Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

Issue #160 | 04 June 2020

Alexander House
94 Talbot Road
Manchester
M16 0SP

T: 03300 240 711
F: 03300 240 712

www.h-f.co.uk

Welcome to Insight

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

- Conduct and indemnity costs
- What can happen if medical evidence is served too late
- When a local authority became liable for a pathway through a park.

Malcom Henké
Partner & Head of LACIG

Expert Evidence

Magee v Willmott (2020) EWHC 1378 (QB)

This was an appeal from the decision of a Recorder handed down in the County Court. The Recorder granted the claimant/respondent relief from sanctions, permitting her to rely on expert evidence obtained after the date for exchange of such evidence, in circumstances where this had caused the trial date to be lost. The Recorder also refused a cross-application by the second defendant/appellant to strike the claim out.

The claim out of which this appeal arose was a claim for clinical negligence, relating to an alleged delay in diagnosing bowel cancer, originally pursued against two general practitioners and a hospital trust. The second defendant was one of the two GPs. The claim against her partner, the first defendant and the claim against the hospital trust had been discontinued. The claim against the second defendant related to two consultations in August 2012 and one in April 2013. After more than one extension to the court timetable, expert evidence was exchanged on 15 July 2019. Joint statements were due by 2 August 2019 and meetings had been diarised before the reports were exchanged. The trial was listed to begin on 16 September 2019.

Upon reviewing the claimant's expert evidence, the claimant's solicitor noted that it did not appear to support many of the pleaded allegations of breach of duty and that no oncology causation evidence had been served. The claimant conceded that her claim against the second defendant would fail if she was only able to rely on the expert evidence served on 15 July 2019.

The matter was listed for a pre-trial review and the claimant issued an application seeking permission to rely on further expert evidence and for an extension of time for the experts' joint meetings to take place. She sought to introduce three new reports from three disciplines.

At the hearing before the Recorder, the agreed starting point was that the claimant's claim could not succeed unless she was permitted to rely upon the additional expert evidence. It was common ground that in order to do that, she required relief from sanctions under CPR 3.9. This brought into play the well-known three stage test set out by the Court of Appeal in Denton (2014). The claimant accepted, that the breach was serious and that there was no good reason for it. The focus therefore was on the third stage of Denton, requiring the court to consider all the circumstances of the case, so as to enable it to deal justly with the application.

The Recorder noted the second defendant's criticism of the claimant's solicitor at the time, on the basis that he did not merely fail to file and serve the evidence on time, but he sought to rely on reports which did not exist at the date fixed for exchange. However, he rejected the suggestion that the claimant had gained a forensic advantage by her experts seeing the second defendant's evidence first, relying on the duty of experts under CPR 35.3. The Recorder granted relief from sanctions and gave leave to the claimant to rely on the new expert evidence.

Allowing the second defendant's appeal in part, the High Court Judge held that an appellate court would not lightly interfere with case management decisions or the exercise of judicial discretion. However, the second defendant's grounds of appeal were well-founded and the Recorder did err in his approach to the application for relief from sanctions.

Although he purported to apply the test in CPR 3.9, as explained in Denton, his analysis in fact demonstrated a different approach, focusing on the claimant's Article 6 human rights, asking whether it was "necessary" to deprive her of her right to a trial of her claim and "seeking so far as possible" not to deprive her of that right. The simple balancing of prejudice to the claimant if she were unable to pursue her claim to trial against that to the second defendant in not having the claim struck out also failed properly to engage with all the relevant circumstances, including the two factors specifically mentioned in CPR 3.9.

Sympathy for the claimant and her personal blamelessness could not be the sole, or even the main, consideration. It was not enough to weigh the prejudice to the claimant in losing her claim against the prejudice to the second defendant in the loss of the trial date and the resultant delay and ongoing worry for her. The court must look at all the circumstances, including in particular the two factors set out in the rule, namely the need for litigation to be conducted efficiently and at a proportionate cost and to enforce compliance with rules, practice directions and orders.

