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 need to adhere to court orders
- The principles to be applied to issue-based costs orders
- A claimant's tripping accident while in Mauritius.

Malcom Henké
Partner & Head of LACIG

Adhering to court orders

Tully v Exterion Media (UK) Limited and another (2020) EWHC 1119 (QB)

The claimant claimed to have sustained injuries caused by an accident at work whilst putting up advertising materials on the London Underground. The injuries allegedly sustained led to directions which related to experts in the fields of orthopaedics and psychiatry. The issues of liability and of quantum were live and that the defendants' position was that the claimant either did not sustain injuries as claimed or that they were not as serious as claimed.

The defendants covertly obtained video footage said to show that the claimant was far more mobile than he claimed.

A Master gave directions on 26 April 2018 that witness statements of fact were to be served by 9 August 2018, and that expert evidence in the above medical fields was to be served by both sides by way of simultaneous exchange by 28 September 2018. After allowing for joint statements by the experts the Master timetabled a further case management hearing to consider any additional expertise in other fields. In the case of the claimant's orthopaedic expert the order provided that 'any updated evidence' from him was to be exchanged by that date (28 September) since he had provided an initial report the previous year.

The date for exchange of reports passed. The parties duly served their reports save that the claimant elected not to produce an updated report from his orthopaedic expert. The evidence before the Master was to the effect that the claimant had informed his solicitors that his condition had not changed since the first report, and the solicitors appeared to have taken the view that no update was needed.

The Master found that a surprising stance to take given that his expert's report was 'long in the tooth' and that not only would there have been up to date medical notes and records which he had not seen but also the claimant himself had made his witness statement. Furthermore, the decision not to obtain such an update meant that the defendants' first and only set of reports were more up to date than the claimant's and that was not an ideal position for a party ahead of a joint expert meeting.

On 4 October 2018, once experts' reports and witness statements had been exchanged the defendants served surveillance footage and made it clear that they were adopting the position that this showed that the injuries, if any, were not as claimed in the witness statement. At that date, 4 October, the follow-up case management hearing was imminent and was listed for 19 October 2018.

The fact that surveillance evidence had been served changed matters so that the first thing to ensure was that the claimant having now seen the surveillance, had a fair opportunity to respond to it by way of an extra witness statement with his account of what it showed and so that any relevant experts could be shown the footage and the claimant's explanatory statement and asked to comment on the issues raised by those in relation to the content of their reports which had been written without knowledge of it.

The parties agreed a consent order on terms that by 4pm on 9 November 2018 the claimant was to serve a statement responding to the surveillance footage and that there was to be a further exchange of expert reports in both specialisms on both sides "limited to issues arising from the surveillance footage and the claimant's witness statement" by 4pm on 14 December 2018. Joint reports were then to be prepared.

The claimant served his explanatory statement (which the Master did not find impressive).

The claimant's solicitor then applied for relief from sanctions to allow for the claimant to serve an updated report by his orthopaedic expert. From the supporting statement of the claimant's solicitor it became apparent that when the expert had been sent the defendants' medical evidence and the surveillance evidence, he had responded that he could not comment further without further review and examination of the claimant.

The defendants resisted the application on the basis that the claimant was in breach of the directions order which limited any new reports to the issues raised in the surveillance footage and the (explanatory) witness statement of the claimant. What the claimant had obtained was a new, fully updating report of the kind which had been permitted under the first case management order but which the claimant had deliberately elected not to obtain at the time (allowing the permission to lapse). Also, the approach taken effectively managed to gain for the claimant a sequential exchange of material.

Refusing the claimant's application, the Master held that this was not a case of a party wanting a new expert and being disaffected. Rather this was a case of a party having not made use of a right to obtain an updated report from an expert in which it had confidence and arguing that so as to retain confidence the claimant wanted (after the event) to obtain the updated report which he had originally elected not to obtain. If such an approach were held generally then there would be widespread re-instruction of experts 'ad hoc' without the court controlling how much expert evidence was appropriate and the timing of when it has to be obtained and on what issues.

