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 reliability of a claimant's evidence in an asbestosis claim
- A claimant recovering only a proportion of his costs
- Counsel's fees being denied in a fixed costs case
- The abuse of the RTA claims Portal

Malcom Henké
Partner & Head of LACIG

Employers' Liability/Credibility

Smith v Secretary of State for Transport (2020) EWHC 1954 (QB)

The claimant was a 77-year-old man with pulmonary fibrosis, which had reduced his life expectancy by three years. From 1956-1963, he was employed by British Rail to repair train carriages. His case is that he was regularly exposed to asbestos dust during the course of his employment, as a consequence of which he had asbestosis.

The defendant, who had taken over the liabilities of British Rail for historic industrial injury claims, considered he had idiopathic pulmonary fibrosis, for which it could not be held responsible.

The medical experts were agreed that the claimant could be considered to have asbestosis if his cumulative exposure to asbestos amounted to 25 fibres per millilitre per year ('fibre years').

By the end of the trial the key issues for the court were:

a. how the court should treat the claimant's oral evidence in light of his communication difficulties following a stroke in 2001;

b. how often he was likely to have been exposed to asbestos dust falling from the ceiling panels during repair work in the carriages; and

c. whether he was exposed to 25 fibre years of asbestos dust during his career with British Rail.

On the first issue, the judge had watched, on video, the claimant's evidence on deposition and found that his difficulties were easily apparent. It was agreed by the parties that the judge should approach the claimant's evidence with the following in mind:

a. In assessing oral evidence based on recollection of events which occurred many years ago, the court must be alive to the unreliability of human memory.

b. A proper awareness of the fallibility of memory did not relieve judges of the task of making findings of fact based upon all the evidence

c. The task of the court was always to go on looking for a kernel of truth even if a witness was in some respects unreliable.

d. Exaggeration or even fabrication of parts of a witness' testimony did not exclude the possibility that there was a hard core of acceptable evidence within the body of the testimony.

e. The mere fact that there were inconsistencies or unreliability in parts of a witness' evidence was normal in the court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts could be accepted as reliable.

f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, might be neither reliable nor even truthful, the difficulty of discerning where the truth actually lay, what findings he could properly make, was often one of almost excruciating difficulty yet it was a task which judges were paid to perform to the best of their ability.

'…the claimant's stroke meant that he was considerably hindered in his ability to communicate before the court. Nonetheless… the judge was not persuaded that there were material inconsistencies in his evidence'

Having considered the factual and documentary evidence, when considering the issue of the claimant's credibility, the judge concluded that the claimant's stroke meant that he was considerably hindered in his ability to communicate before the court. Nonetheless, he gave clear and consistent evidence on a number of aspects of his day to day working career, which were consistent with the history of the period. Once due allowance was made for his communication the judge was not persuaded that there were material inconsistencies in his evidence. He was to be considered an honest witness.

The claimant gave unchallenged evidence that a colleague would remove ceiling panels to do repair work. The ceiling panels would release blue asbestos dust which fell onto the claimant and the floor. It would remain on the floor until it was swept up after the job was done. It would be disturbed by the men as they moved about the carriage in the course of their work. His evidence was supported by the known fact that a considerable number of the train coaches built between 1951 and 1967 used blue asbestos for body insulation.

In light of British Rail memos emphasising the need for protective measures for the removal of ceiling panels, the removal of the panels exposed the claimant to the risk of asbestos dust.

The claimant gave evidence that he was exposed to asbestos dust on a regular basis. Support for this was to be found in his unchallenged evidence that his gang were expected to do a range of repair work; from the history of the period as a challenging one for railway repairs; and in the repeated emphasis in the British Rail documentation about the need for protective measures for removal of ceiling panels.

On the second issue of cumulative exposure, the judge found that by the end of the trial there was broad agreement between the parties' experts that the divergence in their estimations of the claimant's exposure to asbestos dust was due to their differing views as to the factual reality of his working life.