'…after the second defendant's solicitor had taken the trouble to identify the real weaknesses in the claimant's evidence, her solicitor set about trying to put the case in order'

The second defendant served her evidence before promptly raising her concerns with the claimant's solicitor. The second defendant's solicitor's conduct was exemplary and demonstrated a genuine desire to deal with the matter fairly, efficiently and within the timetable set by the court. The same could not be said of the claimant's solicitor, who was not frank with the second defendant's solicitor or with the court. He sought to give the impression that the problems with the claimant's evidence arose through his oversight in serving the 'wrong' evidence but that he was in possession of evidence supporting the pleaded allegations of breach of duty and causation. His statement that the expert evidence had not materially changed but had just been completed and made ready for trial was just not true. The reality was that, after the second defendant's solicitor had taken the trouble to identify the real weaknesses in the claimant's evidence, her solicitor set about trying to put the case in order.

The claimant's solicitor's attempt to conceal the true position, namely that he did not then have the necessary expert evidence to support the claimant's case and his withholding of the supplementary reports until after the pre-trial review made it impossible for the second defendant properly to respond in time. Had this truly been a case of oversight where evidence

was available but had not been served at the right time, it may well have been possible to rectify the situation without threatening the trial. The true position was very different.

In those circumstances, granting relief in this case undermined rather than promoted the need for litigation to be conducted efficiently and at proportionate cost and for parties to comply with rules and court orders. It rewarded the inefficient and improper conduct of the claimant's solicitor at the expense of a party who had done everything possible to conduct the litigation efficiently and without incurring unnecessary cost.

Standing back, the proper test under CPR 3.9 led to the refusal to grant relief from sanctions so as to allow the claimant to rely upon the additional expert evidence which came into existence only after the date for exchange of the evidence to be relied on at trial. The breach was serious and resulted in the loss of the trial date. Re-listing would have produced further, not insignificant, delay leaving the matter hanging over the parties. The conduct of the claimant's solicitor was particularly egregious. He was not frank with the second defendant or the court and delayed in making the application and in giving full disclosure while he attempted to obtain the necessary evidence to support the claim which had been advanced.

Having reached that conclusion, the judge considered the second defendant's strike-out application.

CPR 3.4(2)(a) did not apply in respect of the claim relating to the consultations in August 2012. The Particulars of Claim did disclose a claim, which if made out on the evidence, would succeed. The real complaint was that the claim was pleaded and maintained for over three years without proper expert evidence to support it. That fell for consideration under CPR 3.4(2)(b).

It would not be appropriate in the circumstances of this case to strike out the entire claim as an abuse of process. That conclusion followed close examination of the pleadings and the expert evidence which had been disclosed. It was not possible to conclude that the claim amounted to an abuse of process having regard to the expert evidence available when it was brought.

Unless the claim was now discontinued, and subject to any application for summary judgment, the matter would have to be remitted to the court below for further directions.

The claimant was represented by Linder Myers Solicitors

The second defendant was represented by Browne Jacobson LLP

Comment

In other cases, judges have declined to penalise claimants for errors on the part of their legal advisers. This decision illustrates that will not always be the situation.

Costs

Les Ambassadeurs Club Limited v Albluewi and another (2020) EWHC 1368 (QB)

Following the hearing of interlocutory matters in this commercial case, a number of matters relating to costs fell to be determined, including:

1. What was the appropriate order for costs;

2. If the first defendant was awarded costs, should the assessment be on the indemnity basis?

The first defendant argued that he should have the costs of and occasioned by injunctions which had been obtained against him and the costs of and occasioned by the discharge application and a continuation application. The claimant submitted that the costs should be costs in the case, but in oral submissions moved towards the position of defendant's costs in the case (i.e. that he would pay those costs only if the defendant was successful in the action).