There had been a breach of the original order for directions. There was a deadline. The deadline passed and the claimant decided not to make use of the permission to obtain an updated report. It was not a mistake; it was a deliberate choice. Thereafter once the evidence had been 'pinned down' the defendants served surveillance material and a very standard type of order was made for experts to opine further but limited to the issues raised by the surveillance and on the basis of an explanatory statement from the claimant.

'…the material obtained went well beyond the permission granted but also… the playing field was rendered uneven…'

It would have been perfectly possible, if the claimant had at that stage reconsidered whether to seek an update from his orthopaedic expert, to have asked the court at the case management hearing and to have explained why none had been sought in time, and hope for relief. The choice by the claimant to go back to his expert and to decide, without the court being asked, to effectively modify the limited permission so as to allow a full update and to address the evidence of the defendants' orthopaedic expert not only meant that the material obtained went well beyond the permission granted but also that the playing field was rendered uneven: it became tilted towards the claimant.

The correct approach would have been (if the claimant wanted to re-open the right to have a full update from his expert) to go to the case management hearing, seek relief so as to try to get permission for the full update out of time, and to do so without having informed his expert about the content of the surveillance. Relief may or may not have been granted but the court would not have been in the position where the horses had left the stable and the expert had already seen and reported on not merely the surveillance but also the position generally.

Furthermore, the claimant's solicitor had also sent to the claimant's psychiatric expert a copy of the claimant's updated orthopaedic report. The psychiatric expert's updated report was produced on the basis of instructions which exceeded those allowed by the limited permission in relation to the implications of the surveillance.

Relief from sanctions had been sought and the Master dealt with that issue by applying the principles in Denton.

There had been a breach of the earlier order. The breach was that the report of the claimant's orthopaedic expert exceeded the permission granted after the service of the surveillance footage. The omission to serve a full updating report back in September 2018 was not a breach, it was simply that permission lapsed once the time had expired.

The breach was not trivial or immaterial. Once the full updated orthopaedic report was commissioned the impact on fairness was considerable. The effect of what occurred was to achieve sequential service and to ensure that the examination of the claimant took place with knowledge of the surveillance (which self-evidently would not have been the case if the update had been obtained, in accordance with permission in September 2018). The psychiatric expert's report, based on instructions containing impermissible material was itself also served in breach (by being out of scope of the order) and that too was a serious breach.

There was no good reason for the breach. There was nothing tactical or underhand here, but it was simply incorrect to have proceeded with the substantive instruction to the claimant's orthopaedic expert in this form without returning to court to explore what if any late permission could be granted and how, prior to any mention of surveillance to the expert. The original decision not to obtain a substantive update before the surveillance was plainly not a mistake and was a deliberate choice.

Relief from sanctions should not be granted in all the circumstances. The impact on fairness here was substantial, as was the use of resources which had to be deployed to consider the issues.

The ultimate trial timetable would be delayed. It would be unfair to the defendants to allow the claimant's experts' updated reports to be relied upon as they were. It might be possible to make some order such as allowing solely the paragraphs of the claimant's orthopaedic expert's report which covered the surveillance to stand since they were quite separate parts.

The claimant was represented by Slater and Gordon UK Limited

The defendants were represented by Clyde & Co LLP and Kennedys Law LLP

Comment

This decision highlights the need to consider very carefully both the adequacy of existing evidence and what restrictions court directions may place on updating evidence at a later stage. The seemingly deliberate decision not to serve updated evidence in accordance with the original directions, made it inevitable that an application for relief from sanctions, made much later in the proceedings, was doomed to failure.

Issue-based costs orders

Pigot v The Environment Agency (2020) EWHC 1444 (Ch)

A number of cases we have reported in Insight have related to issue-based costs orders. Following judgment in this dispute, the court was asked to consider such an order and in doing so the Deputy High Court Judge revisited the principles involved.

The defendant accepted that the claimant has been successful on two issues and therefore accepted that an order for it to pay the claimant's costs should be made. However, the defendant argued that the claimant did not succeed on a number of issues of law. Therefore, an issue-based costs order should be made and the claimant should only recover a proportion of its costs.

