OUTER HOUSE, COURT OF SESSION

[2011] CSOH 145

OPINION OF LORD McEWAN

in the cause

LEE LIDDLE

Pursuer;

A754/09

against

BRIT INSURANCE LIMITED

Defender:

Pursuer: Ms Casey, Thompsons, Solicitors

Defender: J G Thomson, Andersons, Solicitors LLP

31 August 2011

[1] This is an ordinary action in which the pursuer seeks to recover a sum of money from an insurance company following upon a road accident in Edinburgh on 22 July 2008. It is alleged that on that date his Vauxhall car was stationary in traffic when the defenders' insured vehicle ran into the rear of the car causing damage. Liability for the collision is admitted but the quantum of damages is disputed.

[2] At the outset it is important to look at the Record and remembering that this is not a Rule 43 type of action where more latitude is commonly allowed to pleadings. In Article 4 of the Condescendence the pursuer avers *inter alia* "... His vehicle sustained extensive damage. It required repair and he was accordingly denied the use and amenity of the vehicle for the period of the repair ...". He then narrates entering into a Credit Hire Agreement with Accident Exchange Limited and how under that contract he is liable for six enumerated charges. It is said that the third party insurance position was not finalised until 16 October 2008 and the repairing garage then had authority to carry out repairs. The pursuer alleges "... but this authority did not cover all of the damage to the vehicle ...".

[3] When the proof opened the pursuer had no standard denial at the end of that Article of Condescendence. The defenders' Answer 4 contains the following averment *inter alia* "... the ... vehicle sustained minor and cosmetic damages to the bodywork. Such damage did not prevent the vehicle being driven safely. The damage was repaired at a cost of £237.87 ... The repairs would have required the vehicle to be in the workshop for a day or so ... there was no requirement for the pursuer to incur hire charges. Nor was it reasonable to do so. *Separatim* the vehicle was not roadworthy during the period of which hire charges were incurred due to a defective clutch. The defect in the clutch was unrelated to the accident. As a result of the defective clutch the vehicle could not be driven ...".

[4] The defenders thus clearly contend that the paintwork damage was minimal and the vehicle had a defective clutch unrelated to the accident. As the pleadings were at the start of the pursuer's evidence, it is in my opinion obvious that the pursuer had no case based on a defective clutch being due to the shunt. The pursuer, however, began to make such a case, and the defenders' counsel objected on the basis that there was no such case and in any event no denial of his Answer 4. I reserved my decision on the line of evidence and

allowed the case to continue. However, soon thereafter a further objection was made on the same basis. I granted an adjournment and on resuming Miss Casey for the pursuer sought to amend at the Bar. She did not lodge a formal Minute. Against objection I allowed her amendment which said (after item 6 on page 9) *sic* "In response to the defenders averments in answer denied except in so far as coinciding herewith. *Quoad ultra* denied."

[5] The proof then continued, and I will come to that in due course. Whether the effect of the amendment allows the pursuer to prove a case that the clutch was damaged in the accident, or whether any such proof was ever achieved remain for discussion later. To that end the defenders maintained their opposition to any case based on the clutch. The significance of all of this is obvious. If there is no case on record about the clutch or no such case is proved then it is less easy to see how the pursuer is entitled to the large sum sued for. There were other unusual features in the case. The accident was in July but the Insurers did not finalise until October and the garage did not do the work until February of the following year (ie a delay of six months from the accident). That delay was never explained. Two expert witnesses gave evidence, one of whom had never inspected the car and the other who only looked at the rear paint damage. I was also told there would be a Joint Minute of Agreement but none was produced.

[6] What then was the evidence. The pursuer (aged 31) is a painter to trade but was unemployed at the time. On 22 July 2008 he was taking a pet to the PDSA. Apart from the dog, in his car were his partner and a child. Around midday he stopped at traffic lights in Chesser Avenue. He was struck from the rear by the defender's insured. The pursuer did not have comprehensive insurance. After the accident he drove to the coachworks garage MRM in Roseburn and left his car there. He filled in a form for Accident Exchange and went home to Corstorphine in a taxi. Thereafter he drove a series of hire cars until February 2009.

[7] The pursuer said that when he drove to MRM, the exhaust was sounding loud and it was difficult to put his car into gear. He said (though this was pure hearsay) "the garage" told him the clutch was damaged. He said that prior to the accident the car was driving well and that he used it daily. He was aware of the delay in authorising the repair and of the further delay. He said he kept phoning MRM for progress reports, speaking to a "Jim" and a "Rocco". He maintained that he was told that Accident Exchange would "take care of everything" for him.

