England and Wales Court of Appeal (Civil Division) Decisions

STUART RICHARD CUTTER v. EAGLE STAR INSURANCE COMPANY LIMITED [1996] EWCA Civ 1029 (22nd November, 1996)

IN THE SUPREME COURT OF JUDICATURE CCRTF 95/1506/C
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM TUNBRIDGE WELLS COUNTY COURT
(HIS HONOUR DEPUTY JUDGE KEE)

Royal Courts of Justice
Strand
London WC2

Friday 22 November 1996

B e f o r e:

LORD JUSTICE BELDAM
LORD JUSTICE MORRITT
SIR JOHN BALCOMBE
- - - - - -

STUART RICHARD CUTTER
Plaintiff/Appellant

- v -

EAGLE STAR INSURANCE COMPANY LIMITED
Defendant/Respondent

- - - - - -

(Transcript of handed down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)
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MR R BARRACLOUGH (Instructed by Max Barford & Co, Tunbridge Wells, Kent, TN1 1QU) appeared on behalf of the Appellant.

MR C COPYWRIGHT (Instructed by C M Sinclair-Jenkins, London ECJ 8JQ) appeared on behalf of the Respondent.
- - - - - -
J U D G M E N T
(As approved by the Court)
- - - - - -

JUDGMENT

LORD JUSTICE BELDAM: The question for the court in this appeal is whether an injury sustained by the passenger in a car in a multi-storey public car park was caused by or arose out of the use of the vehicle on a road .

On the 21st July 1991 the appellant was injured whilst sitting in the front passenger seat of a Volvo motor car parked in a car parking space in the Great Hall multi-storey car park, Mount Pleasant Road, Tunbridge Wells. The car was owned by the plaintiff's friend Mr Pennial who had left an aerosol can of lighter fuel in the rear of the car behind the front seats. The can had leaked creating an inflammable gas in the car. After returning to the car and before driving off, Mr Pennial lit a cigarette and as he did so he ignited the gas causing a fire. The plaintiff was burnt and claimed damages from Mr Pennial who was entitled to the benefit of a motor insurance policy issued by the respondent, Eagle Star Insurance Co. Ltd. If Mr Pennial had reported the accident and complied with the terms of the policy, the respondent would have indemnified him and would no doubt have taken over conduct of the plaintiff's claim. But Mr Pennial did not do so and on 28th April 1992 the appellant's solicitor gave the respondent notice under sec. 149 of the Road Traffic Act 1988 that he was about to issue proceedings against their insured, Mr Pennial.

On 5th May 1992 the appellant issued proceedings claiming damages for the injuries he had received alleging they were due to the negligence of Mr Pennial in leaving the lighter fuel container in the motor car in circumstances in which it could be caused to give off inflammable gas. Judgment in default was obtained by the appellant on 10th December 1992 and on 29th October His Hon. Judge Hargrove QC assessed the appellant's damages at £8,547.33, including interest. He gave judgment for that sum and for costs which were subsequently taxed in the sum of £4,105.86. The appellant took proceedings to make Mr Pennial bankrupt at an additional cost of £1,139.05. He claimed a total of £15,575.54 from the respondent insurers.

The respondent conceded that the accident and the appellant's consequent injury arose out of the use of Mr Pennial's car but contended that the car was not at the time of the accident being used on a road

as defined in sec. 192 of the Road Traffic Act 1988.

The action was tried by Deputy Judge Kee in the Tunbridge Wells County Court on 21st September 1995. He dismissed the plaintiff's claim holding that the accident had not occurred on a road. He rejected a submission by the respondent that, even if some part of the car park over which cars travelled could be regarded as a road, the parking bays could not. They were analogous to a lay-by which was to be considered as part of a road. He thought that the car park had to be looked at as a whole and held "this multi-storey car park is not a road..." He relied principally on "the criterion laid down by Kilner-Brown J. in the Oxford v Austin case"

The appellant contends that the judge ought to have found that the car park was a road; the respondent by cross notice argued that even if some part of the car park was held to be a road the car parking space ought not to be regarded as part of the road.

The appellant's right to recover the amount of his judgment directly from the respondent results from the duty of an insurer under sec. 151 of the Road Traffic Act 1988 to satisfy a judgment obtained against a person insured for third party risks in respect of a liability required to be covered by a policy of insurance under sec. 145 of the Act.

