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 recording of medical examinations
- A claimant switching from legal aid to a CFA
- An appeal against liability in a RTA claim

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Recording of medical examinations

MacDonald v Burton (2020) EWHC 906 (QB)

In this matter, the judge was asked to give case management directions in relation to discreet issues concerning proposed neuropsychological testing on behalf of the defendant and also to look generally at the question of recording of examinations by medical experts in general and neuropsychologists in particular.

The claimant had sustained serious injuries, including a traumatic brain injury which had led to neuropsychological deficits. On any view, the injuries were serious and the consequences were, to some extent or other, permanent. Liability was not in issue, subject to contributory negligence.

The claimant's solicitor had written to the defendant's solicitor indicating that the claimant/his mother had been advised to record his consultations with the defendant's medical experts as an aide memoire and to protect him against errors. The case of Mustard was cited in support of his stance.

The reference to the Mustard case was a reference to a claim in which it transpired that the tests carried out by the neuropsychologist instructed by the defendant may have been carried out otherwise than in accordance with the strict protocols laid down for neuropsychological testing with the consequence that the results obtained by that expert were invalidated or otherwise unreliable.

The claimant submitted that it would be useful for the court to make some general observations about the advantage of recordings because of the effective surveillance which they allowed of experts in medico-legal cases generally.

It was submitted that the recording of examinations would encourage experts to carry out their examinations properly, to adhere to the rules, and recordings provide an objective and irrefutable proof of what was both said and not said.

In relation to all experts except the defendant's neuropsychological expert, the parties had reached agreement that all examinations would be recorded. However, the defendant's neuropsychological expert was not prepared to have either his examination or his testing recorded. He and other neuropsychologists who had been approached by the defendant, were of the opinion that testing ought never to be recorded. The reasons for the expert's objection are set out in detail in the judgment.

Moreover, the claimant's neuropsychological expert had already assessed the claimant and his examination and testing were not recorded. Accordingly, the testing conditions if the defendant's expert's assessment were to be recorded would be different from the conditions administered by the claimant's expert and would cause further problems with interpretation.

The judge considered a number of articles and statements in support of the defendant's expert's position. There was evidence that the BPS, an organisation serving the interests of psychologists, had appointed a working party to review the guidance on the recording of neuropsychological assessments and the guidance was still under consideration.

The judge held that what Mustard demonstrated was that there was a tension between on the one hand the understandable desire on the part of competent neuropsychologists instructed to prepare reports to be allowed to conduct their tests and carry out their work without any form of recording so as to produce results which were standardised in relation to testing which was not intended to be recorded.

This enabled them to establish an appropriate rapport and relationship with the patient being tested and produce a report which was appropriate, valid, and useful for the court; and on the other hand, the right or ability of a claimant to challenge reports which were adverse and which might betray a lack of competence on behalf of the tester, a lack of competence which would not come to light were it not for the evidence of recording.

These problems and difficulties were best worked out through the joint working party between the Association of Personal Injury Lawyers representing claimant lawyers, and the Federation (sic) of Insurance Lawyers representing defendant lawyers who, as a result of the Mustard case, were working together to produce a protocol of guidance of some kind. Any such guidance or protocol for the courts should be informed by the best possible medical and clinical evidence.

The judge expressed the hope that those guidelines would recognise and reflect the competing interests of the parties. It would be disappointing if the guidelines merely stated that psychological examinations and testing should never be recorded because of the clear advantage forensically in the cases where recordings had shown the lack of competence of certain experts instructed in this field.

'…in relation to psychological testing there needed to be a level playing field; and that level playing field could not be achieved where the claimant had not recorded the examination and testing by his own expert'

However, in relation to psychological testing there needed to be a level playing field; and that level playing field could not be achieved where the claimant had not recorded the examination and testing by his own expert but where the examination and testing by the defendant's expert was so recorded. To compare the tests where one set of tests had been subjected to a recording and the other had not, would be to compare apples and pears as it were, in other words, tests which have been produced under different conditions.

It was important that the playing field should be as level as could be achieved in cases of this kind and that went for all experts, not just neuropsychological experts. Experts instructed on behalf of claimants were equally fallible and liable to produce results which were less than accurate, sometimes results which were

favourable to the claimant and again, defence experts might wish to be able to examine the process by which those results were obtained in order to see whether they are or are not valid.

In this particular case, the defendant's expert should be allowed to conduct his examination testing without any kind of recording. Should the claimant nevertheless covertly record his examination by this expert, the court would expect that to have serious consequences for his claim and his ability to recover damages in this case because to do so would be in direct conflict with and contrary to the both letter and spirit of this ruling.

