Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

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Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- The validity of a voidable motor insurance certificate
- Psychiatric injury in a secondary victim
- Remote hearings and 'fairness'

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Motor Insurance - Voidable Policy

The Queen (on the application of Astrid Linse) v The Chief Constable of North Wales Police (2020) EWHC 1288 (Admin)

The essential issue in this judicial review claim was whether a certificate of motor insurance which might be avoided for non-disclosure was nevertheless a "valid" certificate of insurance within the meaning of the Road Traffic Act 1988 (Retention and Disposal of Seized Motor Vehicles) Regulations 2005 (the Regulations).

An officer of the North Wales Police's Road Policing Unit (RPU), decided that it was not, and consequently did not permit the claimant to remove her vehicle from custody. The vehicle had been seized on an earlier date on the grounds that police officers believed that it was not insured.

The claimant (a German national) issued this claim challenging that decision. In the detailed statement of grounds, she said that the vehicle was a mobile home and was the only accommodation of herself and her husband. She also said that she produced a valid certificate of insurance and the vehicle should have been released to her.

When the police would not accept a certificate provided by a German insurer, the claimant applied to add the vehicle to an existing insurance policy with the insurer who insured a car owned by her husband. The vehicle was added to that policy and a new schedule added to show the alteration and a new certificate issued. The claimant forwarded a copy to the RPU. On 22 December 2019, a sergeant in the RPU advised all relevant parties that the new insurance was valid, and that if the claimant took that insurance document to a police station, the document would be stamped and she could go and collect the vehicle.

However, the original police officer caused further enquiries to be made with the insurer, as a result of which the police became aware that the claimant had driving convictions on a UK licence created for the purpose of recording the endorsements, and from conversations he had with an employee of the insurer it was clear that the claimant had not revealed a number of facts. These included the convictions, that the vehicle was not registered, that the purpose of obtaining the new insurance was to secure the release of the vehicle after it had been seized, that the vehicle was her home, and that she and her husband were being prosecuted for driving without insurance.

Subsequently, by letter dated 12 May 2020, the insurer voided the policy from inception.

This judgment focused on the police officer's decision-making process in refusing to accept the insurance certificate as a valid certificate of insurance for the vehicle, because of his conclusion at that time that the non-disclosure "invalidated" the insurance policy.

Having cited the relevant regulations and law, the Deputy High Court Judge held that in the specific instance of motor vehicle insurance, the editors of MacGillivray on Insurance Law 14th edition at paragraph 31-008 referred to provisions of the Road Traffic Act 1988:

"When a policy is voidable, for instance on account of misrepresentation, it remains "in force" for the purposes of S143 unless and until the insurer takes steps to avoid the policy as provided in S152."

The defendant accepted in the end that the policy in question was voidable and was not avoided until the insurer wrote the letter dated 12 May 2020. However, he submitted that the officers were entitled to take the view that that would be the likely position and were vindicated in their decision by that letter, which made it clear that the policy was treated as having never existed.

'At the time the certificate was presented to the RPU it was a valid certificate'

The judge rejected this submission. The policy remained in force until 12 May. At the time the certificate was presented to the RPU it was a valid certificate. The officers who took into account that the insurer might have grounds to avoid the policy, took into account immaterial matters.

The decision of the police officer that the new certificate of insurance was invalidated when presented in December 2019 was quashed. It followed that the claimant should have been permitted to recover the vehicle from custody.

As the police had already disposed of the vehicle, the matter was to be relisted for an assessment of damages hearing.

The claimant appeared in person

The defendant was represented by Legal Services, North Wales Police

Comment

This case confirms the basic principle that non-disclosure or misrepresentation makes a contract voidable, not void, so that the aggrieved party has an election whether or not to avoid the contract. Until that election is made, the contract remains valid.

Psychiatric injury - Secondary victim

Paul and another (minors) v The Royal Wolverhampton NHS Trust (2020) EWHC 1415 (QB)

In Insight 135, we reported the decision of a Master striking out these claims.

The claimants claimed damages as 'secondary victims' for psychiatric injury caused by witnessing the death of their father, which allegedly resulted from failure in his care by the defendant. The particular event cited was a fall. The relevant sequence of events was:

a. One claimant (age nine) had had a minor argument with her father shortly before he died, so she was walking slightly in front of him. The other claimant (12) was walking slightly behind.

b. The deceased said he felt ill.

c. The claimant who was in front turned and saw her father lean against the wall momentarily and then his eyes roll back.

d. Both girls saw him fall backwards and his head hit the floor.

e. The girls were alone with their father who was unconscious or dead in the street. They were so distressed and frightened they had difficulty calling for help.

f. Eventually a woman responded to their shouts and called an ambulance.

g. The girls contacted their mother. They were so distressed that the younger girl managed to call her mother but could not be understood. The 12-year-old broke the news to her mother that her father had collapsed.

h. Both girls saw a man holding their father's head as he lay on the floor and there was blood on the man's hands from the injury sustained when the deceased's head hit the ground.

i. The girls were taken into a nearby church for a short time because of what they had been witnessing. Whilst they were there their mother arrived and they heard her screams, screaming their father's name.

j. The girls went back outside and saw their father under a foil blanket receiving chest compressions from paramedics. There was a crowd of people there including the police. They were then taken away to a relative's house.

k. The timings are: the ambulance arrived at 15.57 and left the scene 30 minutes later at 16.28. The deceased arrived at hospital at 16.43 but further resuscitation was felt to be futile and he was declared dead at 16.51.

l. The children therefore witnessed their father's final event.