Sec. 145(3)(a) requires that such a policy -

"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 in Great Britain ..."

Thus the respondent argues that, unless the insured was using his vehicle on a "road", it is not bound to meet the judgment. If the parking place where the vehicle was stationed at the time of the accident was not within the definition of "road" in sec. 192 of the Act, the insured's liability was not a liability required to be insured under sec. 145(3)(a) of the Act.

Sec. 192 of the Act provides:

""road", in relation to England and Wales means any highway and any other road to which the public has access."

As might be expected in a Road Traffic Act, the word "road" occurs many times. It appears in sections creating offences, sections imposing duties on drivers and sections providing for traffic regulation in general. The definition provided in sec. 192 has thus to do duty in many different circumstances. It is not surprising therefore to find decisions, particularly on cases stated for the opinion of the Divisional Court, in which that court refers in particular instances to the decision being one of fact for the justices and thus whether there was evidence upon which the justices could reach the decision called in question. When however the facts are determined or are not in dispute, the question whether they support the conclusion that the place in question is or is not "a road" within the definition in the Act is a question of law.

The definition is clearly intended to include roads which are not highways but to exclude roads to which the public do not have access. There are therefore two separate questions:

(i) Is the place in question a road?

(ii) If it is a road, do the public have access to it?

Many of the reported cases concern the second question and in particular what type of access by the public is necessary. In deciding that question, Lord Widgery in Cox v White [1976] RTR 248 at page 251 gave this advice:

"I would invite the justices next time, and other justices charged with this same question, to look at the very brief statement of Lord Sands in Harrison v Hill [1932] JC 13, 17 ... Lord Sands said:

In my view, any road may be regarded as a road to which the public have access upon which members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of prohibition express or implied.

I think that in 99 cases out of 100 that direction is all the justices need to decide whether a road is a "road" for current purposes."

The present case requires the court to focus on the first question, whether the car park or any part of it can be considered a road having regard to its layout, its physical characteristics and the type of use made of it. In some of the cases it appears to have been assumed that the car park is capable of being a road if members of the public have access to it for the purpose of passing across it or if it is possible to use it as a means of access from one road to another but, unless the evidence shows those characteristics, it is not a road within the definition. In my view these are relevant but not determinative attributes.

The public have access to the Great Hall multi-storey car park for the purpose of leaving their cars on payment of a parking fee and it is conceded that, if the car park or any part of it can be considered "a road", it is a road to which the public have access.

The physical characteristics of the car park are clearly shown in photographs and plans put before us. Briefly described, it is a conventional multi-storey car park of the kind provided for off-street parking in many towns. It is laid out on six floors, though only four are used by the public for parking. Access is gained to the car park by an entrance leading from Mount Pleasant Avenue. On entering the car park, traffic is directed by a standard road sign to give way to traffic emerging. A carriageway three metres wide is provided for a distance of some thirty metres between rows of parking spaces, leading to ramps which give access to the floor above or the floor beneath. There is an exit on each side of the car park and pedestrians can cross from one side of the car park to the other to visit an arcade of shops and offices fronting on Mount Pleasant Road. Road signs and carriageway markings direct cars entering and driving within the car park. Drivers follow the carriageway until an empty space is available. A complete circuit of one level of the car park is about 80 metres so that the total distance marked off for and used by cars driving from the entrance to the fourth floor is approximately 320 metres. As the photographs show, carriageway markings including white direction arrows, give way lines and "slow" signs are painted on the surface to regulate the behaviour of traffic.

On a typical floor there are 36 car parking spaces between the areas marked out for the passage of vehicles and a further 20 on each side of the areas.

Because of the vast increase in the use by the public of motor vehicles, the size of car parks generally has greatly increased. Many super-stores and shopping centres provide very large areas for car parking

which are laid out on a similar plan. When in the open air they are frequently landscaped and the areas on which drivers are expected to drive are often bounded by kerbs giving the access ways an appearance more readily recognised as a conventional road. On entering from the public highway, a driver may not even pause to take a ticket, but drives directly to an unoccupied space.

The origin of the definition of "road" in sec. 192 of the Road Traffic Act 1988 can be traced to the Motor Car Act of 1903, an Act introduced for the protection of the public. Sec. 1 created the offences of driving a motor car on a public highway recklessly, negligently or at a speed or manner which was dangerous to the public. It further required a person driving a motor car to stop and give his name and address if an accident occurred to any person owing to the presence of a motor car on the road.