A second issue was as to whether, where a claimant recorded an examination and/or testing by his own expert, the disclosure of the expert's report entailed a waiver of any privilege that might exist in the recording.

There could be no such privilege in a recording of an examination or testing by the other side's expert, on the basis that the recording could equally have been carried out by the defendant's expert or on behalf of the defendant. The recording would of course have been exactly the same and there would have been no question of any privilege attaching.

The waiver of privilege in relation to a medical examination of a claimant by his own medical expert when that report was disclosed to the other side, should and did entail waiver of all aspects of the examination by the medical expert. In the course of his report, the medical expert should state what he had been told by the claimant and thus there was a waiver of privilege in relation to those matters. A recording of the examination was simply a different aspect of the same waiver.

It enabled the parties to know whether the record in the report by the expert of what had been said was or was not accurate, but there was no confidentiality or privilege which should be allowed to survive extant from the disclosure of the medical report.

There might be different arguments in relation to such a document produced by a solicitor or solicitor's clerk whereby that would still enjoy the protection of legal professional privilege.

The judgment does not identify the firms of solicitors instructed.

Comment

It seems clear that the judiciary expects APIL and FOIL to resolve this issue but they in turn will need to hear from the professionals involved in carrying out examinations. Neuropsychological testing may be an area where recording will not be acceptable to that body of experts.

Switching from legal aid to a CFA

XDE (Protected Party) v North Middlesex University Hospital NHS Trust (2020) EWCA Civ 543

This was the second appeal following the decision by a Master, upheld on appeal to the High Court, to disallow on assessment certain "additional liabilities", namely the success fees of solicitors and counsel and the ATE insurance premium. These additional liabilities were claimed at £1,078,972.72 (out of a total bill of around £2.4m).

The appeal raised issues as to the reasonableness of the claimant/appellant's decision to change funding from legal aid (which would not have given rise to these liabilities) to a CFA (which had done) and, in particular, arguments as to the application of the decision of this court in Surrey v Barnet and Chase Farm Hospitals NHS Trust (2018).

The issues dealt with at this hearing were:

Issue 1: The broad equivalence identified in Surrey

Surrey was not limited to cases where the *Simmons v Castle* uplift applied. It was setting out an approach which started with the general equivalence of legal aid and CFA-lite (which was what was meant by the expression "level playing field"), before then going on to look at the individual circumstances. Surrey therefore was of general application in cases where the reasonableness of a decision to change funding was in issue, and of particular application where the change was from legal aid to a CFA.

Issue 2: The reasons for the change

The judgment in Surrey was predicated on the basis that the decision to change funding was a decision of the client, albeit advised by his or her solicitor. The court must look at the reasons that the client had for deciding to change funding, to see if they were reasonable in the particular circumstances of the case. That obviously involved the examination of the advice given by the solicitors because in most cases it would be that advice which informed the decision.

The authorities confirmed the principle that what mattered when considering reasonableness were the actual reasons for the incurring of the costs in question, and that where this involved a change in funding or a change in the firm instructed, the court

generally put out of account matters which were not part of the decision-making process.

'The actual reasons for the change were found to be the claimant's solicitors' unreasonable failure to limit their spending within the parameters imposed by the Legal Services Commission'

The practical common sense of that approach could be tied back to the facts of the present case. The actual reasons for the change were found to be the claimant's solicitors' unreasonable failure to limit their spending within the parameters imposed by the Legal Services Commission. This was part of a wider monitoring issue at the firm.

When they sought further funds, they did so in a way that was "half-hearted". They decided, without obtaining the instructions of the litigation friend, that they would move to a CFA-lite. The Master found that they had behaved unreasonably. That finding of fact was not appealed.

In addition, there was no evidence here that, had the claimant's litigation friend been advised about the features of CFA-lite in advance of any change, he would have chosen to discharge legal aid, which had been running for five years without any apparent problem, and switch to this new system. On that basis, the claimant had not discharged the necessary burden of proof: she had not shown on the facts that the change to CFA-lite was reasonable.

In one sense, that was the end of the appeal. However, the Court of Appeal went on to consider the remaining issues.

Issue 3: The alleged superiority of CFA-lite

The claimant's argument that CFA-lite was obviously superior to legal aid and that, because of that obvious superiority, it was unnecessary for the claimant to do any more to justify the change in funding, failed at every level.

First, although legal aid involved a deduction from any damages because of the statutory charge, whilst CFA-lite did not, unrecovered costs which might otherwise be deductible under the statutory charge were usually waived in cases involving children or protected parties.

Secondly, although legal aid only provided limited protection against adverse costs orders, the chances of a costs order being enforced against a severely brain-damaged woman with supportive expert evidence was properly regarded as fanciful.