The claimant's expert estimated that the mean concentration of asbestos dust produced by the activities described by the claimant in his evidence was in the range of 20-100 fibres/ml. The defendant's expert accepted in giving his evidence that this was a reasonable assessment if the court were to accept the claimant's factual evidence.

The claimant's expert also calculated that the claimant would have to be exposed to concentrations of asbestos dust of 20 fibre/ml for approximately seven hours a week during a seven-year career with British Rail in order for his total exposure to exceed the Helsinki threshold of 25 fibre years. At higher concentrations of 100

fibre/ml, he would need to be exposed for 1 hour 26 minutes a week in order for his total exposure to exceed the Helsinki threshold. The defendant's expert did not dispute the mathematics of this analysis.

In light of this agreement between the experts and the findings of fact made, the judge was satisfied that the claimant would have been exposed to concentrations of asbestos dust in the range of 20 – 100 fibre/ml on a regular basis.

He was therefore satisfied on the balance of probabilities, that the claimant's total exposure would have exceeded the Helsinki threshold of 25 fibre years.

The claimant was represented by BTMK

The defendant was represented by DWF

Comment

Although decided on its facts, this case offers helpful guidance on how judges should assess evidence when the credibility of the witness is in doubt.

Costs/Claimant Recovering a Proportion of his Costs

Jones v Ministry of Defence (2020) EWHC 1987 (QB)

On 22 June 2020, judgment was handed down in this clinical negligence claim with the consequential issue of costs agreed to be determined. The costs of the claim were divided into two periods:

i) The period from the inception of the claim until 6 May 2020, being the point at which it was agreed that the defendant's Part 36 Offer of £60,000 became effective:

ii) The period from 7 May 2020 onwards.

The parties were agreed that the defendant was entitled to its costs in respect of the second period. The Part 36 Offer was considerably in excess of the damages awarded by the court and the claimant accepted that he must bear the consequences provided for by the rules. As the claimant was in receipt of insurance which covered the adverse costs of not beating the Part 36 Offer, the defendant did not seek to offset the costs against the award of damages.

As to the first period, the defendant contended that it was the successful party and accordingly it should recover the substantial majority of its costs. The claimant only recovered a small percentage of the damages claimed because the court overwhelmingly preferred its evidence to that advanced by the claimant.

The claimant contended that he was the successful party. Despite the fact that he recovered less money than claimed, it was still a significant amount and certainly one justifying the continuation of proceedings in the absence of any offers. Also, the defendant did not admit a particular allegation on which it failed and pursuing that issue was reasonable and led to considerable further expense. Finally, the defendant failed to engage with settlement discussions until close to the commencement of trial.

The claimant opposed the making of an issues-based cost order and contended that he should receive the entirety of his costs pre-dating the coming into effect of the Part 36 Offer.

The Deputy High Court Judge held that the cost dispute can be resolved by asking three sequential questions.

i) Who was the successful party for the purpose of the 'general rule' provided in CPR 44.2(2) (namely, that the unsuccessful party will be ordered to pay the costs of the successful party)?

ii) Was there a reason why the successful party should not recover all of his/its costs (subject to assessment)?

iii) If so, what was the appropriate order to make?

The general rule provided by CPR 44.2(2)(a) was that the successful party was entitled to

be paid their costs by the unsuccessful party. The claimant here should be deemed to have succeeded in his claim in substance and reality. Absent any offer, it was reasonable of him to bring proceedings even for the relatively modest amount awarded by the Court.

There needed to be a "reason based on justice" to depart from the general rule that the successful party recovered its costs and the mere fact that a successful party had succeeded on some, but not all, issues did not always amount to sufficient justification for departure.