Sec. 20 of the Act provided:

"The provisions of this Act and of the principal Act shall apply in the case of a roadway to which the public are granted access, in the same manner as they apply in the case of a public highway."

A more comprehensive Act for the protection of the public was the Road Traffic Act 1930 which, as its long title proclaims, was:

"An Act to make provision for the regulation of traffic on roads and of motor vehicles and otherwise with respect to roads and vehicles thereon to make provision for the protection of third parties against risks arising out of the use of motor vehicles."

It is to be noticed that sec. 14 of that Act created an offence of driving a motor vehicle on common land, moor land or other land of whatsoever description (not being land forming part of a road) or any road being a bridleway or footway, though it was not an offence to drive a vehicle on land within 15 yards of a road provided it could lawfully be driven on the road and was driven on the land only for the purpose of parking the vehicle.

I should also refer to sec. 15 which, in creating the offence of driving or attempting to drive or being in charge of a motor vehicle under the influence of drink or drugs, did not confine the offence to a road. The offence could be committed on a road or other public place.

Part II of the Act made provision for compulsory third party insurance. Sec. 36(1)(b) was the precursor of sec. 145(3)(a) of the 1988 Act. Sec. 121 defined "road" to mean:

"... any highway and any other road to which the public has access, and includes bridges over which a road passes ..."

a definition which has been carried down in successive Road Traffic Acts and into sec. 192 of the 1988 Act. The draughtsman, by adopting this definition, obviously intended to combine in one definition the highway in sec. 1, the road in sec. 6 and the roadway in sec. 20 of the Act of 1903. In my view "roadway" denotes any way used for the passage of vehicles and I would so interpret the word "road" in sec. 192.

The terms of the other sections referred to make it clear that the draughtsman regarded bridleways and roadways as "roads" but also that cars might be driven or left on other places used by the public which were not roads.

The origin of the provision in sec. 151 of the Act of 1988 requiring an insurer to meet a judgment obtained in respect of a compulsorily insurable risk was sec. 10 of the Road Traffic Act of 1934 passed when it had become clear that such a measure was necessary in certain circumstances to secure that the victims of accidents actually received the compensation awarded to them. Taken in the context of the legislation as a whole, I consider that the definition in sec. 192 should be given a meaning consistent with the intention to protect the public and to secure compensation for third parties injured or caused damage by the use of motor vehicles. I would give the definition a broad rather than a confined meaning to achieve the declared aim of the statute.

We were referred to a number of cases bearing on the question whether a vehicle used in a car park was being used on a road; I need only refer briefly to four.

In Harrison v Hill [1932] JC 13 the appellant had been convicted of driving while disqualified. He had been driving a motor vehicle on a road leading from a public highway to an adjoining farm in Scotland. The question for the court was whether that road came within the definition of "road" in sec. 121 of the Road Traffic Act 1930. Lord Clyde said:

"It is plain from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may therefore be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public "has access" to it."

After considering what was meant by "access" to the road, Lord Clyde said:

"There must be, as a matter of fact, walking or driving by the public on the road and such walking or driving must be lawfully performed ...

In arriving at these conclusions I am partly influenced by the broad consideration that, as the statute is intended for the protection of the public, it is natural to suppose that the statutory traffic regulations should apply to any road on which the public may be expected to be found. Hence the inclusion of such private roads as the public (generally) is, as a matter of fact, allowed to use, and the exclusion of those which the public (generally) cannot lawfully use at all."

In Bugge v Taylor [1941] 1 KB 198, Lord Caldecott C.J. quoting from Lord Clyde's judgment said that there was plenty of material on which justices could come to the conclusion that the forecourt of a hotel, the private property of the owners but which was open to the highway at each end and which the public used, was a road to which the public had access. In Griffin v Squires [1958] 1 WLR 1106 Lord Parker reached a different conclusion in relation to a car park used by members of a bowling club and allotment holders as part of a footpath and as a means of access because the public generally did not habitually use the car park for that purpose. But additionally, in considering whether the car park to which the public generally had access and which they habitually used was a road, he said that something else must as a matter of common sense and ordinary meaning be proved for the car park to be a road and he said:

"I think it was a matter for the magistrates to decide as a matter of fact whether this car park in the

ordinary sense could be treated as a road. It seems to me there must be a limitation of that sort, otherwise any place to which the general public have access could be said to be a road within the definition. I think there was evidence on which the magistrates could come to that conclusion."

