Neutral Citation Number: [2020] EWHC 153 (QB)

Case No: QB-2018-001014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
GENERAL

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 30 January 2020

Before:

The Honourable Mrs Justice Tipples DBE

- -

Between :

NEIL CARROLL
(A protected party, suing by his mother and litigation friend, Catherine Carroll)

Claimant

- and –

(1) MICHAEL TAYLOR
(2) MICHAEL DOYLE
(3) EMMS TAXIS LIMITED
(4) QBE INSURANCE (EUROPE) LIMITED **Defendants**

- -
- -

Mr Christopher Melton QC and Mr Robert Smallwood (instructed by **E Rex Makin & Co**) for the Claimant
Miss Isabel Hitching QC (instructed by **DAC Beachcroft**) for the Fourth Defendant

Hearing dates: 10, 11, 12 and 13 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

The Hon. Mrs Justice Tipples:

Introduction

1. The Claimant, Neil Carroll, suffered catastrophic head injuries in the early hours of Sunday 19 August 2012 as he was making his way home after a night out with friends in the centre of Liverpool. He had been drinking and shortly before 3am hailed a black cab to take him to his home in Huyton. The taxi driver did not take him home. Rather, he stole the Claimant's debit card and PIN and, having done so, left the Claimant in the Old Swan area of Liverpool, to find his own way home. The Claimant was some three miles short of his destination.

2. It was in these circumstances that the Claimant, without any money on him, continued home on foot and, at the same time, his girlfriend set out to find him in her car. She did not find him and, whilst pausing on the walk home, the Claimant fell off the barrier of a motorway bridge into the car park below and was severely injured. The Claimant was discovered at around 8am and taken to hospital. He is now 31 years old, remains severely brain injured and requires 24-hour care.

3. The First Defendant, Michael Taylor, was the taxi driver ("**the taxi driver**"). He pleaded guilty to theft and received a custodial sentence in May 2013.

4. The Second Defendant, Michael Doyle, was the owner of the taxi, which had vehicle registration number WV52 CUO ("**the taxi**"). The taxi was hired from him by the taxi driver.

5. The Fourth Defendant, QBE Insurance (Europe) Ltd ("**the insurer**"), issued a policy and certificate of insurance to the Second Defendant in respect of the use of the taxi for "social, domestic and pleasure purposes, for the insured's business and for the purpose of hire and reward", which provided no more than the minimum compulsory scope required under the Road Traffic Act 1988 ("**the RTA**") in respect of third party injury claims. This cover extended to the taxi driver. The policy was in force in August 2012. The relevant parts of the policy are set out in more detail at paragraphs 31 to 34 below.

6. The Claimant alleges a direct right of action against the insurer in respect of claims in negligence under the European Communities (Rights against Insurers) Regulations 2002. The basis for this claim is that "for the purposes of section 145 of [the RTA], the [bodily injury] arose out of the use of the taxi on the road" (para. 3 of the particulars of claim). The insurer maintains that the Claimant does not have any claim against it under the RTA or under the terms of the policy of insurance.

7. The preliminary issues I have to decide are to determine whether the insurer is liable in respect of the Claimant's injuries under section 145(3)(a) of the RTA or the policy of insurance.

8. I am not concerned with any other issues in the proceedings.

The preliminary issues

9. The Claimant is a protected party and these proceedings are brought by his mother and litigation friend, Catherine Carroll. The claim form was issued on 13 November 2018 seeking unlimited damages for personal injury and uninsured losses against the Defendants. The claim form was served, together with the particulars of claim, on 7 December 2018. The insurer served its defence on 4 January 2019. On 17 June 2019 Master Thornett allocated the claim to the multi-track and, on the application of the insurer, directed the trial of four preliminary issues.

10. The preliminary issues were simplified by agreement into two questions, namely:

    Question 1: Did the Claimant's injuries arise out of the use of the taxi on a road or other public place within the meaning section 145(3)(a) of the RTA?

    Question 2: Given the basis for the Court's finding on the first question and, in particular, the relevance or otherwise of the First Defendant's deliberate criminal acts, does the insurance policy issued by insurer to the Second Defendant respond to the Claimant's claims in tort against the First and Second Defendants if those claims in tort are proved?

11. The insurer maintains that the answer to question 1 is "No" and that the second question does not arise (although if it did, the answer would be "No"). The insurer says the claim should therefore be dismissed.

12. The Claimant maintains that the answer to both these questions is "Yes". The Claimant says that claim against the insurer should not be dismissed prior to trial of the claims against the First, Second and Third Defendants.

13. On the facts of this case the clear conclusion I have reached is that the answer to each of these questions is "No". The claim against the Fourth Defendant must therefore be dismissed.

The facts

14. The relevant facts for the purposes of determining the preliminary issues were agreed between the parties and I was provided with an agreed statement of facts. There was also CCTV footage which I was taken through by Counsel for both parties. However, the inferences to be drawn from that footage were not agreed, and I have drawn my own conclusions from the observations I made from the CCTV for the purposes of determining the preliminary issues.

15. In August 2012 the Claimant, then aged 23, was living together with his then girlfriend, Kathryn Dyer ("**Ms Dyer**"), and his mother in Huyton, Liverpool. On the evening of 18 August 2012 he went out for a birthday celebration with friends in Liverpool city centre. The Claimant was drinking alcohol with his friends until about 1.30am and, for the purposes of this hearing, I am asked to assume he drank in the range of 21 to 32 units of alcohol. Anthony Langley, one of the friends with whom the Claimant was drinking, and who had himself drunk a similar amount to the Claimant, said of the Claimant that "he had drunk a bit but wasn't what I would describe as drunk".

However, it is accepted by the insurer for the purposes of this hearing that the Claimant's judgment was substantially impaired by drink.

