must be the cause of the injury

(It was agreed that the first-named defendant was not driving the motorcycle).

[11] Counsel referred to a series of cases decided under the Road Traffic legislation in support of the proposition that the phrase, "in charge" refers to the person in actual control of the vehicle at the material time. These cases included *Woodage v. Jones* [1975] RTR 119, *Ellis v. Smyth* [1962] 3 All ER 954, *R v. Shortt* [1955] The Times, 10 December, and *Haines v. Roberts* [1953] 1 WLR 309. Counsel also placed considerable reliance on the Scottish case of *Crichton v. Burrell* [1951] SLT 365. He also referred to the case of *DPP v. Watkins* [1989] 2 WLR 966 in which the divisional court in England considered the matter and reviewed some to the authorities relied upon by the second defendant.

Conclusion on the first issue

[12] All of the cases referred to by both counsel were criminal cases decided under the Road Traffic legislation which has its own distinctive legislative and public policy objectives particularly in the field of drink driving. These case were primarily concerned with what the prosecution must prove in order to establish that a defendant is "in charge" of a motor vehicle. *DPP v. Watkins* was one such case in which the divisional court (Taylor LJ and Henry J) stated in respect of the phrase "in charge of a motor vehicle":

> **"There have been many reported cases in which differing, and often bizarre facts, have been said to fall on one or other side of the line, but no exhaustive definition has been given as to the scope of the phrase. Probably it cannot be. In a number of cases the court has said that whether a person is "in charge" is a matter of fact and degree: see e.g. *Fisher v. Keiton* [1964] 108 S.J. 258; *Woodage v. Jones* (No 2) [1975] R.T.R. 119, 124 c(d); and most recently, *Director of Public Prosecutions v. Webb* [1988] RTR 374, 379h".**

[13] The cases under the Road Traffic legislation are therefore highly fact specific and it would not be profitable to embark upon an exhaustive review of the many decided cases in this area which plainly turn upon their special facts. Just as no hard and fast test can be propounded as to the meaning of the phrase "in charge" under the Road Traffic legislation neither is such a test available for the analogous words in the insurance contract. Despite the somewhat different context of these cases both parties sought to rely upon them in construing the relevant provisions in the contract. Mr Bentley laid considerable stress on the judgment of the divisional court in *DPP v. Janman* which concerned the prosecution not of the person driving the car but of the person (under the influence of drink) supervising a learner driver who was driving. One of the questions raised was whether a person supervising a learner driver is in charge of a motor vehicle. May LJ stated at paragraph 15 of the judgment:

> **". . . in my judgment, at any rate in any normal circumstances, if the holder of a provisional driving licence is in fact driving a motor vehicle on a road or other public place, the person supervising that driver will be in charge of the motor vehicle. That seems to me to be an obvious normal consequence of the requirement that such a person should be supervised. It does not necessarily follow from the fact that the supervisor is in charge of the motor vehicle either that the driver is not, because in my judgment, as will appear, it is perfectly possible for more than one person to be in charge of a motor vehicle."**

[14] Mr Bentley sought to analogize that case with the present both of which undoubtedly include the features of the learner driver and the defendant instructor. There are however significant differences between these cases. Janman was concerned with a driving instructor and learner driver in a car where the instructor/supervisor could assume control immediately in a number of ways e.g. (1) by taking sole charge of the driving if the learner got into difficulties, (2) by the instructor operating one or more of the controls on the vehicle's movements or (3) by instructing the driver to control the vehicle in a certain way in circumstances in which the driver could be expected to follow such instructions (see paragraph 19 of the judgment).

[15] By contrast in the present case the instructor was neither in nor on the bike at the material time; nor could he have taken sole charge of the driving; nor, on the limited material available, is it apparent that the instructor could have operated any of the vehicle's controls or otherwise effected any meaningful control in that respect. He may of course have been in a position to assert control, for example, by issuing instructions as in (3) above. Notwithstanding the differences between Janman and the present case it would appear somewhat incongruous and contrary to public policy if the same drunken instructor albeit

with a learner motor bike driver (as opposed to a learner car driver) would escape liability under the same provisions on the basis that he was not in charge of the motor bike.

[16] The fact that the instructor did not have exclusive control does not prevent him from being "in charge". As was acknowledged in *Janman* it is perfectly possible for more than one person to be in charge of a motor vehicle. The first defendant as the plaintiff's supervisor was in control (albeit not exclusive control), exercised same, and was in a position to assert control as, for example, in (3) above. In my judgment he was therefore "in the charge of the insured motor cycle". Accordingly I hold that the terms of the policy do allow for cover for the plaintiff's injury and the first preliminary question posed by the Master must be answered in the affirmative.

THE SECOND ISSUE

[17] This issue concerned the second named defendant's liability, if any, under the provisions of the Road Traffic (Northern Ireland) Order 1981 ("the Order").

[18] Article 92 of the Order (as amended) provides:

> ***"Requirements in respect of policies***
> **92. – (1) In order to comply with the requirements of this Part a policy of insurance must be a policy which**
> **(a) …**
> **(b) insures such person, persons or classes of persons as may be specified in the policy (in this Article referred to as "the insured") and the personal representatives of the insured, during the period (in this Article referred to as "the period of cover") specified in that behalf in the policy, in respect of any liability which may be incurred by the insured in respect of the death of or bodily injury to any person or damage to property caused by or arising out of the use of the motor vehicle on a road or other public place in Northern Ireland".**

[19] Mr Bentley QC contended that if the insurance policy didn't cover the accident the Plaintiff was effectively uninsured and his claim, if unsatisfied by the first defendant, fell to be satisfied by the second defendant as insurer by virtue of the terms of the Agreement dated 20 December 1989 between the Department of the Environment for Northern Ireland and the Motor Insurers Bureau as amended thereafter.

[20] Mr Simpson QC submitted that the Plaintiff's injury did not qualify as the type of third party liability which the road traffic legislation contemplated; his use of the motor cycle (which was permitted within the terms of the policy)

was not insurable in the same way as the insured owner of a car, who was injured in an accident while he was driving, could not claim under the terms of the policy. In other words he was not a third party for the purposes of the road traffic legislation. Similarly he submitted that if A (the owner of a car) lent his car to B who drove it, either as permitted by the terms of A's policy or as permitted by the terms of B's own policy, B could not claim under either policy of insurance if he crashed the car and sustained injury.

Conclusion

[21] In my view the second defendant's submissions on this issue are correct. The compulsory insurance required by Article 92 is to cover claims by third parties and in my judgment the Plaintiff cannot, in the circumstances of this case, be regarded as a third party. He is, in my view, in the same position as the instructor would have been had he (the instructor) been injured in an accident while he was driving and who would plainly not have been a third party entitled to recover. It has moreover been held that "any person" does not include the driver or owner of that vehicle see *Cooper v MIB* [1985] QB 575. Accordingly, on the second issue I find in favour of the second named defendant.