Butterworths Road Traffic Service

Bulletin Editor
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NEW LEGISLATION

The Drug Driving (Specified Limits) (England and Wales) Regulations 2014, SI 2014/2868

These regulations come into force on 2 March 2015. They were made under s 5A of the Road Traffic Act 1988 and specify the controlled drugs and limits for the purposes of the offence created by that provision, which was inserted by s 56(1) of the Crime and Courts Act 2013.

The Motor Vehicles (Driving Licences) (Amendment) Regulations 2015, SI 2015/15

These regulations, which came into force on 4 February 2015, introduce a fee of £64 for a licence granted following disqualification by a court in Scotland for soliciting or loitering for the purpose of obtaining the services of a person engaged in prostitution while driving or otherwise in charge of a motor vehicle.

The Criminal Procedure (Amendment) Rules 2015, SI 2015/13

Various amendments are made. Of principal note for road traffic practitioners, Part 63 (Appeal to the Crown Court) is amended by the insertion of new rule 63.7. This applies where a party wants to introduce new evidence on an appeal from the magistrates' court where one of Part 29 (Measures to assist a witness or defendant to give evidence), Part 34 (Hearsay evidence), Part 35 (Evidence of bad character), or Part 36 (Evidence of a complainant's previous sexual behaviour) applies. Notice of the application must be served not more than 14 days after service of the appeal notice.

The Offender Rehabilitation Act 2014 (Commencement No 2) Order 2015, SI 2015/40

This brings into force nearly all the provisions of the Act not previously implemented.

The main changes to sentencing law, which apply to offences committed after 31 January, are: a) a new 'rehabilitation activity requirement' which may be included in community and suspended sentence orders (replacing supervision and activity requirements); and b) post-sentence supervision for offenders who receive more than one day but less than two years' imprisonment (amending the duty to release prisoners serving less than 12 months on unconditional licence at the halfway point of the sentence). Under b, the offender (if aged at least 18 at the half-way point of the custodial term) will be supervised for 12 months (longer if released early on home detention curfew) in the community from the day after the halfway point of their sentence. This will be made up of licence until the expiry of the remainder of the prison term and supervision for the rest of the 12-month period. Breach of post-sentence supervision requirements will be dealt with in the magistrates' court, even if the original sentence was imposed by the Crown Court. The available sanctions are: committal to prison for a period not exceeding 14 days; a fine not exceeding level 3 on the standard scale; or a 'supervision default order' imposing either an unpaid work requirement or a curfew requirement.

Offenders serving community and suspended sentence orders were required to notify any change of address. This now changes to a duty to seek permission to change address.

CASES OF NOTE

Crown Court disqualification from driving where vehicle used to commit or facilitate the commission of an offence

In *R v Ketteridge* [2014] EWCA Crim 1692, [2015] RTR 5, the Court of Appeal (Pitchford LJ, Irwin and Spencer JJ) dismissed an appeal from a 12-month disqualification imposed under this provision.

The appellant committed two offences of indecent exposure to young people. He committed the offences, which involved masturbating, while controlling his vehicle with his other hand. The first offence was committed on the M1, when the appellant drew alongside a vehicle carrying the victims. The second offence was committed on a slip road off the A1 and the victims were standing on a bridge.

The judge imposed the ban because the offences were not merely indecent but created an obvious risk of danger to other road users since the appellant's attention was on the victims instead of being on the road.

Their Lordships accepted that if this had been the sole justification for the ban it would have been wrong in principle since no traffic offence had been

charged. However, on both occasions the offences were facilitated by his driving of a motor vehicle, and the judge was not bound to ignore the undeniable circumstances of the driving, especially in the case of the M1 offence which carried obvious danger to other road users.