16. The Claimant, using his own debit card and PIN, paid his bar bill at Revolution Bar at 1.40am on 19 August 2012. He left that bar on his own at 2:05am. He did not tell any of his friends that he was leaving, but that was not unusual. The CCTV footage showed the Claimant leaving the bar and then meandering down Fleet Street towards Hardman Street. The Claimant was walking to avoid the other people moving around him. However, he was not swaying whilst he was walking. The Claimant was on his phone at the time, no doubt to Ms Dyer.

17. Before he left the club, the Claimant had told Ms Dyer he was going to purchase a takeaway meal and he would then take a taxi to their home in Huyton. Having bought something to eat, the Claimant phoned her again and told her that he could not find a taxi. She suggested that he go back to the takeaway and ask if they would phone for a mini-cab for him. The Claimant did this, but they refused to help.

18. In Hardman Street at about 2:45am the Claimant hailed and got into the taxi driven by Michael Taylor, the taxi driver. The Claimant gave the taxi driver his full home address in Huyton, Liverpool and requested to be taken home. The Claimant's home address was about six and a half miles from Hardman Street. The Claimant phoned Ms Dyer again and told her he was in a taxi and on his way home. Once in the taxi, the Claimant's debit card was stolen from him by the taxi driver. The taxi driver somehow obtained the Claimant's wallet, removed the Claimant's debit card and swapped it for the debit card of a Mr Howard Davies, which he had stolen from Mr Davies on an earlier occasion. The Claimant was unaware that his debit card had been stolen from his wallet and replaced with someone else's card. The taxi driver can only have achieved this because he knew the Claimant was affected by drink, and therefore easy to take advantage of.

19. In my view the taxi driver will have known the Claimant was affected by alcohol when he spoke to the Claimant and the Claimant told him where he wanted to go. That will have been either immediately before the Claimant got in the cab, or once he was inside. There is no evidence before me to show that the taxi driver knew the Claimant was drunk before that point in time, for example by the way the Claimant was walking along the street.

20. The taxi driver had stolen from other passengers in this way before. He had stolen debit cards from Mr Davies and a Mr Thomas McDonald, who were drunk passengers in his taxi. However, having done so, he did take each of these passengers to their requested destinations.

21. Having picked up the Claimant, the taxi driver stopped 10 minutes later outside the Santander bank on Prescot Road in the Old Swan area. This was just under half-way to the Claimant's home. The Claimant got out of the taxi in order to get cash from the cash point at the bank. The taxi driver also got out of the cab and followed the Claimant to the cash point and stood behind him watching him put his PIN into the cash machine. Just before 3am the Claimant tried to withdraw cash from the Santander cash point. He was unable to do so, as the card he was using was not his, and his PIN did not work. However, the Claimant did not know why this was so and he then walked across the road to the nearby Lloyds TSB cash point.

22. In the meantime, the taxi driver moved his cab and parked outside the Lloyds TSB. The taxi driver again got out of the cab and stood behind the Claimant at the cash point watching him tap his PIN into the machine whilst he tried to obtain to obtain cash. At this point the Claimant was on the phone to Ms Dyer and he told her he could not get any cash. She told him to get the taxi driver to drive him home as she was sure that there would be money at home to pay him. The taxi driver had no intention of taking the Claimant home. Having watched the Claimant at two cash points, the taxi driver knew his PIN. That was all he needed and at 2:58am he drove off, leaving the Claimant behind on Prescot Road. The taxi driver wasted no time and, less than 10 minutes later, withdrew £220 from the Claimant's bank account, using the stolen debit card and PIN.

23. The Claimant, left on his own on Prescot Road, did not have any money and was three miles short of his destination. He was, however, familiar with the Old Swan area, as his uncle Sean lived on Orleans Road. The Claimant went to Orleans Road daily to pick up his uncle as they worked together. The Claimant called Ms Dyer again. He told her what had happened and said he could see his uncle's house on Orleans Road, which was very nearby. The Claimant's uncle's house was about 100m away from where he was standing.

24. Ms Dyer made three suggestions to the Claimant. First, she told the Claimant to stay at his uncle's house. However, he was not prepared to do so as he thought it was unfair to wake up his uncle at that time in the morning. Second, she suggested that the Claimant could get another taxi as there was likely to be money at home. There were other taxis for hire still around, and this was shown in the CCTV. At the point where the Claimant was left on Prescot Road the CCTV showed that there were at least two taxis coming from the Huyton direction with their "for hire" lights on, and another taxi pulled out of the side road next to the Santander bank. However, the Claimant did not have any money on him, and was affected by drink. In my view these circumstances alone would have made it very difficult for the Claimant to persuade another cab driver to take him home with a simple promise of payment on arrival at the destination.

25. Third, Ms Dyer told the Claimant to stay where he was and that she would collect him by car. She thought this is what the Claimant would do. Ms Dyer then set out from Huyton in her car to collect the Claimant from the Old Swan area. The route Ms Dyer followed included travelling on the M62, which was the only route she knew to get from home to the Old Swan area, and in her witness statement she said "I think Neil [the Claimant] knew that the M62 was the only way that I knew to get to and from Huyton".

26. However, the Claimant decided not to stay where he was and wait for Ms Dyer to arrive to pick him up. Rather, he ignored her suggestion and decided to walk home. The start of his walk home was picked up by CCTV cameras. The CCTV footage showed the Claimant walking past a Ladbrokes shop on Prescot Road at 3:05am (a 160m walk from the Lloyds TSB cash point), The Navigator pub at 3:09am as he turned on to Queen's Drive from Prescot Road (a 320m walk from Ladbrokes) and walking under the "Rocket flyover" and onto the road leading to the M62 motorway at 03:28 (approximately a 1.6km walk from The Navigator public house). The CCTV footage showed the Claimant walking on the pavement (albeit in an "S" shape at one point), and in the right direction to eventually take him home to Huyton. From this footage it is clear the Claimant knew to walk on the pavement (ie he was not so drunk that he did

not know the difference between the road and the pavement) and, perhaps more importantly, he knew where he was going.