It was the claimants' case that the father's collapse was the first appreciable manifestation of the defendant's breach of duty (in other words the point at which the damage became evident).

The secondary victim claims were supported by reports from a consultant psychiatrist, who concluded that they each presented with symptoms of PTSD (ICD10 F43.1) caused by witnessing the events set out above.

After an extensive review of the law, the High Court Judge allowed the claimants' appeal.

A survey of the authorities indicated a degree of frustration about the lack of coherent principle underlying the law governing claims for psychiatric damage suffered by secondary victims. It seemed that there were only two coherent positions for the law to take: allow secondary victim claims for psychiatric damage generally (subject only to foreseeability) or disallow them generally. But coherence was not the only desideratum.

Another was the need to ensure that developments in the common law should be incremental. There was nothing, however, to inhibit the courts from aiming for maximal coherence in the principles which governed the circumstances in which the existing control mechanisms would be satisfied. In doing so, they were bound by the rules of precedent, but were otherwise unconstrained.

'…there was no dispute that, if the deceased's collapse from a heart attack was capable of being a relevant "event", each of the "control mechanisms" was satisfied on the facts pleaded…'

In this case, there was no dispute that, if the deceased's collapse from a heart attack was capable of being a relevant "event", each of the "control mechanisms" was satisfied on the facts pleaded: there was a parental relationship between the claimants and the primary victim; the injury for which damages were claimed arose from a sudden and unexpected shock to the claimants' nervous systems; the claimants were personally present at the scene; the injury suffered arose from witnessing the death of the primary victim; and there was a close temporal connection between the event and the claimants' perception of it, combined with a close relationship of affection between the claimants and the primary victim.

It followed from the foregoing analysis that the key question in the present case was whether the deceased's collapse from a heart attack, 14½ months after the allegedly negligent treatment, was capable of constituting a relevant "event".

The judge found that the ratio of Taylor v A. Novo (2014) was that, in a case where the defendant's negligence resulted in an "event" giving rise to injury in a primary victim, a secondary victim could claim for psychiatric injury only where it was caused by witnessing that event rather than any subsequent, discrete event which was the consequence of it, however sudden or shocking that subsequent event might be. Lord Dyson had reasoned that it would be undesirable to allow recovery in a case where "death had occurred months, and possibly years, after the accident". But this was a concern about delay between "the accident" (i.e. the event) and its later consequence. There was nothing to suggest that there would be any reason to deny recovery simply because the accident or event occurred months or years after the negligence which caused it.

Lord Dyson was careful to say that "accident" cases were "[a] paradigm example" of those in which a claimant could recover damages as a secondary victim and that "[i]n such a case" the relevant event was the accident, rather than a later consequence of it. This careful formulation seemed to allow for non-paradigm cases where there was no "accident", but some other kind of event. The passage in which Walters (2002) was distinguished appeared to recognise that an event which was external to the secondary victim, but internal

to the primary victim, could in principle qualify if it was sufficiently sudden and horrifying and led immediately or "seamlessly" to death or injury in the primary victim.

On this analysis, the Master was wrong to conclude that these claims were bound to fail on the facts pleaded. Here, unlike in Taylor v A. Novo, there was on the facts pleaded only one event: the deceased's collapse from a heart attack. On the facts pleaded, it was a sudden event, external to the secondary victims, and it led immediately or very rapidly to the deceased's death. The event would have been horrifying to any close family member who witnessed it, and especially so to children of 12 and 9. The fact that the event occurred 14 ½ months after the negligent omission which caused it did not, in and of itself, preclude liability. Nor did the fact that it was not an "accident" in the ordinary sense of the word, but rather an event internal to the primary victim. In a case where such an event was the first occasion on which damage was caused, and therefore the first occasion on which it could be said that the cause of action was complete, Taylor v A. Novo did not preclude liability.

This analysis was sufficient to demonstrate that this appeal must be allowed and the Master's order striking out these claims set aside. However, the claimants had argued that it was possible for the claims to succeed even if the negligent failure to diagnose had given rise to actionable damage prior to the deceased's collapse.

Taylor v A. Novo would preclude liability in the present case if there were a relevant "event" prior to the deceased's collapse, so that the latter could be said to be separate from it. In that case, the collapse would be merely the consequence of the event caused by the defendant's negligence and not the event itself. In Taylor v A. Novo, however, there was something that could properly be described as an "event" prior to that witnessed by the secondary victim. That event coincided with or immediately preceded the moment when actionable damage was first suffered by that claimant, which was also the moment when that damage became manifest. In the present case, there was nothing that could naturally be described as an "event" before the deceased's collapse, even on the assumption that some actionable damage was suffered before that date.

