Case No: E05YY066

IN THE COUNTY COURT AT PORTSMOUTH

Courts of Justice, Winston Churchill Avenue, Portsmouth PO1 2EB

Date: 09/12/2019
Start Time: **1611** Finish Time: 1643

Before:

DEPUTY DISTRICT JUDGE PRINTER

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Between:

MATTHEW DARCY MCNALLY	**Claimant**
- and -	
AVIVA INSURANCE LIMITED	**Defendant**

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MR. P. JUDD (C) for the **Claimant**
MR. J. BROWN (C) for the **Defendant**

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Approved Judgment

(Transcript prepared from a poor-quality audio recording)

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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JUDGE PRINTER :

1. This is an *ex tempore* judgment that I give in the matter of McNally v Aviva Insurance, and I record for the tape that the proceedings did include a part 20 claim. Whilst the paperwork before me initially seemed to suggest that liability was in dispute, I was told at the commencement of today's proceedings that liability was not in dispute and I am therefore dealing with this matter on the basis of the claim being between Mr. McNally and the first defendant, Aviva Insurance.

2. The claim arises out of a road traffic accident that occurred on 1st March 2018, where I discovered in my reading there were some fairly appalling weather conditions. The claim as put is a claim in negligence and the claimant, Mr. McNally, seeks to recover damages for hire charges, storage and recovery, medical expenses, miscellaneous expenses and damages for personal injury.

3. The defence brings into question liability in the first instance, but that is now resolved and thereafter puts the claimant to strict proof in relation to all heads of claim.

4. The matter today has been dealt with excellently by respective counsel, Mr. Judd for the claimant and Mr. Brown for the defendant, and I am satisfied that where cross-examination was concerned, Mr. Brown appropriately and vigorously cross-examined the claimant on the facts of this case.

5. In terms of the evidence before me, whilst I had the benefit of perusing all of the witness statements in the case in preparing, I have for the purposes of the matter before me realistically only been referred to the witness statement of Mr. McNally which is dated June of 2019, the medical evidence of Dr. Andrew Kenane and some evidence from a physiotherapist.

6. Looking at the law, it is fairly trite law. This is a claim in negligence and I am not going to articulate that or say any more about that save to say that of course, liability has been admitted, as a consequence of which that breach allows me to determine the losses the Claimant has incurred.

7. I am mindful, of course, in looking at the matter I must consider mitigation, but I am also mindful of the fact that it is for the claimant to prove his case on the balance of probability.

8. Looking at the claimant and the evidence that I have heard, I am satisfied that the claimant, Mr. McNally, is a truthful witness. He was thoughtful in his responses and made clear concessions when he could not otherwise remember the facts of the matter, and I give him credit for that.

9. He was challenged extensively in cross-examination and I found him to be credible and truthful. I have, in considering the written evidence tendered on his behalf and having listened to his oral evidence today, preferred the oral evidence where that otherwise differs from the written evidence otherwise produced on his behalf.

10. Looking at the issue for me to determine, I take those in the order in which they appear in the claimant's schedule of loss. The first matter for determination is that relating to hire, storage and recovery expenses. I record for the tape the fact that much of the

cross-examination that I have heard went to the issue of the enforceability of the credit hire agreement and the findings I make in relation to that first point, are as follows:

11. I find that on the day of the accident that the claimant did not call his insurers, Hastings, as he otherwise thought that he did and I am satisfied that that is the case by reference not only to his own oral evidence but by reference to evidence in the bundle from his insurance company which confirms that the first they knew of the incident was 8th May 2018. I find that whoever it was that the claimant did call, he honestly believed that he was speaking to his insurers following the accident that occurred. I am satisfied that the claimant had an honest belief that he was reporting the accident to his own insurers; clearly he did not, and that whoever he spoke to misled him into believing he was speaking to his insurers and he, the claimant, accepted that to be the case in cross-examination.

12. I find that on 1st March 2018 the claimant believed as a consequence of the phone calls that he had made, against what I find now to be a misunderstanding that he was not only reporting the accident and arranging for recovery and storage, but he was also sorting out for himself a courtesy car, which was a part of his insurance provision through Hastings, something provided to him free of charge by them.

13. I find that ultimately the claimant spoke to Spectra Drive by some mechanism and that he believed he was signing documentation provided to him by them, as documentation that permitted him to have his free courtesy car. I find that by his own admission he failed to read that documentation fully. Whilst in an ideal world everybody reads everything, it is not surprising that perhaps from a mobile phone at the roadside, reading such documentation as thoroughly as one might, might not occur. I am satisfied that he was perhaps not fully cognisant with every term of the document.

14. I am satisfied that in relation to the evidence that I have been given today that the claimant very clearly understood that he had no worry about incurring charges, given what was said to him. That it was his honest belief that he was getting his courtesy car. I find that the claimant did not appreciate or understand the full nature of the transaction and that the wording "Credit hire" meant little or nothing to him. That in relation to the provision of the car on the basis on which it was provided, that this came about as a consequence of a misrepresentation by the call handler with whom he was speaking. I say that in the context that the conversation was had in the belief by the claimant he was speaking to his insurers when clearly he was not, and the individual dealing with the call clearly being cognisant of that fact, nonetheless allowed the conversation to continue and the transaction to proceed knowing its position was not truthful.