'…the court far preferred the relevant expert evidence submitted by the defendant with the result that the award of damages was very far below that sought'

Whilst the defendant's arguments were not sufficient to demonstrate that it was the successful party, they did demonstrate that it would be unjust if it were to pay for all the claimant's legal costs. The reason for this conclusion was obvious from the face of the substantive judgment and did not need to be rehearsed in this judgment. In short, the court far preferred the relevant expert evidence submitted by the defendant with the result that the award of damages was very far below that sought. An award of 100% of the claimant's costs in those circumstances would be unjust and therefore a departure from the general rule is justified.

The judge declined to make an issue-based cost order pursuant to CPR 44.2(6)(f). Orders of this nature could present an unnecessary and disproportionate burden in detailed assessments where many of the issues (here negligence, causation and loss) materially overlapped with each other and were difficult to unpick fairly. If the general rule was being departed from, then it was generally preferable to make orders expressed in percentage terms, or references to distinct periods. Indeed, reinforcing this principle, CPR 44.2(7) provided that before considering making an issue-based cost order, the court should consider whether it would be practicable to make an order for payment of a 'proportion' of costs. Such an approach was practicable here.

Having regard to the findings made at trial, the amount of time and costs focussed on the medical dispute the appropriate order was that the claimant should recover 60% of his costs.

The claimant was represented by Russell Cooke LLP

The defendant was represented by The Government Legal Department

Comment

This is yet another example of a court using its costs' discretion better to reflect the true result of a trial, rather than simply allowing costs to 'follow the event', even though the losing party had already incurred the penalties under Part 36.

Costs/Counsel's fees being denied in a fixed costs case

Coleman v Townsend (2020) EWHC (Costs)

The scope of this appeal was limited to the award of two items: counsel's abated brief fee for trial at £852.50; counsel's fee for a skeleton argument at £370.00.

The appeal proceeded by way of a re-hearing pursuant to CPR 47.21.

It was common ground that the claimant/respondent's costs fell to be fixed pursuant to CPR Part 45 Section IIIA, which provided a structured system of costs recovery in high volume, low value, personal injury litigation.

The claim was for personal injuries, pre-accident value of a vehicle, hire car costs recovery, storage, damaged items and miscellaneous expenses. The matter was uploaded to the Portal and the Claim Notification Form sent electronically to the defendant's insurers. The defendant's representatives did not admit liability and the claim exited the Portal.

Proceedings were commenced in the County Court and proceeded to be listed for trial on 26 April 2018. However, the matter settled following acceptance of the defendant's Part 36 offer on 25 April 2018, the afternoon prior to the trial date.

Table 6B of CPR Part 45 Section IIIA dealt with the costs of a claim which no longer continued under the RTA Protocol. In addition to the fixed costs allowed in Table 6B, disbursements were dealt with in Rule 45 29I which states:

"45.29I(2) In a claim started under the RTA Protocol, the EL/BL protocol or the pre-action protocol for resolution of Package Travel Claims (PTC) the disbursements referred to in paragraph (1) are (a) … (g) (h) Any other disbursement reasonably incurred due to a particular feature of the dispute."

The defendant/appellant submitted that Table 6B only provided for a trial advocacy fee to be recoverable where a claim was settled on the day of trial or at trial. It was submitted there was no provision for a trial advocacy fee to be payable at any earlier point irrespective of when such a brief fee might be incurred. In relation to allowable disbursements, it was submitted that whilst CPR 45.29I prescribed a long list of disbursements, the only counsel's fee was for an advice as provided for in a relevant Protocol, usually by a claimant on a quantum settlement for an infant, otherwise counsel's fees were notable by their absence. In terms of discretion, neither disbursement was reasonable or proportionate in the circumstances. Overall, fixed costs involved

swings and roundabouts. The overall purpose of the fixed recoverable costs regime was to ensure that, save for express exceptions, the amount recoverable was limited to the sums set out in the relevant tables.