Thirdly, whilst a claimant in a large clinical negligence case like this had to be very careful of a well-judged Part 36 offer, because of the costs risks if it was not accepted, a claimant funded through a CFA was, in reality, in much the same position. If that claimant was advised to take the offer but refused to do so, in all probability the funding (however provided) would cease.

A legally aided claimant would find the funding withdrawn; a claimant with ATE insurance would have to look at the small print, but might find himself/herself paid out to the limit of the insurance and left to continue themselves, or might find that their cover was terminated or withdrawn.

The only practical difference that might arise was when the claimant was advised to reject the offer and then failed to beat it at trial: then a legally aided claimant might be at risk of deductions whilst a claimant with a CFA would not be. But that would arise so rarely that it could not be a general reason to suggest that one system of funding was so obviously superior to the other.

Fourthly, arguments about the costs of interlocutory disputes were an entirely unrealistic factor, given that it was not a reason in the present case put forward for the change of funding.

Fifthly, although a claimant who only made a partial recovery of costs in their legal aid case would also see substantial deductions from damages because the unrecovered costs would be deducted and repaid to the legal aid agency, this was a multi-million-pound claim which was either going to succeed or fail. It was not a case in which a partial costs order was going to be made.

Furthermore, there was a positive advantage of legal aid which was particularly apposite in the present case. There was a measure of budgetary control imposed as a result of the legal aid arrangement which was a benefit to the claimant. It was ironic that, just as civil legal aid had ceased to be available for much of the work it used to fund, the sort of control of costs that used to be exercised by the LSC had now been introduced in a much wider range of civil cases, through the mechanism of cost-budgeting. Accordingly, the change in funding was not an obvious benefit because, "it freed the (claimant) from the LSC's financial control." Control of the costs being incurred was in everyone's interests, including those of the claimant.

Issue 4: Could a hypothetical reason ever trump the actual reasons for a change of funding?

In the light if the findings above, it was unnecessary for the Court of Appeal to give any sort of definitive answer to the question as to whether a hypothetical trump card could ever displace the actual reasons for the change in funding. However, the court took the view that whilst it would be wrong in principle to rule out entirely a factor that played no part in the decision-making process, an argument based upon such a factor faced two very high hurdles.

The first was the weight of the authorities which stressed again and again the importance of the actual reasons for the change in funding. The second was the unlikelihood of such a situation arising in practice; the more obvious the reason for a change in funding, the more likely it was that such a reason would have occurred to the claimant's solicitors at the time.

The claimant was represented by Bolt Burdon Kemp

The defendant was represented by Acumension Ltd

Comment

While this is an important judgment, given the demise of legal aid even before the reform of CFAs, its relevance is limited to an ever-dwindling number of cases.

RTA Liability

Lenord v First Manchester Limited (2020) EWHC 982 (QB)

This was an appeal against a decision of a Recorder apportioning liability on a two thirds/one third basis in favour of the claimant/respondent. The Recorder had an evaluative judgment to make as to breach of duty and causation with limited materials of which the most important were various video clips of the accident.

The defendant/appellant raised two grounds of appeal: that the Recorder was "wrong to find" that (1) its bus driver had breached his duty of care in failing to see the claimant before walking out in front of his bus, and that (2) the claimant had proved that the breach of duty caused his injuries.

At the time of the accident, the claimant was walking along King Street to what was effectively a crossroads with Brown Street; with priority for traffic on King Street. His intention was to cross over Brown Street where it joined King Street and then to turn right and to cross over King Street so that he could proceed along the part of Brown Street to his right.

The accident involved a bus driven by the defendant's employee. At the time immediately before the accident, the driver was approaching King Street from Spring Street. He then turned left into King Street so that he was then proceeding down King Street in the same direction as the Claimant. As the bus approached the junction with Brown Street, another bus was driving down King Street in the opposite direction. These two buses needed to pass each other.

King Street was a relatively narrow street and there were parked cars on both sides of the road. In order to have enough space to pass safely, the buses used the extra width afforded by the junction with Brown Street. Accordingly, therefore, the defendant's driver veered slightly to the left towards the mouth of Brown Street, and either just touching or just passing over the most proximal white lines on that junction.

At about the same time that the bus was doing this, the claimant was in the process of crossing Brown Street. As he neared the other side of Brown Street the claimant turned to his right, effectively attempting to cut off the corner of the pavement and, it would appear, to proceed to cross King Street at the same time without pausing. In so doing, he walked in front of the nearside of the bus just as the bus was passing the mouth of Brown Street and the two collided. The claimant was thrown to the street by the accident and suffered a nasty head injury with a fracture of his skull.

