Insight 178

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

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

- Part 36 – all or nothing
- Causation in a claim for PTSD
- Illegality – no change in the law
- Quantum in a provisional damages case

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Part 36

Telefonica UK Limited v The Office of Communications (2020) EWCA Civ 1374

The claimant/appellant had made a successful Part 36 offer. The trial judge accordingly awarded it indemnity costs from the date the time for acceptance expired, pursuant to CPR 36.17(4)(b) and an "additional amount" of £75,000 pursuant to CPR 36.17(4)(d). The judge refused, however, to award an enhanced rate of interest (above the agreed commercial rate of 2% above base rate) on either the principal sum for which judgment was entered (CPR 36.17(4)(a)) or the costs the claimant incurred after the date for acceptance, (CPR 36.17(4)(c)), holding that it would be unjust to do so.

The trial judge recognised the heavy burden on a defendant seeking to avoid orders in favour of a claimant under CPR 36.17(4) on the grounds of injustice. He then identified the factors he considered to be relevant in the present case.

First was the fact that the question at issue in the proceedings was "a binary one, to which there was only one answer rather than some answer meeting in the middle" which may have rendered settlement "an unlikely prospect and may have rendered any decision to that effect an understandable one".

Second, the judge did not consider there was anything unreasonable in the defendant's decision to take the case to trial or in its conduct of the litigation, but again recognised that that was not determinative, albeit relevant.

Third, he did not accept that the defendant had behaved unreasonably in failing to engage in the without prejudice process.

Fourth, the judge considered "the nature of the offers in play" and whether the offers made by the claimant here were genuine attempts to settle the proceedings, although he did not rule that they were not.

'…having correctly awarded the claimant both indemnity costs and the maximum additional sum, there were no grounds for finding that the claimant was not also entitled to enhanced interest'

The Court of Appeal found that having correctly awarded the claimant both indemnity costs and the maximum additional sum, there were no grounds for finding that the claimant was not also entitled to enhanced interest. Indeed, in relation to indemnity costs, the judge had considered that the "normal Part 36 approach" ought to

be engaged, and that the "standard consequence" was an indemnity costs order.

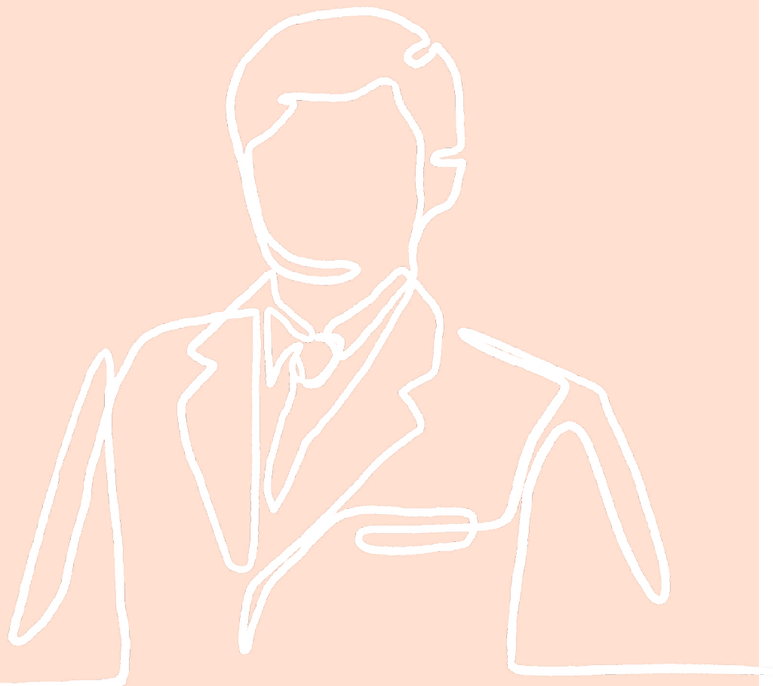
In that context, the question arose as to why the position was any different in relation to the award of the other standard consequences, namely the award of additional interest on the principal judgment and costs. The question was particularly acute in the case of a judgment for £54m (following a relatively short trial under Part 8), where an award of indemnity costs and an additional £75,000 was an almost trivial uplift and any significant enhancement in overall relief would only have been achieved by the award of additional interest on the principal sum.