27. The Claimant continued to text and speak on the phone with Ms Dyer during this time. When she got to the Old Swan area in her car, she could not find the Claimant. She called him on his mobile phone and in her witness statement she said that: "He answered. He was very drunk. He could not tell me where he was. He said that he had fallen over in someone's garden … I was worried as well as annoyed because Neil did not normally behave like that". As she could not find the Claimant, she drove her car home. The Claimant telephoned her when she was getting out of the car at home, but she did not answer as she did not want to wake the Claimant's mother. At 3:45am Ms Dyer texted the Claimant from home to tell him to get a taxi and she had money to pay when he got home.

28. Eventually, although it is not clear precisely when, the Claimant walked on to the M62 motorway and up onto the flyover. By this point, the Claimant had walked just over 2 km from where the taxi driver had abandoned him on Prescot Road.

29. It is not known what then happened, but I am asked to assume that the Claimant stopped and sat on the barrier of the M62. The insurer is willing to assume for the purpose of determining the preliminary issues that, when the Claimant did so, he accidently fell while sitting on the barrier and that happened at least 40 minutes after he had been left on Prescot Road by the taxi driver. At about 8am on 19 August 2012 the Claimant was discovered in the car park below the motorway having suffered catastrophic head injuries.

The insurance policy

30. The policy provided cover of the minimum compulsory scope required by the RTA. The RTA does not require all uses of the vehicle to be insured. Instead, there is an obligation on the user to have insurance for the particular use to which he puts the vehicle. If the use from which the injuries allegedly arose was outside the permitted use, the phrase in section 151(2)(a) of the RTA "it is a liability covered by the terms of the policy" is not satisfied, and the insurer is not required by section 151 of the RTA to meet the judgment awarded against the wrongdoer.

31. In the instant case the policy provided:

> "Definition of Terms
>
> … Schedule: Details of you/your motor vehicle and the Insurance protection provided to you. The Schedule is part of and must be read in conjunction with this policy.
>
> … Certificate of Motor Insurance: The certificate required by law to certify the existence of the minimum compulsory insurance".

32. The Schedule provided:

> "Operative endorsements … Purpose of Use: This insurance does not operate and the insurer will not be liable if the insured vehicle is being used for purposes

> other than as shown on the policy schedule and/or certificate of motor insurance".

33. The permitted uses shown in the certificate of motor insurance were:

> "Social, Domestic and Pleasure Purposes.
>
> Use for the Insured's business.
>
> Use for the carriage of passengers for hire and reward under the terms of a Hackney Carriage Licence."

34. The policy further provided by way of exception that cover for liability to third parties would not apply:

> "(1) If any person insured under this section fails to observe the terms, exceptions and conditions of this policy as far as they can apply."

35. Having set out the relevant facts, I now turn to the points in issue.

Question 1: section 145(3)(a) of the RTA

36. The first question gives rise to two issues, namely: (1) was there a use of the taxi on a road or public place; and (2) did the Claimant's injuries arise out of that use? (see *Dunthorne v Bentley* [1996] RTR 428, CA at 430F, per Rose LJ).

37. Issue (1) was not in dispute. This is because the insurer accepted that the taxi driver's carriage of the Claimant in the taxi culminating in him driving away from the cash point on Prescot Road was a "use of the vehicle". To deal with issue (2) I must now turn to the relevant statutory framework and law in relation to section 145(3)(a) of the RTA.

Statutory framework

38. The context of compulsory third party liability insurance in respect of the use of a vehicle on the road was recently summarised by Lord Hodge in *R & S Pilling (trading as Phoenix Engineering) v UK Insurance Ltd* [2019] 2 WLR 1015, SC ("***Pilling***") at paragraphs [11] to [17]. Section 143 of the RTA provides that it is an offence to use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that person such a policy of insurance or such security in respect of third party risks as complies with Part VI of the RTA.

39. Section 145 of the RTA, which falls within Part VI, sets out the conditions which the policy of insurance must satisfy. It provides, so far as relevant:

> "(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions.
>
> (2) The policy must be issued by an authorised insurer.
>
> (3) Subject to subsection (4) below, the policy – (a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of

> or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain; …
>
> (4) The policy shall not, by virtue of subsection (3)(a) above, be required – (a) to cover liability in respect of death, arising out of and in the course of his employment, of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment, or … (f) to cover any contractual liability."

40. Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 ("**the Directive**") consolidates various earlier EU Directives and ensures that civil liability arising out of the use of motor vehicles is covered by insurance. The UK Government is required to comply with the Directive and, in so far as possible, the phrase "caused by, or arising out of, the use of the vehicle" in section 145 of the RTA is to be read consistently with the Directive (*Pilling* at paragraph [35]). There is no conflict between the Directive and section 145 of the RTA which gives rise to any issues in relation to this case.

41. Further, section 151 of the RTA provides:

> "(1) This section applies where, after a certificate of insurance or certificate of security has been delivered under section 147 of this Act to the person by whom a policy has been effected or to whom security has been given, a judgment to which this subsection applies is obtained.
>
> (2) Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and either – (a) it is a liability covered by the terms of the policy or security to which the certificate relates, and the judgment is obtained against any person who is insured by the policy or whose liability is covered by the security, as the case may be, or (b) …

42. The RTA does not require all uses of the vehicle to be insured. Rather, there is an obligation on the user to have insurance for the particular use to which he puts the vehicle. If the use from which the injuries allegedly arose was outside the permitted use then section 151(2)(a) is not satisfied and the insurer is not required by section 151 to meet the judgment awarded against the wrongdoer.

The meaning of "arising out of" - relevant case law

43. The key legal principles which apply to the facts of this case are derived from *Dunthorne v Bentley* [1996] RTR 428, CA, which explains what "arising out of the use of the vehicle on a road" means in the context of the RTA. The decision of the Court of Appeal in *Dunthorne v Bentley* was recently approved by the Supreme Court in *Pilling*. Nevertheless, the Claimant maintained that, although the words "arising out of the use of the vehicle on the road" are ordinary English words, and should be read as such, the court will adopt a "liberal" approach to the interpretation of these words in the context of the RTA. The Claimant's Counsel, Mr Melton QC, took me to a number

of other English and Commonwealth authorities in support of these submissions, which are also referred to below.