The defendant submitted that he was the successful party in respect of the above applications and the general rule (CPR 44.2(2)) applied in the following terms:

"(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order."

The defendant also submitted that the court had found not only that the claimant had not provided sufficient evidence of a real risk that the defendant would dissipate his assets (the reason for the injunction), but also that the court had found instances of non-disclosure including issues relevant to whether there was a real risk of dissipation. He argued that the issues had been hard fought, and he had succeeded.

The claimant pointed to parts of the judgment which were critical about the defendant, and submitted that they were matters where a fuller picture would emerge at a later stage. He, therefore, submitted that having regard to those matters, the order as to costs should either be by reference entirely or in part to the result of the case.

'The defendant had succeeded on both applications heard before the court which was sufficient reason for the costs of those applications to be the defendant's'

Finding in favour of the defendant, the High Court Judge held that whilst the points

made by the claimant were correct, the result of the applications did not hinge on those points. Further, the points on non-disclosure were independent of those points.

The defendant had succeeded on both applications heard before the court which was sufficient reason for the costs of those applications to be the defendant's. This was not therefore a case where it was just for any part of the costs to abide the event of the ultimate trial or to await adjudication at that stage. Thus, those costs should be paid by the claimant to the defendant.

On the second issue, the judge held that there was no controversy as to the test for when indemnity costs were appropriate. It was not necessary to prove conduct which was "disgraceful or deserving of moral condemnation" or "unreasonable to a high degree", as set out in see Excelsior Commercial and Industrial Holdings Ltd (2002).

The court there held that the making of a costs order on the indemnity basis would be appropriate in circumstances where: (1) the conduct of the parties or (2) other particular circumstances of the case (or both) was such as to take the situation "out of the norm" in a way which justified an order for indemnity costs.

The defendant submitted that non-disclosure was a breach of an important duty and this without more took the matter "out of the norm". It was stronger still in this case because the non-disclosure was about matters which were relevant to the risk of dissipation, and which were material to whether a real risk of dissipation was established.

The judge found that there was a distinction between, on the one hand, a case where there was plainly no basis for making an application and, on the other hand, a case where there was an argument to put, but the result was that when the evidence was seen as a whole, there was not sufficient evidence to establish a real risk of dissipation. This case was the latter rather than the former. There were also aspects of the defendant's conduct which were not satisfactory.

It was relevant to take into account the non-disclosure and its inter-relationship with whether risk of dissipation was established. A factor was the importance of the duty of disclosure (in without notice applications) being upheld by its breach having consequences, often including indemnity costs. However, whilst all of this was highly relevant, it was not decisive.

It was also relevant that throughout the judgment, it was found that the non-disclosure was not in bad faith. This was a case where the failure to comply with the duty of disclosure was caused by a failure to appreciate that the matters relating to property and previous defaults might be relevant to the real risk of dissipation without any intention to mislead the court. This was not a "no basis" case, but a failure due to there not being sufficient evidence overall of a real risk of dissipation. If it were that every case of non-disclosure merited indemnity costs, then these counter-veiling considerations would be irrelevant. However, that was not the law and practice.

The law and practice were to be summarised as follows:

"Although material non-disclosure on the ex parte application is a breach of the claimant's duty to the court, there is no general practice of the court that where there has been non-disclosure, and costs are to be awarded, they ought to be on an indemnity basis. However, the fact that there has been material non-disclosure is plainly a relevant factor to be taken into account on the question of costs and is capable of justifying an award on this basis, and such an order will usually be made if the non-disclosure was deliberate or culpable."

The proper basis of costs was an exercise of discretion. It was a question of weighing up the above factors. Taking full cognisance of the importance of full and frank disclosure as a relevant factor, this was not a case which was "out of the norm" or "something outside the ordinary and reasonable conduct of proceedings".

