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:

- An indemnity costs order against claimants' solicitors
- The contributory negligence of a drunk passenger in a car

Malcom Henké
Partner & Head of LACIG

Solicitor to pay indemnity costs

Jovicic and others v The Serbian Orthodox Church (2020) EWHC 2229 (QB)

In this action, the claimants alleged that they had suffered abuse at the hands of the defendant. However, none of the claims had any connection with England and Wales and none of the events which were alleged to have given rise to those claims occurred in England and Wales.

The claim form in each of the six actions was issued on 8 January 2019. In each claim the defendant was named as the Serbian Orthodox Church. No application was made by the solicitors for permission to serve out of the jurisdiction. In the circumstances under CPR 7.5 valid service of the claim forms would have to take place on the defendant before midnight on 8 May 2019.

On 28 May 2019 the claimants' solicitor submitted six applications seeking an extension of time for service of the claim form on the basis that he had not been able to obtain the necessary medical evidence to append to the statements of claim. The application notices each had the box "without a hearing" ticked. As the application notices were seeking an order which was not being made by consent, they were referred to the Master, who directed they should be listed for a hearing.

After further procedural delays, applications by the defendant were eventually heard and resulted in orders pursuant to CPR 11.1(a) declaring that the court had no jurisdiction to try the claims and that the claim forms be set aside.

The Master had also made a declaration that any purported service of the claim forms within the jurisdiction was invalid and of no effect because it took place outside the permitted four-month period of time permitted by CPR 7.5 (1).
The Master ordered the claimants to pay the defendant's costs on the indemnity basis and made a direction under the provisions of CPR 46.8, PD 46 para 5 and S51 Senior Courts Act 1981 requiring the claimant's solicitors (by now a respondent to the action) to show cause why they should not pay the defendant's costs of the applications.

The Master reviewed the principles governing the making of a wasted costs order, including that when a wasted costs order was contemplated a three-stage test should be applied:

a) Had the legal representative of whom complaint was made acted improperly unreasonably or negligently?

b) If so, did such conduct cause the application to incur unnecessary costs?

c) If so, was it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

The Master found that the claimants' solicitor was aware from the outset that there was a potential issue as to jurisdiction and also concerning the identity of the defendant and service at the address of the London Parish. This was made clear to him in the responses to the letters of claim by both the London Parish and the solicitors instructed on its behalf.

'The solicitor's conduct…permitted of no reasonable explanation'

Against the background of correspondence between the parties and the procedural steps taken by the claimants' solicitor, the defendant's application to strike out the claims was always going to succeed unless the claimants' solicitor took some active steps to regularise the position before the strike out hearing.

This was not a mere negligent failure to serve the claim within the required period. The solicitor's conduct went way beyond that and continued down to the date of the strike out hearing. He could not have reasonably believed that he had done all that was necessary in this regard.

Having specifically asked the court to vacate a hearing of his application to extend time the onus was on him actively to progress the matter. The solicitor's conduct in failing to serve the claim forms within the required period and then taking no effective steps to attempt to remedy the position before the strike out application was heard permitted of no reasonable explanation. In the circumstances, in relation to this issue, the first stage of the test made out.

The relevant principles governing service of the proceedings and jurisdiction required a solicitor to have regard to the criteria set out in CPR 6 and PD 6B. These were essentially legal issues and it was inconceivable that the claimants would have anything useful to say on these issues. Indeed, such evidence as there was suggested that the claimants' solicitors were given power of attorney by at least one client to conduct the proceedings as they saw fit.

In the circumstances, making full allowance for anything that might have been said to the claimants' solicitors by their clients or in advices from counsel it was wholly unreasonable and negligent to issue these claims in this jurisdiction. The defendant's solicitors did all that was in their power to alert the claimants' solicitor to the correct jurisdictional position. However, he chose to proceed with a wholly unarguable position through to the hearing of the strike out application. In the circumstances the first stage of the test was also made out in relation to the issue of jurisdiction.