The judge recited CPR r.44.2, relating to the court's discretion on costs and the factors to be taken into account and he reviewed the relevant authorities. He then summarised those principles as follows:

(1) The mere fact that the successful party was not successful on every issue did not, of itself, justify an issue-based cost order. In any litigation, there were likely to be issues which involved reviewing the same, or overlapping, sets of facts, and where it was therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party had lost on one or more issues did not by itself normally make it appropriate to deprive them of their costs.

'…an order might be appropriate if there was a discrete or distinct issue, the raising of which caused additional costs to be incurred'

(2) Such an order might be appropriate if there was a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order might also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.

(3) Where there was a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party was likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party was likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue might be treated as having been raised unreasonably if it was hopeless and ought never to have been pursued.

(4) Where an issue-based costs order was appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that was practicable.

(5) An issue-based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.

(6) Before making an issue-based costs order, it was important to stand back and ask whether, applying the principles set out in CPR 44.2, it was in all the circumstances of the case the right result. The aim must always be to make an order that reflected the overall justice of the case.

In this case, the defendant asserted that the claimant lost on the issue of whether the defendant was in breach of statutory duty. However, the claim for breach of statutory duty was simply a different legal basis for putting the claimant's case. It was not a discrete issue which caused additional costs to be raised.

The claimant had succeeded in his claim in nuisance and he had not acted unreasonably in raising any of the issues considered in the main judgment. On the contrary, they were all reasonably raised. Overall, applying the principles set out in CPR 44.2, an issue-based costs order would not, in all the circumstances of the case, be the right result.

The claimant was represented by Aaron and Partners LLP

The defendant was represented by the Environment Agency legal department

Comment

As we have commented before, the important factor in seeking an issue-based costs order is to be able to identify one or more discrete or distinct issues, the raising of which have caused material additional costs to be incurred.

A tripping accident on holiday

Morgan v TUI UK Ltd (Cardiff County Court 12/06/2020)

The claimant and her husband were on holiday in Mauritius. On the second evening on the way to dinner they walked along an outside sun terrace adjacent to the swimming pool at about 7pm when it was still light. At about 9pm, by which time it was dark, the claimant returned to her room via the same route. Just after she walked back onto the sun terrace, which was unlit, she collided with a heavy wooden sunbed and fell, suffering injuries to her knees, face and head.

That brief description of the accident was not in dispute, but there were some factual issues of varying importance which needed to be resolved. The first was which restaurant the couple went to that night. They both said in their oral evidence that they went to a general restaurant, which was included in the holiday price but the hotel manager at the time, said that he was informed by his staff on the night of the accident that they had dined in another restaurant, at a different location on the hotel complex.

That was repeated in contemporaneous reports. In cross examination, the claimant said that they did not dine there at all, as that was a restaurant which was not included in the holiday price and at which it was necessary to reserve a place two days beforehand. She was not challenged on that part of her evidence and the judge accepted it.

The next issue was whether the claimant left a lit pathway to cross a grassed area to get to the sun terrace. The claimant said that she kept to the pathway until it joined the sun terrace, where she turned right and then carried straight on to her room. That latter part could not be correct, as she would have needed to take a left turn just after turning right to get to her room.

The claimant remained firm in her oral evidence that she did not leave the pathway to walk on the grass and was not disorientated before her fall. The short cut across the grass was a very short one indeed, a few paces, and again her evidence as to her route and her orientation before the fall was accepted by the judge.

The next issue was precisely where the fall took place. The claimant's husband, who did not witness the accident, drew a rough plan of the area which showed the point of the accident a few paces into the sun terrace. He took photographs a couple of days later of the area where he marked with a circle where the accident happened. In cross examination he said that this was where he had found his wife lying on the sun terrace after being called by staff.

There were posts on the sun terrace supporting retractable canopies, but there was no suggestion that these were closed at the time of the accident. The circle was near to the second line of posts on the sun terrace from the claimant's direction of travel, or perhaps a little beyond it. In her witness statement she gave the impression that her husband's marking on this photograph showed were she had fallen. In cross- examination she said she thought it was nearer the first line of posts, but later on said it might have been between the second line of posts, but that she knew she hadn't gone far onto the sun terrace and not far enough to know what danger she was in from the lack of lighting.

