**Neutral Citation No: [2009] NIQB 61** | *Ref:* **HAR7570**

*Judgment: approved by the Court for handing down* | *Delivered:* **30/6/2009**

*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

**IN AN ARBITRATION APPLICATION**

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**BETWEEN:**

**LEONA SLOAN**

**Appellant;**

**-and-**

**MOTOR INSURERS' BUREAU**

**Respondent.**

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**HART J**

[1] This is an appeal by the appellant under s. 69 of the Arbitration Act 1996 pursuant to leave granted by Gillen J on 6 February 2009 in respect of a decision by Mervyn Morrow QC acting as an arbitrator (the arbitrator) appointed by the Department of the Environment to hear an appeal by the appellant under Clause 18 of the Compensation of Victims of Untraced Drivers Agreement (NI) 2004 against a refusal by the Motor Insurers' Bureau (the MIB) to make a payment to the appellant under that agreement.

[2] Section 69 of the Act permits an appeal on a point of law only, which was formulated in the following terms in the application for leave to appeal:

> "Whether, where a thrower of a hammer was using a vehicle in which to travel as a passenger at the time, and notwithstanding that the driver and passenger may have been acting in a joint enterprise, a liability arising from the throwing of the hammer is one which falls to be compensated by the Motor Insurers' Bureau

> under the terms of the Untraced Drivers' Agreement (Northern Ireland) 2004."

[3] The circumstances giving rise to this point of law were described by the arbitrator in his preliminary decision of 29 September 2008. Although these are not described as findings of fact, and Mr Ringland QC for the MIB pointed to a number of inconsistencies in the evidence submitted on behalf of the applicant, as these represent the factual basis upon which the arbitrator reached his decision I propose to threat them as findings of fact.

[4] The circumstances are described as follows:

> "1. On 3rd January 2005 the Appellant was a passenger sitting in the rear seat behind the driver in a Vauxhall Astra motor—car, with four other passengers, two adults and two children. This car was being driven by a friend on the main road between Killough and Downpatrick, County Down.
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> 2. At approximately 16.45 pm a silver coloured Ford Escort overtook their car and suddenly stopped. The Vauxhall drove around the Ford and while doing so a male person got out of the Ford at the same time as a red coloured Peugeot 306 behind the Vauxhall was flashing its lights. The person who had got out of the Ford got into the Peugeot. The Vauxhall was by that time ahead of the Ford and of the Peugeot. The Ford again overtook and as it passed the Vauxhall a hammer came through the Vauxhall back seat window where the Appellant was sitting and struck the passenger who was sitting in the Vauxhall beside the Appellant. The hammer was near the Appellant's head and she lifted it and put it on the floor. The Ford was in front and the Peugeot behind when the Vauxhall turned off the main road into a minor road. The Ford continued along the main road. The Peugeot followed the Vauxhall. Eventually the Peugeot passed the Vauxhall and stopped. Two men got out and tried to stop the Vauxhall and lifted something out of the back of their car and came towards the Vauxhall which drove around them and travelled to the local police station where statements were recorded from the Appellant and the other adults in the Vauxhall. The Appellant stated "I am not injured, just slightly shocked".

> 3. Neither the driver of the Ford nor the driver of the Peugeot nor their occupants have been identified."

[5] The relevant part of Clause 4(1)(c) of the Untraced Drivers' Agreement states that:

> ". . . this Agreement applies where . . . (c) the death, bodily injury or damage to property occurred in circumstances giving rise to liability of a kind which is required to be covered by a policy of insurance or a security under part VIII of the 1981 Order . . .".

[6] The relevant part of Part VIII of the Road Traffic (Northern Ireland) Order 1981 provides:

> "Subject to the provisions of this Part, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road or other public place unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third—party risks as complies with the requirements of this Part. . . 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 any property caused by or arising out of the use of the motor vehicle on a road or other public place in Northern Ireland."

[7] Having referred to Part VIII and summarised the appellant's submissions, the arbitrator gave his preliminary conclusions at paragraph 6 of his decision.

> "I find that if the Appellant sustained injury, notwithstanding her statement to the Police to the contrary, the injury arose from a hammer thrown by a passenger in the Ford into the Vauxhall. The injury was not caused out of the use of the Ford within the meaning of Part VIII of the 1981 Order. A person does not use a motor vehicle on the road for the purposes of Part VIII of the 1981 unless there is present in the person alleged to be user an element of controlling managing or operating the vehicle at the relevant time. The relationship of a passenger to a motor vehicle is not "use" within the meaning of Part VIII of the 1981 Order - see the decision in Brown v Roberts

> [1965] 1 QB 1; [1963] 2 All ER 263 - It follows that the Appellant's injury did not occur in circumstances giving rise to a liability of a passenger of a kind required to be covered by a policy of insurance within the meaning of Clause 4 (1)(c) of the Untraced Drivers' Agreement dated 1 June 2004. Therefore I dismiss the appeal."