The claimant submitted that counsel's fees were a disbursement recoverable in this instance because they were reasonably incurred due to a particular feature of the dispute. In terms of jurisdiction, as the court had made a direction for skeleton arguments to be exchanged, counsel's fee was manifestly a disbursement and there was therefore jurisdiction to award it pursuant to CPR 45.29I(2)(h). As far as the abated brief fee was concerned, this case settled a day before trial. Counsel had inevitably already been briefed and whilst the trial advocacy fee under CPR45.29C and Table 6B was concerned, there was nothing in either of those provisions to exclude its recovery as a disbursement which otherwise met the requirements of CPR45.29I(2)(h). The claimant accepted the defendant's Part 36 offer within the 21-day period and consequently an abated brief fee was a reasonable disbursement to recover.

The Master held that the defendant's submissions were to be preferred. The costs in Table 6B set out the recoverable costs for each stage of the claim which no longer continued under the RTA Protocol and included all the work which could reasonably be expected to be carried out for each stage. In relation to Table C that specifically included the trial advocacy fee and implicitly the costs of preparing for the trial which self-evidently would include a skeleton argument. That stage was not reached in this case. The day of the trial was not yet at hand. It followed that both the claim for the preparation of the skeleton argument and an abated brief fee fell within Table B, which included all work "on or after the day of listing, but prior to the date of trial".

The Master rejected the claimant's argument that the Court of Appeal decision in Aldred had no application in this case and that these disbursements fell squarely within CPR45.29I(2)(h) where the court could allow any other disbursement incurred due to the particular feature of the dispute.

The claimant was represented by Bond Turner

The defendant was represented by Weightmans LLPThe claimant was represented by Russell Cooke LLP

The defendant was represented by The Government Legal Department

Comment

This is a very important decision for defendants, showing that the courts are likely to apply the fixed costs regime strictly. It does, however, bring into focus the need for defendants to time Part 36 offers to try to avoid a claimant accepting the offer just after the claim has moved from one phase of costs to another and thus being entitled to recover all of the costs of that later phase.

RTA/Claims Portal Abuse

Tandara v EUI Limited (Central London County Court 29 July 2020)

On 8 March 2012 the claimant was involved in a road traffic accident when a vehicle insured by the defendant in these proceedings collided with the rear of her vehicle.

The claimant consulted solicitors to pursue a personal injury claim on her behalf and by 28 April 2012 she had seen a medico-legal expert, who diagnosed soft tissue/whiplash injuries to her neck and back together with some headaches and anxiety which he considered would resolve within 3-6 months. However, her injuries did not resolve.

Subsequently, on 3 February 2015, almost on the cusp of limitation, the solicitors issued protective proceedings. They were issued under the provisions of CPR 8 (Part 8) in accordance with the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the "Protocol").

The relevance of the Protocol was that it was concerned with and related to claims which (at the time) did not exceed £10,000. Pursuant to Practice Direction 8B paragraph 16.2 the proceedings were almost immediately stayed by an order dated 5 February 2015.

That stay was not lifted until more than four years later when, by an order of 26 March 2019, the proceedings were transferred to Part 7 and consequential directions were given for the service of a Particulars of Claim and a Defence.

On 3 May 2019 the claimant served a Claim Form and Particulars Claim together with a Provisional Schedule of Loss. The statement of value endorsed upon this Claim Form was for "an unlimited sum in excess of £500,000" and the Schedule of Loss, described as "Preliminary", now valued the claim, some seven years and two months after the accident at a little over £760,000.

No warning, notice or previous information had been given to the defendant nor this firm (its solicitors) for this substantial increase in the value of the claim.

After such a long time, throughout which the defendant believed, and indeed understood, that the value of the claim was either up to £10,000 or might be settled for not (relatively) a great deal more, to now be faced with a claim of such magnitude was, it considered, unfair and unreasonable.

Accordingly, on 17 December 2019 the defendant issued the present application to strike out the claim on the basis that the way

in which the claim had been conducted amounted to an abuse of process.

Finding in favour of the defendant and in striking out the claim, the District Judge held that the stated aim of the Protocol and the special procedure under Part 8 was to deal with claims valued at no more than £10,000 on a full liability basis, where liability was admitted but quantum was disputed.