In relation to enhanced interest on the principal award (CPR 36.17(4)(a)), the judge's reasoning was that such an award would have been "disproportionate" given the "very high nature of the offers" and the other benefits he was awarding. That reasoning did not bear scrutiny.

First, it was difficult to see the relevance of the level of the offers given that the key factor was that the defendant could have avoided the need for the proceedings (or most of the proceedings) by accepting one of the offers that had been made, and been in as good a position as it was after the trial. The fact that the amount offered was a very high percentage of the maximum a claimant could be awarded after judgment might justify the court in finding that it was not a genuine attempt to settle the proceedings, but once the judge had accepted that the offers were genuine attempts at settlement (his negative formulation that he could "not determine that they were not genuine attempts to settle" amounting to the same finding), the level of the offers could not, in itself, form the basis of an assessment of the "proportionality" of enhanced interest, let alone a finding that any enhanced interest would be unjust. The judge "reintroduced" the overturned approach in Carver, effectively and improperly declining to implement Part 36 because of the small margins involved.

Second, since the court had a wide discretion as to the rate of enhanced interest to award, there was limited (if any) scope for consideration of disproportionality in deciding whether it was unjust to make any such award. The level of enhanced interest awarded must be proportionate in all the circumstances, entailing that the court could and must ensure that the award of enhanced interest was not, by definition, unjust on the grounds of disproportionality.

Third, there was no justification for the judge's approach of treating the award of the additional amount of £75,000 and of indemnity costs as factors rendering it unjust to also award enhanced interest on the principal sum, whether as a matter of "proportionality" or otherwise. The rule provided for the successful claimant (in the terms of CPR 36.17(1(b)) to receive each of the four enhancements and there was no suggestion that the award of one in any way undermined or lessened entitlement to the others.



The judge considered it unjust to award an uplift of interest on costs because the case was not conducted by the defendant in an unreasonable way and so costs were not enlarged by such conduct. However, the key question was which party was responsible for costs being incurred when they should not have been. The costs were incurred because the defendant could have, but did not, accept the claimant's offers, deciding instead to fight the case but failing to do better than the offers.

A defendant's conduct of proceedings after rejection of the claimant's offer might be a major factor in increasing or decreasing the level of interest awarded. But, reasonable conduct on the part of the defendant was not sufficient in itself to render it unjust to make an award at all.

As a result of these findings, the Court of Appeal awarded an additional 1.5% per annum (equating to about £900,000), making the total interest payable 3.5% above base rate, on both principal and costs, from the relevant date.

The claimant was represented by DWF Law LLP

The defendant was represented by its in-house solicitors

Comment

The additional penalties provided under CPR 36.17(4) are intended to encourage defendants to consider carefully any Part 36 offers made by claimants. This case merely confirms that if a defendant errs in rejecting an offer and the claimant is successful at trial, all four penalties will apply, save in exceptional circumstances.

Causation / PTSD

Leach v North East Ambulance Service NHS Foundation Trust (2020) EWHC 2914 (QB)

This claim arose out of an admitted breach of duty on the part of the defendant insofar as it was accepted that there was a 31-minute negligent delay in an ambulance arriving at the claimant's house for the purposes of taking her to hospital. (She had suffered a subarachnoid haemorrhage ("SAH") as a result of a ruptured aneurysm.) What was in dispute was whether the negligent period of delay had caused or contributed to the onset of PTSD.

