Insight 189

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we focus on one case, to illustrate how a High Court Judge has preserved a five-day trial date, despite the following substantive applications being considered at the pre-trial review, with only 20 days to go:

- Specific disclosure

- Introduction of accommodation expert evidence

- Amendment to include provisional damages

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Daniel Pass v Ministry of Defence [2021] EWHC 243 (QB)

The judgment in this case arises from a pre-trial review that took place on 9 February 2021 before Fordham J relating to a five-day trial which has been fixed for 1 March 2021.

Nobody was asking the court to adjourn the trial. Indeed, both parties wanted to keep the trial date and for the most part, straightforward directions could be given. However, there were three applications to be resolved, which Fordham J referred to as the 'new inputs'.

Background

The claim is for damages for personal injury and loss arising out of what the claimant says was the negligent delay in the diagnosis and treatment of a spinal tumour whilst he was a serving soldier with the defendant.

He alleges that he suffered permanent disability as well as loss of his career in the armed forces due to that delay in diagnosis and treatment.

Breach of duty is accepted by the defendant but all issues relating to causation and quantum are in dispute.

Experts range from neuroradiologists and neurosurgeons on causation to neurosurgeons, neuro-rehabilitation experts, orthotics experts, care and occupational therapy experts, and employment experts on condition, prognosis, and quantum.

Fordham J gave detailed directions on the uncontentious aspects up to and including the trial. It then fell to him to decide the three "new input" points, which included applications for specific disclosure; accommodation expert evidence and amendment of the particulars of claim to allow for an award of provisional damages.

Specific disclosure

This was relatively straightforward. The claimant wanted records from the defendant, all of which are types of military training and fitness test records. The application was granted and the documents were to be provided by 4pm on 16 February 2021 together with a witness statement from "a currently-unnamed but identified 'captain' (who will need to be named for the purposes of the court order) or a proper officer of the Army Personnel Centre giving reasons why the defendant has failed to do so."

Liberty to apply was given, in the event that something arose from the witness statement, should there be a failure to produce those documents and Fordham J made it clear that:

"… it is very much to be hoped that in the light of ventilation of this issue today, and the order that I will be making, this matter can speedily and satisfactorily be resolved. If the documents exist they must be found and disclosed. The trial of this case must not be derailed by any inertia."

Accommodation expert evidence

The claim includes future losses and expenses relating to accommodation, adaptation costs alone being £150,000. That head of future loss and damage was clearly set out in an initial claimant's schedule of 20 January 2020.

The claimant's team had previously pursued permission to rely on accommodation expert evidence and the defendant had, throughout, contested permission.

At a hearing on 7 December 2020 an application dated 23 October 2020 before Master Thornett was adjourned with directions for the claimant to have permission to restore it, which is effectively what they did, now in possession of a draft accommodation expert report.

Fordham J had to decide how the trial next month will deal with that issue if causation is proved. He seemed to be particularly concerned with how the reversionary interest element would be dealt with absent expert evidence.

The defendant submitted that it was "far too late" for the claimant now to have permission to adduce an expert report dealing with the cost of accommodation. His counsel suggested two possibilities, each involving the trial proceeding, including on this aspect, and no report being relied on by the claimant – either;

(i) the court could "do its best on the material that it has" or

(ii) the claimant would fail on this aspect of the claim, the onus being on the claimant to make good his case and, absent evidence, he would fail on this aspect of loss.

Fordham J was not persuaded that the first of those, in the circumstances of the present case, could be an appropriate way of approaching this issue, particularly in view of the sums claimed, stating that the value "serves to emphasise how inappropriate it would be for the Court to "do its best" with no material."

As to the second possibility, "in my judgment and in the circumstances of this case, would be fundamentally unfair to the claimant, with his claim failing on this head through lack of evidence."

He went on to give the claimant permission but deftly avoided an adjournment. He removed the issue of quantification of future accommodation costs from the trial and had left the trial judge to give any further necessary directions, in the event that causation and recovery of accommodation costs in principle is established. He also made it clear that the defendant need not incur costs in relation to that head of loss unless and until it became necessary. The detailed reasoning was:

"It is clear, and the White Book commentary emphasises, that it is important wherever possible that the position on as to (sic) the ability to rely on expert reports be resolved at the earliest possible stage in proceedings. The reasons for that are obvious."

"[The defendant] submitted that, were permission for this report to be given at this late stage by the court, and were this issue of quantum of future accommodation costs to be before the trial judge next month, that would be fundamentally unfair to the defendant and in those circumstances he would be urging an adjournment of the trial. [The claimant's] primary position was that the defendant has 'brought that position on itself' through resistance throughout to something to which it ought to have acceded and with which it could have been making plans of its own to deal.

Questions that I need to evaluate (in accordance with the White Book commentary at Volume 1 page 1170 §35.4.2) include: whether the expert evidence meets a necessity test; if not, whether it is reasonably required; and as to the latter question considerations of proportionality; always having regard to the overriding objective; and in particular having regard to whether the trial date would be lost.

In my judgment there is a path which: resolves all the imperatives; achieves fairness; is in accordance with the overriding objective; and secures that the question – should it be reached – of quantifying future accommodation costs will be addressed by a court having the material that it reasonably required; all of which can be achieved without losing the 5 day trial date.

That solution, which I adopt, is this. I will give the claimant permission under rule 35.4(1) to adduce the expert accommodation evidence. I will leave all further and consequential directions to the trial judge. But I will direct today that the issue of quantification of future accommodation costs is to be removed from the trial next month. I emphasise that it is only that question, of quantum of future accommodation costs, that will be off the agenda for the hearing. All issues of causation and recoverability in principle will be before the Court. It is only the question of quantum which would be the subject and would reasonably require the evidence.

