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:

- What documents attract legal privilege
- The problem of trying to amend a defence close to trial
- Statistical evidence on life expectancy.

Malcom Henké
Partner & Head of LACIG

Privilege

A v B and another (2020) EWHC 1492 (CH)

The judgment in this commercial action focused on whether or not the claimant was entitled to refuse to produce documents in High Court proceedings on the grounds of legal professional privilege.

In respect of some of the documents, the claimant raised questions of legal advice privilege. One document was said to be protected from disclosure by litigation privilege.

The starting point on the principles applicable to legal advice privilege was Three Rivers District Council (2004):

"Legal advice privilege attaches to all communications made in confidence between solicitors and their clients for the purposes of giving or obtaining legal advice, even at a stage when litigation is not in contemplation."

This extended to documents (such as internal communications within a company) which reproduced legal advice for dissemination to those who needed it, anyway to the extent that the dissemination did not destroy the confidentiality.

It was also clearly established that, for legal advice privilege to apply, it was not necessary for the communication to be telling the client the law or advising on some legal principle. It was sufficient for it to be advice on what could or should prudently and sensibly be done, so long as that advice was given in a legal context. Where that was the case, the entirety of the communication was privileged, so long as it could all be said to have those characteristics.

The final principle was that, for legal advice privilege to apply to a particular communication or document, the person asserting the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice. The claimant submitted that this dominant purpose requirement was controversial and reserved the right to challenge the existing Court of Appeal authority in a higher court.

The judge then considered the documents in issue.

Executive Committee Minutes

These two documents, which were minutes of two meetings of the claimant's executive corporate governance group could be taken together. They appeared to be a straightforward record of what was discussed at the two meetings and did not appear to record any legal advice. The claim to privilege was not established.

The mere fact that a lawyer (the claimant's General Counsel (GC)) was involved in the preparation of the minutes of a meeting did not mean that in carrying out that task, the function he was performing was connected with the giving of legal advice. Lawyers often fulfilled secretarial functions in the context of recording discussions at important meetings, and there was nothing to indicate that the GC in this case was doing any more than that.

'The mere fact that the documents were headed "privileged and confidential" had little evidential weight one way or the other, because the question was whether they were in fact privileged…'

Even if that were not the case, it was still necessary to be able to identify from the document, either directly or by inference, a statement of the advice or communication said to be privileged. There would be cases where the inference was obvious and in which the privilege was therefore established, but in the present case, it was clear that there was no basis in the evidence (let alone one that was obvious) for drawing the inference that either of the documents recorded legal advice.

The mere fact that the documents were headed "privileged and confidential" had little evidential weight one way or the other, because the question was whether they were in fact privileged, not whether the person who put the phrase on the documents thought that they were.

Minutes of board meeting dated 23 October 2017

The claimant contended that the metadata for these minutes disclosed that they were originally prepared by a solicitor. His evidence was that they were prepared before the meeting because the solicitor did not attend it. He said that the solicitor drafted the document in advance in order to advise the board as to the topics to be discussed. The claimant argued that this amounted to the preparation of a confidential document in a legal context for the dominant purpose of providing legal advice.

There was insufficient evidence to demonstrate that this understanding of the factual position was established. The metadata actually disclosed that the document was created in December (i.e. after the meeting).

In any event, the probabilities were that the minutes were prepared by the solicitor after the meeting. There was no evidence from the solicitor in question to confirm that his firm were acting for the claimant at the time, or the ambit of their instructions.

Of equal significance was the actual content of the document itself. Most of the items recorded as having been discussed comprised resolutions in a form which were often drafted by solicitors. The words used were much more consistent with this version of the document being a post-meeting record of what was actually said and discussed, not a pre-meeting advice to the Board as to what they should be discussing

For these reasons, this version of the minutes did not disclose privileged information of any kind.

The Risk Register

The claimant contended that this document was prepared by his GC (with the assistance of others) for the dominant purpose of providing legal advice. The claimant's solicitor said that the risks which were addressed in the register were both legal and commercial. He contended that:

"I understand it was created within a legal context and is, therefore, a confidential document prepared by an in-house lawyer for A for the dominant purpose of providing legal advice".