At the trial, the claimant gave evidence that he had no recollection of the events in question since the accident caused him to lose his memory. The bus driver, gave evidence. He did have a recollection. There was evidence of a passenger, on the bus. but he was not concentrating on the road prior to the accident and his evidence did not provide any material assistance to the court.

The Recorder found that this case turned almost exclusively on CCTV footage, which he considered to be of a very high quality, with no less than 14 active cameras on the bus, providing both views of the inside of the bus and from various perspectives looking out from the bus.

The Recorder found that the defendant's driver was right to focus his gaze mainly on the other bus, but that he could not fix his gaze entirely on that bus to the exclusion of all other potential hazards. The Recorder said that he had taken into account a warning that a counsel of perfection should not be applied to the driver, but that "it cannot be right that he was entitled to focus entirely on the (other) bus to the exclusion of all other potential hazards. (He) should have been intermittently glancing forward and to his left and, on the basis of the evidence…he did not, at any material time, do this."

When dealing with contributory negligence, the Recorder found that the claimant had been daydreaming with his head in the clouds and was simply not concentrating on the world in front of him. However, he also found in respect of the defendant's driver that "given the manoeuvre that (he) was undertaking, he was under a duty to look forward and not just to the right and since he was pulling to the left he ought also to have glanced to the left as well."

Dismissing the defendant's appeal, the High Court judge held that this was not a case of reviewing facts, which were not in issue, but the evaluation of breach of duty and causation from those facts. An appellate court should be reluctant to interfere with the evaluation of primary facts.

'„„the judge had reminded himself about not applying "a counsel of perfection"'

The criticism of principle comprised the judge looking for perfection rather than the exercise of reasonable care but the judge had reminded himself about not applying "a counsel of perfection". This criticism was therefore not one of principle but was simply a way of saying that the decision was not an evaluative judgment which the Recorder could make, but was one which could be shown to be wrong.

The Recorder carried out this task in arriving at the evaluation which he did in a manner which was unexceptionable. He took into account all relevant circumstances. He arrived at a conclusion which was available to him on the evidence. It was not "wrong". There was no reason to differ from the judge's evaluation.

The decision on causation was closely related to and flowed from the findings of the Recorder about breach of duty. The criticisms of principle identified were that (a) the Recorder did not mention the very short period between the movement of the claimant to the right into the path of the bus, and (b) the absence of evidence entitling the court to come to the conclusion that the driver could have avoided the conclusion, and (c) the fact that the claimant was not asked if the accident could have been avoided.

None of the criticisms made of the Recorder were sustainable. In the end, it was not a criticism of a gap in logic, a lack of consistency or a failure to take into account some material factor undermining the cogency of the conclusion. The Recorder made an evaluation as to causation. Having looked carefully at the evidence on the appeal, the appellate judge was not persuaded that he should arrive at a different evaluation in respect of the ability to bring the bus to a standstill in order to avoid the accident. The Recorder had carried out this task in arriving at the

evaluation which he did in a manner which was unexceptionable. He took into account all relevant circumstances. He arrived at a conclusion which was available to him on the evidence. It was not "wrong". Here too, there was no reason to differ from the judge's evaluation.

Applying the law about the nature of a review and the authorities, this was not a case where it was appropriate to carry out a fresh evaluation. There was no demonstrable factual error at the heart of the findings. This was a case which depended on an evaluative judgment, where an appellate court was particularly reluctant to interfere and for good reasons.

It was appreciated that in a case which was "not easy", the losing side was likely to be disappointed. However, the trial was conducted entirely properly. The Recorder came to a conclusion based on evaluative judgments which emerged as a result of a careful account of the evidence. It was a conclusion that was available on the evidence as a whole.

There was nothing to criticise about the logic, consistency and material factors taken into account. The decision both as to breach of duty and causation were closely interlocked: they were also separate, and the two were considered separately.

In those circumstances, an accident occurred for which the defendant must share a part of the legal responsibility. The claimant was entitled to have a finding of liability in his favour subject to contributory negligence. There was no challenge against the apportionment of contributory negligence.

The claimant was represented by Irwin Mitchell LLP

The defendant was represented by in-house solicitors

Comment

This judgment illustrates the difference between a party not liking a decision and satisfying the heavy burden of persuading an appellate court that it was plainly wrong.

Useful links:

MacDonald v Burton (2020) EWHC 906 (QB)

XDE (Protected Party) v North Middlesex University Hopsital NHS Trust (2020) EWCA Civ 543

Lenord v FIrst Manchester Limited (2020) EWHC 982 (QB)