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FOIL UPDATE 16th November 2021

Travelling as a passenger with a drunk driver

Campbell (Protected Party) v Advantage Insurance Company Limited (2021) EWCA Civ 1698

The appeal in this case raised a short but interesting point of law about whether a claimant could rely on his own drunkenness, and consequential lack of insight, either to avoid a finding of contributory negligence or to reduce the apportionment of responsibility for his contributory negligence.

Early in the morning the claimant, then aged 31 years, was an unrestrained rear seat passenger in a three-door car being driven by the defendant's insured. The claimant, the insured and others had all been drinking at a nightclub which was some 9.3 miles from the site of the collision. Before the journey had commenced, the claimant had moved from the front passenger seat in the car to a rear seat.

At the time of the collision the insured driver was driving the motor car when it crossed on to the wrong side of the road and collided with a lorry being driven in the opposite direction. It was a high-speed collision with a combined closing speed between the two vehicles of between 99 and 114 mph.

The defendant admitted liability for the claimant's claim but contended that his damages should be reduced for contributory negligence in that:

IN BRIEF

The Court of Appeal upheld a judge's decision to reduce the claimant's damages by 20% for travelling in a car when the driver was too drunk to drive safely.

The claimant's own drunkenness did not mean that he could not have made a conscious decision to be carried in the vehicle.

(1) he was not wearing a seat belt; and (2) he had allowed himself to be driven by the driver when the driver had obviously been drinking to excess at the nightclub.

The trial judge had found that the failure to where a seatbelt had no causative effect and no deduction was made for contributory negligence on this account. This was not an issue on this appeal.

The judge, however, found that the claimant should have appreciated that the driver had drunk too much alcohol to be fit to drive, and he assessed contributory negligence at 20%. The judge set out the very considerable amounts of alcohol which had been drunk by all three men but found that the evidence of previous consumption of alcohol by the claimant was "insufficient to displace the presumption of capacity". The judge held that the decision to get from the front to the back of the car was simple, and the claimant must have been aware of what was happening. The judge found that "if the claimant had capacity to consent to a change of position in the car, then in my judgment he also had capacity to consent to being driven in the car." The judge held that the move was consistent only with the claimant consenting to remain in the car as it was driven away. This was at a time when the claimant was aware that the driver "had consumed so much alcohol that his ability to drive safely was impaired".

This appeal challenged those findings.

Ten grounds of appeal were advanced on behalf of the claimant but overlapped so that effectively the issues were:

A proper reference to the Mental Capacity Act 2005 (issue one)

It had been pleaded that the driver had placed the claimant in the rear seat "well-knowing that the claimant was unable to reach a capacitous or informed decision as to whether he wished be driven away from the position outside the club…". In the light of the statement of case the judge decided to address the formal position under the Mental Capacity Act 2005.

In these circumstances where the issue of capacity had apparently been put in issue on behalf of the claimant, the judge could not be criticised for addressing the issue of capacity. The judge's treatment of the issue was in accordance with the express terms of the Mental Capacity Act 2005. All that the judge did was to point out that a person was presumed to have capacity until the contrary was proved, and this did not amount to an impermissible reversal of the burden of proof in relation to the issue of contributory negligence.

No impermissible speculation (issue two)

The judge was well aware of the limitations of the evidence. The judge identified the two ways in which the claimant could have got into the back of the car in his judgment, and he gave clear and convincing reasons for finding that he must have been helped by the driver into the back of the car. The judge's findings of fact were soundly based on the known facts and reasonable inferences drawn from those facts. The fact that there were "unknown unknowns" and "known unknowns", did not prevent the judge from making the findings of fact that he did.

An objective test for assessing contributory negligence of a passenger (issue three)

The test of whether a person had breached a duty of care in negligence was an objective standard. The fact that the claimant would not have agreed to be driven by the driver if he had been sober did not assist him if an objective standard was applied.

The issue of contributory negligence for a drunken passenger accepting a lift from a drunk driver was considered in England and Wales in *Owens v Brimmell*. The fact that drunkenness of the passenger would not avoid a finding of contributory negligence was part supported by references from other cases. It was established that in assessing contributory negligence the age of the claimant would be taken into account, so that the objective standard of care was to be measured by what was reasonably to be expected of a child of the same age, intelligence and experience. The claimant was an adult at the time of the collision. The judge was right to judge his actions at the relevant time by the standards of a reasonable, prudent and competent adult.

No interference with apportionment (issue four)

The apportionment of responsibility in contributory negligence was very much a decision for the trial judge to make, and an appellate court could interfere only if the judgment exceeded the ambit where reasonable disagreement was possible and the court below had gone wrong. There was nothing to show that the judge's apportionment in this case was wrong. He considered carefully the respective facts and matters.

The primary question in any case where contributory negligence was in issue was whether the claimant took reasonable care for his or her own safety. That principle must apply to the case of a person who was injured as a result of agreeing to be driven by a drunken driver.

The full judgment may be found at: Campbell v Advantage Insurance Company Ltd [2021] EWCA Civ 1698 (15 November 2021) (bailii.org)