In all the circumstances, this was not a case where in the exercise of the court's discretion there should be an order for indemnity costs. It followed that when the costs were assessed, they would be on the standard basis

The claimant was represented by CANDEY

The defendant was represented by Trowers and Hamlins LLP

Comment

In recent editions of *Insight* we have summarised cases in which issue-based costs orders have been made or costs have been apportioned to reflect the winning party's failure on one or more issues. This case is a reminder that sometimes costs will be assessed at the end of a particular phase of the litigation and those costs awarded to one party, irrespective of the final outcome of the dispute.

Public Liability

Barlow v Wigan Metropolitan Borough Council (2020) EWCA Civ 696

In Insight 124, we reported the decision in the first appeal in this case.

On 21 September 2014 the claimant was walking along a path in Abram Park, Wigan when she tripped over an exposed tree root and sustained injury to her shoulder and arm. The defendant was the Highway Authority for the area in question.

The following facts were agreed:

a. The land was purchased by the defendant's predecessor, Abram UBC on 10 November 1920 with the intention of building a public park.

b. The park was constructed some time in the early 1930s.

c. The paths were constructed some time prior to 1959 and thus prior to the commencement of the Highways Act 1959.

d. The defendant or its predecessor built both the park and the paths.

e. The defendant's records did not list the relevant park as a public right of way.

It was also accepted that there had been at least one and probably two entrances to the park on its west side since it was created and that a third entrance to the park, on its north-eastern side, came into existence when some housing was built just outside that north-eastern entrance. There was no evidence of the park ever having been closed to the public since its creation in the 1930s.

In order to succeed in her contention that the defendant was under a duty to maintain the path, the claimant had to prove one of two alternative cases. The first was that it was a "highway constructed by a highway authority" within the meaning of S36(2)(a) of the 1980 Act. The second was that it was one of those highways which "immediately before the commencement of this Act were highways maintainable at public expense" within the meaning of S36(1) of the 1980 Act.

At the trial of liability, the judge held that a public path in a park was not a highway maintainable at public expense within the meaning of S36 (2) (a) Highways Act 1980 ("the Act"). It had only become a highway as a result of long usage, not original dedication.

Accordingly, the claimant had no cause of action against the defendant and her claim for damages failed. Had the path been such a highway, the defendant would have owed her a duty to maintain it pursuant to S41 of the Act. It was found by the judge and common ground on the appeal that the path was in a dangerous or defective condition.

A High Court Judge allowed the claimant's appeal. He held that S(2)(a) of the 1980 Act was not confined to highways which were not constructed as such at the outset.

The defendant appealed to the Court of Appeal on the following grounds:

1. The High Court Judge was wrong to find that the path within the park upon which the claimant fell was a highway maintainable at the public expense pursuant to S36(2)(a) of the 1980 Act and was therefore also wrong to find that the defendant was under a statutory duty to maintain that path pursuant to S41 of the Act.

2. The judge was wrong not to find that the path on which the claimant fell was maintainable by nobody and therefore also wrong to find that the defendant could not avail itself of a defence applying the principles set out in McGeown (1995).

3. The judge was wrong to find that the defendant was under a statutory duty to maintain as an adopted highway a footpath which a predecessor authority did not construct as a highway but as part of a park which that predecessor authority then occupied under the Occupiers' Liability Act.

4. He was wrong to adopt the obiter dictum statement of Sedley LJ in the case of Gulliksen (2003) and therefore make a finding to the effect that for a path to be a highway and come within section 36(2)(a) of the Highways Act 1980 the local authority did not have to be acting in its capacity as a highway authority when constructing that path.

5. He was wrong to base [his] findings on policy reasons. A reading of the judgment made it clear that the court was concerned to ensure that there should not be public highways in public open spaces that were maintainable by no-one.

6. The judge was wrong to find that S36(2)(a) of the 1980 Act had retrospective effect such that it was capable of applying to a highway constructed prior to the coming into force of that provision that did not fall within S36(1).

