Neutral Citation: [2016] IEHC 505

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 354 JR]

RUSSELL IGHOVOJAH

APPLICANT

AND

DISTRICT JUDGE BRYAN SMYTH AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 7th day of April, 2016.

1. In this judicial review application, the applicant seeks an order of certiorari quashing his conviction by the first named respondent on the 14th of May, 2014, of an offence contrary to s. 56 (1) of the Road Traffic Act 1961, colloquially known as driving without insurance. He was also convicted of failing to produce a certificate of insurance.

Background Facts.
2. On the 18th of April, 2013, the applicant was disqualified from driving. On the 17th of June, 2013, while the applicant was so disqualified, he took out a policy of motor insurance with the Royal & Sun Alliance insurance company ("RSA"), which covered the period from the 17th of June, 2013, until the 30th of November, 2013. The insurance policy was subject to the following proviso:-

> "Provided that the person driving holds a licence to drive such a vehicle, or having held such a licence is not disqualified from holding such a licence."

3. It is clear that the applicant did not disclose his disqualification to RSA when he took out the insurance policy. On the 23rd of June, 2013, while driving on the public highway, the applicant was stopped by a member of An Garda Síochána and a demand made from him to produce his insurance. When he eventually did so, he produced the RSA certificate which on its face covered the relevant time but contained the stipulation above referred to.

Legislation.
4. Section 56 (1) of the Road Traffic Act 1961 provides:-

> "A person (in this subsection referred to as the user) shall not use in a public place a mechanically propelled vehicle unless either a vehicle insurer, a vehicle guarantor or an exempted person would be liable for injury caused by the negligent use of the vehicle by him at that time or there is in force at that time either—
>
> > (a) an approved policy of insurance whereby the user or some other person who would be liable for injury caused by the negligent use of the vehicle at that time by the user, is insured against all sums without limit (save as is hereinafter otherwise provided) which the user or his personal representative or such other person or his personal representative shall become liable to pay to any person (exclusive of the excepted persons) by way of damages or costs on account of injury to person or property caused by the negligent use of the vehicle at that time by the user, …"

The Applicant's Case.
5. The essential point made by the applicant is that s. 56 is directed towards ensuring that a person injured by the negligent use of a mechanically propelled vehicle in a public place shall not be left without compensation. Accordingly, where there is an insurance policy in place which enjoins the insurer, in this case RSA, to compensate an injured third party, no offence is committed under s. 56 as the user of the vehicle is "insured" within the meaning of the section. It is immaterial to criminal liability under the section that the insurer may have a right over against the insured by virtue of breach of the policy condition to recover the amount of any compensation paid from the insured.

Discussion.
6. As is apparent from the wording of s. 56, the essential issue is whether or not the applicant was "insured" at the material time by an "approved policy of insurance".

7. The essence of insurance is indemnity. A contract of insurance is a contract, privately entered into between insured and insurer, whereby the insurer agrees, in consideration of the payment of a premium by the insured, to indemnify the insured against a loss or a liability on the happening of an event.

8. This is explained by Mr. Austin Buckley in his authorative work "Insurance Law" – 3rd edition at page 170:-

> "4-01 The principle of indemnity is at the very foundation of insurance law. It is the bedrock on which the insurance industry has developed since the judgment of Brett L.J. in *Castellian v. Preston* [1883] 11 QBD 380:
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> > "In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted upon by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance is this, namely that the contract of insurance contained in a marine or fire policy is a contract of indemnity only, and that this contract means that the assured, because of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either would prevent the assured from obtaining a full indemnity, or which would give to the assured more than a full indemnity, that proposition must be wrong."
>
> Insurance contracts are intended to provide the insured with an indemnity against his loss, be it loss of or damage to his property or the property of others in his custody or control, in the case of property insurance, or liability incurred to a third party in the case of liability insurance."