Commentary

The disqualification was under s 147 of the Powers of Criminal Courts (Sentencing) Act 2000. This power is available only to the Crown Court. Section 146 of the Act, however, enables disqualification to be imposed for any offence, and this power is also available to the magistrates' court. It does not require any connection between the use of a vehicle and the offence. It was introduced by the Crime Sentences Act 1997 to provide a further non-custodial option in sentencing, but it can also accompany a custodial sentence: see R v Knight [2012] EWCA Crim 3019, [2013] 2 Cr App R (S) 297.

Contributory negligence

In *Train v Secretary of State for Defence* [2014] EWHC 1928 (QB), [2014] RTR 28, the High Court (David Pittaway QC, sitting as a deputy judge of the Queen's Bench Division) reduced the claimant's compensation by 80% on the following facts.

An army private was driving a minibus on a road within an army barracks, intending to turn right into a fuel depot. When he reached the turn he saw a motorcycle approaching from the opposite direction, but he thought he had ample time to complete the turn. He proceeded to do so and the motorcyclist struck the side of the bus, sustaining fatal injuries. Witnesses testified that the motorcyclist was driving in excess of the 20 mph speed limit (probably in excess of 40 mph), he glanced to his left (at some soldiers preparing for parade) and, as he looked back to the road he braked hard, but collided with the bus only a split second later. Excess speed was conceded. Whether or not it would have been possible for the motorcyclist to take evasive action if he had seen the minibus in front of him was a matter of speculation, but it was found that by glancing to his left he had lost his last opportunity of avoiding the collision.

The court accepted that the minibus driver had stopped before attempting to turn right and had genuinely believed that the gap between the two vehicles had been sufficient for him to turn safely. The motorcyclist had been the principal, but not sole, cause of his misfortune. The minibus driver should not have started to turn right unless he had satisfied himself as to the speed of the oncoming motorcyclist. If he had been unable to judge that speed he should have waited.

However, it was held that a fair apportionment of responsibility was to reduce the recoverable damages by 80%.

Commentary

The apportionment may be thought to be a little harsh on the family of the deceased, even allowing for the excess speed, in the conclusion of the judge,

'probably more than 40 mph (*the expert could not determine his speed at the point of impact*), *and the fact he took his eyes off the road, which cost him his last opportunity to avoid the accident. First, the deceased must have been considerably nearer to the bus when the latter commenced its right hand turn – a point established by time and distance – and, secondly, the bus driver failed to make "any assessment of the speed of the approaching motorcycle … I suspect that he assumed that the motorcycle was travelling at or about the speed limit, and made the fateful decision to turn". Moreover, this was a long wheeled minibus. This 'should have been another factor in* (*the driver's*) *mind, namely that he should not turn unless he was sure that his vehicle would clear the road before the motorcycle reached the side turning'. 'Causative potency'* (*see Section D [3.13] of the main work*) *should also have worked in favour of the deceased. A minibus can do very much more harm than a motorcycle.*

Credit hire charges

In *Stevens v Syndicate Management Ltd* [2014] EWHC 689 (QB), [2014] RTR 34, the claimant's car was damaged as a result of the negligent driving of a car insured by the defendant. The claimant did not want to jeopardise his no claims bonus. The claimant's insurer, therefore, put him in touch with a company which arranged and paid for the repair of his car and hired a replacement vehicle for him while his car was off the road, pending reimbursement from the insurers of the party at fault for causing the accident. This company made arrangements for the repair of the car and in so doing agreed repair coasts and authorised repairs on the claimant's behalf. They also hired an alternative vehicle. The daily hire charge was £198.60, which included VAT and fees to reduce the excess should the hire car be damaged. The car was on hire for 28 days. The claimant sought recovery of the hire costs, but the county court held, on the basis of bank statements, that the claimant was not impecunious and was not, therefore, entitled to claim the additional cost of using a credit hire company. The court awarded, instead, the basic rate hire at £75.62 per day inclusive of VAT. The court also reduced the recoverable period to 19 days on the basis that the claimant's car had been left with the repairer nine days before repair work began.