The Deputy High Court Judge summarised the position in law as follows:

i) If it could be shown that the claimant would have developed PTSD, in any event, irrespective of the negligent period of delay, then the claim failed;

ii) If it could be shown that but for the period of negligent delay the claimant would not have developed PTSD, then the claim succeeded;

iii) If, on the other hand, the evidence was incapable of supporting either of the two propositions set out above, then if it could be shown that the negligent period of delay had made a material contribution to the PTSD, the claim succeeded.

It was the defendant's case that the claimant would have developed PTSD in any event, irrespective of the period of negligent delay.

It was also the defendant's case that there were no diagnostic criteria which placed weight on duration of trauma. Whilst agreeing with that in principle, the judge found that it did not follow that it could be said, even on the balance of probabilities, that a short period of trauma should be taken as the trigger for PTSD in the context of a much longer period of trauma. In other words, just because a short period of trauma could result in PTSD, it did not mean that the whole period of

trauma had not made a material contribution to the PTSD. Secondly, the defendant argued that there was incongruity between the claimant's medical expert being able to say that the negligent period of delay undoubtedly made a contribution to the PTSD whereas he was not able to express a view on the 'but for' test. The judge found there was no inconsistency in that stance. It was often very difficult, particularly in the case of an indivisible injury to apply the 'but for' test however much less difficulty arose where the question which was posed was whether events had made a material contribution to an injury.

'…medical science was not capable of dissecting (the) 31-minute period from the rest of the period of delay, so as to enable the inference to be drawn that PTSD would have occurred irrespective of the 31-minute delay'

The claimant's expert's opinion had to be considered by reference to what occurred prior to the 31-minute period of negligent delay. Undoubtedly, what occurred prior to the negligent period of delay was traumatic and in particular, the fact that the claimant felt that she was going to die; and that she was suffering intense physical pain. Nonetheless, it did not follow that it was possible to identify a specific cut-off point when it could be said

that whatever happened thereafter, PTSD was going to evolve. It was in the realms of speculation to attempt to identify a fixed time when the claimant had suffered sufficient trauma such that she was likely to go on to suffer PTSD. Accordingly, there was considerable force in the proposition advanced by the claimant's expert to the effect that medical science was not capable of dissecting that 31-minute period from the rest of the period of delay, so as to enable the inference to be drawn that PTSD would have occurred irrespective of the 31-minute delay.

Consideration needed to be given as to whether the theory that the PTSD would have arisen as a direct result of the SAH alone was sustainable. It was possible that from the moment the claimant suffered her SAH, she was destined to go on to develop PTSD but to come to such a conclusion, on the balance of probabilities, was a step too far. Put simply, medical science did not permit such a conclusion to be drawn.

Having adopted that reasoning, the judge was unpersuaded that it could be said, even on the balance of probabilities, that at the point of onset of the SAH, it was likely that the claimant would develop PTSD. Equally, it could not be said, on a balance of probabilities, at what point during the 109 minutes when she waited for an ambulance to arrive that the PTSD was likely to develop. To the contrary, it was pure speculation. In similar vein, it could not be said that the 31 minutes of negligent delay was of no importance. Although duration of trauma may or may not be a relevant diagnostic factor, the reality was that the period of delay was approximately

one third of the overall delay. It would be verging on the absurd to suggest that that period of delay when the claimant was in acute distress, believing that the ambulance was not going to come, did not make a material contribution to the onset of her PTSD.

An apportionment exercise was not possible. PTSD was an indivisible injury. It was far removed from, for example, industrial diseases such as noise induced deafness or asbestosis which were known to be dose related. That was simply not the case with PTSD. It could not be said when the trigger for the PTSD occurred, and it would not be logical to go on to conclude that, nevertheless, there could be an apportionment exercise.

In conclusion, the period of the 31-minute delay made a material contribution to the claimant's PTSD and an apportionment exercise was not permissible in these circumstances. Accordingly, there would be judgment for the claimant in the sum of £40,000.