[8] By letter of 23 October 2008 the appellant requested the arbitrator to reconsider his decision. By letter dated 31 October 2008 the MIB wrote to the appellant informing her that having considered the observations in her letter of 23 October 2008 the arbitrator had directed the MIB to inform her that the preliminary decision was now the final decision. The arbitrator's final decision was stated as follows:

> "…he finds that notwithstanding the thrower of the hammer was using the Ford Escort in which to travel as a passenger at the time, and notwithstanding that the driver and the passenger may have been acting in a joint enterprise, a liability of the driver for the act of the passenger is not a liability which the driver is required to insure against, being a liability to insure against third party risks arising out of the use of the vehicle within the meaning of Part VIII of the Road Traffic (Northern Ireland) Order 1981. The risk to the Appellant third party arose out of the negligent or criminal act of throwing the hammer. Furthermore in accordance with the decision in Brown v. Brown (already referred to) the thrower, whether negligent or engaged in a criminal act of assault, was not "using" the Ford Escort within the meaning of the Statute, and the driver was not under a duty to provide insurance against that act."

[9] The point of law at issue in this appeal may be said to be whether the arbitrator was correct to conclude that, if the passenger and driver of the Ford Escort were acting in a joint enterprise, the passenger's action in throwing the hammer was not something the driver was required to insure against under the 1981 Order because the passenger's action did not arise out of the use of the Escort on a road.

[10] The extent to which the actions of a passenger may be said to amount to "using" a vehicle, and so fall within the obligation of a driver to have in place insurance for third party cover, has been considered on a number of occasions. Counsel were agreed that the relevant authorities are Brown v. Roberts [1965] 1 QB 1; Leathley v. Tatton [1980] RTR 21; B (a minor) v. Knight [1981] RTR 136;

Stinton v. Stinton and another [1995] RTR 167; Hatton v. Hall and another [1997] RTR 212; and O'Mahony v. Joliffe and Another [1999] All ER (D) 151. Mr Ringland QC and Mr Reel (who appears for the appellant) referred me in detail to each of these cases, but I do not think that it is necessary to refer to all of them. However, before considering O'Mahony v. Joliffe, which is the most recent decision where Simon Brown LJ identified a number of principles to be derived from these cases, it is appropriate to refer briefly to Brown v. Roberts.

[11] The facts of that case were that Mrs Brown was walking along a pavement when a van pulled up beside the kerb. Mrs Roberts was the passenger and suddenly and unexpectedly flung open the door of the van. The door struck Mrs Brown and knocked her to the ground, causing her serious injuries. Megaw J found that there was no evidence that the driver, the second defendant, knew, or ought to have known, that Mrs Roberts was likely to behave in this way, or had any opportunity to stop her or warn anybody, and he found the driver was not personally negligent. The driver's insurance policy did not cover any passenger carried in the van, but did cover the driver against third party liability "caused by or arising out of the use of the van".

[12] In order to succeed against the driver it was therefore necessary to establish that he was in breach of his statutory duty in that he had permitted the passenger to use the van on the road without there being in force a policy of insurance as required by s. 36(1)(b) of the Road Traffic Act, 1930 in respect of any liability incurred by her as a result of the use of the van. Megaw J rejected the proposition that the passenger was "using" the van in the following passage at page 15:

> "Mr Chapman is right in his contention that a person does not "use ...a motor vehicle on a road for the purposes of section 35 (1) of the Act unless there is present, in the person alleged to be the user, an element of controlling', managing or operating the vehicle at the, relevant time. Precisely what the extent of that element may be, it is unnecessary to seek to define. There was no such element present in the relationship between Mrs. Roberts and the second defendant's van. I do not accept that the control or management or operation of a door of the vehicle by the passenger entering or alighting amounts to the necessary control or management or operating of the vehicle."

[13] At page 11 Megaw J made the following observations which have a bearing on the issued raised in the present case:

> "It is clear, and is conceded by Mr Chapman, that there may be more than one person who is "using" a vehicle at any given time, for the purpose of Section 35(1). It is clear further, from Elliott v. Grey and other authorities, that the element of driving the vehicle is not an essential element of "using". Nor, of course, is "use" of the vehicle on a road confined to the owner of the vehicle". (Emphasis added).