The claimant's appeal as to the credit hire charges was rejected. The High Court (Burnett J) held that the judge had been justified to find that the claimant was not impecunious. While the claimant's evidence was that, if he had not been able to hire on credit terms he would not have hired at all, the relevant hire rate was the figure the claimant would have been willing to pay on the basis that he had in fact gone to the ordinary hire market for a replacement vehicle and, if a car had been so hired, it would have been with a nil excess from a major reputable company with a local presence. The claimant's appeal as to the relevant period was, however, successful. The car had been stripped the day after delivery to determine what parts were required. The claimant had not simply left his car with a garage which had simply dragged its feet. Therefore, the claimant had not failed to mitigate his loss and was entitled to a further nine's days' hire charges calculated at the basic rate.

Commentary

This subject is discussed at D Accident Offences, para ***[3.19]****. The relevant topics – impecuniosity and the approach to ascertaining the appropriate basic hire rate – arose in Pattini v First Leicester Buses Ltd [2011] EWCA Civ 1384, [2012] RTR 17. The burden of proving impecuniosity lies on the claimant, and in the present case the claimant did not consider whether he could have afforded to pay hire charges. He wanted to keep a cushion of money and if he had been unable to hire on credit he would have had his car repaired at a garage which provided a free courtesy car. While this was described as a 'pragmatic and sensible approach', that is not the test for recovery of the credit element.*

If the claimant fails to prove impecuniosity, it is for the defendant to establish, by evidence, that there is a difference between the credit hire charge agreed between the claimant and the credit hire company and the basic hire rate. In Pattini, it was held that this could be identified by evidence of how the credit charge rate was made up, which might be feasible in an appropriate case, or by applying a 'reasonable discount' though this was dismissed in Lagden v O'Connor [2003] UKHL 64, [2004] RTR 24 as being too arbitrary, or by looking at actual locally available figures. The latter is the method which will be adopted in most cases. The duty to mitigate loss does not extend to trawling the entire local hire market. Provided that it was reasonable for the claimant to hire the type of car he did he can generally go to the nearest hire company and is prima facie entitled to recover the amount charged, whether or not it is at the top of the range of car hire rates, subject to the duty to take reasonable steps to mitigate the loss (*see Burdis v Livsey [2002] EWCA Civ 510, [2003] QB 36*)*. This seems to require at least a degree of research of the hire market by the claimant, and the hire rates charge by major companies are relatively easy to discover, though there might be good reason not to go for the cheapest.*

In cases where a car was hired on credit, but only the basic hire rate is recoverable, the court will be concerned with a hypothetical situation. The search was for the figure which the claimant would have been willing to pay on the basis he had been willing to pay hire charges and had gone to the ordinary hire market. The trial judge concentrated on four companies, all of which were substantial national organisations whose rates would be potentially accessible to a potential client, but he erred in averaging their rates at the localities which were within striking distance of the claimant's home. Had the claimant hired, he would have done so with a nil excess from a reputable company with a local presence, and that is how the matter should have been approached. However, the result was not detrimental to the claimant so the judge's decision was upheld.

Recoverable loss where vehicle damaged

In *Coles v Hetherington* [2013] EWCA Civ 1704, [2015] 1 WLR 160, the Court of Appeal heard 13 appeals which concerned the principles to be applied in the assessment of damages where vehicles are damaged through negligence and repairs are arranged and paid for by the innocent party's insurer with, in some cases, courtesy cars being provided.

In all the appeals the defendants' insurers claimed that the arrangements inflated the amount of the repair costs (allegedly by 25%) above that which should be recoverable. It was further contended that the costs of providing courtesy cars was not recoverable. The litigation was effectively between Royal and Sun Alliance Insurance, which insured the claimants, and Provident Insurance and Allianz Insurance, which insured the defendants.

