IN THE EXETER COUNTY COURT

Claim No. 0TA00967

Southernhay Gardens
Exeter
Devon

Tuesday, 21st January 2014

Before:

HIS HONOUR JUDGE COTTER QC

Between:

MR. GARY ORANGE

Appellant

-v-

MRS. SUSAN TAYLOR

Respondent

Counsel for the Appellant: MR. EDWARDS
(Instructed by Harris Fowler Solicitors)

Counsel for the Respondent: MR. MOORE
(Instructed by Acumension Law Ltd)

APPROVED JUDGMENT

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1. THE JUDGE: This is an appeal against the order of Master O'Hare, sitting as a Deputy District Judge of the Exeter County Court, made on 7th June 2013. His order contained reflected a decision upon a point of which was in dispute in a detailed assessment. Master O'Hare gave permission to appeal and described it as a difficult issue of principle.

2. The facts of the underlying claim that was the subject of the detailed assessment are straightforward. At 6.10am on 2nd June 2007, the Claimant, Mr Orange, was driving his Land Rover along the A377 when a sycamore tree (on land that he subsequently alleged belonged to the defendant) fell, hitting his vehicle and causing him a significant head injury. A claim was made against the defendant on the basis she owned the land on which the tree had stood, the tree was in poor condition and that a reasonable landowner would have taken steps to fell it or otherwise deal with it so it did not present a hazard to people using the road.

3. The defendant did not accept that the tree was on her land and did not admit liability. Proceedings were then issued. A defence was served, and again it was not accepted that the tree was on the Defendant's land. The defence also made other points, including that the tree was not so diseased that it was obviously a danger and there was a reasonable system of inspection. However the case was eventually settled with the claimant accepting £100,000 damages plus costs.

4. The costs could not be agreed and therefore the claimant served a Notice of Commencement. There followed points of dispute, which gave rise to the matter of principle that was before the Deputy District Judge, and is now before me on appeal.

5. The issue can be simply set out. It is whether the accident which I have described falls within CPR 45.15(2) section 3 Fixed Percentage in Road Traffic Accident Claims or not. The Deputy District Judge described the issue as follows:

> "The defendants argue that the amount of the success fee is fixed by rules of court because the injuries here come within the definition of a road traffic accident for the purpose of CPR 45 section 3. If the defendant is right, that means the success fee is fixed at 12.5 per cent, however easy or difficult the task of proving liability in that case might have been."

6. The claimant argued that the case fell outside of the definition of a road traffic accident for the purposes of CPR 45. That meant the success fee, if this were correct, that would have to be assessed having regards to all the particular circumstances of the case, including how easy or difficult it was to progress. It was said that this was a difficult case and the claim is for a 100 per cent success fee.

7. It is Master O'Hare's determination of the meaning of the phrase: "Caused by or arising out of the use of a motor vehicle on the road," that gives rise to this appeal. The facts of the accident were as I have stated, and the Deputy District Judge heard submissions on the authorities such as they were giving him guidance as to relevant principle. He stated in conclusion:

> "In my judgment, having considered these different cases as carefully as I can, I think the circumstances of this case are within the description given by CPR 45 section 3. This is a road accident case. The injuries suffered by the

> claimant did arise out of the use of a car driving himself to that part of the road at which he suffered those injuries."

He did go on to say some things about how wide or narrow CPR 45 is, stating that the definition plainly covered accidents which are familiarly described as road traffic accidents and is likely to cover all two vehicle accidents. However he considered the words are wide enough encompass other cases which are not so easily described as road traffic accidents, for example one car accidents where the vehicle is not moving at all. I come on to the cases that he considered in due course. I have to say that some of his comments, whether by virtue of transcription error or not are not so easy to understand, particularly his view of *Dunthorne*, which he clearly considered was binding upon him, which of course it was.

8. The grounds of appeal are that he got it wrong in law, in that he was wrong to hold that the accident arose from the use of a motor vehicle. The second and third grounds add nothing and are mirror images and give the reasons why it is said that the decision was wrong in law. It said that driving to a place where an accident takes place does not establish a sufficient causal connection between the use of the car and the accident for the section to apply, and that the use of the car was merely incidental to the happening of the accident.

9. The arguments in the grounds are expanded upon by Mr Edwards, who appears on behalf of the appellant, as he did for the claimant before the Deputy District Judge. He states as follows:

> "Mr Orange could have been walking along the road, cycling along the road or riding on a horse. His means of travelling on the road was purely incidental to that which occurred. In no sense did the accident of falling the tree have any causal relationship direct, indirect, approximate, distant or otherwise with Mr Orange's driving along the road. Plainly Mr Orange would not have suffered his injuries had he not been driving along the road at the time. That is no more a cause of the accident than Mr Orange's birth, because had he not been born he would not have been driving along the road at the time and he would not have suffered the injuries."

