FORUM OF INSURANCE LAWYERS

Informing Progress - Shaping the Future

FOIL UPDATE 17th January 2022

Psychiatric claims by secondary victims, following clinical negligence affecting the primary victim

Paul and another v The Royal Wolverhampton NHS Trust (and related appeals) (2022) EWCA Civ 12

IN BRIEF

The Court of Appeal dismissed the claims of three secondary victims of psychiatric injury, who had witnessed the death of a close relative. In each case the death followed an act of clinical negligence by one of the defendants.

Three appeals raised the question of the circumstances in which a defendant to a clinical negligence claim could be held liable for psychiatric injury (or what used to be called nervous shock) caused to a close relative of the primary victim of that negligence. The basic facts in each of the cases were that the defendant was alleged to have failed to diagnose the primary victim's life-threatening condition. Sometime after that negligent omission, the primary victim suffered a traumatic death. In two of the cases the shocking death occurred in the presence of the close relatives, causing them psychiatric injury. In the other, the close relative came upon the primary victim immediately after her death, again causing her (the mother in that case) psychiatric injury. The question in each case was whether the necessary legal proximity existed between the defendant and the close relative (often referred to as the secondary victim).

The broad facts of each case were as follows:

Paul

Mr Paul suffered a heart attack and collapsed on 26 January 2014 when shopping with the second claimant (aged 12) and the third claimant (aged 9). His daughters saw him fall backwards and hit his head on the

floor. The second claimant was so distressed that her attempts to ring her mother and an ambulance failed. A member of the public called an ambulance. The third claimant contacted her mother but could not be understood due to her distress. Both claimants saw a man holding their father's head; there was blood on his hands. Their mother subsequently arrived. The second and third claimants heard their mother screaming their father's name. They saw the ambulance crew put a foil blanket over him. Paramedics were performing chest compressions. The ambulance arrived at 15.57. It left the scene at 16.28. Mr Paul was declared dead at hospital at 16.51. Mr Paul's heart attack was caused by ischemic coronary artery atherosclerosis.

Mr Paul suffered from type II diabetes and from complications of this condition. On 9 November 2012 he was admitted to New Cross Hospital in Wolverhampton complaining of chest and jaw pain which radiated to the left arm. He was treated for acute coronary symptoms and was discharged on 12 November 2012. It was the claimants' case that the defendant was negligent in failing to perform coronary angiography in November 2012 which would have revealed the coronary artery disease and which could have been successfully treated by coronary revascularisation.

As a result of the events on 26 January 2014, the second and third claimants sustained psychiatric injury.

Mr Justice Chamberlain held that Master Cook had been wrong to conclude that the claims were bound to fail.

Polmear

Esmee Polmear, aged 7, was seen by her GP on 19 August 2014 with a history of strange episodes during which she could not breathe, appeared pale and turned blue after a few minutes. On 10 September 2014, Esmee and the claimants returned to the GP because of worsening symptoms. Esmee was referred to a paediatrician at the hospital and was seen on 1 December 2014 in the presence of the claimants. As a result, from 21 to 22 January 2015 Esmee underwent ambulatory ECG monitoring, which revealed no episodes of shortness of breath. The reviewing paediatrician concluded that Esmee's symptoms were likely to be related to exertion and were physiological "with nothing to suggest an underlying abnormality of her cardiac rhythm". Esmee was seen again by her GP on 21 April 2015 accompanied by the second claimant. Esmee was re-referred to the paediatrician at the hospital but the referral did not take place due to her death on 1 July 2015, the cause of which was pulmonary veno-occlusive disease.

On 1 July 2015, Esmee was due to attend a school trip but did not feel well. It was agreed that the second claimant would meet Esmee at the beach to take her back to school if required. When he later went to the beach, Esmee was not present. The second claimant found Esmee with a teacher and another pupil. Esmee looked tired, pale and was breathless. Esmee wanted to sit down but was encouraged to try to walk. At one point she stopped and vomited. The first claimant joined them. The second claimant resumed the walk to the school but Esmee seemed frightened at the thought of walking and had to stop frequently, causing him to carry Esmee to the school. She was white and clammy with some blueness around her lips. At the door of the school, Esmee said that she felt faint. The second claimant reassured and comforted her. He walked away but received a call asking him to return. On doing so, he saw Esmee lying on the floor and a member of staff providing first aid. The second claimant took over and attempted to give Esmee mouth-to-mouth resuscitation. She was not breathing. The first claimant ran to the school and saw Esmee lying on the floor with members of staff attempting resuscitation which she could see was not working. Paramedics arrived

and attempted resuscitation, which was witnessed by both claimants. The claimants went with Esmee in an ambulance to hospital. Attempts to revive Esmee continued at the hospital but they were unsuccessful.