44. In *Dunthorne v Bentley* the insured, Mrs Bentley, was driving her car on the road when she ran out of petrol. She parked at the side of the road with the hazard lights flashing and stood at the rear of the car. After about 10 minutes she was seen by a colleague, who stopped her car on the opposite side of the road. Following some shouted conversation, Mrs Bentley ran across the road. She was struck by an oncoming vehicle and killed. The driver of that vehicle was Mr Dunthorne, who was seriously injured and claimed damages against the administrators of Mrs Bentley's estate, who admitted negligence. The motor insurers were joined as defendants. There was a trial of a preliminary issue to determine whether the accident 'arose out of' Mrs Bentley's use of the car so that the insurers were liable for Mr Dunthorne's injuries under the terms of the motor insurance policy issued to Mrs Bentley pursuant to section 145(3)(a) of the 1988 Act. The trial judge inferred from the agreed facts that Mrs Bentley was running across the road to obtain assistance in restarting her car, and this was closely and causally connected with her use of the car and, as a result, the accident 'arose out of such use' and the insurers were liable. The trial judge's decision was upheld by the Court of Appeal.

45. In relation to the phrase 'arising out of' Rose LJ said this at 431G-432B (and Hutchinson LJ agreed at 434D):

> "… the phrase 'arising out of' contemplates a more remote consequence than is embraced by 'caused by.' This is, indeed, the view of the High Court of Australia in the *RJ Green and Lloyd* case [*Government Insurance Office of New South Wales v RJ Green and Lloyd Pty Ltd* (1966) 114 CLR 437].
>
> Barwick CJ says, at p443:
> '… I think the expression "arising out of" must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words "caused by."'
>
> Menzies J said, at p445:
> 'The words "arising out of the use" have no doubt a wider connotation than the words "caused by … the use." To my mind, however, they do import a relationship between the use of the vehicle and the injury which has causal element in it.'
>
> Windeyer J said, at p447:
> 'The words "injury caused by or arising out of the use of the vehicle" postulate a causal relationship between the use of the vehicle and the injury. "Caused by" connotes a "direct" or "proximate" relationship of cause and effect. "Arising out of" extends this to a result that is less immediate; but it still carries a sense of consequence.'
>
> For my part, that construction of the phrase 'arising out of' by contrast with the phrase 'caused by' is the only significant assistance to be derived by this court from the Commonwealth authorities… the matter, as it seems to me, must be

> determined by the facts of the particular case of which the Canadian and Australian authorities provide examples."

46. Pill LJ also referred to the *RJ Green and Lloyd* case (*Government Insurance Office of New South Wales v RJ Green and Lloyd Pty Ltd* (1966) 114 CLR 437), but identified the relevant test by reference to a different passage in the judgment of Windeyer J (although also at p447), namely:

> ‘"Arising out of" extends this to a result that is less immediate; but it still carries a sense of consequence. It excludes cases of bodily injury in which the use of the vehicle is a merely causal concomitant[1], not considered to be, in a relevant causal sense, a contributing factor."

47. Having identified the principle, the members of the Court of Appeal considered its application to the facts of the case. The insurers argued that it was irrelevant why the insured, Mrs Bentley, was in the road when Mr Dunthorne's car collided with her. This argument was rejected.

48. Rose LJ explained (at 432D-433A):

> "In my view, the reason why she was crossing was one of the facts which had to be considered when determining whether the accident was caused by or arose out of the use of her car… But in my judgment, it by no means follows that intention and motive are irrelevant to what can be said to have arisen out of the use of the vehicle. Indeed, this is demonstrated by Mr O'Brien's [the insurer's Counsel's] acceptance that a driver of a parked car walking to the boot to get a can of petrol would be engaged in an activity arising out of the use of the car. This, to my mind, shows that the reason for a pedestrian [the insured driver/Mrs Bentley] being in the road is or may be relevant to whether or not that which occurs arose out of the use of the motor car. The mere activity of crossing the road cannot, as it seems to me, be viewed in isolation. 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 longer journey on foot, or incidentally to some other activity, of example, to fetch water to refresh a horse or, indeed, to clean a motor car. In each case how the act of crossing the road is to be categorised and, in particular, whether it can be said to arise out of some other activity is to be judged objectively according to all the circumstances of the particular case including the reason why the pedestrian [the insured driver/Mrs Bentley] was there. To exclude consideration of the pedestrian's purpose [the insured driver/Mrs Bentley'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 [the insured's] purpose was. To that end he drew inferences from the agreed facts… In my judgment, not only was the judge entitled to draw the inference which he did, namely, that she was seeking help in order to assist her in resuming her

[1] It was not in dispute that the phrase "causal concomitant" was a typographical error in Pill LJ's judgment, the original judgment of Windeyer J referred not to a "causal" but to a "casual" concomitant. This was noted by Silber J in *Worboys* at paragraph [35] of his judgment.

> journey, but that was the obvious inference, the one which, as a matter of probability, out properly to have been drawn." (underlining added)

49. Pill LJ said that he had "more difficulty" than Rose LJ in deciding whether the conduct of Mrs Bentley is properly categorised as arising from her use of the motor car. However, he agreed that the trial judge's decision was correct, "although not without hesitation". Hutchinson LJ agreed with Pill LJ that the facts were close to the line and was also satisfied that the trial judge was entitled to reach the conclusion that he did.

