[2017] EWHC 1336 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Case No: C90BM231

Civil Justice Centre
The Priory Courts
33 Bull Street
Birmingham

Wednesday, 19th April 2017

Before:

HIS HONOUR JUDGE PURLE QC
(sitting as a Judge of the High Court)

BETWEEN:

KIERAN BLAKE

Claimant

-v-

(1) DOMINIC CROASDALE
(2) ESURE INSURANCE LIMITED

Defendants

MR. S. HUNJAN QC (instructed by McGrath Solicitors) appeared on behalf of the Claimant.

MR. B. McCLUGGAGE (instructed by Keoghs LLP) appeared on behalf of the Second Defendant.

JUDGMENT
(As Approved)

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JUDGMENT

JUDGE PURLE QC:

1. This is an application to determine whether or not an admission that has been made has a binding status under the Civil Procedure Rules 1998 ("CPR"), in particular CPR 14.1A or 14.1B. The fall-back position is that if there is an admission which would otherwise be binding, the applicant ("Esure"), who is the second defendant, applies for permission to withdraw the admission.

2. The case concerns a road traffic accident which took place on 1st September 2013 at around half-past midnight. The driver was the first defendant, Mr. Croasdale, who was subsequently, as a result of the accident which occurred, convicted of causing death by dangerous driving and is now serving a substantial period of imprisonment. The immediate cause of the accident appears to have been that the driver, Mr. Croasdale, went through a red light which was observed by the police in a patrol vehicle. The police sought to get Mr. Croasdale to stop. Instead he accelerated away at high speed on the wrong side of the road and had a collision with a car coming the other way. One of the passengers died. Another passenger, a rear-seat passenger, was Mr. Kieran Blake, who is the claimant in these proceedings, who sues by his father and litigation friend. He suffered severe brain injury. The matter was investigated by the police which resulted in the proceedings to which I have referred.

3. Over a year later on 23rd October 2014 solicitors for the claimant wrote to Esure's Motor Claims Department as the first defendant's insurer notifying Esure that a claim had been submitted via the Ministry of Justice Portal on 16th October 2014 and enclosing a claims notification form. That claims notification form is appropriate for cases having a value not exceeding £25,000. The matter comes out of the portal if various issues are raised, one of which is contributory negligence. It was soon realised that this matter would have to come out of the portal.

4. On 24th November 2014 Esure wrote to the claimant's solicitors suggesting a 25% reduction in damages on account of the failure of the claimant to wear a seat belt, and notifying the claimant's solicitors that it might well be advancing a further argument in respect of contributory negligence arising from the fact that the driver had consumed drugs prior to the accident about which it would be seeking a toxicologist's report. Although the claim was still in the portal, the same letter recorded as follows: "Clearly regarding the nature of the injuries sustained by your client, this claim is not suitable to be dealt with via the portal." Thus, the nature of the injuries alone were recognised as sufficient to take the case out of the portal. The claimant's solicitors were not initially confident that that was so and, no doubt mindful of possible adverse costs consequences

by starting a claim outside the portal which should be started within it, started it within the portal.

5. By a letter dated 14th January 2015 the claimant's solicitors acknowledged that the allegation of contributory negligence meant that they should proceed on the basis that liability was in issue.

6. However, the previous letter of 24th November from Esure had stated in terms: "Primary liability for the accident is admitted". It was once that admission was made that that the question of contributory negligence was raised later in the same letter. That was queried by the letter of 14th January 2015 saying: "We are pleased to note that primary liability is admitted. Please advise whether this is an unequivocal and irrevocable admission or if you seek to reserve your position in any way." Then later on, when considering contributory negligence (and in that context alone) they said as already mentioned that they were proceeding on the basis that liability remained in issue.

7. Just pausing there, it is clear, in my judgment, that an admission was made in the letter of 24th November 2014, though the claim remained subject to issues of contributory negligence. I doubt whether the claimant's solicitors needed to be as cautious as they were by seeking further clarification on 14th January 2015. That letter, it is said, showed that the claimant refused to accept the admission. In my judgment, it did no such thing because it stated in terms: "We are pleased to note that primary liability is admitted." The letter qualified that, just as the previous letter had done, by making it plain that the admission was subject to a contributory negligence defence.