As a result of witnessing the collapse, unsuccessful attempts to resuscitate and the death of Esmee, the first claimant has developed post-traumatic stress disorder and major depression. The second claimant has developed post-traumatic stress disorder, and major depression with addictive behaviour.

The defendant admitted that Esmee's condition should have been diagnosed by mid-January 2015.

After Master Cook had been reversed by Chamberlain J in *Paul*. he said that the parties were agreed that the question on the strike out was whether the claimant parents had a reasonably arguable case that the relevant event required to satisfy the control mechanism of proximity was the collapse and death of the primary child victim, Esmee (5 or 7 months after the negligent failure to diagnose). He followed Chamberlain J and held that it was possible to identify a qualifying horrific event and that that horrific event did not have to coincide with or immediately precede the first actionable damage to the primary victim.

Purchase

Evelyn Purchase, aged 20, died on 7 April 2013. The cause of her death was extensive bilateral pneumonia with pulmonary abscesses.

On 28 January 2013, Evelyn visited her GP with acute sinusitis. In February Evelyn continued to feel unwell. She lost her appetite, resulting in weight loss. On 28 March 2013, Evelyn visited her GP and was prescribed medication for oral thrush and for a skin infection. She subsequently developed a cough and mouth ulcers. She lost her appetite and stopped eating. By 4 April 2013, Evelyn was weak and generally unwell. The claimant took Evelyn to the out-of-hours clinic where she was examined by the defendant. Evelyn had difficulty walking into the clinic as a result of weakness, dizziness and difficulty in breathing which was rapid, shallow and noisy. The diagnosis made was respiratory tract infection with pleuritic pain, oral thrush and "depressed". Antibiotics and an antidepressant were prescribed. Evelyn was advised to contact her own GP if the problems did not resolve.

Evelyn's condition remained the same, save by 6 April 2013 she complained of heart palpitations. That evening the claimant attended a pre-planned event in London with her younger daughter. She discussed staying at home, but Evelyn insisted she kept to her plans. Evelyn's father remained at home with her.

The claimant returned home at 4.50am on 7 April 2013. She found Evelyn lying motionless on her bed with the house telephone in her hand, staring at the ceiling not moving. Her skin was slightly warm, she looked alive but was not moving or blinking. The claimant felt stunned, panicked and began screaming. She was joined by her younger daughter and her ex-husband. All were screaming. The claimant attempted to call 999 but the phone would not work. The younger daughter called 999 and the family were advised to give Evelyn cardiopulmonary resuscitation. In attempting mouth-to-mouth resuscitation, the claimant opened Evelyn's mouth but this caused blood and bodily fluids to spill out of the mouth and nose. The claimant tipped Evelyn's body to one side and more fluid spilled out. Increasingly aware that her efforts would be in vain, the claimant attempted resuscitation until the arrival of paramedics. The paramedics' attempts at resuscitation were unsuccessful and the claimant was told that her daughter had died.

The claimant realised that she had a missed call from Evelyn on her mobile phone and a voice message. It was the sound of Evelyn's dying breaths which continued for four minutes and 37 seconds. This caused the claimant to run out of the house and stand screaming in the street. The call was timed at 4.40am, and concluded approximately five minutes before the claimant saw Evelyn.

The claimant has developed post-traumatic stress disorder, severe chronic anxiety and depression with continuing symptomatology. It is the claimant's case that Evelyn had severe pneumonia when seen by the defendant on 4 April 2013. It is alleged that there was a negligent failure to properly assess and treat Evelyn's symptoms.

The case was decided by a District Judge in favour of the defendant a month before Chamberlain J's decision. The DJ held that he was bound by *Novo (2013)*, which meant that the claim was doomed to fail.

Allowing the appeals in *Paul* and *Polmear*, and dismissing the appeal in *Purchase*, the Court of Appeal held that the five elements required to establish legal proximity in secondary victim cases applied as much to clinical negligence cases as they did to accident cases. The question of what was a relevant horrific event was not dependent either on the completion of the primary victim's cause of action for negligence or the first manifestation of injury to the primary victim. The primary victim's cause of action was not the critical thing; there might not always be one. For a secondary victim to be sufficiently proximate to claim for psychiatric injury against the defendant whose clinical negligence caused the primary victim injury, the horrific event could not be a separate event removed in time from the negligence. *Novo* was binding authority for the proposition that no claim could be brought in respect of psychiatric injury caused by a separate horrific event removed in time from the original negligence, accident or a first horrific event.

However, the Court of Appeal had reservations about whether *Novo* correctly interpreted the limitations on liability to secondary victims contained in the five elements emerging from the House of Lords authorities and subject to further argument has indicated that it was prepared to grant permission to the claimants to appeal to the Supreme Court, if sought, so that it could consider the important issues that arise in this case.

The full judgment may be found at: Paul & Ors v The Royal Wolverhampton NHS Trust [2022] EWCA Civ 12 (13 January 2022) (bailii.org)