The claimant was represented by Armstrong Foulkes

The defendant was represented by Ward Hadaway

Comment

Of greatest concern to defendants will be the judge's rejection of the argument that there should have been some apportionment between PTSD brought on by suffering the SAH and that caused by the defendant's delay. Notwithstanding that the delay was only one-third of the overall time, the defendant was ordered to pay 100% of the damages.

Illegality

Henderson (A Protected Party) v Dorset Healthcare University NHS Foundation Trust (2020) UKSC 43

The Supreme Court (UKSC) was asked to decide whether the claimant/appellant, could claim from the defendant/ respondent damages for loss she had suffered as a result of her conviction for her mother's manslaughter.

The claimant suffered from paranoid schizophrenia or schizoaffective disorder. In August 2010, she was under the care of a body which was managed and operated by the defendant. On or around 13 August 2010, the claimant's condition began to deteriorate. On 25 August 2010, she stabbed her mother to death whilst experiencing a serious psychotic episode. The claimant was convicted of manslaughter by reason of diminished responsibility.

Following the criminal trial at which the claimant was sentenced to a hospital order under S37 and an unlimited restriction order under S41 Mental Health Act 1983, the claimant brought a negligence claim against the defendant, seeking damages for personal injury and other loss and damage. The defendant admitted liability for its negligent failure to return the claimant to hospital when her psychiatric condition deteriorated. It accepted that, if it had done this, the killing of her mother would not have taken place.

However, the defendant argued that the claim was barred for illegality, because the damages claimed resulted from: (i) the sentence imposed on her by the criminal court; and/or (ii) her own criminal act of manslaughter. The defendant succeeded both at first instance and on the claimant's appeal to the Court of Appeal.

The appeal raised the question of whether Gray (2009) could be distinguished and, if not, whether it should be departed from.

Dismissing the claimant's further appeal, the UKSC held that the appeal raised three main issues:

1: Could Gray be distinguished?

In Gray, the House of Lords held that the claimant's negligence claim was barred by the defence of illegality because the damages he sought resulted from: (i) the sentence imposed on him by the criminal court; and/or (ii) his own criminal act of manslaughter. The courts below held that the facts of Gray and this claim were materially identical, so this claimant's claim was barred for illegality for the same reasons as in Gray.

However, the claimant argued that the reasoning in Gray did not apply or could be distinguished, because Gray concerned a claimant with significant personal responsibility for his crime. In contrast, in this claimant's criminal trial, the judge said that there was no suggestion that she should be seen as bearing a significant degree of responsibility for what she had done. This argument was rejected, as the crucial consideration in Gray was that the claimant had been found to be criminally responsible for his conduct, not the degree of personal responsibility which that reflected.

Issue 2

Should the Court depart from Gray?

The claimant contended that the UKSC should depart from Gray on three grounds.

The first ground was that the reasoning in Gray was incompatible with the approach to illegality adopted by the UKSC in Patel (2016). However, the court found that the essential reasoning in Gray was consistent with Patel, and so remained good law.

The second ground was that Gray should not apply where the claimant had no significant personal responsibility for the criminal act and/or there was no penal element in the sentence imposed on them by the criminal court. This argument was rejected because allowing a claimant to recover damages for loss that resulted from: (i) the sentence imposed by the criminal court; and/or (ii) an intentional criminal act for which the claimant had been held to be criminally responsible would give rise to inconsistency that was damaging to the integrity of the legal system. The criminal under the criminal law would become the victim under the civil. Requiring the civil court to assess whether a civil claimant had a significant degree of personal responsibility for their crime would create a clear risk of inconsistent decisions being reached in the criminal and civil courts.

In any case, it was unclear why significant personal responsibility was the appropriate threshold, and how the civil courts should decide whether a claimant met that threshold. There might be some exceptional trivial or strict liability offences which did not engage the illegality defence. However, the serious criminal offence of manslaughter by reason of diminished responsibility was not one of those exceptions.