The RSA group included a company MRNM, which owned six garages and also used subcontractors. RSA policyholders could choose either to have their vehicles repaired through the RSA scheme or make their own arrangements. A service level agreement existed between RSA and MRNM, covering a range of detail including hourly charge rates and sundry services. The amounts charged to RSA by MRNM were designed not to exceed the amount that an individual would pay in the private market place. RSA and MRNM were able to negotiate discounts from approved subcontractors because of their bargaining power and the volume of work supplied. MRNM added its own mark up in the costs passed on to RSA, but it was claimed that the scheme was still no dearer, and usually less expensive, than the alternative of policyholders arranging their own repairs. As noted above, however, the defendants' insurers claimed that the interposition of MRNM added about 25% to bills.

The view taken at first instance (Cooke J) was that the relevant loss was the diminution in value of the vehicle as a result of the damage, and that this could be measured in terms of the reasonable costs of repair. The detailed breakdown of individual charges did not convert the claim from general to special damages, and the reasonableness of any component charge was not the issue, but whether the repairs costs as whole were reasonable and so could be taken to represent the diminution in value of the vehicle concerned. As to the provision of a courtesy car, this was held to something for which the policyholder had paid a premium and this did not prevent a claim for loss of use of the car, damages for which would be the reasonable cost of hiring a courtesy car.

The court (Moore-Bick, Aikens and Voss LJJ) took time to consider its decision before upholding the decision and reasoning of Cooke J.

The practical way to calculate the diminution of value was to ask how much would be the reasonable cost of repair to restore the chattel to the state it was in before the damage. Only if the sum claimed was excessive would the court be justified in investigating whether that sum exceeded the cost the claimant would have incurred in having the repairs carried out by a reputable company. Diminution in value should be pleaded as general damages. Consequential losses, such as 'loss of use', would, in a simple case, also be a claim for general damages, unless the vehicle was normally used in the hope of making a profit. Mitigation of loss by having repairs carried out more cheaply was irrelevant, since the loss suffered by the claimant was immediate. It was not the cost of repairs which constituted the loss, but diminution of value; the cost of repairs is evidence of that loss. Diminution of value or reasonable cost of repair is a question of fact for the court to determine if there is a dispute.

Reasonable cost of repair is to be judged by reference to what a person in the position of the claimant could obtain in the open market and not what the insurer could so obtain. There should be no difference between a chattel that was not insured and one that was. The claim belongs to the claimant, whether or not the insurer has a contractual right of subrogation. On the facts of the present case, RSA was not acting as the agent of the claimant when arranging the repairs, so RSA's contract with MRNM was not the relevant one for ascertaining the cost of the repairs.

Benefits obtained under a contract of insurance are irrelevant and cannot be prayed in aid to reduce liabilities. Money spent by the claimant on insurance benefits should not enure to the benefit of the defendant.

Administrative or sundry charges added by the insurer were relevant only if they caused the overall claim to be more than the reasonable repair cost the claimant would have paid if he had arranged the repairs on the open market.

If the claimant was entitled to a courtesy car from the insurer, this was a 'fruit of insurance' where the claimant chose to use the RSA scheme and he could still claim damages for loss of use; the claimant was exercising contractual rights for which he had paid and was not 'mitigating his loss'. If the substitute car was provided at a reasonable rate, reasonably incurred to cover the cost of use of the damaged vehicle, the costs were recoverable. The claimant can thus recover the reasonable costs of a courtesy car (in these appeals this crystallised at £11 per day) and holds that sum for the benefit of the insurer.

Abuse of process – loss/unavailability of evidence

Abuse of process is not dealt with as a discrete topic in the main work, but some decisions are mentioned in the narrative on particular offences and there have been two recent decisions concerning road traffic offences, the first of which also raised case management issues.