[14] In O'Mahony v. Joliffe Simon Brown LJ reviewed the relevant cases and identified the following as the central principles to be derived from them.

> "1. "Using" in clause 6 bears the same meaning as in the Road Traffic Acts (now the 1988 Act), so that a user is by definition someone required to provide third party cover and, if he fails to do, is potentially liable both criminally and civilly. User must therefore be given a restricted meaning.
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> 2. Plainly not all passengers are users even when they know that the vehicle is being driven without insurance. So much, indeed, is plain from clause 6(l)(c)(ii) itself, it being a specific further element of the clause that the passenger (if not the owner) is "a person using the vehicle".
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> 3. There must be present in the putative user some element of controlling, managing or operating the vehicle.
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> 4. That element may exist as a result of a joint venture to use the vehicle for a particular purpose or where the passenger procures the making of the journey.
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> 5. Not every such joint venture or procurement, however, will involve the element of control or management necessary to constitute the passenger a user.
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> 6. Whether in any given case there is a sufficient element of control or management to constitute the passenger a user is a question of fact and degree for the trial judge."

[15] It is therefore necessary to consider in the present case whether there is evidence of a sufficient element of control or management on the part of the

passenger who threw the hammer to make the passenger a user of the Escort because the passenger was a participant in a joint enterprise on the part of the passenger and the driver to use the Escort for that purpose.

[16] I consider that from the circumstances found by the arbitrator the following could be construed as establishing a joint enterprise between the occupants of the Escort and the Peugeot to stop the Astra in order to inflict harm upon the occupants of the Astra.

(1) The Escort suddenly stopped having overtaken the Astra, as it seems did the Peugeot 306.

(2) A male then got out of the Escort and got into the Peugeot.

(3) The Escort again passed the Astra, and as it did so a hammer was thrown from the Escort through back window of the Astra.

(4) It appears that the three cars travelled along on the main road after this, with the Astra between the Escort and the Peugeot.

(5) When the Astra turned off the main road the Peugeot proceeded to follow it off the main road before passing the Astra and then stopping.

(6) Two men then got out of the Peugeot and tried to stop the Astra, at the same time lifting something from the back of the Peugeot and approaching the Astra.

(7) The Astra avoided the two men, and by inference avoided the Peugeot, by driving round them and that is the end of the episode so far as all three vehicles are concerned.

[17] I consider that the actions of the Escort and the Peugeot indicate:

(a) that the occupants of both vehicles wanted to stop the Astra,

(b) both vehicles were acting in conjunction which each other,

(c) that the inference that this is the case is strengthened by a male occupant getting out of the Escort and into the Peugeot.

These actions described at [16] are, in my opinion, capable of being construed as showing that the occupants of both vehicles were taking part in a joint enterprise, the object of which was to bring the Astra to a halt. There are two matters which suggest that the purpose of bringing the Astra to a halt was to attack the occupants of it. The first indication of such a joint intention to attack the occupants of the Astra was the throwing of the hammer from the Escort. The second was the action of occupants of the Peugeot in getting out of their car and approaching the Astra after lifting something from the Peugeot. Whilst the object has not been identified, it would be a proper inference open to the arbitrator that the object was to be put to some criminal or improper use when viewed against the background of all of the circumstances.

[18] I consider that there is evidence upon which it would be open to the arbitrator to conclude that the occupants of both vehicles, including the driver of the Escort, were engaged in a joint enterprise to inflict harm upon the occupants of the Astra. In such circumstances, applying the principles identified by Simon Brown LJ I am satisfied that it would be open to the arbitrator to conclude that the criminal or negligent action of the passenger was an action in the course of a joint venture (which is another way of saying a joint enterprise) between the passenger and the driver of the Escort to attack the occupants of the Astra. As such both the passenger and the driver of the Escort would both be participants in an illicit venture, and the passenger who threw the hammer would be a user of the car in respect of which there should have been in force a policy of insurance within Part VIII of the 1981 Order. In such circumstances the authorities show that the appellant would be eligible for compensation under the provisions of the Untraced Drivers' Agreement, provided of course that the arbitrator was satisfied that she had suffered injury.

[19] I therefore answer the point of law "yes" and remit the matter to the arbitrator for reconsideration under s. 71(3) of the Arbitration Act because the parties were in agreement that if I answered the point of law in favour of the appellant it was appropriate that the matter should be remitted to the arbitrator as he had not made a finding that the appellant was injured, and this is a matter that remains for consideration by him.