The third ground was that the claimant's claim would be allowed under the trio of considerations approach in Patel, namely: stage (a) the underlying purpose of the illegality in question, and whether that purpose would be enhanced by denying the claim; stage (b) any other relevant public policy on which denying the claim may have an impact; and stage (c) whether denying the claim would be a proportionate response to the illegality.

With regard to the trio of considerations, the court confirmed first that they should usually be capable of being addressed as a matter of argument and at a level of generality that did not make evidence necessary; secondly, that they involved a balancing between policy considerations arising under stages (a) and (b) and that stage (c) related to proportionality and factors specific to

the case rather than general policy considerations; thirdly, that, where they arose, it was appropriate to give great weight to the policy considerations that a person should not be allowed to profit from his own wrongdoing and that the law should be coherent; fourthly, that where the policy considerations came down firmly against denial of the claim it would not be necessary to consider stage (c) and proportionality; and fifthly, that in relation to proportionality, centrality and the closeness of the causal link between the illegality and the claim would often be factors of particular importance.

In relation to stage (a), the policy reasons which supported denial of this claim included the consistency and public confidence principles identified in Gray. They also included: (i) the gravity of the claimant's criminal offence; (ii) the public interest in the proper allocation of NHS resources; (iii) the very close connection between her claim and her offence; and (iv) the public interest in deterring, protecting the public from and condemning unlawful killing.

'…there might well be a broader deterrent effect in a clear rule that unlawful killing never paid'

Although a claimant in the claimant's position might not be deterred from unlawful killing by being deprived of a civil right to compensation, there might well be a broader deterrent effect in a clear rule that unlawful killing never paid. Any such effect was important given the fundamental importance of the right to life. To have such a rule also supported the public interest in public condemnation and due punishment.

In relation to stage (b), the policy reasons relied upon for allowing the claimant's negligence claim did not begin to outweigh those which supported the denial of the claim. In particular, as Gray made clear, the resulting inconsistency in the law was such as to affect the integrity of the legal system and the underlying policy question identified in Patel was accordingly engaged. In relation to stage (c), the four factors relevant to proportionality identified in Patel did not show that denial of the claim would be disproportionate. It followed that the trio of considerations approached in Patel did not lead to a different outcome in this case.

Issue 3

Could the claimant recover damages for any of the heads of loss she had claimed?

She could not claim damages for loss of liberty or for loss of amenity during her detention in hospital because these heads of loss resulted from the sentence imposed on her by the criminal court. The other heads of loss could not be recovered because they resulted from the claimant's unlawful killing of her mother. It would be inappropriate for the court to subvert the operation of the Forfeiture Act 1982, which prevented the claimant from recovering her full share of her mother's estate.

The claimant was represented by Russell - Cooke LLP

The defendant was represented by DAC Beachcroft LLP

Comment

There was some concern that the decision in this case might have had wider implications for the principle of ex turpi causa. As can be seen, however, the UKSC stood firm on the existing principles.

Quantum/ Provisional Damages

Hamilton v NG Bailey Ltd (2020) EWHC 2910 (QB)

The claimant sought an award of “provisional damages” pursuant to S32A Senior Courts Act 1981 and CPR 41.2 that would enable him to receive damages now for the injuries from which he was currently suffering, and to return to court if particular conditions, linked to his asbestos exposure, were to develop in the future.

It was not disputed that the claimant was, in principle, entitled to a provisional damages order. Nor was there a dispute as to the conditions that should be the subject of the order and which would enable him to return to court if they were to materialise. The dispute before the court was as to the quantum of the general damages to which the claimant was entitled for pain, suffering and loss of amenity, and, to a lesser extent, the quantum of special damages.