9. Accordingly, where the insured suffers a loss or incurs a liability contemplated by the policy of insurance, he is contractually entitled to be indemnified in respect of that loss or liability by the insurer. Where liability insurance is concerned, the insurer, as a matter of law, has no tortuous or contractual liability to the injured party. As Fennelly J. noted in *DPP v. Donnelly* [2012] IESC 44:

> "[23.] A motor insurance policy is a policy of indemnity. The liability of an insurer, in the event of injury caused by the negligent driving of an insured, is to indemnify the latter. The duty is owed to the insured, whose liability the insurer is bound to meet. It is not a liability owed directly to the injured party. That liability remains the liability of the insured."

10. The applicant places reliance upon s. 76 of the 1961 Act, which entitles an injured party to recover damages directly against the insurer where the conditions set out in the section are fulfilled. The Road Traffic (Compulsory Insurance) Regulations 1962 to 1987 provide that an insurer may not rely on certain conditions and limitations in policies to defeat an application by an injured party for compensation pursuant to s. 76. The conditions upon which an insurer may not rely include any condition whereby the insured is required to have a valid driving licence. This approach is also to be found in the relevant European motor insurance directives including Directive 2009/103/EC. All of these legislative provisions are clearly concerned with compensating victims of negligent driving but they are not concerned with the insured's right to indemnity.

11. A not dissimilar issue arose in *Donnelly*. The appellant was driving his father's car which was covered by an approved policy of insurance but he was not a named driver on the policy. He was charged and convicted of an offence pursuant to s. 56 of the 1961 Act. At the hearing before the Circuit Court and again before the Supreme Court on foot of a case stated, the appellant argued that an offence under s. 56 arose only where a motor vehicle is used in a public place in circumstances where an insurer is not liable for any injury or damage incurred by a third party as a result of the negligent use of the vehicle. As an approved policy of insurance was in force in respect of the vehicle, albeit not one covering the appellant, the insurer was liable for such injury or damage and consequently no offence was committed.

12. In *Donnelly*, as here, the insurer would not have been entitled to resist a claim by an injured party under s. 76 on the grounds that the appellant was not a named driver on the policy. Two questions were stated by the Circuit Court for the opinion of the Supreme Court. The first was, in s. 56 (1), does reference to a vehicle insurer being liable for injury caused by the negligent use of a vehicle include liability to pay damages to, or to satisfy judgment obtained by a third party claimant pursuant to s. 76 of the said Act? Thus the issue raised was in its terms similar to that arising in the instant case. The first question was answered by Fennelly J. in the following manner:-

> "[21.] The question is whether the 'vehicle insurer,'—AXA Insurance Ltd on the facts of this case—would have been 'liable,' in the event that the appellant, or, indeed the named driver, had caused personal injury or other damage to a third party by negligent driving on 27th January 2007.
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> [22.] I do not think it would. It would not, in the hypothetical circumstances I have posed, in my view, as a matter of law, have been, to use the exact words of the section, 'liable for [the] injury caused by the negligent use of the vehicle at that time…' The injury envisaged here is the injury suffered by a third party as a result of negligent driving. The hypothetical negligent driving is that of the appellant or, as I have noted, even the named driver. The 'vehicle insurer' would certainly have been liable for his negligent driving, if it had been the owner of the vehicle. That would, of course, have been vicarious liability, but, nonetheless, legal liability. It is interesting to note that s.56 (1) of the [Road Traffic Act 1933] uses the expression 'legally liable.'…
>
> [27.] The plain legal meaning of 'liable' is that the 'vehicle insurer' is liable as a matter of law to pay damages to an injured third party for the consequences of its own acts, including acts of the drivers of vehicles which it owns for which it is vicariously liable. The insurer is legally liable in that way only when it owns the vehicle. The language is, in my view, clear and without ambiguity and leads inevitably to a negative answer to the first question."