In *DPP v Petrie* [2015] EWHC 48 (Admin) the defendant was charged with driving with excess alcohol. He pleaded not guilty and his representative stated that there were disputed issues including the procedure which had been carried out at the police station; in particular that the statutory warning had not been given and that questions had not been put in accordance with the standard form. There was CCTV covering the procedure and, while the court had not been asked to make a direction as to service, the defence put the Crown on notice at an early stage that the relevant footage was required. This was supplied on the day of trial, but it was not in a form that could be played on any equipment in the court. The prosecution sought an adjournment with a view to making enquiries about possibly obtaining the original footage from the police station that day. This was opposed and the court refused the application on case management principles, holding that the prosecution 'had been lax' and that it had been clear from the outset that CCTV had been required. The defence then submitted abuse of process. The prosecution countered this by submitting that the trial could proceed simply by hearing the evidence of the police officer who carried out the breathalyser procedure.

The justices ruled that it would be unfair to proceed and the defendant would not have a fair trial if the case proceeded that day, which the court had directed that it should.

The Administrative Court (Gross LJ and Simon J) agreed that the justices had been entitled to refuse the adjournment. This was a 'robust case management decision', but it was none the worse for that. However, it was held that the proceedings should not have been stayed. The prosecution had been at fault, but there was no question of this amounting to such grave misconduct as to justify a stay on the ground that it was unfair to proceed with the trial. The decision that a fair trial was not possible was also unsustainable. This was purely speculative. It was not known whether the CCTV covered the relevant part of the procedure or, if it did, whether it captured the precise detail of what was said. The justices had no basis, therefore, for concluding that the footage, if playable, might, still less would, have assisted the defence. The trial could and should have proceeded on the available evidence.

Lord Justice Gross added that there had been no proper analysis of the CCTV footage. It did not form part of the prosecution's evidence. Therefore, it was 'unused material' and, if properly requested, the prosecution should have considered whether or not it met the test for disclosure, which would have required viewing it, which would then have focused minds on ensuring that the footage, if disclosable, was properly formatted.

In *Clay v South Cambridgeshire Justices* [2014] EWHC 321 (Admin), [2015] RTR 1, the defendant was driving a lorry on a motorway at night. He suddenly came upon a car, which had earlier reported problems changing a wheel following a puncture. The lorry hit the car. It was removed by a recovery firm (after several pictures of the vehicle had been taken) on behalf of insurers. Eight weeks later the police released the car and it was broken up. A month later, the defendant received a requisition charging him with driving without due care and attention. His solicitor sought information from the police about the whereabouts of the lorry and was told it had been released to the insurer. The solicitor then sought access to the car for expert examination and access to the tachograph data from the lorry. Neither had been preserved. An application was made to stay the proceedings as an abuse of process on the ground that failure to retain evidence prevented the pursuit of legitimate enquiries as to the car's condition and the respective speeds of the vehicles at the moment of impact. The justices rejected the application and convicted the defendant.

The Administrative Court (Pitchford LJ and Burton J) dismissed the appeal by way of case stated. There had been a failure to obtain/retain evidence, but the issue was whether a fair trial could take place and this did not logically depend on whether anyone had been at fault in creating the exigency that created the alleged unfairness. The justices had been correct to conclude that the trial could still accommodate fairly any disadvantage to the defendant.

It was necessary to apply common sense and proportionality to the question of whether it was necessary to retain exhibits. On the evidence it had been

open to the court to conclude the defendant had driven carelessly quite independently of the issue of what inspection of the car might have revealed. Whether or not the car had braked at the last moment, the defendant had not been paying proper attention to the road conditions ahead. The defendant had been interviewed at the scene and had made no suggestion that the car had been driven erratically or had made a sudden stopping movement without warning.

Taxi use of bus lanes

Finally, mention should be made of Court of Justice decision in *R* (*Eventech Ltd*) *v Parking Adjudicator* C-518/13, [2015] All ER (D) 81 (Jan), which concerned the policy of TFL and some London Boroughs to allow black cabs to use bus lanes while lane restrictions are not in force, but to prohibit private hire vehicles from doing so except to pick up and set down passengers who have pre-booked. It was held that this policy could conceivably be such as to affect trade between Member States within the meaning of art 107(1) of the Functioning of the European Union, which it was for the referring court to determine.

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