The claimant was now 74 and on 3 July 2019, his medical expert concluded that the claimant (then 72) had a life expectancy of around 14.5 years. That would be a little over 13 more years from the date of this hearing. The claimant had “multiple bilateral pleural plaques together with mild subpleural basal fibrosis with a predominantly reticular pattern, together with subpleural lines” His medical expert described those appearances as “entirely consistent with mild asbestosis” and concluded that the claimant “does have significant disease in clinical terms”.

The defendant conceded liability and accepted that the claimant suffered from “mild asbestosis”, albeit a significant disease in clinical terms.

The key dispute between the parties concerned the appropriate bracket of the JC Guidelines for the claimant’s injuries. There was also a dispute, once the correct bracket was identified, as to where within that bracket the claimant’s case should fall.

The defendant contended that the claimant should fall within the lower asbestosis bracket, which applied to those with a respiratory impairment of “1-10%” and even if the claimant was taken as having 10% impairment, that bracket applied to him. Further, the claimant was relatively old, at 74, and had only had symptoms for 2-3 years. The asbestosis the claimant was suffering from was described as “mild”, and the only impact on him relates to breathlessness while gardening.

The claimant submitted that the case properly fell within the higher asbestosis bracket, which applied to cases with a level of disability “in excess of 10%”, but which the JC

Guidelines also referred as “causing progressive symptoms” which applied to the claimant. Taking account of the claimant’s life expectancy, age, symptoms and the level of his disability, as well as the progressive nature of his condition, a provisional award at the bottom end of the higher asbestosis bracket was appropriate.

‘…while the claimant’s case sat close to the borderline of the two asbestosis categories in the JC Guidelines, it fell within the lower one’

The Deputy High Court Judge held that while the claimant’s case sat close to the borderline of the two asbestosis categories in the JC Guidelines, it fell within the lower one. The JC Guidelines should not be read as a statute, but it did appear from the language used in the Guidelines that the lower bracket was intended for a level of respiratory disability of 10% and below, while the higher bracket was intended for cases above 10%. The lower bracket was said to be applicable in cases of impairment of “1-10%”. That applied to the claimant. The higher bracket applied to cases “in excess of 10%”.

As to where the claimant would come within the lower bracket, he should be placed close to the top end of the lower bracket. He was not the youngest age at which individuals could begin to exhibit asbestosis symptoms and there was no evidence of anxiety and relatively little impact on his daily life. On the other hand, he did experience breathlessness in what appeared to be his primary pastime. Of greater significance was the fact that his current disability was assessed as 10%, which was intended to be the top of the lower bracket, and that he was likely to suffer a further 5% deterioration. The latter clearly made his injury more serious than those whose condition was unlikely to deteriorate significantly. This would place the claimant a little below the very top of the lower bracket, giving a figure of £35,000.

The defendant suggested an arithmetical approach to calculate the deduction that should be made to take account of the provisional nature of the damages award. That included a reduction of £2,850 to reflect a 3% risk of mesothelioma. It also included a further reduction of £1,500 to take account of the 2% chance of the claimant developing asbestosis related lung cancer. The defendant also suggested a reduction of £3,500 based on a 5% chance of the claimant developing severe asbestosis. However, overall, the defendant rounded these figures to a total of £5-6,000. The claimant did not demur, and submitted that, if an arithmetic approach was taken, the difference between provisional and final award in this case would be around £5,000. The judge found that to be an appropriate approximate figure.

That meant if the claimant would in principle receive £35,000 for a full and final award, the appropriate award on a provisional basis was £30,000. However, it was not entirely clear whether the JC Guidelines brackets were intended to give figures for full and final awards, provisional awards or some mixture of both. An award of £30,000 would be somewhat low when compared to analogous cases that had been cited in argument. In those circumstances it was appropriate to adjust the figure of £30,000 up slightly and an award of £32,000 was appropriate in this case.

The claimant was represented by The Asbestos Law Partnership.

The defendant was represented by Weightmans LLP.

Comment

Although a case on it’s own facts, this judgment provides some general guidance on how a court will approach the valuation of PSLA in a case in which provisional damages arise.

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