Having considered the document, it was clear that it did not state the substance of any advice. It was another instance in which the claimant's claim to privilege could only be based on the proposition that the content of the advice could be inferred from the record of how the risks which were dealt with item by item were to be resolved by the business. This was not sufficient.

Whist the communication of advice as to what should prudently and sensibly be done in a legal context was capable of attracting legal advice privilege, it was still necessary to identify how it was that the document in issue communicated or disclosed the communication of that advice. The risk register did not satisfy that requirement. The most that could be said was that it might be possible to infer the substance of the legal advice from the way in which the document recorded the commercial decision.

Draft Chairman's script

The claimant stressed that the important question was the status of the particular version of the document in issue. He contended that this version of the document was prepared by a lawyer. There was a single tracked changed comment contained in the version of the script for which privilege was claimed which was deleted but the contents of which were visible. It was particularly important to concentrate on the precise version of the document to which this claim related.

It contained a lawyer's comment which had been struck out in tracked changes. With the exception of the lawyer's note, there was nothing to indicate on the face of the document that it communicated legal advice in any form. The script as whole was not protected by document, but the contents could be seen, this was a classic situation in which redaction of the deleted lawyer's comment was the right course.

The claimant was represented by Reynolds Porter Chamberlain LLP

The defendant was represented by Taylor Wessing LLP

Comment

This case provides a helpful reminder of the difference between sensitive, commercial information that a party would prefer not to disclose, but which is not protected by legal privilege and material for which privilege can justifiably be claimed.

Applying to amend a defence close to trial

Pearce (a minor) v East and North Hertfordshire NHS Trust (2020) EWHC 1504 (QB)

This was an application by the defendant to amend the defence in this action for damages for personal injury arising from clinical negligence. The application was contested on the grounds that it was made very late and, if granted, would require the trial to be vacated; that there was no good reason for the late timing of the application and the amendment raised an argument which, in the context of this claim, carried no realistic prospect of success.

The legal framework was not in dispute. The starting point was CPR 17.3 which conferred on the court a broad discretionary power to grant permission to amend. The case-law was replete with guidance as to how that discretionary power should be exercised in different contexts. The list of factors to be borne in mind when considering an application such as this included:

a) In exercising the discretion under CPR 17.3, the overriding objective was of central importance. Applications always involved the court striking a balance between injustice to the applicant if the amendment was refused, and injustice to the opposing party and other litigants in general, if the amendment was permitted.

b) A strict view must be taken of non-compliance with the CPR and directions of the court. The court must take into account the fair and efficient distribution of resources, not just between the parties but amongst litigants as a group. It followed that parties could no longer expect indulgence if they failed to comply with their procedural obligations: those obligations served the purpose of ensuring that litigation was conducted proportionately as between the parties and that the wider public interest of ensuring that other litigants could obtain justice efficiently and proportionately was satisfied.

c) The timing of the application should be considered and weighed in the balance. An amendment could be regarded as 'very late' if permission to amend threatened the trial date, even if the application was made some months before the trial was due to start. Parties had a legitimate expectation that trial dates would be met and not adjourned without good reason. Where a very late application to amend was made the correct approach was not that the amendments ought, in general, to be allowed so that the real dispute between the parties could be adjudicated upon. A heavy burden lay on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users required him to be able to pursue it. The timing of the amendment, its history and an explanation for its lateness, was a matter for the amending party and was an important factor in the necessary balancing exercise: there must be a good reason for the delay.

d) The prejudice to the resisting parties if the amendments were allowed would incorporate, at one end of the spectrum, the simple fact of being 'mucked around' to the disruption of and additional pressure on their lawyers in the run-up to trial and the duplication of cost and effort at the other. The risk to a trial date might mean that the lateness of the application to amend would of itself cause the balance to be loaded

heavily against the grant of permission. If allowing the amendments would necessitate the adjournment of the trial, this might be an overwhelming reason to refuse the amendments.

e) Prejudice to the amending party if the amendments were not allowed would, obviously, include its inability to advance its amended case, but that was just one factor to be considered. Moreover, if that prejudice had come about by the amending party's own conduct, then it was a much less important element of the balancing exercise.