10. In response Mr Moore submits that this is really rather a simple and straightforward application of the common sense meaning of the phrase. Mr Orange was driving his Land Rover along the road at the time it was struck by the tree. It matters not, he says whether it was struck by a tree, another car or something else. It was a road traffic accident plainly and simply because he was driving a car at the time that it was struck by something.

11. The Deputy District Judge was referred, as I have indicated, to authority. It seems to me that two of those cases are not only relevant, but needed to be considered and were carefully considered by the Deputy District Judge. The first of those is *Dunthorne v Bentley [1996] RTR 428*. In that case the second defendant, which was the insurers of the first defendant appealed against an order of Mr Justice Laws (as he then was) on a preliminary point.

12. The litigation arose from a road traffic accident which occurred when the plaintiff was driving his car on the A109 at about 7pm. The first defendant ran across the road into his path. He struck her, she was fatally injured and he suffered a serious head injury.

He claimed damages against the first defendant and the second defendant, as her motor insurers.

13. The agreed facts show that ten minutes or more before the accident the first defendant had been driving her car on the same road, she had run out of petrol, parked with hazard lights flashing and stood near the rear of the car. As Lord Justice Rose, who gave the first judgment indicated: "None of these acts caused or contributed to the accident."

14. However, she was seen by a colleague driving past who stopped her motor car on the opposite side of the road, and following some shouted conversation the first defendant ran across the road but sadly and tragically straight into the path of the claimant's vehicle.

15. The second defendants were joined and the action was stayed pending determination of the preliminary point as to whether liability could be attached to the insurer under the terms of the motor insurance policy.

16. The crucial question for the court was whether the plaintiff's injuries were caused by or arising out of the use by the first defendant of a motor car on the road. It was said by Lord Justice Rose that two questions arose. Firstly, what use of the car was being made by the first defendant at the time or immediately before the accident occurred? Secondly, was the accident cause or did it arise out of that use?

17. Mr Justice Laws at first instance had inferred from the facts agreed between the parties (which I have summarised) that the first defendant was running across the road to obtain help of some nature, to get petrol to restart her car. Mr Justice Laws had concluded that this was closely and causally connected with her use of the car. The resulting accident therefore arose out of such use.

18. Mr O'Brien QC, on behalf of the insurer raised a number of different arguments. I have no doubt in his usual persuasive way. Firstly, he said that the first defendant's car had been safely and properly parked ten minutes or more. Whilst this amounted to use of the vehicle on the road, the running across the road was not incidental to using the vehicle to park and the injuries arose not from her use of the car, but from her decision as a pedestrian to run across the road. Secondly, crossing the road to get help to restart her journey did not constitute use of the vehicle and her motive in crossing the road could not alter the use for which the vehicle had been put.

19. Despite what he referred to as "The great skill and ingenuity of Mr O'Brien's submissions", Lord Justice Rose was unpersuaded by any of them, separately or collectively. He agreed with Mr Justice Laws that the phrase "Arising out of" contemplated a more remote consequence than embraced by "caused by", referring to the view of the High Court of Australia in certain cases that had been referred to in argument. He agreed with proposition that "arising out of" must be taken to require a less approximate relationship to the injury to the relevant use of the vehicle than is required by the words "caused by". He stated as follows:

> "A pedestrian may cross a road as an end in itself; for example to reach a shop or to walk where there are street lights in the hours of darkness or as part of a long journey on foot, or incidentally to some other activity; for example to fetch water, to refresh a horse or indeed to clean a motor car. In each case, how the act of cross the road is to be categorised, in particular whether it can be said

> to arise out of some other activities can be judged objectively according to all the circumstances of a particular place, including the reason why the pedestrian was there. To exclude consideration of a pedestrian's purpose would be an unwarranted disregard of common sense and to close one's eyes to potentially important information as to the origins of the act of crossing the road. It follows, in my judgment, that the Judge was entitled to consider what Mrs Bentley's purpose was.. inferences from the agreed fact, in my judgment, as the role of judge is ordinarily entitled to performed, but is expected to perform."

20. He went on to find that the question of whether something arose out of (being a wider concept than caused by) particular facts was essentially one of fact rather than law. The accident which was caused by Mrs Bentley's negligence when seeking help to continue the journey in her car had arisen from her use of the car. She would have not have been crossing the road had her car not run out of petrol, because she was seeking help to continue her journey. Lord Justice Pill and Lord Justice Hutchinson agreed with that conclusion.

