CASE NOTES

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Clare v Halton Taxis Limited (D1), Stephen Eric Bond (D2) and Gary Whelan (D3)

Civil Procedure: Application for specific disclosure of liability insurance policy. Hearings before District Judge Richmond on 4 November 2014 and District Judge Iyers on 18 February 2015, Manchester District Registry of the High Court of Justice.

The applications arose from a claim for personal injuries and loss brought on behalf of Mark Clare. On 8 April 2011, Mark was assaulted by D3, a taxi driver who had taken him home together with four other passengers. Immediately before the assault, witnesses described D3 as having referred to Mark's failure to contribute to the taxi fare. D3 punched Mark once to the head, causing him to fall backwards and crack his head on the pavement.

As a result, Mark suffered a severe traumatic brain injury. He commenced proceedings through his wife and litigation friend on 2 April 2014. Judgment in default was entered against D3, who was a man of straw.

The claim against D3's insurer was abandoned, taking into account the decision in *AXN and Others v Worboys* [2012] EWHC 1730 (QB). D1 was the private hire taxi company for whom D3 was working at the time of the incident. D2 was the sole director of D1. In the claim, Mark alleged that D1 and D2 were vicariously liable for the actions of D3.

Before proceedings were commenced, D1/D2 denied having insurance in respect of the incident, and were generally hostile and unco-operative. After proceedings had been commenced, the insurance position of D1 became more ambiguous.

In view of the uncertainty, the potential value of the claim (approximately £5m) and the £500,000 cap on the award available under the Criminal Injuries Compensation Authority scheme, the claimant made an application seeking an order that D2 provide, on his own behalf and on behalf of D1, a witness statement indicating whether or not either had insurance in respect of the incident.

First hearing before DJ Richmond

Here, the claimant submitted that the court had the power under CPR 3.1(2)(m) to require the defendant to provide a statement setting out its insurance position. Such statement was ordered in *XYZ v Various sub nom re PIP breast implant litigation* [2013] EWHC 3643. It was also noted that under what was then paragraph 3.6 of the personal injury pre-action protocol (PAP) (now paragraph 6.2), the defendant was required to identify any insurer. Accordingly, the statement requested went no further than what the defendant was required to do by the protocol.

It was also noted that shortly before the hearing, D1 and 2 had provided two emails from an insurance broker, together with an insurance proposal form, indicating that D1 did not have insurance in respect of the incident. In relation to this, it was noted that the insurance position of D2 remained unknown, and that D1 had given mixed signals - making the provision of a statement desirable. It was emphasised that the claimant was seeking only limited information in respect of the insurance position of the defendants, and did not seek a copy of the terms of the policy. The defendants' response focused on the decision in *XYZ v Various*, and in particular set out to persuade the court that the facts of that case were distinguishable from those present in this case.

Noting in particular the failure of the defendants to comply with the PAP, DJ Richmond ordered the provision of a witness statement setting out whether or not either defendant had insurance that

did or may provide indemnity in respect of the incident. The statement was also required to identify any such insurer.

D2 then provided a statement giving details of his and D1's insurance. The statement also referred to communications with insurance brokers and loss adjusters and copies of those communications, together with an insurance proposal form, were exhibited.

The claimant applied for disclosure of D1's insurance policy, on the basis that it was referred to in the statement, and so the claimant was entitled to see it pursuant to CPR 31.14 (1)(b).

Second hearing before DJ Iyers

Here, the claimant submitted that since the insurance policy had been referred to in the statement, he was *prima facie* entitled to inspect it - unless D1 could show good cause why he should not. It was submitted that the evidential burden was on the defendant to show a right to withhold inspection under either CPR 31.3 or CPR 31.19, pursuant to *Expandable Limited v Rubin* [2008] EWCA Civ 59.

It was also submitted that, by virtue of the fact that the document had been disclosed (in the sense of being referred to in the witness statement), it was to be taken as being relevant. Further, the claimant argued that, having deployed the insurance proposal form by exhibiting it to the statement in support of its position that it did not cover any liability in respect of the claim, and in doing so having accepted that the proposal form was relevant, the defendant could not be heard to argue to the contrary in relation to the policy terms. To accede to that submission would be to permit the defendant to cherry pick the material that it released, while withholding the best evidence on the issue.

It was also argued that, since the continuation of the litigation was heavily dependent on the claimant being satisfied as to D1's insurance position, the policy, far from being irrelevant, was of crucial importance to the just disposal of the action.

It was also contended that, in the event that the policy extended to cover the liability of D1 for the actions of D3, then that would, of itself, be consistent with a relationship analogous to employment. In those circumstances, the document would be covered by the duty of standard disclosure in any event.

It was also noted that the claimant sought an award of provisional damages against the risk of the development of uncontrolled epilepsy, and that the court would be required to consider the suitability of making an order for periodical payments at the time of approving any award of damages. Accordingly, the insurance position of D1 was a matter that would, on the claimant's case, fall for consideration in the proceedings in any event.

The defendant had indicated an intention to argue that the policy was confidential. In response to this, it was submitted that having disclosed the insurance proposal form, D1 could not be heard to claim confidentially in relation to the policy itself. It was also submitted that any legitimate concerns as to confidentiality could be met by an order requiring disclosure to legal representatives only.

It was also submitted that D1 had been forced to provide the statement because it had breached the PAP. It had also gone beyond what it had been ordered to do in the statement. The defendant was therefore the author of its own misfortune.