The judge found that the claimant fell forward and hit her face hard on the concrete, and so the point where she made contact with the sunbed was likely to be a little further back. It was likely that that contact was between the first and second line of posts, probably nearer the second line.

The final issue as to the accident, and the most crucial one, was how dark the sun terrace was at the time and point of contact between the claimant and the sunbed. She agreed in cross-examination that this part of the sun terrace was no darker than any other unlit part of the complex, but she maintained that it was dark enough that she couldn't see the sunbed

The judge concluded that the preponderance of the evidence on how dark the accident spot was at the time showed that whilst it was not pitch dark, it was dark enough to make it very difficult to see the dark wooden sunbed, especially when someone was walking from the lit pathway onto the unlit sun terrace. The cause of the accident was therefore the lack of lighting on or adjacent to the sun terrace and the time of the accident.

Had the accident happened in England or Wales, then that was likely to have been the end of the matter on primary liability. It was accepted that under Regulation 15(1) of the Package Travel, Package Holidays and Package Tour Regulations 1992 (the 1992 Regulations), the defendant was liable for the acts of its suppliers where there had been improper performance of the holiday contract which fell below the prevailing local standard in the country in question.

It was for the claimant to show such improper performance. There was little evidence before the court of safety regulations in Mauritius as to external lighting applicable to hotels. The hotel in question was acquired by its present owners in 2014 and substantially refurbished, but no contractual documentation relating to that refurbishment was put before the judge. The judge found the state of the evidence on this point was not entirely satisfactory.

The judge preferred the evidence of the claimant's lighting expert to that of the defendant. The claimant's expert relied primarily upon an international standard on emergency lighting adopted by the International Organization for Standardisation (ISO) in 2007.

Mauritius was a member of that organisation, and as the forward to the standard made clear, it was adopted by a special procedure which required approval by at least 75% of the member bodies casting a vote. The forward also made clear that ISO collaborated closely with the International Electrotechnical Commission (IEC) on all matters of electrotechnical standardisation. However, there was no evidence before the court of how, if at all, Mauritius cast its vote.

It was the claimant's expert's view that the standard was frequently used in construction to give a minimum for such hazard perception. The minimum was 0.5 lux, and this was one of the few universal principles. It was the expert's opinion that where, as in Mauritius, there was no specific local standard, that this was what was used. (The judge held that at the scene of the accident it was likely to have been a little less than 0.24 lux, as that was the figure measured for the next nearest point going back to the lit pathway).

'…there was no suggestion…that the claimant should not have been walking where she was'

It was not in dispute that there were two lit

routes back to the rooms, one alongside the beach and one to the rear of the rooms. However, it was not in dispute either that once the lit footpath which the claimant was using joined the sun terrace the most direct route to her room was along the terrace. She and her husband said they had seen other customers use this way to access rooms and the defendant accepted this may have been the case.

The holiday details form referred to the accident spot as on a walkway, and whilst there was no activity in or around the pool after it closed at 8pm, there was no suggestion in this or in the health and safety pro forma that the claimant should not have been walking where she was. To the contrary both referred to the poor lighting. The accident spot was upon a walkway which customers might reasonably be expected to use to access their rooms, even after the pool closed.

This was not the sort of case where there was a specific local standard which was lower than, for example, the prevailing British Standard. It was a case of coming to a conclusion on the limited evidence before the court of whether there was a prevailing local standard and if so, what it was.

The defendant was liable for the claimant's accident under the 1992 Regulations in respect of the poor lighting where she fell.

Contributory negligence was assessed at 20%.

The court went on to assess those damages that had not already been agreed.

The claimant was represented by Wilkin Chapman LLP

The defendant was represented by MB law

Comment

This is a case decided on its facts and the judge's acceptance of the claimant's expert's view of what would have been the applicable standard for lighting at the time. However, the judge may also have been influenced by the fact that following the accident, the hotel installed additional lighting in the area. That was said to have been designed and arranged with ambience in mind, but the judge took the view that it was likely to have been prompted by the accident.

Useful links:

Tully v Exterion Media (UK) Limited and another (2020) EWHC 1119 (QB)

Morgan v TUI UK LTD (Cardiff County Court 12/06/2020)