Neutral Citation No. [2013] NIQB 147 | *Ref:* **GIL9083**

Judgment: approved by the Court for handing down | *Delivered:* **16/12/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MARCIN MARCINIEC

Plaintiff;

-and-

ARKADIUSZ GRUSZCZYNSKI
and
AXA INSURANCE LIMITED

Defendants.

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GILLEN J

[1] This is an appeal from a decision of Deputy County Court Judge Gilpin at Ballymena County Court sitting on 20 May 2013 when he dismissed the plaintiff's case which was for personal injuries loss and damage arising out of a road traffic accident on 26 July 2011 caused by the first named defendant (an unrepresented litigant in this case) who was insured by the second named defendant. AXA's defence was to the effect that the claim was fraudulent in that the purported accident was a "staged" collision designed to set up a dishonest insurance claim and that the plaintiff had been knowingly complicit in that fraud.

The plaintiff's evidence

[2] In the course of evidence before me the plaintiff made the following case:

- He was a married man with a young daughter who has been living in Antrim for some years and is of Polish extraction. He is a man of good character with no criminal convictions.
- On 26 July 2011 he was driving a Ford Focus which he informed me he had bought from a workmate some time before.

- In the Antrim area there resides a considerable number of Polish people. In his car on this date were four Polish nationals namely his wife, a man he knew called Karol Utkowski (hereinafter referred to as Karol) and a female friend of his wife. The intention was to do some shopping at nearby Asda.
- On reaching the mouth of a roundabout at junction 1, Antrim, his car was stopped when he felt an impact from the rear.
- He informed me that he spoke to the driver of the offending vehicle who was the first defendant in this action. He did not know him but had seen him a couple of times about the town. He sustained damage to his car worth £850, he sustained loss of earnings and a neck injury which recovered after 9-10 months.

[3] In cross-examination the following points emerged:

- Although he had bought the car from a workmate whom he named having seen an advertisement on the internet, he had said in the lower court that he did not remember exactly where he saw the car advertised and whilst the person selling the car was Polish he did not know his name. I pause to observe that the defendant proved the evidence of what he had said in the lower court by calling Ms Karen Fyffe, the solicitor for the defendant, who had preserved a note of the evidence. I was satisfied that there was a clear discrepancy between what he was saying now and what he had said in the lower court as to his knowledge of the man from whom he had bought the car.
- He said he was unaware that the registered owner of the car had been a man who had been in partnership with the first named defendant.
- He had told the court below that he had not known anyone in the other car but at this court he informed me that he knew the defendant to see. The plaintiff's explanation for this apparent discrepancy was that there was a difference between knowing someone and knowing someone to see. I was satisfied that in the lower court he had not volunteered to the judge that he knew the defendant to see and that irrespective of any difficulties that may have arisen in interpretation, I cannot understand why he did not make it plain to the lower court that he at least knew the defendant to see.
- He did not recall anyone in his car saying that they knew anyone in the other car. He was unaware that Karol's wife was a "Facebook friend" of the first defendant.
- He accepted that the four people in his car were Polish, the four people in the first defendant's car were Polish, and everyone had brought a claim for whiplash injuries except for the driver of the first defendant's vehicle.

The first defendant's evidence

[4] The first defendant, also a Polish national, gave evidence that he along with three Polish friends had been driving that day from Tesco's to Asda because of some

special offer. He described stopping at the roundabout and then starting to move off and driving into the back of the plaintiff's vehicle by accident.

[5] The defendant admitted that he knew Karol to see and had seen him many times in Antrim. It is a small town and they saw each other when shopping. He also knew Karol from working in Camden Frames although he was not a friend.

[6] The defendant accepted that he may have known all of the people in the plaintiff's car to see. He had his own business which involved him collecting parcels for further delivery to Poland.