50. In *AXN v Worboys* [2012] EWHC 1730 (QB) ("***Worboys***") Silber J summarised the principles that emerge from *Dunthorne v Bentley* in these terms at [38]:

> "first, that the concept of "arising out of" is a wider concept than "caused by"; secondly, that the focus of the inquiry has to be to consider whether the injuries of the claimant were matters "arising out of the use of the car"; and thirdly, that it is necessary to analyse the activities of the driver whose insurers are being sued to see what he was doing at the time when the injuries were suffered in order to ascertain if they were "arising out of the use of the car"." (underlining added)

51. Mr Melton QC said that the third principle Silber J identified from *Dunthorne v Bentley* was wrong. When asked to explain this point, Mr Melton QC said "it will not always be necessary to analyse the activities of the driver to see what he was doing at the time when the injuries were suffered because in this case the driver might have been asleep; he could have been doing anything." However, this point of Mr Melton's is simply wrong. As Rose LJ said in *Dunthorne v Bentley* "to exclude consideration of the [insured driver's purpose] would be an unwarranted disregard of common sense", and in my view the third principle identified by Silber J is correctly stated. Therefore, in relation to the facts of this case, it will be relevant to consider what the taxi driver was doing, and where he was, at the time the Claimant was injured.

52. Silber J then considered a number of Commonwealth authorities (some of which were cited to me) and, at paragraph [58], pulled "the threads together" and set out his approach to section 145(3)(a) of the RTA, which included the following points:

> "(d) the relationship to which the words "arising out of" must be applied is between the injuries suffered (not the negligent and wrongful acts) and the use of the vehicle (see *Dunthorne* and *Dickinson* [*v Motor Vehicle Insurance Trust* (1987) 163 CLR 500]) not at the start of the journey, but as at the time when the injuries were suffered as shown by the approach in these two cases;
>
> (e) the application of the words "bodily injury … arising out of the use of a vehicle" entails considering all the material circumstances. *Dickinson* and *Dunthorne* show that deliberate human acts of respectively starting a fire and of crossing the road do not prevent the bodily injury being held to have arisen out of the use of the motor vehicle. What was crucially important in *Dunthorne* in reaching the decision that the injuries of the claimant arose out of B's [Mrs Bentley's/the insured's] use of the car is that she would not have crossed the road if she had not run out of petrol and sought help to continue her journey…;

> (f) so the purpose of the user of the motor vehicle is relevant in deciding whether what occurred and in particular the bodily injuries arose out the use of his motor car as explained by Rose LJ in *Dunthorne* …; and so
>
> (g) the wording of section 145(3)(a) RTA 1988 shows that the focus has to be on the question of whether the bodily injury of the claimants was a matter "arising out of the use of the vehicle" by Worboys [the insured driver] at the time when the bodily injuries were sustained."

53. Mr Melton QC also sought to argue that last part of Silber J's analysis in sub-paragraph (d) above, where he says "not at the start of the journey, but as at the time when the injuries were suffered as shown by the approach in these two cases", is also wrong. I disagree. That approach by Silber J set out in sub-paragraph (d) is plainly derived from *Dunthorne v Bentley*, and I agree with it.

54. Most recently the statutory phrase "arising out of the use of the vehicle" in section 145(3)(a) of the RTA has been considered by the Supreme Court in *Pilling*.

55. The motorist's insurers in that case argued, amongst other things, that *Dunthorne v Bentley* was wrongly decided. This argument was rejected. The judgment of the Supreme Court was given by Lord Hodge JSC (with all other Supreme Court Justices agreeing) and at paragraphs [44] and [45] he said this:

> "[44] Mr Eklund QC, who appeared for UKI, submitted that *Dunthorne v Bentley* [1996] RTR 428 was wrongly decided. I would not so hold. The case did not turn on a point of law but on the application of the law to a particular set of facts. The Court of Appeal held in that case that the trial judge was entitled to conclude that Mrs Bentley had crossed the road and so caused the accident while she was seeking help from a colleague to continue her journey, shortly after she had run out of petrol and had parked her car at the side of the road. The judge was entitled to conclude that the accident had arisen out of her use of the car on the road. <u>Mr Dunthorne's claim was close to the line, as Hutchinson LJ recognised, but it is not apparent to me that the outcome of that borderline case was wrong, having regard to the close connection in time, place and circumstance between the use of the car on the road and the accident.</u>
>
> [45] In summary, section 145(3) of the RTA must be interpreted as mandating third party motor insurance against liability in respect of death or bodily injury of a person or damage to property which is caused by or arising out of the use of the vehicle on the road or other public place. The relevant use occurs where a person uses or has the use of a vehicle on a road or public place, including where he or she parks an immobilised vehicle in such a place (as the English case law requires), and the relevant damage has to have arisen out of that use." (<u>underlining</u> added)

56. It is therefore clear from *Pilling* that *Dunthorne v Bentley* was (i) a borderline case, (ii) Mr Dunthorne's claim was close to the line, but (iii) Mr Dunthorne's claim was on the right side of the line as the case was correctly decided, and his claim succeeded. This, of course, means that although each case will turn on its own facts, the facts of

Dunthorne v Bentley are likely to be instructive as to which side of the line other cases, including this one, will fall.

57. The causal phrase "caused by, or arising out of" the use of a vehicle on a road was considered by Lord Hodge JSC at paragraph [42]. Lord Hodge JSC explained that "the addition of the words "arising out of" after "caused" makes it clear that there can be a causal link between the use of a vehicle on a road and damage resulting from that use which occurs elsewhere" and, having referred to *Romford Ice and Cold Storage Co Ltd v Lister* [1956] 2 QB 180, CA and *Inman v Kenny* [2001] PIQR P18, he then said this about the relevant causal chain at [43]:

> "There must be a reasonable limit to the length of the relevant causal chain. In *Malcom v Dickson* 1951 SC 542, a case about remoteness of damage in a negligence claim, Lord Birnam stated, at p544: "It is of course logically possible, as every schoolboy knows, to trace the loss of a battle, or even of a kingdom, to … the absence of a nail in a horse's shoe. But strict logic does not appear to me to be a safe guide in the decision of questions such as this.""