Of crucial importance was the fact that if a claim exited the Protocol because liability was in issue or quantum exceeded the upper limit, it then immediately became subject to the Pre-Action Protocol for Personal Injury Claims (the "PI Protocol").

The PI Protocol made it clear that there should be, and was expected to be, a high degree of voluntary disclosure and cooperation between the parties.

One of the problems highlighted by this case was that neither the Protocol nor the Practice Direction stipulates a time by which a claimant needs to apply to lift the stay or, indeed, provide any mechanism by which the stay might automatically come to an end if no such application is made by a claimant within a specific time.

That means, as has occurred here, that a case is able to languish in a sort of 'no man's land' with nothing happening (because of the stay) for a considerable period but, concurrently, avoiding the rigours and requirements of the PI Protocol, the Part 7 procedure or the exigency of limitation.

The District Judge held that only on 5 September 2016 did the claimant's then solicitors indicate, in a telephone conversation, that the claim was likely be over £10,000.

Therefore, on 5 September 2016 the Protocol ceased to apply and the claimant should have made an application to court to start Part 7 proceedings. In this case no application was ever made. It was only the defendant's application of 19 February 2019 which led to the lifting of the stay.

Accordingly, there was a breach of not only the letter, but also the spirit, of the Protocol by the claimant, the culpability for which must rest squarely with herself and her advisers.

There had been an almost complete lack of any flow of information and co-operation by the claimant's advisers which prevented the defendant taking relevant steps at the relevant times, which had prevented it from knowing the magnitude of the claim it now faced. This included the claimant's previous solicitors' failure to respond to numerous requests by the defendant and this firm for clarification of the nature and value of the claim.

The defendant only became aware of the extent of the claim it faced in May 2019 just over seven years after the accident and four years on since the issue of proceedings. It now faced an entrenched claim of fibromyalgia which was said to be permanent and yet, almost 8½ years post-accident, had not obtained any medical evidence itself.

'By issuing proceedings under the Protocol when she should not have done so the claimant secured a stay which endured for just over four years…'

By the failure and inaction of her advisors and herself the claimant had been able to totally circumvent all the usual checks and balances.

There had been no consideration or scrutiny at the material time of her injuries by the defendant or this firm, who had been entirely cut out of the decision-making process either to participate in the selection of experts or their instruction, all the more so after the claimant's current solicitors were instructed and had obtained three experts' reports.

By issuing proceedings under the Protocol when she should not have done so the claimant secured a stay which endured for just over four years and thereby neutered the usual effect of limitation, a defence which would otherwise be open to the defendant.

The defendant had been placed in an irredeemable position and a fair trial of the issues could not now be achieved. No order for costs or selective striking out of certain parts of the claim would, or could, remedy the unfairness or prejudice caused to it.

That being so the claim could only be struck out in its entirety. There was no alternative and the court had therefore to exercise that last resort which would, in any event have been the consequence if all these matters were being raised at the lifting of the stay hearing in March 2019.

The claimant was represented by Taylor Rose.

The defendant was represented by Horwich Farrelly

Comment

Horwich Farrelly's application raised important issues on delay generally and also specifically on those cases which are deliberately or inadvertently kept in the Protocol process, despite their value substantially exceeding the upper limits. This practice denies insurers and their solicitors the ability to conduct investigations and set suitable reserves. This judgment sounds a stark warning to claimant solicitors who adopt this tactic that the courts will, in appropriate cases, exercise their case management powers robustly and strike out claims as an abuse of process.

It further demonstrates that Horwich Farrelly will vigorously challenge the conduct of claimants and their solicitors where court processes and rules are manipulated in order to unfairly disadvantage insurers.

The 'parking' of claims in the MOJ/Part 8 process is a commonly encountered issue and a source of considerable frustration to motor insurers. It prevents an open exchange of information about cases and denies insurers the ability to investigate claims and make informed decisions, including offers of rehabilitation or settlement.

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