[7] This defendant contended that AXA Insurance Company had raised the issue of fraud because the people in both cars were Polish. He drew attention to a document which had been supplied in discovery by the second named defendant which described the accident occurring. The note, taken by a claims advisor, included the following:

> "This is a typical accident at a roundabout when one driver believes that the other vehicle is driving onto the roundabout. The first car stops and the second driver while looking to his right fails to see the stationary car.
>
> Both drivers come from Poland and (the first defendant) stated that he is not a friend with (the plaintiff) but knows him to see. I am not in a position to contradict this. However I might be inclined to suggest that AXA carry out additional enquiries into this accident as all the drivers and passengers are foreign nationals from Poland."

[8] The defendant said that in running his business he added as many friends as possible on Facebook for business reasons. He also drew the distinction between knowing someone and knowing someone to see. He said he had 96 friends on Facebook and all were Polish with the exception of two.

[9] In cross-examination by Mr Harkin on behalf of the second defendant, the following matters emerged:

- He knew the wife of Karol just to see. Her name was on his Facebook as a friend but so were quite a number of Polish people as potential customers. A third of the people named on Facebook friends of his were customers.
- He also accepted that his wife has Karol's wife as a Facebook friend. However he insisted that he was not a friend of Mrs Utkowski. He knew Karol but only by his nickname.

- It was put to him that a representative from AXA had telephoned him after the accident at a time when his wife was acting as an interpreter. She was requested to ask him if he knew any of the occupants of the other vehicle and the response was that he did not know any of them. The first defendant drew the distinction between friends (of which there were none he claimed in the plaintiff's car) and people that he knew to see for example Karol. The others he could have seen for example on a Saturday night when all the Polish people go to a local Polish store in Antrim.
- He claims that he may have said to his wife that he knew Karol to see but this was not interpreted properly by his wife.

[10] A letter of 5 March 2012 from AXA to him was drawn to his attention. In that letter he was asked, inter alia, for written confirmation if he knew or did not know of all the persons set out in the two vehicles. The response to the letter, signed by him, indicated that he knew and was friendly with the people in his own car but added the following:

> "With regards to the other people I do not know them. Since the accident occurred, I have seen two of them Mr and Mrs Marciniec because they live in Antrim but before that I did not know them by sight or by anything else." These documents had not been produced at the lower court.

[11] Mr Bentley QC, who appeared on behalf of the plaintiff and the first named defendant, who represented himself, both objected to these letters being put in evidence because they were produced after the first named defendant had closed his case and because they had not been disclosed before trial. These documents had not been produced at the lower court. Mr Harkin indicated that the evidence had triggered the memory of the representative from AXA, who was sitting in court, about these letters. They had not been revealed in disclosure because they were generated arising out of litigation. I was prepared to allow this evidence to be introduced having accepted the explanation given to me by Mr Harkin. Needless to say I afforded the parties a full opportunity to consider and read these documents during a break in the hearing.

[12] The first defendant explained this erroneous information on the basis that there may have been a problem in translation and in any event there was a distinction between knowing someone as a friend and knowing someone to see. He only understood the question to be whether or not he was a friend. When it was put to him that the letter of 5 March 2012 simply asked him if he knew or did not know any of the following persons etc he said that his wife may have misinterpreted the matter to him. When asked by me why he did not simply say that he knew Karol to see (as well the others in the plaintiff's car) and that he might have known the plaintiff and his wife, he could not provide any explanation. He said that whilst he

had signed the letter, he could not recall if his wife had read it over to him before it was sent off.

[13] There was also put before him a memorandum of a telephone call made on 29 February 2012 between his wife (acting as interpreter for him) and Mr Fisher the representative of AXA. In the course of that note the following appeared:

> "Asked if (first defendant) knows TPV occupants. Called out names. Advised no. But knows of (plaintiff) from around town. Does not socialise with him and not in his circle of friends."

[14] I pause to observe that no explanation was given by him as to why he did not at the same time in the same conversation cause his wife to inform the representative that he also knew Karol to see or that his wife was a Facebook friend

The second named defendant's evidence

[15] Mr Fisher the senior claims investigator of AXA gave evidence on behalf of the second named defendant. In the course of his evidence in chief he made the following points:

- It was the multi occupancy of the car with the fact that 7 whiplash claims were instituted and not the nationality of the occupants that excited suspicion.
- He gave evidence of the telephone call and correspondence mentioned in paragraphs [9]-[13] above.
- Having researched the history of the car driven by the plaintiff he discovered that the former owner had been in business with the first defendant.