Did this unreasonable conduct cause the defendant to incur unnecessary costs? The answer to this question must be yes. The defendant incurred the costs of issuing the Part 11 application and attending the hearing.

Those costs would still have been incurred even if new proceedings had been issued. No extra costs were incurred because ~the court went on to determine the jurisdictional issues; those costs had to be incurred in any event. All costs incurred

after 27 December 2018 when the defendant instructed solicitors were caused by the negligent and unreasonable conduct of the claimants' solicitors.

Having regard to the above was it just in all the circumstances to order the claimants' solicitors to compensate the defendant for the whole or part of the relevant costs? The defendant had been forced to come to this jurisdiction to deal with issues which no responsible solicitor could have continued to pursue.

This was not a situation where the qualified one-way costs ("QOCS") provisions were relevant. They only applied to a claimant and did not operate to protect a legal representative. It was clear that the defendant had no realistic prospect of recovering its costs from any other party.

In the circumstances, this was a clear and obvious case, where it was just in all the circumstances for the claimants' solicitors to pay the entirety of the costs incurred by the defendant on the indemnity basis from 27 December 2018.

The claimants' solicitors/respondents represented themselves

The defendant was represented by DWF Law LLP

Comment

Decisions of this nature are relatively rare, but this judgment is a useful reminder of the factors that a judge must take into account before making a solicitor personally liable for other side's costs.

RTA: Passenger contributory negligence

Campbell (Protected Party) v Advantage Insurance Company Limited (2020) EWHC 2210 (QB)

In the early hours of the morning, the claimant and one Aaron Brown were driven by Aaron's brother, Dean Brown, to a night club. The car was a three-door hatch back andall three had drank alcohol in a club. There came a time when the claimant, who was clearly drunk, was assisted out of the club by Aaron and Dean and placed in the front passenger seat of Dean's car. He leaned out of the car to be sick on the ground. Aaron and Dean returned to the club to continue drinking.

About an hour or so later, Aaron and Dean left the club, returned to the car and got into it. Aaron was in the rear off side passenger seat. The claimant was still in the front passenger seat. The car would not start. Aaron got out of the car to return to the club to find some jump leads. When he returned, the car had gone. At 3.53am the car drove headlong into an articulated lorry. Dean was killed outright. The claimant had somehow moved from the front passenger seat into the rear of the car. He survived the crash but sustained extremely serious injuries. He claimed damages for those injuries and other losses. Primary liability was admitted, subject to allegations of contributory negligence, namely:

(1) The claimant knowingly allowed himself to be driven by Dean, when knew or ought to have known he was not fit to drive by reason of his intoxicated state: Owens v Brimmell (1977);

(2) The claimant did not wear a seat belt: Froom v Butcher (1976).

(By the date of the trial, Aaron had taken his own life).

In making his findings of fact, the Deputy High Court Judge had regard to the entirety of the written and oral evidence before him (including that of two accident reconstruction experts), and such documents as were relied upon.

He found that it was more probable than not that when the claimant was first taken to the car, Aaron put the seat belt on him, to provide some degree of support for the claimant as he slept. When Aaron and Dean came back out of the club and Aaron got into the rear offside passenger seat, the claimant was still asleep or passed out and wearing a seatbelt.

Dean's car was driven head-on into an articulated lorry. The lorry was on its correct side of the road. It was probable that Dean had fallen asleep at the wheel, but it was not necessary to make a finding of fact on that issue. The closing speed of the two vehicles was between 99 mph and 114 mph.

Dean was killed instantly and the forensic toxicology report prepared for the Coroner showed that he had used cannabis at some time before his death. There was a high

concentration of Tetrahydrocannabinol-carboxylic acid, suggestive of "heavy and/or regular use". Alcohol was detected in the post-mortem blood sample at176mg/dl. The legal driving limit is 80mg/dl in "life blood".

Neither Dean nor the claimant were wearing seat belts at the moment of collision. The accident reconstruction experts agreed that the claimant was most probably lying across the rear seats at the time of the collision. The head and torso of the claimant appeared to have made contact with the rear of the driver's seat.