8. The same letter of 14th January 2015 also expressed the view that the claim was not suitable to be dealt with via the portal and sought acceptance of the letter as formal notification that the claim had left the portal.

9. Esure wrote a further letter to the claimant's solicitors, erroneously dated 9th May 2014. It is accepted that it was received on 4th February 2015 and should bear the date 3rd February 2015. Esure stated: "With regard to liability, we have made our position abundantly clear. We accept primary liability. No further clarification is needed".

10. Subsequently, on 9th November 2015 the claimant's solicitors sent a number of medical reports to Esure including one from a consultant neurologist dated 15th May 2015. It did not, however, include anything from Mr. Worthington, a neuropsychologist, on the effects of the head injury. However, the report of the consultant neurologist, Mr. Corstone, did make plain the head injuries were severe. Prompted, no doubt, by that, a letter of 4th December 2015 from Esure offered £100,000 which was said to be net of liability and in subsequent correspondence net of CRU. It is evident therefore that Esure appreciated, as indeed it seems to have done at the outset, that the claim potentially was for more than £25,000. Esure had not, however, at that stage appreciated that the claim would run into millions of pounds. Looking ahead to the proceedings when issued, a

provisional schedule of damages served on 6th February 2017 suggests a range of loss of somewhere between £3 million and £5 million, which could increase. That is based in substantial part upon the medical report of Mr. Worthington, the consultant neuropsychologist to whom I have referred. This was not a report which Esure had seen until the proceedings were served.

11. The proceedings were issued in August 2016. Dr. Worthington's report had been obtained earlier, and was dated 26th May 2016. The claim was not served until later, on 28th November 2016.

12. The defence pleaded amongst other matters that the claimant's injury was caused by his own criminal act, namely that he was acting at the time in the course of a joint criminal enterprise - in essence, as a drug-dealer jointly with the first defendant. It is said that it was reasonably foreseeable that the claimant would be subject to unusual or increased risks of harm as a result of that enterprise. Pleading that as a causation defence is consistent with the approach of the Court of Appeal in *Joyce v O'Brien & Anor* [2013] EWCA Civ. 546 where, at paragraph 29, Lord Justice Elias stated as follows:

> "29. I would formulate the principle as follows: where the character of the joint criminal enterprise is such that it is foreseeable that a party or parties may be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal objectives, and the risk materialises, the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise. I do not suggest that this necessarily exhausts situations where the *ex turpi* principle applies in joint enterprise cases, but I would expect it to cater for the overwhelming majority of cases."

13. The applicability of the *ex turpi* defence generally was considered by the Supreme Court in *Patel v Mirza* [2016] UKSC 42. The case is not directly relevant to joint enterprise cases, its significance merely being to depart from the previous approach commonly understood to represent the law as laid down in *Tinsley v Milligan* [1994] 1 AC, 340 and to introduce in its stead a rationale set out in paragraph 120 of the decision as follows:

> "120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case)."

14. Guidelines are then given as to how the harm to the public interest is to be assessed. If that is to apply in joint enterprise cases, it may be that the reasoning in cases such as *Joyce v O'Brien* will need to be revisited.

However, as things stand *Joyce v O'Brien* is binding upon me as a decision of the Court of Appeal which has not been in terms reversed by the Supreme Court (nor am I suggesting that it should be).