[16] In cross-examination by Mr Bentley and the first defendant himself of Mr Fisher the following matters emerged:

- He did not have the original notes of the telephone record of 29 February 2011 and simply had the typed copy of those notes in court.
- The matter had not been reported to the PSNI.
- Seven claims had been brought out of this accident.
- It was put to him that there was nothing more than suspicion in this case and that there was no hard evidence of fraud.
- He asserted that it was the multi-occupancy that was the good reason why this case was investigated. He denied that it was anything to do with the fact that the men were of Polish extraction.
- He considered that the fact that the wife of one of the plaintiff's passengers was a Facebook associate of the defendant could also indicate an association between them.

[17] Ms Fyffe gave evidence of her notes of the previous hearing as indicated above. She accepted that at the lower court the judge had been mistakenly told by another witness, who was not called in the present case that six of the eight occupants of these two cars worked in Camden Frameworks. This had been incorrect and had been discovered since then. She also accepted that the interpreter at the lower court had "not been great".

Legal principles

[18] It is well established law that the burden of proof on a fraud allegation rests on the person making it i.e. in this case AXA Insurance Company and the gravity of the allegation has to be taken into account.

[19] Hornal v Neuberger Products Limited (1957) 1 QB 247, cited with approval in Hussain v Hussain and Another (2012) EWCA Civ. 1367, is authority for the proposition that there is need for a cautious approach to be adopted in assessing an allegation of fraud. It needs appropriately cogent evidence if a finding of fraud is to be made. If fraud is alleged the evidence needs to be commensurately strong if the allegation is to be proved.

[20] Morris LJ in Hornal set out the position at 266:

> "But in truth no real mischief results from an acceptance of the fact that there are some differences of approach in civil actions. Particularly is this so if the words which are used to define that approach are the servants but not the masters of meaning. Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities."

[21] In Re Dellow's Will Trusts (1964) 1 WLR 451 at 454-5 Ungoed-Thomas J said:

> "It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but, as Morris LJ said, the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

[22] In short, it is the strength or quality of the evidence that will in practice be required for an allegation of fraud to be proved on the balance of probabilities that has to be considered. (See R (N) v Mental Health Review Board (Northern Region) (2006) QB 468 at (62)).

[23] As in Hussain's case, there are three possibilities in this instance namely:

(i) That the first defendant happened by chance to have a "genuine" accident with the plaintiff's car.
(ii) That the first defendant fraudulently and for his own purposes deliberately ran into the car of the plaintiff who was an innocent victim.
(iii) That the entire collision was fraudulently staged and the plaintiff was complicit in the fraud.

[24] In looking at allegations of fraud, the court must be careful to duly balance any points which are telling against the plaintiff being fraudulent. The court will usually make reference to them in setting out its judgment.

Conclusion

[25] Whilst I have approached the allegation of fraud with caution, I am satisfied that in the present case there is sufficiently cogent evidence pointing to the likelihood of fraud in this case as to lead me to dismiss this plaintiff's case. I have come to that conclusion for the following reasons.

[26] First, I observed carefully the manner and demeanour in which the plaintiff and for that matter the first defendant gave their evidence. I found the plaintiff to be evasive and completely unconvincing. When taxed by Mr Harkin on the issue of the contradictions between what he had said in the lower court and the present court e.g concerning his denial in that lower court that he had known anyone in the other vehicles and, that he could not remember the name of the person who had sold him the car notwithstanding that he was a workmate, I formed the view that he was being untruthful. The only plausible explanation for this was that he had been deliberately attempting to distance himself from any connection with the occupants or driver of the other vehicle. I found no plausible point to put in the balance e.g. his protestations of difficulty in recollection, which would point against fraudulence in this regard notwithstanding his previous good character.