On the evidence, the judge considered it far more likely that it was Dean's idea to move the claimant from the front passenger seat to the rear of the car. Once Aaron returned and the car was started, all Aaron would have to do was get in the front passenger seat and the car could be driven away.

It seemed most likely that the claimant got into the nearside rear seat, but given that he slumped to his right side and he was unrestrained, there was always the possibility that when he was asleep there was some movement towards the offside, but whether that happened and if so to what extent it was not possible to determine.

Two issues arose as to the claimant's capacity:

(1) Did he have the capacity to consent to being moved into the back seat of the car?

(2) Did he have the capacity to consent to being driven by Dean?

Inexorably linked to the issue of capacity was the claimant's state of awareness generally and specifically his knowledge of Dean's level of intoxication.

The claimant's awareness of what Dean drank was limited to the time before he was helped from the club. After that, the evidence was that he was asleep in the car. By the time the claimant was put into the front seat of the car, he had spent all evening with Dean and must have been aware that Dean had drunk a great deal of alcohol. The judge found that the claimant was awake when Dean began the process of moving him into the back of the car. The evidence of previous consumption of alcohol by the claimant was insufficient to displace the presumption of capacity to consent to moving position into the back of the car.

'…the claimant must have known he was moving from the front of the car to the back of the car, this move was only consistent with the claimant consenting to remaining in the car whilst it was driven away…'

If the claimant had capacity to consent to a change of position in the car, then he also had capacity to consent to being driven in the car. Having found that the claimant must have known he was moving from the front of the car to the back of the car, this move was only consistent with the claimant consenting to remaining in the car whilst it was driven away. If his intention had been to leave the car, before it was driven off, he would surely not have got into the back of it. The claimant was aware that Dean had consumed so much alcohol that his ability to drive safely was impaired.

Having consented to move from the front to the rear of the car, it was for the claimant to fasten his seat belt. If he was physically able to move from the front into the rear of the car, even with assistance, he was physically able to accomplish the fairly simple task of putting a seat belt on.

The factual enquiry on this issue concerned what effect the failure to wear a seat belt had on the nature and extent of the claimant's injuries. Having reviewed the expert evidence, the judge had no hesitation is finding that even if the claimant had been wearing a seat belt in the rear near side passenger seat, his head would have struck the front passenger seat. The key issue then was the effectiveness of seat belts in a collision involving forces of the magnitude present in this collision. There was no regulatory testing data dealing with collisions such as this one.

It had not been established that wearing a seat belt would have sufficiently slowed the decelerative effect so that the extent of the consequences of the inevitable diffuse axonal injury would have been diminished. It was not legitimate to extrapolate the

results from relatively low speed impacts in regulatory testing to conclude that in this particular accident wearing a seat belt would have made any significant difference at all to the consequences of the head injury sustained by the claimant. The evidence did not show that wearing a seat belt would have made a "considerable difference" such that the claimant's injuries would have been a "good deal less severe", per Froom v Butcher.

There must come a point where the wearing of a seat belt did not make any difference to outcome, and it was likely that such point was reached in this case.

As to the degree of contributory fault arising out of the alcohol issue, the claimant must have known how much alcohol Dean had drunk up to the point where the claimant was walked from the club to the car. Thereafter, he cannot have known how much more Dean had drunk. In those circumstances the contributory fault on the part of the claimant was less than that found to be appropriate in the two cases relied upon by the defendant (Meah v McCreamer (1985) and Stinton v Stinton and MIB (1993)). The appropriate degree of contributory fault on the part of the claimant was 20%.

The claimant was represented by Novum Law

The defendant was represented by Keoghs LLP

Comment

The onus was on the defendant to prove each allegation of contributory negligence, on the balance of probabilities.

However, when considering the claimant's capacity, the judge applied the presumption of capacity under the Mental Capacity Act 2005, which also had to be displaced on the balance of probabilities, if lack of capacity was to be established.

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