[8] When he got his own car back he drove it home and left it at his house until he had saved enough money to have the clutch repaired. The repair was done and he sold the car. The pursuer was closely cross examined about this. He could not remember what the repair cost. He said he paid cash. He could produce no receipt. He said the work was done in a garage "in Edinburgh" but he could not name it or say where it was. He was making no claim for that repair.

[9] The pursuer was shown No. 7/4 of process (photos). He agreed that any damage visible was minor. He was unable to explain why he had taken the car to MRM in Roseburn.

[10] The second witness for the pursuer was Mr Alan Livingstone (aged 64) a consultant motor engineer and assessor who worked for a firm called Strangs, Green, Mathieson. He said he examined vehicles and "anything pulled by wheels". He advised police forces and made accident reports. He had not seen or examined the pursuer's car. He was asked how a shunt could have damaged the clutch and what he said was this: If the vehicle had been in gear and was pushed forward with the clutch engaged, or if a wheel had been pushed against the kerb, then there could be clutch damage. He also said the clutch pedal could have been bent or the cable disengaged. The exhaust could have been deflected on to the clutch causing damage. It was possible to drive a vehicle with a "... problem clutch ...". In cross examination he said he had been instructed a week before the proof for an opinion on how the clutch could have been damaged. He said he did not know if the car was in gear or had hit the kerb.

[11] That was the pursuer's proof and I pause to observe that none of the foregoing theories was ever put to the pursuer.

[12] Martin McIntee was the first witness for the defenders. He was aged 40 and had been a spray painter with MRM for ten years. He said the firm employed six workers and their work was mostly on high performance vehicles like Porsche and Maserati cars. He had no clear memory of the pursuer's car but remembers a car which had sat around "for ages". He remembers speaking on the phone to someone claiming to be the owner asking for a progress report. All he was told was that the car was "waiting for insurance ...". He confirmed that the man in charge of the business was Jim Gibb and the person at reception was Rocco D'Agostino. He did say that if the vehicle had come in, it must have been driveable.

[13] The last witness was Ian Barrowman (aged 62) an insurance assessor and engineer with Scottish Technical Services. He had City and Guild qualifications as well as MIMI. He had worked on all cars for many employers including Skelly and Taggart. He had examined the pursuer's car in August 2008. He found minor damage to the rear bumper with paint transfer. Having examined the boot and found the sealant unbroken (No 7/4 photos N and O - all taken by him) he concluded that the impact must have been very light. He said at three miles per hour. The number plate was intact and the exhaust was still in position. He was the author of two reports Nos. 7/1 and 7/5 and I refer to these elsewhere. He concluded that the impact was too light to damage the clutch.

[14] He said that while he did not examine the clutch he did try to move the car. He got the keys but when he tried the car would not to into gear. The pedal moved but the stick did not engage.

[15] In cross examination he said the clutch plate might have seized on the flywheel due to the car being left out and the brake pads might be jammed. The car would have to be towed or rocked in gear to free it up. He repeated that the accident damage could not account for the clutch. He then described what would be necessary to inspect the clutch. It was a day's job for two men and would require removal of the engine and gearbox by chain hoist. The job would cost £250. He finally said that only a high speed impact could damage a gearbox and the car would have to be in gear.

[16] I want now to look at the productions lodged. There has been no formal agreement about them but they were referred to and not seriously disputed. I am prepared to hold them as proved to be accurate and what they bear to be.

[17] Mr Barrowman's photos are 7/4 lettered A to P and only he and the pursuer looked at them. The pursuer agreed that photos A and B showed no obvious damage. Mr Barrowman said under reference to Photos N and O, that because there was no damage to the sealant there had been no severe impact. These photos do appear to support that proposition.

[18] The various hire agreements are Nos. 6/3 to 6/8 of process. Only the pursuer spoke to these. The pursuer hired several cars between the accident and the return of his own vehicle. He accepted that he had signed these on the various dates they bear. There are two important clauses which should be noticed. 2.1 says "... where you cannot use your motor vehicle as a result of an accident which in our opinion was the fault of a third party, we may hire you the vehicle for the rental period and allow you credit on the AX charges in accordance with this agreement ...". Clause 3.4 provides "... you must take reasonable steps to keep the rental period to a minimum ...". Apart from clauses 1.2, 1.5 and 1.6 no other clauses were looked at. These clauses are only definitions. No issue was taken about the scale of the charges in the front sheet of each document. Clause 5 shows that AX has claims control.