13. It seems to me clear beyond doubt that a party such as the applicant, who enjoys no right of indemnity by virtue of the relevant insurance policy, cannot be regarded as being "insured" within the meaning of s. 56 (1). The fact that the insurer concerned may have a statutory obligation to compensate an injured third party is in my view immaterial. The applicant's argument in reality confuses two entirely different things being the contractual right to an indemnity on the one hand and the statutory obligation to compensate on the other. This view is consistent with the terms of the Act itself and in particular s. 62 which provides:-

> "(1) A policy of insurance shall be an approved policy of insurance for the purposes of this Act if, but only if, it complies with the following conditions:-
>
> (a) it is issued by a vehicle insurer to a person (in this Act referred to as the insured) named therein;
>
> (b) the insurer by whom it is issued binds himself by it to insure the insured against all sums without limit which the insured or his personal representative shall become liable to pay to any person (exclusive of the excepted persons) whether by way of damages or costs on account of injury to person or property caused by the negligent use, during the period (in this Act referred to as the period of cover) specified in that behalf in the policy, of a mechanically propelled vehicle to which the policy relates, by the insured or by any of such other persons (if any) as are mentioned or otherwise indicated in that behalf in the policy;"

14. Accordingly, since the policy of insurance in this case does not operate to insure the insured as already explained, it cannot be an approved policy of insurance within the meaning of s. 56 (1).

15. This is also consistent with the jurisprudence of the European Court of Justice. In *Rafael Ruis Bernaldez* (case C-129/94, judgment of court 28th of March, 1996) Mr. Bernaldez was insured under a policy of insurance which provided that the insurer had no obligation to pay out if the driver of a vehicle was intoxicated when the damage was caused. Such a condition was however invalid under the terms of the relevant insurance directives. Consequently the insurer could not decline payment. That however did not mean that the insurer could not have recourse to Mr. Bernaldez. In the course of its judgment, the European Court said:

> "a compulsory insurance contract may not provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle …
>
> The compulsory insurance contract may, on the other hand, provide that in such cases the insurer is to have a right of recovery against the insured."

16. The impact of *Bernaldez* in the criminal context was considered by the English High Court in *Mangal Singh v. Solihull Metropolitan Borough Council* [2007] EWHC 552 (Admin). The claimant was a hackney driver who was found plying for public hire and had a policy of motor insurance which did not cover this activity. He was prosecuted for driving without insurance. His defence was that as a result of *Bernaldez* and the relevant EU insurance Directives, no offence was committed since the insurers would have been obliged to compensate any person injured through use of the vehicle. Collins J. rejected this proposition. He said:

> "[19.] The Directives are concerned, as is apparent, with the protection of the victims of drivers. They are to ensure that there is compulsory insurance, which means that any victim is compensated, and, in the case of the second directive is 84/5/ECC, that if the driver of the vehicle which causes the damage is either uninsured or the vehicle cannot be identified, then the victim shall have compensation and if it cannot be by the insurer, it will be by the Motor Insurers' Bureau in the case of this country or some similar body in the case of other Member States. The Directive is not in terms concerned with the criminal responsibility, if any, of the driver in relation to whether he has failed to comply with the compulsory insurance laws of the country in question."

17. He continued (at para. 29):

> "…there is no reason why criminal liability should not apply in accordance with our domestic legislation under the Road Traffic Act 1988. But even if there is some possible validity in the more general argument raised by Mr. Gibbons, the purpose of the Directives is clearly to provide for the protection of victims of road traffic accidents. It has nothing to do with any possible criminal liability of the drivers who do not comply with the policies of insurance which they have."

I believe these views represent the law in this jurisdiction also. I entertain no doubt that the first respondent was correct to convict the applicant of both the s. 56 (1) offence and the associated offence of failing to produce a certificate of insurance.

18. Having regard to my finding in this respect, it is unnecessary to consider the second issue raised in argument whether if an erroneous view of s. 56 had been taken by the first respondent, this was an error within jurisdiction. That no longer arises.

19. For these reasons therefore, I will dismiss this application.