'…S36(2)(a) should be construed to refer only to highways constructed by a highway authority acting in their capacity as such…'

Was the Path "constructed by a highway authority" within the terms of S36(2)(a)?"

The main issue under this heading was whether the claimant had to show that, when Abram constructed the path in the 1930s, they did so in their capacity as the local highway authority. The Court of Appeal held that S36(2)(a) should be construed to refer only to highways constructed by a highway authority acting in their capacity as such, and any provision in a consolidating Act was not intended to change the law.

The critical issue in this case was whether the path on which the claimant fell was, or was deemed to have become, a highway before 16 December 1949, the date on which Ss47-49 of the National Parks and Access to the Countryside Act 1949 came into force. S38(2)(a) of the Highways Act 1959 created two kinds of highway maintainable at public expense, in each case by reference to the position immediately before the 1959 Act came into force (which was on 1 January 1960).

The first was those which were in 1959 maintainable by the inhabitants at large; that meant those responsible by virtue of S47 of the 1949 Act; and that in turn depended on whether the highway was dedicated or deemed to have been dedicated before 16 December 1949.

The second category was those which in 1959 were "maintainable by the highway authority". The fact that the highway authority (in this case Abram) had constructed a path before 1949, whatever the capacity in which they did so, would not help the claimant because under the 1949 Act regime that did not make the highway maintainable unless it had been dedicated or was deemed to have been dedicated as

a highway before 16 December 1949 (or there was a later public path agreement). S38(3) of the 1959 Act applied to this second category. Section 36 of the 1980 Act, in particular S36(2)(a), was not intended to, and did not, alter that position.

The claimant could not succeed under S36(2)(a) of the 1980 Act, because when Abram constructed the path they were not acting in their capacity as the highway authority for the area. This made it unnecessary to decide whether intention was a factor under s 36(2)(a), though the issue of intention cropped up in a different form under the heading of dedication.

Section 36(1) and the deemed date of dedication

Whether the claimant could succeed under S36(1) depended on whether the path was, or was deemed to have been, dedicated as a highway before 16 December 1949. What the evidence clearly established was that the park was opened in the early 1930s; the path and other paths were laid out soon afterwards; and that ever since that time (about 80 years before this accident) the public had been allowed to walk on the paths without restriction or interruption of any kind even on one day a year. This was ample evidence to support the implication or presumption of dedication at common law.

The importance of this was that when the common law presumption arose, it was retrospective. The effect was that the act of dedication was deemed to have occurred at the beginning of the period of continuous user (when the park opened), not at the end of it. In the present case this meant that the path was deemed to have been dedicated since the early to mid-1930s, well before the commencement of the 1949 Act.

It was therefore deemed to have been "repairable by the inhabitants at large" until 16 December 1949 and thereafter until 1 January 1960 (the commencement dates of the 1949 and 1959 Acts), and "maintainable at public expense" since that time. The claimant's cause of action for breach of statutory duty under S41 of the 1980 Act was accordingly established.

For these reasons, albeit on different grounds from those in the court below, the appeal was dismissed.

The claimant was represented by Active Legal Solicitors

The defendant was represented by Forbes Solicitors

Comment

The single most important point to be taken from this judgment is that a council which is a highway authority may also build roads which are not highways within the meaning of the 1980 Act. The example given was of where a housing authority constructed a housing estate with private roads and subsequently sold off the estate to the residents or to a third party. If, subsequently the residents or the third party allowed the public to use the private roads so that they become impliedly dedicated as highways under S31, it would be surprising if some 20 after selling the estate, the local authority found itself being liable to maintain those roadways at public expense because much earlier it, in its capacity as the housing authority, it had constructed the roads as private roadways on the estate.

Useful links:

Magee v Willmott (2020) EWHC 1378 (QB)

Les Ambassadeurs Club Limited v Albluewi and another (2020) EWHC 1368 (QB)

Barlow v Wigan Metropolitan Borough Council (2020) EWCA Civ 696