Testing the Limits: Are Passengers of Drink Drivers Contributorily Negligent for Failing to Act on What They Ought to Have Known?

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In *Campbell v Advantage Insurance Co* [2021] EWCA Civ 1698 the Court of Appeal has given guidance on the assessment of passengers' contributory negligence in drink-driver cases.

The Facts

Dean Brown had driven the claimant, Lyum Campbell, and Dean's brother, Aaron Brown, to a club. All three consumed significant quantities of alcohol and in the early hours of the morning Dean Brown drove Lyum away from the club. Aaron was left behind and took a taxi home.

On the journey, the car veered on to the wrong side of the road and hit a lorry head on. Dean was killed in the accident and Lyum, who had been in the back seat and not wearing a seatbelt, suffered serious brain injury. Sadly, Aaron later took his own life.

The Grounds of Appeal

Although there were ten grounds of appeal, the focus of this article is the Court of Appeal's consideration of Lyum's contributory negligence.

An earlier post on this blog considered the circumstances in which a passenger can be contributorily negligent for getting into a car with a drunk driver including the first instance decision in the High Court in *Campbell*. That earlier blog can be read here.

Can a Passenger Plead Their Own Drunkenness to Avoid a Finding of Contributory Negligence?

In considering the standard to be applied to an intoxicated person, Dingemans LJ, giving the leading judgment, reviewed the provisions of the Law Reform (Contributory Negligence) Act 1945 and said at [36]:

> *"The test of whether a person has breached a duty of care in negligence is an objective standard. The standard normally set "is that of a reasonable and prudent man", see* Clerk & Lindsell on Torts *Twenty Third Edition at 7-157. This is the objective standard applied to Mr Dean Brown when judging his driving of the Seat Ibiza motor car… As a matter of principle, it is not obvious why a different standard should be applied to Mr Lyum Campbell when assessing whether there was any contributory negligence on his part when he agreed to be driven by Mr Dean Brown. The fact that Mr Lyum Campbell would not have agreed to be driven by Mr Dean Brown if he had been sober does not assist him if an objective standard is applied."*

It was submitted on behalf of the claimant, as summarised by Dingemans LJ, that:

> *"… there was a line of authorities in Australia, exemplified by the decision in* McPherson v Whitfield, *which suggested that if a person became intoxicated in circumstances "where no reasonably foreseeable specific risk to his safety should have been apparent to him. If, in these circumstances, while lacking relevant conscious awareness he is placed into or induced to enter into the car of an intoxicated driver he should not on that account be held responsible for a failure to take reasonable care for his own safety."*

His Lordship continued at [37]-[38]:

> *"That line of authorities, however, co-existed with another and different line of authorities, exemplified by* Morton v Knight*, which applied an objective test of the reasonable man to the passenger, holding that the claimant was not relieved or excused by self-intoxication from the consequences of his conduct and could not rely on drunkenness for not taking the same care of himself as when he was sober.*
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> "In Joslyn v Berryman *the High Court of Australia endorsed the* Morton v Knight *line of authorities. Having reviewed the competing lines of authority, McHugh J. said "if a reasonable person would know that he or she was exposed to a risk of injury in accepting a lift from an intoxicated driver, an intoxicated passenger who is sober enough to enter the car voluntarily is guilty of contributory negligence. The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication".*

Underhill LJ stated that he did not consider that his reasoning differed from that of Dingemans LJ, but added some words of his own, as the fundamental issue was of some importance. He also adopted the position as stated by McHugh J in *Joslyn v Berryman*.

In summary, it is clear that when assessing contributory negligence, the test is objective, and a claimant cannot rely on his own drunkenness for failing to take adequate care for his own safety. This, it is submitted, reflects what most texts and practitioners considered the law to be prior to this case and indeed confirmed the decision of the High Court below.

Can a Passenger Have Constructive Knowledge of the Drink-Driver's Impairment?