In response, the defendant argued that the application was a renewal of the previous application; that the proceedings were speculative; the application was designed to facilitate deep pocket speculative litigation; and that the statement provided by D2 did not go beyond what he had been ordered to do.

Reference was also made to the decisions in *XYZ v Various*, in which the court granted a very limited order in response to an attempt to obtain information about the defendant's insurance position in a multi-party personal injury action. The defendant also relied on the decision in *West London Pipe Line and Storage Limited and another v Total UK Limited and others* [2008] EWHC 1296, when the court refused to order the provision of information about a party's liability insurance cover under CPR Part 18.

In response to this, the claimant focused on the entitlement to inspect under CPR 31.14 (1) (b), which raised different issues to those considered in the decisions presented by the defendant. The claimant also referred to paragraph 31.14.1 of the White Book, where it is stated that 'a party may seek to obtain a specific reference to the document sufficient to lead to a right of inspection by making a request for further information.' It was therefore submitted that the claimant had simply deployed a legitimate litigation tactic, and the fact that the defendant had been seeking to comply with the court's order was irrelevant.

The district judge was not persuaded of the merits of the argument that the document requested was covered by standard disclosure. He was also not persuaded that disclosure should be granted because the court would have to look at the insurance position in any event, because of the obligation to consider PPOs. The application under CPR 31.14 was, however, considered to have merit. The district judge also considered that the interests of fairness, the fact that the document was relevant, and that the defendant could comply with the order easily and had failed to show any prejudice, all favoured granting the order. Since the policy was referred to in the witness statement, the

order was accordingly granted with costs.

Comment

The issue of insurers refusing indemnity is an increasingly common problem. In high-value personal injury litigation, being able to satisfy oneself as to the insurance position of a potential defendant brings huge benefits in terms of certainty and risk management.

There are conflicting authorities about how the court should approach requests for disclosure of information about the liability insurance position of a defendant. The most helpful decision is *Harcourt v FEF Griffin* [2007] EWHC 1500, where a defendant in a high-value personal injury action was ordered to provide information about the extent of its insurance cover under CPR Part 18. Doubt regarding this decision was expressed in *West London Pipe Line Storage Limited v Total UK Limited* [2008] EWHC 1296 (Comm), although it is submitted that different considerations will apply in a commercial dispute, where the court will not be asked to consider the ability of a defendant to meet an order for periodical payments when approving settlement.

Further doubt regarding the decision in *Harcourt* was expressed in *XYZ*, although in that case again, the court was not dealing with a situation where it would have to consider whether or not to make an order for periodical payments. It is submitted that where this feature is present, then the decision in *Harcourt* holds good.

Although the facts of the case that is the subject of this article are unusual, and both decisions are first instance, it nevertheless illustrates another method by which a party may seek to gain access to a defendant's liability insurance documents. There is no reported case of which the author is aware, in which the court has ordered a defendant to disclose its liability insurance policy prior to the entry of judgment. In the recent case of *Senior v Rock UK Adventure Centres Limited* [2015] EWHC 1447 (QB), an application for disclosure of an employer's liability insurance cover was successful in an unopposed application made after the entry of judgment.

Richard Edwards, solicitor-advocate of Potter Rees Dolan, Manchester, appeared on behalf of the claimant at both hearings.

Simon Earlam of Exchange Chambers instructed by Watsons Solicitors appeared for the defendant.

Case report submitted by Richard Edwards

Horton v The Police and Crime Commissioner for Derbyshire Police

Quantum: road traffic accident; soft tissue injury to neck, back, shoulders, bruising, travel anxiety.

Settlement on 26 May 2015

The 22-year-old claimant received a settlement of £7,000 for soft tissue and psychological injuries sustained during a road traffic collision at a traffic light controlled junction.

On 7 May 2014, the claimant was involved in an RTA when proceeding through a traffic light controlled junction on a green traffic light signal. The defendant's servant or agent exited from a nearside road, proceeding on a red traffic light signal. The defendant driver was a police officer driving in the course of his duty in an unmarked police vehicle, responding to an emergency call.

The claimant sustained injury and brought an action against the defendant alleging that he was negligent in failing to stop at the red light.

The defendant's insurers put forward an offer in respect of liability on a 60/40 basis in favour of the defendant, citing *Griffin v Mersey Regional Ambulance* [1997]. The offer

was rejected on the basis that the cases differed because, in this matter, the police vehicle was unmarked, and witnesses could not agree as to whether or not the vehicle was displaying lights and signals as it entered into the junction.

The claimant solicitor put forward a counter offer in respect of liability on a 75/25 basis in favour of the claimant, and this was accepted.

Injuries

The claimant sustained soft tissue injuries to her neck, back and shoulders with bruising to her legs and suffered from travel anxiety, avoiding travel. She undertook a course of physiotherapy and required a week off work.

The prognosis was that her neck, back and shoulder symptoms would return to their pre-accident condition within 13 to 15 months, and the anxiety within 11 to 17 months of the accident date. The bruising resolved within five to seven weeks of the accident.

Settlement: £7,000 total damages

General damages: pain, suffering and loss of amenity: £6,215.15

Special damages: £784.45 (policy excess £400, travel expenses £24.40, skills for life course £149.00, postal charges £6.40, mobile phone repairs £85, petrol £20, prescriptions £16.10, travel tickets £21.80, phone calls £62.15).

Jefferies Solicitors (Altrincham) instructed for the claimant

Travelers Insurance represented the defendant

Case note supplied by Joanne Waring of Jefferies