15. I was referred to other authorities in this field concerning criminal joint enterprises and their effect on civil liability. In particular, I was referred to *Smith v Stratton*, both at first instance: [2014] EWHC 1749 QB, and in the Court of Appeal [2015] EWCA Civ 1413. In that case the issue arose as to whether the Motor Insurers Bureau ("MIB") were liable to meet a claim for damages for personal injury in which the appellant/claimant was a back-seat passenger in a car being driven by the first defendant. That car struck a parked vehicle at speed. Insurers had avoided liability and the MIB were potentially liable if a judgment against the driver should remain unsatisfied. This was another case concerning a police chase, where the car was driven away from the police presence at speed, and failed to heed the police vehicle's sirens and flashing blue lights. There was no issue as to whether or not the car had been driven negligently, as it obviously was. The defence was that the four men in the car were in a joint enterprise in dealing in cannabis and made off in the car when spotted by the police, which led directly to the appellant's injuries. It has, at least superficially, some parallels with the present case. There was no direct evidence that the appellant was involved in drug dealing from the car, but the judge at first instance found the case proved on the balance of probabilities by reference to circumstantial evidence. There are many detailed factual differences between that case and the present, but what it shows is that the *ex turpi* defence could succeed, as it did in that case, without direct evidence so long as the circumstantial evidence was sufficiently cogent.

16. Reference was also made in that case to the previous decision of *Delaney v Pickett & Anor* [2011] EWCA Civ 1532. That case fell on the other side of the line. Although the trial judge found, which the majority of the Court of Appeal upheld, that the occupants of the car were in possession of drugs for the purpose of dealing, the defence did not succeed because it was not shown that the journey itself was undertaken for that purpose. Nonetheless, the claim against the MIB failed for other reasons. That shows how every case is fact-sensitive.

17. I mention these authorities because it is said that on the facts of this case, considered in the light of the decided cases, there is no realistic prospect of the *ex turpi* defence succeeding; and that if I consider that the admission needs to be withdrawn, I should not, as a matter of discretion, allow it to be withdrawn.

18. That brings me to the first point as to the status of the admission. This is the admission in the letter of 24th November 2014, which was subsequently re-affirmed in the letter received on 4th February 2015. The case having been started on the portal was subject to the RTA Protocol to which CPR 14.1B applies. I have, as already indicated, no doubt that an admission has been made here.

19. I was taken to the RTA protocol in order to demonstrate that the admission must be construed narrowly, and not as precluding an *ex turpi* defence. However, an admission of liabilty, as defined in the RTA protocol, means that the defendant admits, among other matters, that the defendant caused some loss to the claimant. As the authorities binding on me explain the *ex turpi* defence by reasoning, in the case of a criminal joint enterprise, that the true cause of the loss is the joint enterprise and not the negligent driving, it seems to me that the admission necessarily precludes an *ex turpi* defence.

20. Accordingly, it seems to me that the admission is binding and that it requires to be withdrawn. This was not done before commencement of proceedings. That, therefore, brings the matter within CPR 14.1B(2)(b), which provides that the admission can be withdrawn after the commencement of the proceedings if all parties consent (not this case) or "with the permission of the court". Sub-paragraph (2) refers expressly to an admission of causation, which I have held is clearly covered by the admission as made, and would, absent withdrawal, exclude the *ex turpi* defence. Even without that any other pre-action admission after commencement of proceedings may only be withdrawn if all parties consent or with the permission of the court under CPR 14.1B(3).

21. Accordingly, I now turn to consider whether I should permit the admission to be withdrawn, given that the claimant does not consent to the withdrawal. In doing so, I bear in mind that there is a wider than anticipated plea of contributory negligence in the defence as served as an alternative case. Paragraph 5 is as follows:

> "5. It is the Second Defendant's alternative case that the Claimant's damages should be reduced
>
> (i) to reflect the fact that he negligently failed to wear his seat belt. Had he done so, his injuries would have been materially less severe;
> (ii) to reflect the fact that he knew or ought to have known that the Claimant might drive in the dangerous manner in which he did;
> (iii) to reflect the fact that he knew or ought to have known that the Claimant's ability to drive was impaired by his consumption of drugs, in particular cannabis."

22. Sub-paragraph (ii) is sufficiently broad to embrace the claimant's knowledge by virtue of his being engaged in (if he was) a joint enterprise of the supply of illegal drugs. That is already pleaded under the causation defence, and is bolstered by the following paragraph:

> "4. It was foreseeable that, as a result of their drug dealing activities, the Claimant could be subject to unusual or increased risk of harm in that, if they were pursued by the police, the First Defendant would drive in a hazardous manner in an attempt to get away. This is what

happened and in the result the Claimant cannot recover from the consequences of his own criminal action."