Examples from other cases

58. To demonstrate the application of the principles from *Dunthorne v Bentley*, Mr Melton QC grouped the various authorities (which he described as mainly of "illustrative value") into two categories, namely:

    a. The "collecting and dropping off" cases. These cases are *Slater v Buckinghamshire County Council & Stigwood* [2004] Lloyd's Rep 432, Morland J ("***Slater v Bucks CC***"); *Law, Union and Rock Insurance Co v Moore's Taxi Ltd* [1960] SCR 80 (Supreme Court of Canada) ("***Law v Moore's Taxi Ltd***"); *Wu v Malamas* (1986) 67 BCLR 105 (CA) (Court of Appeal for British Columbia) ("***Wu v Malamas***"); *Fraser Valley Taxi Cabs Ltd v Insurance Corporation of British Columbia and Canadian Northern Shield* (1993) Can 100 DLR (4th) 282 (Court of Appeal for British Columbia); *Kopas v Western Assurance Co* [2008] 92 OR (3D) 688 (Ontario Superior Court of Justice); and *French v QBE Insurance (Australia) Limited* [2011] QSC 105 (Queensland Supreme Court) ("***French v QBE***"). However, *French v QBE* does not concern the wording of a motor insurance policy and, in the end, Mr Melton QC (rightly) did not appear to place any reliance on this authority, as it is does not assist with determining the issues in this case and I do not need to say any more about that case.

    b. The "non-collecting and dropping off" cases (England and Wales). These cases are *Ellwand v Fitzgerald* [1999] 1 WLUK; *Worboys*; *Beazley Underwriting Ltd v The Travelers Companies Incorporated* [2011] EWHC 1520 (Comm), Christopher Clarke J; *Wastell v Woodward (decd)* [2017] 2 WLUK 717, Master Davison ("***Wastell v Woodward***").

59. Mr Melton QC took me through these cases. In doing so he emphasised that in applying the principles to any particular case, the court must look at all the circumstances and, in particular, the factual context in which injuries have been suffered by a claimant.

60. Interestingly, of the examples provided there are only two cases, in addition to *Dunthorne v Bentley*, which fell the "right" side of the line, and the insurance policy responded. These are *Wu v Malamas* and *Wastell v Woodward*.

61. In *Wu v Malamas* Mrs Wu, a mother and the insured driver, was driving her six-year old child to school. Mrs Wu could not find a parking place alongside the curb, so she double-parked in the road, opposite the school. The child got out of the car, ran around the back of the car and then ran across the road towards the school, and into the path of an incoming car. The issue was whether the injury to the child arose "out of the ownership, use or operation of a motor vehicle". The court held that it did. The use or operation of the vehicle was causally connected with the accident which gave rise to the liability. This was because "the double parking, the position of the vehicle, combined with the reasonable foreseeability that the child would disobey instructions which had been impressed upon her, worked together to bring about the unfortunate consequence", namely the injury to the child (per Esson JA at 109).

62. In *Wastell v Woodward* Mr Woodward, the insured driver, parked his hamburger van in a layby at the side of the road on a regular basis and traded from it. Mr Woodward also regularly placed a sign on the opposite side of the road to promote his business. The road traffic accident happened when Mr Woodward crossed the road to adjust his sign and, on returning to his van, failed to look properly. He stepped into the path of the claimant motorcyclist and was killed instantly. The motorcyclist was injured and sued the deceased's estate and his insurers. Master Davison decided (with some hesitation) that the accident arose out of the use of the van as a hamburger van and, in reaching his decision, he was strongly influenced by *Dunthorne v Bentley*. He concluded that "temporally, geographically and qualitatively, the accident was closely linked to using the van on the road as a hamburger van" and the claim against the insurer therefore succeeded.

63. Of the other cases cited by Mr Melton QC, it seems to me the most relevant is *Slater v Bucks CC*. In that case the claimant, Paul Slater, suffered from Down's Syndrome and was collected on weekdays by minibus to go to a day centre. The minibus was owned and operated by a Mr Stigwood, who provided the driver and escort for disabled passengers (and he did so under a contract with the council). The minibus came to collect the claimant and stopped on the road opposite the claimant's house. In order to get to the minibus the claimant had to cross the road. It was a busy road, with traffic travelling in both directions. The escort, a Mrs Brooks, told the claimant to wait before crossing the road, as there was a car coming. However, the claimant ran out into the road and was hit by an oncoming car, and suffered catastrophic injuries. Mr Stigwood had a motor policy. The insurer was joined as a defendant in order to seek a declaration that it was not obliged to indemnify Mr Stigwood.

64. Morland J held that:

> "[117] In my judgment the accident to Paul Slater was neither caused by the use of the minibus nor arose out of the use of the minibus. It occurred when it did and where it did because Paul was making his way to board the minibus and was therefore not subject to the provision for compulsory insurance under section 145(3). To interpret "arising out of the use" to include the circumstances

giving rise to Paul's accident would be to give an utterly strained meaning outside the purpose of the statute".

65. The facts of *Slater v Bucks CC* therefore fell the wrong side of the line and Morland J granted the declaration sought by the insurer. In doing so, the judge considered *Dunthorne v Bentley*, the *RJ Green and Lloyd* case, and *Law v Moore's Taxi Ltd*. Mr Melton QC sought to distance the Claimant's case from this decision, and the decision in *Law v Moore's Taxi Ltd*, on the basis that (i) *Slater v Bucks CC* is a decision on its own facts, is a "collecting case", and is "not really anything more than illustrative value here", and (ii) *Law v Moore's Taxi Ltd* concerned an argument between a motor insurer and a public liability insurer, with the motor insurer trying to "get off the hook" and put liability on the public liability insurer. I disagree with that approach. The decision of Morland J provides an example of the application of the correct legal test to the particular facts before him. Further, it is clear on the facts that there was no connection between, on the one hand, the use of the vehicle on the road and, on the other, the injuries at the time they were suffered by the claimant. The fact Mr Melton QC has described it as a "collecting case" is neither here, nor there. Likewise, the point that it was a dispute between two insurers also seems to me to be irrelevant.