[19] Something was made of Mr Barrowman's two reports Nos. 7/1 and 7/2 and a later report 7/5. What these say to his principals (the defenders) is this. No. 7/1 is dated 20 August. In relation to the 10 year old Vauxhall it says *inter alia* that "... the vehicle has suffered very light collision damage to the rear affecting the rear bumper. The vehicle would not go into gear or drive when inspected this is due to a clutch fault not part of this claim ...". A small repair cost had been agreed with MRM at £213.66. Having made that report to his principals in August on 16 October, Mr Barrowman authorised MRM to proceed with the repairs. However, on 23 October 2008 (No 7/5) the same writer reported to the defenders "... that the vehicle was not road worthy due to a problem with the clutch/gearbox, which is not part of this claim ...". The problem with that

statement is that in 7/1 in the section dealing with roadworthiness the writer has said "... in our opinion the vehicle was not roadworthy at the time of our inspection as a result of the damage sustained in the incident ...". That is clearly different from the terms of the later statement and the two cannot be reconciled. Mr Barrowman said the discrepancy was his fault due to misreading his computer. What effect, if any, this contradiction had on the defenders is not known.

[20] MRM's invoice for the paintwork is 7/3 and is for £237.87. It is dated 13 February 2009. It is, however, clear from all these documents that the defenders must have been aware that they were dealing with Accident Exchange who are described as "the Insured". I have to assume that they must have known that it was likely that the third party (the pursuer) was hiring a car from them.

[21] I now look at the authorities referred to. *Lagden* v *O'Connor* [2004] 1 AC 1067 concerned an accident caused by the defendant's negligence. The plaintiff who was unemployed could not afford to hire a replacement car. He signed an agreement with a credit hire company to provide a hire car at no cost to him allowing them to recover against the negligent driver's insurers. The agreement resulted in hire rates greater than equivalent contemporary "spot" rates. The county court judge awarded the plaintiff the whole costs of the car hire. The House of Lords, agreeing with him and the Court of Appeal, said the wrongdoer had to take his victim as he found him. It was reasonably foreseeable that an impecunious plaintiff would have to borrow money on credit hire and pay the much higher charges. Lord Nicholls said (1073) that the decision did not mean the innocent motorist could recover damages beyond losses for which he is properly compensatable.

[22] In considering the vexed issue of additional benefit arising out of a plaintiff's impecuniosity Lord Hope (1079) quoted from Dr Lushington in *The Gazelle* (1844) 2 W.Rob 279 at 281 "... the right against the wrongdoer is for a *restitution in integrum,* and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must hear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him ...".

[23] Ultimately it comes to what real choice was open to a plaintiff and that is for the defendant to show on proper evidence.

[24] In *Clark* v *City of Edinburgh Council* [2010] CSOH 144 the pursuer's car was damaged by the defender's truck and via Accident Exchange he was provided with a hire car. The problem was that the vehicle hired was superior to his own second hand car and at a high daily rate. The Lord Ordinary found that a proper hire of an equivalent type of car would have cost about one quarter of the daily rate. He only allowed for hire at the lower rate. In that case the car could not be economically repaired and there was a long period of extra hire before settlement was made. The pursuer was not responsible for the delay and hire charges for the extra long period were held to be recoverable.

[25] It is noteworthy that in that case more evidence was led from both the defenders and the Insurers than was placed before me. It is also of interest to note that the same repairing garage was involved! In spite of all of that, the Lord Ordinary was faced with gaps in evidence and a number of matters not properly explained. I am in a similar position in this case.

[26] There were two other cases referred to viz *Pegler* v *Northern Agricultural Implements* (1877) 4 R 435 at 438, and *O'Connor* v *W G Auld & Co* 1970 SLT 16. These cases are both illustrations on their own facts of the need to make proper averments on record to entitle a party to lead evidence, especially upon matters within their own knowledge.

[27] Miss Casey in argument asked me to allow all the evidence as competent especially since she had amended in the course of the proof. The pursuer should be accepted as a credible and reliable witness. He

was the innocent victim of the 'shunt' accident. He had, at the time, no job and had a partner and a family. The car had run well before the accident and if the clutch was damaged that was nothing to do with the pursuer. The car was not left in the garage because of the clutch. The pursuer had no alternative but to use Accident Exchange since he could not afford to pay "spot" rates. He did all he could to mitigate his loss. He kept phoning the garage to check progress and any delay in authorisation was not his fault. It was down to the third party insurers. No engineer was sent until August and liability was not admitted until October. That delay was never explained. Thereafter any further delay was down to the garage (MRM).

[28] Counsel referred me to *Lagden* v *O'Connor* [2004] 1 AC 1067. The old doctrine in the *Liesboch* case was legal history. This pursuer had no choice and was entitled to be put back in the position he had been in before the accident. Even when his car was returned to him it sat for six weeks before he could afford the clutch repair. There was no question of him having hired a superior car. Miss Casey looked at *Clark* v *Edinburgh District Council*[2010] CSOH 144. This pursuer was impecunious. Miss Casey also lodged a written submission which I refer to for its terms.