23. The contributory negligence paragraph immediately follows that paragraph as paragraph 5. It is not suggested that Esure cannot plead paragraph 5(ii). It must follow, therefore, that unless paragraph 5(ii) is itself so baseless that it must be struck out, all the facts relating to the alleged drug dealing activities will need to be considered under the contributory negligence defence. It is said that it is nonetheless right for the claimant to hold Esure to its admission because all the facts in the contributory negligence defence have this feature: the onus of proving them is upon Esure. That may be so, but the onus of proving the criminal enterprise in support of the *ex turpi* defence is also on Esure, as the authorities to which I have referred make clear.

24. In those circumstances unless it can be said that clause 5(ii) is simply demurrable and has no factual basis, the overwhelmingly sensible course is for both the causation defence (or the *ex turpi* defence as it may otherwise be described) and the contributory negligence defence to remain on the pleadings and proceed to trial together.

25. A number of particulars in support of the joint criminal enterprise are given. I shall read them as pleaded.

> "A quantity of items associated with drug dealing were discovered in the Astra, namely two small quantities of cannabis; a Morrison's bag containing traces of cannabis; another plastic bag containing small plastic bags and traces of cannabis; a Smelly Proof plastic bag containing a large quantity of small plastic dealer bags and £215 in cash in an envelope. A mobile telephone was also found in the vehicle, with a quantity of texts suggestive of drug dealing activity. The name Dom, the First Defendant's name, appears in the texts. The Claimant's fingerprints were found on the Smelly Proof plastic bag which was concealed in the roof interior/light panel of the vehicle. He was also the person in possession of the £215 in the brown envelope and he was carrying a concealed offensive weapon, a lock-knife. For the reasons set out above, the Second Defendant would invite the court to find that the Claimant and the First Defendant were engaged in a criminal activity, namely the business of drug dealing."

26. It has been strongly urged on behalf of the claimant that these matters individually and cumulatively do not make out a case of engaging in criminal activity. It may be that it is correct to say that they do not amount to what many years ago would be called a *prima facie* case. However, if I am considering whether or not, which ultimately is the test I need to apply, paragraph 5(ii) could or should be struck out, then I am concerned only with ascertaining whether there is a real issue to be tried - in other words, a realistic propsect of success. That does not require, at this stage, the satisfaction, even provisionally, of any burden of proof. It merely requires that there be a case worthy for trial. In my judgment, this is not a defence

which could be struck out, whether it appears as *ex turpi* or as a defence of contributory negligence. In those circumstances it seems to me that, unless there is some other significant reason for the matter not to proceed, the claim should go to trial on all issues and that I should allow the admission to be withdrawn.

27. I am conscious, however, that before reaching any final conclusion I must consider all of the circumstances of the case, in particular those set out in the Practice Direction to CPR 14 which reads as follows in paragraph 7.2.

> "7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including -
> (a) the grounds upon which the application seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
> (d) the prejudice that may be caused to any person if the application is refused;
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer [sic] was made; and
> (g) the interests of the administration of justice."

28. Taking each of those in turn, under (a) the grounds upon which Esure seeks to withdraw the admission is, in brief, that it initially considered that it was dealing with a low value claim, although it soon came to realise, and indeed appeared to realise from the outset, that the case was not suitable for the portal. There was nothing in the material it received to indicate a claim running into millions and therefore proportionality persuaded Esure to adopt a pragmatic approach of not taking the *ex turpi* defence in a claim which, to make good the costs of that defence, would or might have exceeded the benefit to be derived from endeavouring to settle, upon the footing of an admitted liability, a relatively small claim. There is no doubt that the raising of the *ex turpi* defence will significantly add to the costs of a trial, at least if one includes within that the costs of the newly emerged contribution negligence limb under paragraph 5(2) which I have mentioned. Moreover, the defence may well fail. In my judgment, Esure's approach was a perfectly sensible one and I do not consider that it is to be criticised for what has been described, in my judgment erroneously, as a last-ditch effort to avoid liability. It is correct to say that the material enabling Esure to raise the defence has been available to Esure from an early stage, but Esure cannot possibly have imagined that it was facing a multi-million pound claim when the claimant's own solicitors considered it appropriate to have started the claim within the portal. Even when the