66. I have set these authorities out in some detail as Mr Melton QC spent some time on them in his submissions. However, the position remains that the key legal principles as to the interpretation of "arising out of the use of the vehicle on a road" are set out in *Dunthorne v Bentley*, and it is those principles (which were summarised in Silber J in *Worboys*) which I must apply to the facts of his case. The other cases to which Mr Melton QC has referred me are, in large part, examples of the application of those principles to the facts of particular cases.

The parties' submissions: did the injuries arise out of the use of the vehicle?

67. Mr Melton QC made the following submissions on behalf of the Claimant:

    a. The Claimant hired the taxi to get him home and the taxi driver knew the Claimant was drunk and therefore vulnerable. There is no dispute about this.

    b. A causal link may exist between the use of a vehicle on the road and damage occurring elsewhere (see *Pilling* at 1027H).

    c. It is entirely foreseeable that, if a taxi driver abandons a drunk or vulnerable passenger short of his destination, then the kind of accidents that befall drunk or vulnerable people are far more likely to happen, and the injuries suffered by the Claimant in this case was such an accident.

    d. There was no new or significant intervening fact that could be sensibly be described as breaking the link between the moment when the Claimant was abandoned and when he fell from the bridge and was injured.

    e. The difference in time between when the Claimant was abandoned, and when the accident happened, is of potential relevance, but it is only one of the several factors that the court has to take into account or weigh in the balance.

f. In this context, and having regard to all the circumstances, the Claimant's injuries arose out of the use of the taxi on the road within the meaning of section 145(3)(a) of the RTA. This was, he said, a case that fell on "the correct side of the line" from the Claimant's perspective.

68. In response, Miss Hitching QC, on behalf of the insurer, submitted this was the wrong approach, and the Claimant's injuries did not arise out of the use of the vehicle because:

a. The Claimant's case exceeds the reasonable limit to the length of the relevant causal chain: *Pilling* at 1028D. In particular, the Claimant's case is "at best" founded on the "horse's shoe nail logic" referred by Lord Birnam in *Malcolm v Dickson* 1951 SC 542 at 544: see *Pilling* at 1028E.

b. The Claimant's injuries did not therefore arise out of the taxi driver's use of the taxi on the road within the meaning of the RTA or the insurance policy. The test to be applied is that set out in *Worboys* by Silber J at paragraphs [38] and [58], taken together with the guidance as where the borderline lies provided by *Dunthorne v Bentley* (and other authorities such as *Slater v Bucks CC*, *Law v Moore's Taxi Ltd*, *Wu v Malamas* and *Wastell v Woodward*).

c. The facts of this case do not satisfy that test, and are on the wrong side of the borderline identified in *Dunthorne v Bentley* by a very long way:

i. There is no "relatively strong degree of causal connection" on the facts. On the contrary the use of the taxi was "merely a casual concomitant" and not "causally connected" with the Claimant's injuries.

ii. The Claimant was injured sometime after 3:45am, and before 8:00am, on 19 August 2012. This is far beyond any temporal link with the taxi driver's use of the taxi in leaving the Claimant at the cash point.

iii. As well as being temporally distant, the Claimant's injuries were geographically distant from the driver's use of the taxi. The Claimant was found having walked 2.1 km from the cash point on Prescot Road where he was left.

iv. *Dunthorne v Bentley* (p. 432) confirms that matters are to be assessed from the driver's perspective (see also *Worboys* at paragraph (f), per Silber J). The taxi driver intended to bring the journey to an end when parking near the first cash point. He did not intend to drive the Claimant any further. Further he had, and positively intended to have, no connection with the Claimant at all from the point when he left him at the second cash point. The abandonment of the Claimant was part of the taxi driver's "criminal enterprise".

v. Therefore, the Claimant's injuries were not "temporally, geographically and qualitatively, closely linked to the use of the taxi": see *Wastell v Woodward*. Rather, properly analysed, the use of the vehicle was merely the background circumstance and not the legal cause of the Claimant's

injuries within the meaning of the RTA. It is a "casual concomitant" and not a relevant legal cause.

vi. Characterizing the Claimant's injuries as "arising out of the use of the vehicle" simply does not make "good sense": see *Pilling* at paragraph [53]. This case is far beyond any borderline established in English case law.

Discussion and conclusion

69. There are four important points to make at the outset.

70. First, the insured in this case was the taxi driver. It was not the Claimant. It was the taxi driver, and not the Claimant, who was in the equivalent position of Mrs Bentley in *Dunthorne v Bentley*. This is not a case where the taxi driver, as a pedestrian, was in the road seeking to continue his journey. The facts of this case are very far removed from those in *Dunthorne v Bentley*.

71. Second, the Claimant was the passenger in the taxi. There is no dispute that his journey in the taxi started in Hardman Street, when he got in the taxi. However, it is crucial to consider whether the journey was continuing at the time the Claimant was injured or whether the journey in the taxi had in fact come to an end: see *Worboys* at paragraph [58](d).

72. Third, it is necessary to analyse the activities of the taxi driver to see what he was doing at the time when the injuries were suffered in order to ascertain if they were "arising out of the use of the car": see *Worboys* at paragraph [38].

73. Fourth, once the journey in the vehicle is at an end, what may or may not happen to a passenger after the journey has been completed is not a relevant consideration in determining whether a person's injuries arise out of the use of a vehicle on a road under section 145(3)(a) of the RTA. There is therefore no legal basis for Mr Melton QC's argument based on foreseeability under section 145(3)(a) of the RTA, namely that it is entirely foreseeable that, if a taxi driver abandons a drunk passenger short of his destination, then accidents will happen, such as the accident to the Claimant.

74. I now turn to my conclusion on the facts. There is no dispute that, by the time the Claimant hailed the taxi on Hardman Street, he was affected by drink. However, the fact he had been drinking was not apparent from the manner in which he was walking and he was still able to talk to Ms Dyer by telephone and hail a cab.