[27] Similarly I found the first defendant equally unconvincing notwithstanding the strident and assertive manner in which he attempted to present his case. His attempts to hide behind language difficulties bore all the hallmarks of a rehearsed

defence in anticipation of what would be said to him in court and I was convinced in watching him that he was dissembling during the entire course of his evidence.

[28] It was not however only the observations as to the manner and demeanour of the plaintiff and the first defendant which produced the cogent evidence sufficient to persuade me that the second defendant had made out a case of fraud on the probabilities.

[29] There is clear evidence of what I consider to be deliberate deceit on the part of both the plaintiff and the first defendant in purporting to deny their knowledge of the personnel involved in this accident. Their sustained attempts to distance one from the other carried the miasma of a planned deception.

[30] There was no basis on which the plaintiff could have informed the lower court that he did not know the first defendant or the name of the person who had sold his vehicle to him when that person had been a workmate working together with him. When one adds that to the coincidence that the previous owner of the car had in fact been a business partner of the first defendant, the web of deceit grows larger. I was satisfied that both the plaintiff and the first defendant at least knew of each other having seen each other on occasions prior to the accident. In the lower court the record of the judge's judgment records that the plaintiff appeared to deny knowing the first named defendant and as I watched both these witnesses attempt to draw out pedantic distinction between knowing someone and knowing them to see I became more convinced that they had concocted this to throw a veil over the truth.

[31] Equally so, I was satisfied that the first defendant had been attempting to deceive the insurance company when he had informed them through his wife both by telephone and by letter, which he signed, that he did not know any of the occupants in the plaintiff's car. He clearly knew Karol Utkowski and the coincidence of his wife being a Facebook friend adds to the conviction that I hold that he knew Karol and his wife before this accident. I have balanced against this his assertion that he had many people on his Facebook list whom he scarcely knew other than for business reasons. However the coincidence of his knowledge of her husband Karol, the former business associate selling the plaintiff his car and both him and his wife having Karol's wife as Facebook friends is all too great to disturb my view that despite his denials he had real connections with persons in the plaintiff's vehicle.

[32] I was satisfied that the first defendant knew well what was contained in the letter which had been sent to the insurance company of 15 March 2012 in which he categorically stated he did not know the people in the plaintiff's car and claimed that he had only seen the plaintiff and his wife since the accident but that "he did not know them by sight or anything else". I consider that to be palpably untrue and another example of where he was deliberately trying to distance himself from the plaintiff. It chimed with Mr Fisher's evidence of the telephone call with him and his wife when he again denied knowing the occupants of the other vehicle. I did balance

against this conclusion the suggestion that he was confused because of language difficulties and unclear as to the difference between knowing someone and knowing someone to see. I find it inconceivable that he did not fully appreciate the tenor of the questions being asked and the need to be candid and frank about any knowledge he had of the other occupants. His attempts to dissemble on these issues clearly point to an attempt to conceal his fraud in the accident.

[33] In passing, I have not taken into account the conflicting evidence recorded by Mr Garstin, the consultant surgeon, when he took the history from the other parties in the vehicles because he may well have become confused due to the language barrier. I also ignore the evidence that one of the passengers had made a previous claim as not being relevant to this case.

[34] I dismiss the suggestion that the second defendant has permitted suspicion of this claim to be fuelled by the nationality of the parties and I am convinced that it has been the multi-occupancy and the fact of seven whiplash claims that has excited its investigation. Polish people are a most welcome addition to the rich multicultural tapestry that increasingly now makes up the population of Northern Ireland and I can conceive of no reason why nationality alone would engender suspicion in a case of this kind.

[35] I have therefore come to the conclusion on the balance of probabilities that the entire collision was fraudulently staged by the first named defendant and the plaintiff was complicit in this enterprise. The second named defendant has thus succeeded in adducing appropriately cogent evidence to sustain such a finding of fraud by me. I therefore affirm the decision of the County Court Judge and dismiss the plaintiff's case.