If it was necessary to identify a stopping point after which the consequences of a negligent act or omission could no longer qualify as an "event" giving rise to liability for psychiatric damage in a secondary victim, the most obvious candidate was the point when damage to the primary victim first becomes manifest or evident.

The principle in Taylor v A. Novo was no bar to recovery in this case if it was shown that the deceased's collapse from a heart attack was the first occasion on which the damage caused by the hospital's negligent failure to diagnose and treat his heart condition became manifest.

The claimants were represented by Shoosmiths LLP for the Appellants

The defendant was represented by Browne Jacobson LLP

Comment

The judge rejected the defendant's submission that this approach would open the floodgates to claims from secondary victims in an unacceptably large number of cases. He said that even though defendants were in principle liable to secondary parties for psychiatric damage caused by witnessing an event in the primary victim caused by clinical negligence, it would still be necessary to establish that the event in question was sudden, unexpected and shocking in the relevant sense. Moreover, even if there was a qualifying shocking event, it would remain necessary to show that it was that event, and not some later discrete consequence of it, that caused the psychiatric injury.

'Fairness' and remote hearings

SC (A minor) v University Hospital Southampton NHS Foundation Trust (2020) 1445 (QB)

One week before the trial of this clinical negligence action was due to take place by way of video technology (i.e. remotely), the defendant applied for an adjournment. This was on the basis that a remote trial would not be fair to the defendant's clinicians, who were subject to stringent criticism on behalf of the claimant. They would not be able to give their accounts "face to face with the communication possible between multiple parties" and it would not be possible for the legal representatives to take instructions from their clients, or discuss matters with the expert witnesses, in the course of evidence being given. It was also said that the defendant's leading counsel and witnesses did not have any experience of a virtual trial.

The claimant resisted the application on the basis that it had been made too late; this case had already been adjourned once; if it was adjourned now then it was likely to be some considerable time before it was heard; the costs that would be incurred would be disproportionate; a trial in a court room ought to be possible but that, if it was not possible, a virtual trial would be fair (albeit there would be significant practical difficulties).

The judge held that subject to the question of whether a hearing could fairly take place next week, the overriding objective militated against the grant of an adjournment. If the trial was adjourned, it was impossible to say when it could be relisted. The issue, therefore, was whether a remote hearing would be fair.

The hearing could be conducted remotely in a way that was fair. That did not mean that it should be conducted remotely.

There were many reasons why such a hearing, in this case, would be undesirable. These included that one of the clinicians whose treatment of the claimant was in issue considered that he would not be able to give as full and rounded and effective an account of his actions by video-link as he would in a face to face hearing. He was concerned that his ability to communicate with the defendant's legal team would be significantly impeded. His professional reputation, medical competence and, potentially, personal integrity were in issue.

Moreover, this was not an isolated or irrational response of a single witness on the eve of a contested trial. The Nuffield Family Justice Observatory (established by the Nuffield Foundation) had, at the request of the President of the Family Division, carried out extensive research into the use of remote hearings in the family courts during the Covid-19 pandemic. Some of the concerns identified arose in the particular

context of family proceedings, but many had more general application.

'…even though a hearing could fairly take place remotely, it should not do so in this case unless a court hearing was simply not possible'

For these reasons, even though a hearing could fairly take place remotely, it should not do so in this case unless a court hearing was simply not possible.

This led to consideration of whether the hearing could be conducted in court.

There was no legal prohibition on a hearing taking place in court. A court hearing did not infringe the restrictions on gatherings (subject to there being reasonable necessity for each participant to attend). Nor had it been argued that attending a hearing would give rise to a risk to the safety of the participants (save for the position of one witness who would, in any event, give evidence by video link).

That then left the question of the practicality of a court hearing next week. Some jury trials were now taking place in the Crown Court. If a jury trial could be conducted then it was difficult to see a practical impediment to a non-jury civil trial. Nobody had provided a convincing reason why a court hearing next week was not practicable and the court staff were confident that a hearing next week could be accommodated with appropriate social distancing measures.

The judge went on to make case management directions on the basis that the hearing would be conducted in court (including the timetabling of speeches and witnesses so as to reduce the number of people who have to be in court at any one time and thereby assist social distancing); and contingent directions in case it turned out that the hearing had to be conducted remotely. These included directions that sought to accommodate the many concerns that had been expressed by the defendant about the fairness of a remote hearing (so they included, for example, breaks between witnesses for the parties to give, or the lawyers to seek, instructions, breaks during the court day so as to limit the amount of continuous "screen time" for participants, and steps to ensure that all witnesses and legal representatives had easy access to the same, agreed, court bundle).

The claimant was represented by Hugh James Solicitors

The defendant was represented by DAC Beachcroft LLP

Comment

The risks of cases like this proceeding remotely, albeit as a last resort, should now diminish. At the same time as this judgment was handed down, the Courts' Service was announcing the reopening of a number of courts that would be able to operate with social distancing.

Useful links:

The Queen (on the application of Astrid Linse) v The Chief Constable of North Wales Police (2020) EWHC 1288 (Admin)

Paul and another (minors) v The Royal Wolverhampton NHS Trust (2020) EWHC 1415 (QB)

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