Streatfield J. in his judgment sought for the "something else" as a matter of common sense and ordinary meaning. He said:

"If the definition of the word "road" was in line with that in the Oxford Dictionary and described as a line of communication, I should have no doubt at all, because whatever may be the position with regard to the private footpath leading from this public car park towards the bowling green and the allotments, as to which I think the magistrates were quite right, I have no doubt whatever that a public car park adjoining a public highway, there being two entrances from the highway on to the car park, is in fact a line of communication from either entrance to and from any point in that car park. If that was the sole test I should undoubtedly come to the conclusion myself that the magistrates were wrong ..."

Referring to the words in sec. 121 of the Act of 1930, he said:

"Although a car park is, in my opinion, a line of communication, I do not think anybody in the ordinary acceptance of the word "road" would think of a car park as a road, and if we were to hold that this was a road it would also be a road if it was a piece of waste land by the side of the road to which the public could resort for picnics, and nobody would call that a road either."

Finally he drew attention to the distinction drawn in sec. 15 of the Act by the addition of the words:

"or other public place."

In Oxford v Austin [1981] RTR 416, the Divisional Court again had to consider whether a car park was capable of being a road. The accused had left his uninsured motor vehicle which had no MOT test certificate in a car park with car parking spaces marked by white lines and was charged with unlawful use of the vehicle on a road. The justices dismissed the information and the prosecutor appealed. Kilner-Brown J. delivered a judgment with which Donaldson L.J. agreed. In the course of his judgment he said of the decision in Griffin v Squires (supra):

"That case is sometimes cited as being an authority for saying that a car park cannot be a road. In point of fact the only observation to that effect, at page 1109, is plainly one which is obiter by Streatfield J. and does not appear anywhere in the leading judgment of Lord Parker C.J. In any event I would respectfully suggest that it is not correct to say that a car park cannot be a road. There must be many cases, and this case probably is such a case, where there is obviously a definable way over which vehicles may pass which in plain common sense qualifies as a road.

That leads me to say that in all these cases there is a well established process which is founded on findings of fact. The first question which has to be asked is whether there is in fact in the ordinary understanding of the word a road, that is to say, whether or not there is a definable way between two points over which vehicles could pass. The second question is whether or not the public, or a section of the public, has access to that which has the appearance of a definable way.

If both questions can be answered affirmatively, then there is a road for the purposes of various Road Traffic Acts and Regulations ..."

Later he said:

"I would simply conclude by saying that in every case where there is a car park it is for the justices to decide as a question of fact along the lines of all the authorities whether it is a road or not, and then they have to go on and consider the second limb, which is whether or not the public has access."

As the justices had apparently misdirected themselves, the case was remitted to them for reconsideration.

These observations were stated by the judge in the present case to provide the criterion on which he principally relied. He considered that the crucial question whether the car park was a road depended on whether or not there was a definable way between two points over which vehicles could pass.

He also referred to two cases decided in the County Court, Evans v Lawson and Motor Insurers Bureau decided by His Hon. Judge Morgan in May 1993 and Cragg v McGuire and the Motor Insurers Bureau decided by His Hon. Judge Chalkley in 1992. In the former case, Judge Morgan considered that for a car park to be a road there must be some feature about it which enabled traffic to use it as a way of communication or a through road. He drew a distinction between the facts in Oxford v Austin and the car park which figured in the case of The Queen v Waterfield [1963] 48 CAR 42 in which parking places were marked out in the market place at King's Lynn and which the Court of Criminal Appeal held a jury were entitled to find was a road. In the second case Judge Chalkley also considered that a road needed some sort of defined way from one defined point to another defined point. Because there was no evidence that vehicles traversed the car park by any defined route to go anywhere except to get into the car park or out of it and there was only one entrance/exit, he said it would be stretching the English language beyond measure to say that the car park was a road; it was a car park.