In this case, the first point to consider was whether, if the adjournment was allowed, the trial date could be kept. The High Court Judge held that if he allowed the amendment then fairness to the claimant would require him to vacate the trial (which was fixed as long ago as 3 October 2019). It followed that this application must be categorised as a "very late application." As such, the balance was loaded heavily against the grant of permission.

The defendant submitted that the impetus for the amendment was the receipt of the joint note of the orthopaedic experts of 22 January 2020. This statement clarified the experts' respective positions. There was a short delay between January and April whilst instructions were sought and the amendment drafted. After the draft amendment was served on 14 April 2020, it was submitted there was no delay in getting on and making the application.

The judge did not accept that the joint statement was the springboard for the amendment: or if it was, it should not have been. It was almost certainly the result of oversight by one or more members of the defendant's legal team.

There were further difficulties facing the defendant concerning the timing of the application. Even if the omission from the defence was due to an oversight, there were many other occasions when the defendant could have raised the point.

As to the merits of the amendment, the judge had a real doubt concerning its prospects of success. That said, he was not persuaded that the argument carried no real prospect of success (which it was agreed was the test which he must apply).

'In refusing the application…(the judge) bore in mind the pressure on court resources and the public interest in the efficient discharge of court business'

In refusing the application to amend the defence, the judge held that the inevitable need to adjourn the trial coupled with the failure to supply any good explanation for the need for the amendment and the lateness of the application drove to the conclusion that the balance of prejudice tipped heavily in favour of refusal. He bore in mind the pressure on court resources and the public interest in the efficient discharge of court business. Although not a critical factor, he also bore in mind the additional stress which would be caused to the claimant's mother, as litigation friend, if the trial were to be adjourned.

The judge also bore in mind that in refusing the application he was depriving the defendant of running a causation argument at trial. However, even if he had concluded that the amendment raised a strong defence on causation, he would still not have allowed the amendment. Any prejudice to the defendant in being deprived of running the argument was neutralised by the fact that the defendant had brought the situation upon itself and for no good reason.

The claimant was represented by Medical Solicitors

The defendant was represented by Clyde & Co

Comment

The simple lesson from this case is that if a party is considering amending its case, it should do so at the earliest possible opportunity, particularly where a trial date has been fixed.

Life expectancy & statistical evidence

Chaplin (Protected Party) v Pistol and another (2020) EWHC 1543 (QB)

In a road traffic accident, the claimant had sustained catastrophic injuries caused by the negligent driving of the first defendant, who was insured by the second defendant. The claimant, who was aged 28 at the time, suffered a very severe traumatic brain injury with tetraplegia, and was wholly dependent on others for his care needs. His life expectancy had been significantly reduced.

The defendants applied for permission to rely on the evidence of two further experts, one in assistive technology (which was not opposed) and the other Professor David Strauss in relation to statistics/life expectancy (which was opposed). The parties were not in agreement as to the extent of the diminution in the claimant's life expectancy although their existing experts were not far apart.

The claimant's care needs would likely be met by a periodical payments order, in respect of which his life expectancy was irrelevant, but other important components of his claim would be calculated using traditional multipliers. The High Court Judge hearing the application accepted the defendant's submission that a seven-figure sum rode on this issue.

As matters stood, the issue of life expectancy had been addressed in the neurological or neurorehabilitation evidence of both parties. The defendants had applied unsuccessfully at a case management hearing for permission to rely on statistical evidence and had not appealed but argued that since then matters had moved on. At that stage, while the methodology for assessing the reduction in life expectancy was agreed, the difficulty of applying certain data with the necessary degree of precision had not been addressed by the experts.

The defendants argued that the Californian Life Expectancy project provided the best database and was therefore the best guide for the estimation of life expectancy. The defendants submitted that they had acted promptly in making this application once one of their experts had referred to the desirability of obtaining statistical evidence of this nature. Furthermore, Professor Strauss' report would be made available without jeopardising either the JSM or the trial date.

The judge (and the claimant) took the view that the starting point for considering the application was that the defendants had not appealed the earlier order, refusing permission for evidence of this type and there had been no relevant or sufficient change in circumstances to permit a variation in directions under CPR 29 PD6. Those provisions reflected the basic principle that a party aggrieved by a court order must either appeal it or demonstrate a

change in circumstances since it was made.