In at least one respect, the statement of the law from McHugh J in the High Court of Australia, as expressly approved by Underhill LJ and seemingly cited with approval by Dingemans LJ, may reflect a widening of the obligation on a passenger to assess the ability of a drunken person to drive. This arises from the following statement:

> *"The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication*" (emphasis added).

It may be instructive to consider what McHugh J meant by this phrase. In the paragraph preceding that cited by their Lordships in *Campbell,* McHugh J stated:

> *"The issue in a case like the present is not whether the passenger ought reasonably to have known of the driver's intoxication from the facts and circumstances known to the passenger. The relevant facts and circumstances include those which a reasonable person could have known by observation, inquiry or otherwise. In cases of contributory negligence outside the field of intoxicated passengers and drivers, the courts take into account as a matter of course those facts and circumstances that the plaintiff could have discovered by the exercise of reasonable care"* (emphasis in original).

In the previous article on this topic surprise was expressed that the law did not require a passenger to inquire as to how much a driver has had to drink, even when it is known that he has been drinking. This was set out clearly by McCowan LJ in *Brignall v Kelly* (CA, 17 May 1994) as follows:

> *"For my part, I refuse to accept the proposition that if a man in a public house observes another man drink one pint of lager and give no sign of intoxication, he cannot accept a lift from him without interrogating him as to exactly how much he has had to drink."*

In determining whether a passenger was contributorily negligent, the assessment focussed on whether a driver's impairment was reasonably apparent from the claimant's objective position. The claimant could avoid a finding of contributory negligence by showing that the impairment to drive was not apparent, even where the driver had significantly exceeded the legal alcohol limit (*Traynor v Donovan* [1978] CLY 2612 – over twice the legal limit; *Brignall v Kelly* (CA, 17 May 1994) – over twice the legal limit; *Booth v White* [2003] EWCA Civ 1708 – just under twice the legal limit). In all these cases the claimant knew that the driver had been drinking, but did not know how much.

It is unclear whether this will continue to be the position post *Campbell* where the test is now what is reasonably

discoverable. The cases in the preceding paragraph were not expressly considered by the Court of Appeal; on the facts of *Campbell* it would have been obvious to a reasonable person that Dean Brown was not fit to drive so the matter did not arise for consideration. The above cases have therefore not been overruled.

The question can also reasonably be asked what the outcome would have been had the claimant in the above cases known how much the driver had drunk. Would it necessarily follow that the claimant was contributorily negligent? The claimant is contributorily negligent, on the basis set out in *Campbell,* when they know or ought to know that the driver is impaired by reason of intoxication; it is not simply whether the driver was over the legal limit. If, however, a driver does not appear impaired to a reasonable person, then it is difficult to see what "*reasonably discoverable*" adds to the test other than knowing how much the driver has drunk.

A person cannot of course ascertain for certain whether a person is over the legal limit as such things vary from person to person and the time span over which alcohol has been consumed, but there must surely be cases where a reasonable person would appreciate that someone is over the legal limit and that their ability is consequently likely to be impaired. This could be so even if the drink-driver is not showing any obvious signs of impairment.

The Passenger Must Have Capacity to Consent

Another point that was only mentioned by Underhill LJ, but which is obviously correct in principle, is that a person can only be contributorily negligent where they are able to consent to getting into the car. Where they are unconscious they have obviously not consented. In addition:

> *"… a person who is not totally unconscious may nevertheless be in a state where they are incapable of making a decision. The decision where exactly to draw the line between voluntary and involuntary conduct – between consent (even if drunken consent) and no-consent – in a particular case is a fact-sensitive question which must, within reasonable limits, be left to the judge."*

Although right in principle, this may lead to a difficult assessment in particular cases. As in *Campbell* itself, the judge may look to evidence of what other tasks the claimant was or was not able to perform at the time to form a conclusion about their capacity to consent.

Conclusion

In *Campbell* the Court of Appeal was clear that contributory negligence is assessed objectively as to what a person did know or could reasonably have discovered. Whether this widens the obligation on potential passengers to inquire into how much a driver has drunk, or at what point a reasonable person should appreciate that the ability to drive is likely to be impaired, remains to be seen.