[29] Mr Thomson in furtherance of his written submission began by accepting that the pursuer needed a car and got various vehicles from Accident Exchange. It was accepted that he could not pay the going rates, and the rates themselves were not disputed. However, he was not entitled to hire a car if there was nothing wrong with his own car. Here there was only minor damage and there was no evidence that the clutch was faulty or what might have caused that. There was no record for any such case. The matter was pure speculation. The pursuer should have used his own car while waiting for the paint repair. The car was roadworthy unlike the one in *Clark*. The real question was the degree of damage. Here it was minimal and could have been repaired in a day or two.

[30] Counsel renewed his objection to the line of evidence about clutch damage. There was no record. The pursuer could not say who repaired it or what it cost. There was no receipt and no claim for any such damage. Any evidence about it was pure speculation even with the late amendment. There was simply no evidence that the vehicle was unroadworthy due to the accident. It was unreasonable to hire a car for such minor damage and *Lagden* was not authority for that. Damages should be limited to £400.36.

[31] What then do I find proved out of the whole evidence? In the first place I do not think the pursuer ever set out to prove that the clutch of his vehicle was damaged because of the shunt. The pursuer was a credible witness although his memory about the later repair to the clutch was defective. The detail he could not remember but he had no particular reason to recall it. It had never been part of his claim against the defender's driver. Rightly or wrongly he thought the clutch was different after the accident and the exhaust noisy and that impression was confirmed by the garage, he said. Before the accident the car had driven well and after the repair he drove it home. On this evidence I do not find that the car was unroadworthy for a reason unconnected with the accident.

[32] I do not accept the evidence of Mr Barrowman on this point. In his August report he said the vehicle was unroadworthy as a result of the damage sustained in the incident but in October that changed to blaming the clutch/gearbox for lack of roadworthiness. These two contradictory statements cannot be explained by saying he misread his computer. He only saw the car once in August and did not examine the clutch although he said it would not go into gear.

[33] That evidence is not satisfactory to hold the vehicle unroadworthy due to a faulty clutch. His later evidence about how the vehicle's clutch might be in a damaged condition is pure speculation. The same comment applies to Mr Livingstone. He never saw the car and his theories of how the clutch might be damaged were never put to the pursuer. The point of all of this is that the defenders cannot be heard to say that during the period of the hire the pursuer would not have been able to use his car anyway. In my view the pursuer was entitled to go to MRM and because he needed his car and could not afford comprehensive insurance, to enter into the agreement he signed.

[34] It is true that after that there was a long delay before the defenders' engineer inspected, issued two reports, liability was admitted and work finally done. That is not the fault of the pursuer and is my view it would have been unrealistic to expect him to go to MRM and demand the return of his own car while the insurers and the garage delayed. He was hiring other vehicles and if that was betterment to him the defenders have to bear that inconvenience. McIntee did confirm that the pursuer did phone to enquire of his car.

[35] I am concerned in this case that I heard no evidence from the defender Insurers or Accident Exchange as to why there was a delay over what was a simple cosmetic repair with a low value. It would have been easy to furnish an explanation. The defenders who knew of the Insurance arrangement should have been more vigilant. The Insurance Scheme is well known and *Lagden* was decided many years earlier. Equally, I should have heard some proper evidence from MRM as to why they took from October to February to do the work. It does not inspire confidence in a garage claiming to work at the top end of the car market.

[36] If the pursuer had no real alternative but to hire for this long period, then no dispute arises as to the level of charges and the pursuer is entitled to the sum sued for which will or course go to the Accident Exchange in due course. Something was said about hire for a lesser period but no date emerges as a cut off point. To select one would be purely arbitrary.

[37] I have a final observation about the pleadings although in the result it may not matter. The pursuer's case lacked the basic reference to the defences and the appropriate denial. The amendment when it came was awkward and rushed. Had it been necessary to decide it I would have ruled as inadmissible any evidence from the pursuer and Livingstone as to the clutch being damaged in the accident. The pursuer himself made no such case and the evidence of his expert was incompetent, he never having seen the vehicle or produced any report to the court. That may not have been his fault due to the vehicle having been sold and his very late instruction. I am surprised he was willing to give evidence and it was a rather disappointing chapter of the case.

[38] The pursuer for the reasons given succeeds and I will award the sum sued for. This is not an outcome I reach with any enthusiasm as I feel I was not given the full facts. It is not for me to speculate or offer any further comment on what must be the obvious consequences in the insurance world over claims like these.