initial medical evidence was served in November 2015, Esure could not then have foreseen that this was what is now described as "a catastrophic" claim running into many millions of pounds, its response then being to make an offer of £100,000 net. Accordingly, it seems to me that Esure should be entitled to withdraw its admission and that to refuse to do so would discourage defendants, especially insurers, from acting proportionately, which would make the giving of admissions in like cases where it is appropriate, in the interests of reasonableness and proportionality, to give them, more difficult to secure.

29. As to ground (b), the conduct of the parties on both sides, neither party's conduct is open to criticism in my judgment. As I have said, Esure has taken a proportionate view, and it is entitled to reassess the position as the litigation proceeds, in the light of the changed circumstances which it now faces. As far as the claimant is concerned I do not think any serious criticism was made of him or his solicitors, but the fact remains that it was the conduct of the claimant's solicitors in starting the claim in the portal, no doubt in complete good faith, which caused Esure to treat this claim as a low value one - not necessarily one which was so low as to justify the portal but one which was sufficiently low not to justify the raising of the stakes by running an *ex turpi* defence which though it has some basis is not bound to succeed.

30. Moving on to (c), the prejudice that may be caused to any person if the admission is withdrawn, there is obvious prejudice in one sense to the claimant; the claimant now no longer has a claim which is admitted. However, if that is to be treated as a determining factor then permission to withdraw an admission would never be given after the commencement of proceedings. Emphasis was placed upon the difficulties of proof which have increased over the three years and more since the admission was made. That is a matter which I should take into account but which can be exaggerated. As I have said, the contributory negligence defence in any event relies upon the same matters and that is something with which the claimant, as well as the defendants, will have to deal. Furthermore, the claimant has suffered brain damage, which I am prepared to accept on the evidence is real and substantial, and he may be able to give only limited assistance to his lawyers. That, however, may always have been the case. It may well be that the immediate impact of the accident was even more severe than it is now. However that may be, it should not be beyond his competence to deal with an allegation of being involved on the night in question in drug dealing, which admits of a simple answer.

31. Reference is also made under (d) to the prejudice that may be caused to any person if the application is refused. In this case there is the prejudice that Esure will suffer if not allowed to rely upon what I have held to be a realistically arguable defence of *ex turpi*.

32. Under (e) there is no imminent likelihood of a trial and the time at which the admission is sought to be withdrawn is shortly after the commencement of proceedings.

33. Paragraph (f) refers to the prospects of success with which I have already dealt. As I have said, it is enough at this stage that there is a claim which has some realistic prospect of success. It is not appropriate at this stage to conduct a mini-trial as counsel for the claimant effectively was asking me to do. It is wrong for me to speculate as to what the position would be if I had to give judgment now, not having heard a single witness who might be available to give evidence at the trial. There were at least two other people in the car who appear to be able to give evidence. One is the driver (the first defendant) and the other is an individual, Mr. Plumber, who was able to walk away relatively unscathed from the scene of the accident and whose recorded comment to the police was that he had only just been picked up, thereby marking a distance between himself and whatever earlier activities the other car occupants might have been engaged in, which he may have known of or suspected. That, of course, is a long way from establishing liability, but at the trial the judge will have to consider all the evidence in detail, and form a view on the reliability of the witnesses. I am in no position to judge any of that on this application save to say whether there is a case which can properly proceed. As to that it is sufficient, as I have said, that the prospects of success are realistic without in any way being guaranteed.

34. Finally, there is a reference to the interests of the administration of justice. In one sense a shorter trial is always better than a long trial but that cannot justify the holding of Esure to the admission in circumstances where overall the general justice of the case requires permission to withdraw the admission to be given. Accordingly, I will allow Esure to withdraw the admission or, given that the initial admission was repeated, admissions.

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