Having reviewed the existing medical evidence on this issue, the judge concluded that the difference between the ranges given by the neurological experts was explicable on the basis that their clinical judgments varied as to the claimant's current condition. Although the possibility could not be excluded that the experts had interpreted the relevant Californian papers slightly differently, if that was the case, it was as much the situation when the defendants made their first application as it was now.

'…the large measure of methodological consensus achieved by the neurological experts would have been fundamentally and radically upset by the Strauss report, assuming that it was admitted'

The judge also took the view that the Strauss report on which the defendants wished to rely. took a rather different approach from the neurologists. Instead of seeking to calibrate the claimant's case on a notional scale between the 2007 and 2015 cohorts, it effectively abandoned the continuing saliency of a paper by Shavelle et al and drew attention to further unpublished material which should be read in conjunction with the 2015 paper. It followed that the large measure of methodological consensus achieved by the neurological experts would have been fundamentally and radically upset by the Strauss report, assuming that it was admitted.

These reasons were sufficient to dispose of the defendants' application, but the judge went on to address the question of whether, if this matter had come before him shorn of any antecedent judicial decision, Professor Strauss' evidence should be understood as reasonably required for the purposes of CPR 35.1.

Evidence from a medical statistician was, in principle, admissible although ordinarily it should be seen as the starting-point for the clinical judgments made by medical witnesses. Experts were usually well able to apply and interpret quite complex statistical evidence which could be admitted as hearsay (particularly if set out in a published paper which had been peer-reviewed) without the need to call probative or explanatory evidence.

Both neurological experts had expressed themselves able, without qualification or equivocation, to proffer evidence on life expectancy in this case. The recent joint report made that clear, as it did the relatively narrow gap between them – explained, in the main, by their different clinical assessments of the claimant.

Courts were well used to deciding cases on the basis of evidence which was adequate but not optimal. Professor Strauss' evidence would fundamentally undermine both parties' neurological evidence. If the defendant wished to proceed in this manner, this path should have been staked out at a much earlier stage in the litigation so that the medical experts could have addressed this radical evidence before committing themselves to their conclusions.

Furthermore, it was unclear whether Professor Strauss would be prepared to disclose his group's unpublished data within the context of these proceedings. These data had not been peer-reviewed and were not appended to his report. There would be an obvious unfairness inherent in one party's expert relying on data which the opposing party was unable to examine.

Had the matter come before the judge with a notional clean slate, at about the time of the defendants' first application, he would have concluded that evidence from Professor Strauss was not reasonably required for the purposes of CPR 35.1.

The final question was whether this evidence should in any event be excluded in the exercise of judicial discretion as coming too late in the day. The premise for the judge's consideration of the overriding objective must be made explicit. He should proceed on the basis that he was wrong in his conclusion that the defendants had failed to show a relevant and sufficient change in circumstances. If the position were otherwise, it would be unnecessary to address this point.

There were powerful reasons in preserving the trial date. Any adjournment would be intolerable to the claimant's litigation friend. If Professor Strauss' report were admitted, the claimant would and should have little option but to accept it as authoritative and reliable. Assuming that new data were provided, the claimant would be entitled to have it subjected to appropriate scrutiny by an expert in medical statistics; it would not have to be taken as Gospel.

The identification and instruction of such an expert would take time, that the dates for the Schedules and Counter-Schedules would be put back (if necessary, the claimant could always serve an amended Schedule, but that would occasion delay), that the JSM would have to be adjourned, and that there would be an unacceptable jeopardy to the trial date.

The claimant was represented by Stewarts LLP

The defendants were represented by BLM

Comment

Two particular points arise from this case. First, at the case management stage, great care needs to be exercised in evaluating the importance of expert evidence. If permission for an expert is refused, the question of an appeal must be considered, even though the prospects of success will always be limited (i.e. the inherent difficulty in appealing a case management decision).

Secondly, this is not the first time that the courts have cast doubt on the part to be played by statistical evidence when medical experts are considering life expectancy on a clinical basis.

Useful links:

A v B and another (2020) EWHC 1492 (CH)

Pearce (a minor) v East and North Hertfordshire NHS Trust (2020) EWHC 1504 (QB)

Chaplin (Protected Party) v Pistol and another (2020) EWHC 1543 (QB)