75. Once the Claimant had hailed the taxi the fact he had been drinking must have become obvious to the taxi driver when he spoke to the Claimant. This, as I have explained above, was either immediately before the Claimant got in the taxi, or immediately after the Claimant got into the taxi on Hardman Street. Once the taxi driver knew the Claimant was affected by drink, and therefore vulnerable, he decided to rob him in the very same way that he had robbed two others on earlier occasions. He tricked the Claimant into parting with his debit card, and exchanged it for another stolen card which the taxi driver knew would not work for the Claimant.

76. The taxi driver then used his taxi to drive the Claimant to the Santander cash point on Prescot Road so that the Claimant would then try and get cash out of the cash point with the stolen card and, in doing so, that would give the taxi driver the opportunity to steal his PIN. The Lloyds cash point was also very nearby and that provided the taxi driver with a further opportunity to steal the Claimant's PIN by watching him unsuccessfully putting it into the machine. Then, having stolen both the debit card and the PIN from the Claimant, the taxi driver abandoned him and used his taxi to drive to another cash point nearby in order to steal money from the Claimant's bank account as quickly as possible. Less than 10 minutes later, the taxi driver had withdrawn £220 in cash from the Claimant's bank account.

77. The Claimant's journey in the taxi driver's taxi was from Hardman Street to the Santander cash point on Prescot Road. Once the Claimant got out of the taxi to go to that first cash point the journey in the taxi came to an end. It was impossible for the Claimant to withdraw any cash from the cash point, or indeed the second cash point at the Lloyds TSB nearby, as the taxi driver had already stolen his debit card, and the Claimant was using someone else's bank card with his own PIN. Further, the taxi driver knew that the Claimant would be unable to withdraw cash and the purpose of taking the Claimant to the two cash points close together was to steal his PIN. The taxi driver had no intention of allowing the Claimant to get back into his cab in order to continue the journey home to Huyton. Rather, once the taxi driver knew the PIN, he intended to drive off without the Claimant and take money out of his bank account from another cash point as soon as possible, and that is precisely what then happened.

78. The Claimant was not put out on the street in the Old Swan area by the taxi driver so that the journey was temporarily interrupted, and so that the Claimant could resume his journey in the taxi once he had withdrawn cash from the cash machine to pay for the journey. Rather, he was put out on the street, so that the taxi driver could observe him at the cash point and steal his PIN. The Claimant's journey in the taxi was then at an end.

79. Having been left in the Old Swan area the Claimant decided to walk home. It was on that walk home that he fell off the motorway barrier and was severely injured. The Claimant could have stayed put and waited for Ms Dyer to collect him in her car. Ms Dyer thought that is what he would do, having discussed the options with him by telephone when he was abandoned. However, the Claimant decided not to wait for Ms Dyer and he decided to walk home. Further, in so far as it may be relevant (although I do not consider it is under section 145(3)(a) of the RTA, as the journey was at an end) the Claimant's decision to walk home broke the causal chain after he had been abandoned by the taxi driver.

80. The Claimant had walked 2.1km from where he had been abandoned by the taxi driver, and the accident happened after 3.45am, or thereabouts, which was the last time he tried to call Ms Dyer. More than 45 minutes therefore had passed since his journey in the taxi had come to an end.

81. There is no evidence whatsoever about what the taxi driver was doing, or where he was, at the time the Claimant sustained his injuries. Having stolen money out of the Claimant's bank account, the taxi driver could have been anywhere in the Liverpool area. This fact alone makes it crystal clear that the accident to the Claimant did not

arise out of the use of the taxi. In these circumstances it is impossible to see how there is a relevant causal link between the use of the taxi and the injuries suffered by the Claimant under section 145(3)(a) of the RTA.

82. In my view, the Claimant's injuries had nothing whatsoever to do with "the use of the vehicle on a road" in the context of section 145(3)(a) of the RTA. Rather, the injuries occurred where they did, and when they did, because the Claimant had decided to make his way home on foot and these injuries were not in any sense closely linked with the use of the taxi.

83. Finally, it is clear from *Pilling* that in *Dunthorne v Bentley* Mr Dunthorne's claim was "close to the line". However, it was on the right side of the line as the claim against the insured was successful. The facts of this case are very far removed from those of *Dunthorne v Bentley* and, in my view, are nowhere near the line for a successful claim against the taxi driver under section 145(3)(a) of the RTA.

84. I have therefore formed the very clear view that the Claimant's injuries did not arise out of the use of the taxi and the answer to Question 1 is "No".

Question 2

85. This issue can be dealt with more briefly. The taxi driver had no intention of using the taxi to take the Claimant home to Huyton. Rather, he was using the taxi as an integral part of his "modus operandi" to steal from people, like the Claimant, who had been drinking and were seeking to make their way home in the early hours of the morning after a night out in the centre of Liverpool. On the facts of this case I have reached the clear view that, from the taxi driver's perspective, the essential character of the journey in which he took the Claimant in the taxi from Hardman Street to the Santander cash point was to steal from him and that he was using the taxi for a criminal purpose.

86. Section 145(3) of the RTA only requires insurance for the use to which the person, in this case, the taxi driver, is putting the vehicle. The policy in this case limits use to "social, domestic and pleasure purposes", "use for the Insured's business" or "use for the carriage of passengers for hire and reward under the terms of a Hackney Carriage Licence". The journey in this case did not therefore constitute a permitted user.

87. In these circumstances, Mr Melton QC accepted that I am bound by *Keeley v Pashen* [2005] 1 WLR 1226, CA and, in particular, at paragraph [19] where Brooke LJ held (and Jonathan Parker LJ and Keene LJ agreed):

> "… Under this statutory scheme Parliament intended innocent third parties to be able to recover direct from the driver's insurers… Of course, if the essential character of the journey in question consists of use for a criminal purpose (as when a burglar takes his car out for a night of burgling other people's houses) then the car will not be being used for "social, domestic and pleasure purposes", but this is not that case."

88. There is therefore no basis in this case for the insurance policy to respond. The answer to question 2 is also "No" and the claim against the insurer must be dismissed.