21. In the case of *AXN & Others v John Worboys & Another [2012] EWHC 1730 (QB)* before Mr Justice Silber in the High Court in 2012, one of the issues was similarly the extent to which bodily injuries suffered arose out of the use of a motor vehicle on a road. The facts in that case however were radically different and rather extreme. Mr Worboys was convicted of a number of offences of a sexual nature, which are, in essence attacks upon people he had lured into his taxi and then had drugged during the journey. Whilst they were appropriately sedated he then attacked them. In essence, the claimant's case was that its insurers insured Mr Worboys pursuant to the Road Traffic Act 1991 in respect of his liability, and thus they were required to pay. In relation to the insurance, it again contained the phrase: "Caused by or arising out of the use of a motor vehicle."

22. Mr Justice Silber had an extensive citation of authority before him in relation to this issue, a lot of which he found to be of very limited assistance. However he was, of course, interested in *Dunthorne v Bentley [1996] RTR 428*, being Court of Appeal authority. He reviewed the case and eventually came conclusions which included the following. Firstly, he could not accept the submission that the critical phrase "arising out of" means a proximate cause or an effective cause, but not necessarily an immediate cause as that was too narrow a test and at variance with the views expressed in *Dunthorne*. Secondly, he found that the relationship to which the words "arising out of" must be applied is between the injuries suffered, not the negligence of wrongful acts and the use of the vehicle not at the start of the journey, but at the time when the injuries were suffered. A temporal aspect, if I can so describe it.

23. The Deputy District Judge in this case was referred to two other cases. However, it appears to me that they are of very limited assistance for the purposes of this appeal. Mr Edwards submits, and I accept his submission that they are really fact specific. In addition, they do not set out any overarching principle that requires to be transported into the consideration of this case.

24. Returning to the issue before the District Judge it was whether the accident was caused or arose out of the use of the Range Rover which Mr Orange was driving at the time that it was hit by the branch of this tree, or as much as the tree has hit the car.

25. Of course I am bound by, but respectfully agree with, the statement of Lord Justice Rose that the phrase "arising out of" contemplates a more remote consequence than is embraced by the phrase "caused by". It is potentially wider in scope. However, it does require some form of relationship, not necessarily sufficient to amount to causation in law, as it can be less immediate. There must be some degree of connection with the use of the vehicle and it must not merely be incidental, or as Mr Edwards would say, "concomitant." There must be a sufficient nexus.

26. In my view, *Dunthorne v Bentley [1996] RTR 428* binds me as regards to the approach to the degree of connection. Mr Edwards' analysis, it seems to me, echoes Mr O'Brien's submissions in *Dunthorne;* that the defendant could have been running across the road for any reason and it mattered not what it was because the use of the car was merely background. It was the act of running across the road, failing to look to see if a car was approaching was, that was the cause of the accident. If adopting the analysis urged upon me by Mr Edwards and as advanced by Mr O'Brien, the consideration starts with the fact that the pedestrian wished to cross the road and not why she was in the position that she is. However the problem is that this analysis was not accepted by the Court of Appeal. Indeed, it was expressly rejected by Lord Justice Rose.

27. The question, it seems to me is an objective one and requires consideration of all the circumstances. Yet, most obviously, as Mr Moore says, the essential and central fact is that the claimant was driving on a public road at the time of the accident and subject to road traffic regulations and duties. There were duties upon him and duties owed by others in relation to the highway upon which he was travelling, as well as duties upon those who were carrying on activities adjacent to that highway. In my opinion, to exclude the use of the car would be, to steal Lord Justice Rose's phrase:

> "An unwarranted disregard of common sense and would close one's eyes to potentially relevant considerations of important factors potentially in the analysis of the accident."

28. I also believe that if one were to apply a common sense description to the generic type of accident, that Mr Moore is correct when he submits that if a person is driving along the road safely and lawfully and something comes onto the road and collides with that car, that that is in the eyes of most ordinary and reasonable people, pre-eminently to be considered a road traffic accident. In my view, the facts in *Worboys*, where such an extreme example that they were properly considered by Mr Justice Silver to be of a very different nature. Moreover, the temporal link, because the taxi had stopped of course at the time of the abuse, was one that was not satisfied. However, in any event, it is the Court of Appeal decision in *Dunthorne* that I must look to for primary guidance.

29. As a result I do not accept that the Master fell into error in his analysis. Rather, I think that if one takes the case of *Dunthorne* as guidance, that "arising out of" must be seen as a potentially wide phrase Although there must be, as I have indicated, some clear connection, it would be easily met by the fact that the car was actually being driven at the time that the tree or branch hit it.

30. I would also add, although it would not in fact have altered my decision, that I accept the proposition that there should be a simple and straightforward analysis of the words, using their ordinary meaning as this consistent with the aim or purpose of cutting out

arguments such as this. That is the very reason why the set rates were put there in the first place.

31. Despite eloquence likely to match that of Mr O'Brien in *Dunthorne*, Mr Edwards' arguments are, I am afraid, ultimately unsuccessful. Therefore, I dismiss the appeal.

(End of judgment)

(Discussions follow as to costs)