15. I find that the claimant in reviewing his witness evidence or his statement, and in particular paragraph 80 of that statement, failed to properly understand the nature of the words put and as I have indicated already, I prefer his oral evidence today to that which is his written evidence. As such, I do not criticise him for the wording in paragraph 80 of his statement. I am satisfied that the words were probably not words that he would have fully understood.

16. I find that from the oral evidence I have heard, that when I am looking at the invoices for the credit hire that the claimant has only ever signed one agreement, that being what I will call the first agreement in March 2018. I fully accept his evidence he did not sign a second agreement dated 10th May 2018, which can be found at page 43 of the bundle.

17. I stop to reflect briefly on the document in question and record the fact that whilst it is docu-signed with the signature of the claimant, the core elements appear to, as in the first agreement, have been written in by hand. I record the fact that the claimant in his evidence did not appear to have had sight of the completed documentation prior to signature in any event.

18. Of more concern to me is the document which appears in the bundle at paragraph 51, which is the form of authority and mitigation questionnaire. Whilst that document is signed by docu-sign again by the claimant on 1st March 2018, it is clear to me that the document was signed as a blank document and was subsequently completed by, one can only guess, somebody at Spectra Drive in manuscript. I find that a dubious and suspicious practice and concerning to the extent of the *bona fides* to the whole transaction.

19. Of note, the document at page 51 under the introduction wording: "I was introduced to your services by —" reflects that the introduction was by another or other. That would be entirely consistent with the course of this matter in the sense that had the phone call in the first instance been to insurers who then passed the claimant on to the Spectra Drive company, one would have expected "Insurer" to have been signified, albeit one would have expected in any event the claimant to have completed that document prior to signature.

20. In reflecting on the credit hire agreement in its totality, I find and am satisfied that using basic contractual principles, the contract said to have been formed is doubtful and I go as far as saying that I consider on the evidence before me and the manner in which this contract was performed, that it is wholly unenforceable and to that extent it does not represent any form of contingent liability to Mr. McNally.

21. On the basis of my findings I therefore dismiss the credit hire head of claim in its entirety.

22. Moving on then to the associated other heads of claim, in relation to recovery and storage charges I am satisfied on the evidence that the recovery charges are legitimate head of claim. It is clear from the engineer's report that the vehicle was not drivable and I am satisfied on the documents before me that the claim for recovery totalling £197.52 is a head of claim that is valid and I find that that sum should be due and payable by the defendant.

23. As regards the claim for storage, I am not satisfied on the claimant's evidence that that is a head of claim that is sustainable. The claimant's own evidence was that he could have stored the car on his driveway and indeed his belief was that that is what he was going to be doing until he was otherwise diverted off the main road and the vehicle taken elsewhere for storage purposes.

24. Looking at the contractual position and the invoicing position, what is also clear to me is that there is no contractual nexus between the claimant and the storage company, the invoices in question going to Copart Newbury and then to Spectra Drive. Accordingly, I find no enforceable contract in relation to that particular head of claim. No contingent liability on the part of the claimant in relation to it, and consequently I dismiss that head of claim.

25. Moving on, there is a claim for medical expenses. Whilst I accept that that was not explored extensively or at all in cross-examination, I record that there are erroneous entries in the documentation with regard to a claim for physiotherapy. It was put to me by the defendants that the level of the claim was too high and that I should use my own judicial experience in that regard. I have before me evidence that suggests that there were seven sessions of physiotherapy, and doing the best I can with the evidence before me, I am adopting that evidence as the evidence upon which I can rely and I find that the claim for medical expenses, the seven sessions of physiotherapy, which include triage and the early intervention, are reasonable, and the sum of £575 is to be paid.

26. In relation to the miscellaneous medical expenses, it is put to the court by the defendant that there is no evidence to support the same. I have read the witness statement of the claimant and in the absence of evidence to the contrary I have given my finding with regard to his truthfulness, and I am satisfied that that is a head of claim that is entirely reasonable, given the nature of this matter. I order that the miscellaneous expenses of £50 be paid.

27. Finally, in relation to general damages, I have considered the medical report of Andrew Kenane, and the physiotherapy report, and I am satisfied that the claimant suffered from what I will call a minor neck injury and a moderate back injury. That taking the medical evidence with a broad-brush approach, there was a full recovery within six months from the back injury and a few weeks from the neck injury.

28. I was taken to the Judicial Studies Guideline, the 14th edition by the claimant and the most recent by the defendant. For ease of my reference I refer to the 14th edition as I have that before me to give me a bracket within which to work. I acknowledge that the updated guidelines inflate the figures slightly. I do not have to look at that as material (inaudible) purposes of this judgment.

29. I am satisfied that the injury in its nature sits within the Judicial Studies Guideline at 7(c)(ii) and that it sits at the bottom end of that bracket, given that recovery was within six months. Taking into account the features of the injury, I am satisfied that a figure of £3,000 represents the level of damages I will award in relation to the injuries suffered.

(For proceedings, see separate transcript)

JUDGE PRINTER:

30. On the issue fee point raised by Mr. Brown, I am satisfied that the claimants paid that issue fee in the context of the case as put at its commencement. Notwithstanding the course that the matter has now taken, given my judgment, I am not satisfied that the claimant should be penalised and that issue fee reduced, given that that was the value of the claim as put at commencement. It would be unusual for the court to vary that figure, in my judgment, so the £1,600 issue fee remains.

(For proceedings, see separate transcript)

This Judgment has been approved by the Judge.