It seems to me that in these judgments and the judgment in the present case, too great an emphasis was placed on seeking to answer the question: "Is the car park a road?" I consider the question would more correctly be posed by asking: "Is there within the car park a roadway?" In the present case, I think that there is within the Great Hall car park a roadway, i.e. a way marked out for the passage of vehicles controlled by conventional traffic signs and markings and regularly used by members of the public seeking a car parking space. The risk of accidents causing injury arising out of the use of cars on this roadway is scarcely less than on any other road. Members of the public, whether driving vehicles or leaving and returning on foot to them, or merely walking through the car park could as easily be injured as in many of the open air car parks I have mentioned. There are moreover many other situations in which cars may be driven on defined routes over open spaces or land when attending sporting events or other entertainment.

The fact that the car is being driven to or from a parking space as opposed to using the way through the field or area in question as a route from one road to another, ought not in my opinion to decide whether or not an injured person is paid the compensation for which he has obtained judgment. Nor, for example, ought it to decide whether, if an accident occurs, a driver is under a duty to produce his insurance details and to give his name and address.

Finally I would refer to two additional matters discussed in argument. Amendments were introduced into the Road Traffic Act 1988 by the Road Traffic Act 1991. Since it was created by sec. 15 of the

Road Traffic Act 1930, the offence of driving or being in charge of a motor vehicle under the influence of drink or drugs can be committed not only on a road but "in any other public place". It was argued that this provision was necessary to promote the safety of persons in public places other than roads of which a clear example would be a car park attached to a public house or hotel.

The Road Traffic Act 1991 amended the Road Traffic Act 1988 so that the offences contained in secs. 1, 2 3 and 3(a) of that Act can similarly be committed on a road or other public place. These extensions, introduced as a result of widespread concern about the scope of the Road Traffic Act offences, were part of the recommendations of the Road Traffic Law Review set up on 31st January 1985 under the chairmanship of Doctor Peter North. In chapter 8 of its report the Review considered whether bad driving offences should be limited to conduct on a road. In paragraph 8.2 the Review pointed out that there was a difference in the definition of road between England and Wales on the one hand and Scotland on the other and said:

""In England and Wales it does not include, for example, driving in a car park, on a garage forecourt or on a private square. In other words, there is a range of public places, to which drivers may have access with their vehicles, which fall outside the scope of these bad driving offences."

In para. 8.6 the Review recorded the opinion of the Director of Public Prosecutions that the definition of "road" (then in sec. 196 of the Road Traffic Act 1972) was both unclear and too narrow and that it was essential that the definition of "road" should be repealed and replaced by words which included unmade-up roads, private roads, car parks and parks adjacent to public houses.

These statements from so distinguished a review panel might lend support to a suggestion that the definition of "road" in sec. 192 of the 1988 Act could not include a car park of any kind. But, as I have attempted to show, that is not the construction hitherto put upon the definition in sec. 192.

A further argument against construing the words of sec. 192 to include a roadway within a car park was noticed in sec. 32 of the Road Traffic Regulation Act 1984 which makes provision for off-street parking and parking on roads without payment. By this section local authorities are given power to provide off-street parking places and to authorise the use as a parking place of any part of a road within their area. By sec. 142 "road" in this Act is defined in England and Wales to mean:

"Any length of highway or any other road to which the public has access ..."

And "street parking place" and "off-street parking place" refer respectively to parking places on land which does, and on land which does not, form part of a road.

Where the local authority lays out an area as an off-street parking place and makes provision for roadways within the area defined, I can see no basis for regarding them differently from any other roadway created on land, for example by a developer, to which the public are subsequently granted access. There is no reason why such roadways cannot become roads for the purposes of the Road Traffic Act.

Where vehicles drive regularly over and into parking spaces from a roadway, the area of the parking space is in my view to be regarded an integral part of the roadway. The spaces are provided to be driven into; I do not regard it as significant that vehicles are only "driven" in such spaces for a short distance as they are coming to rest or reversing from them.

For these reasons I would hold that the areas in the Great Hall car park in Tunbridge Wells marked out for the passage and parking of vehicles were within the definition of "road" in sec. 192. The injury sustained by the appellant was one which arose out of the use of a motor vehicle on a road and the respondent is bound under sec. 151 to meet the judgment. I would allow the appeal and dismiss the cross-appeal.

LORD JUSTICE MORRITT: I agree.

SIR JOHN BALCOMBE: I also agree.

Order: Appeal allowed with costs here and below. Judgment for plaintiff in the sum of £16,714.59 together with interest of £1,566.48 making a total of £18,281.7. Leave to appeal to House of Lords refused.