Both counsel accepted, in my judgment rightly, that that issue of quantum of future accommodation costs could, in principle, be removed from the trial without any adverse knock-on effect for the consideration of the other issues. Neither counsel submitted that there was an inter-linkage with other issues which made that removal of one aspect impossible, unfair or unworkable. By removing that one quantification issue from the trial the consequences are as follows.

Firstly, the claimant avoids being put in the position where this issue would be resolved with him being unable to rely on the report. Secondly, the defendant avoids being in the position where it would have to deal at a hearing next month with an issue without having had time to adduce expert evidence in response. Thirdly, the trial is well able to proceed and resolve all other issues and in particular all of the issues which engage the array of expert reports and joint statements to which I have referred. I am quite satisfied that that course is not only fair to both parties but it is the course which in all the circumstances is necessary."

Amendment of the particulars of claim

The proposed amendment required detailed review of two elements:

1. A "seedling tumour" detected in an MRI scan in February 2014 and the "main tumour" (an intra-spinal tumour which was surgically removed the following month).
2. A remedial option for the Court to award provisional damages pursuant to section 32A of the Senior Courts Act 1981 (S32A).

Fordham J set out a brief summary on provisional damages to set the scene;

"Provisional Damages is a remedial response which a Court concerned with damages can give, if pleaded in the particulars of claim (CPR 41.2(1)(a)).

If ordered, it gives permission to the claimant to return to court should an identified deterioration occur in future so that a court can, at that future stage and in those circumstances, address the compensatory implications of that development.

Provisional damages in that way provide an alternative to the Court otherwise seeking to quantify future risks of possible future deterioration, as being built into the present quantification of a compensatory sum. The purpose and function of the proposed amendments to the particulars of claim, as both counsel accept, are to place on the agenda for the trial judge the remedial option of provisional damages, should the Court consider such a remedy to be relevant in the light of its other findings and justified in all the circumstances."

There was no pleaded claim within the particulars of claim pursuant to CPR 41.2(1)(a), so permission was required.

S 32A requires there to be an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

The claimant argued that:

- both the seedling tumour and the issue of risk of serious future deterioration are matters which are present and visible in the case;
- those are topics featuring conspicuously in the analysis of the relevant experts on both sides;
- the issue of deterioration has been clearly present in the consideration of the experts since expert evidence was first adduced in March 2018;
- in March 2018 the claimant's consultant neurosurgeon expert was discussing the chances of deterioration and describing a 5% chance of recurrence so far as concerned the main tumour;
- the expert evidence deals with the seedling tumour;
- the most recent joint expert statement of the neurosurgeon experts of 20 January 2021 expresses a view with a "proviso" depending on what a future MRI scan shows in relation to "other metastatic disease";

- having regard to the overriding objective, in all the circumstances of this case, fairness requires that the claimant be able to put the option of provisional damages before the Court.

The defendant argued that:

- there was no realistic prospect that the test that would need to be satisfied under section 32A before provisional damages could be appropriate was met;

- it was far too late for the claimant's team to attempt to amend the particulars of claim;

- it would be prejudicial for provisional damages now to enter the fray.

Fordham J rejected each of the defendant's arguments:

No realistic prospect: The defendant submitted that a passage in the neurosurgeon experts' joint statement indicates that the 5% risk previously identified is in fact recognised by both experts as being, in effect 'purely speculative' (judge's wording).

Fordham J did not agree for two reasons:

(i) if the defendant is right that the threshold on the evidence is not met for an order of provisional damages then he will prevail at trial on that very issue;

(ii) the question that the experts were considering in the passage relied on was a causation question about whether the claimant's "current 5% risk of recurrence" was avoidable if other steps had been taken, not whether there is a "current 5% risk of recurrence" or to involve any agreed expert position as to what that "current … risk of recurrence" is.

Too late: The defendant argued that so far as the seedling tumour is concerned, that was identified in the 2014 MRI and therefore discussed in the subsequent experts' analysis, having regard to that MRI and that the issue of future determination was addressed in the expert report of 6 March 2018 which is where the "5% chance of recurrence" was expressly described and that no good explanation had been given as to why it has taken until 2021 to make the application.

Fordham J agreed that there was some force in the argument, but it was subject the question of prejudice. His judgment on this element, subject to prejudice, can be summarised as:

(iii) he did not believe that it was as simple as saying that a March 2018 report clearly flagged up something well-known and which could have been reflected throughout in the particulars of claim;

(iv) he did not accept that it was a 'stale' point being 'freshened-up' by reference to claims relating to 'subsequent developments';

(v) the prospect of future deterioration has continued as a theme addressed within the various expert reports.

(vi) the agreed neurosurgeon experts' position (January 2021) referenced metastasis and their express proviso regarding the future.

(vii) it would not be in the interests of justice for a judge faced with this expert evidence – including the recent reference to the agreed express "proviso" regarding future developments – to be hamstrung by being unable even to consider provisional damages, particularly where the claimant has sought permission to amend the particulars of claim to enable this option to be before them.

Prejudice: The defendant argued that issues relevant to deterioration, future risk and the nature of any future deterioration had not been fairly on the agenda for experts to address in their reports and joint statements and that in those circumstances, it would be unfair and prejudicial for provisional damages belatedly to be introduced.

Fordham J did not agree for these reasons:

(i) all the issues relevant to risk, the future, deterioration, the nature of the future deterioration, the risks related to the prospects of such deterioration including in percentage terms, and the issues relevant to what is known and unknown including as regards metastasis and the seedling tumour are conspicuously present within the expert evaluative reports and statements before the Court;

(ii) there is no doubt that it would be proper for the judge at the trial seeking to quantify future risk and the prospect of deterioration to include these aspects in reaching a conclusion;

(iii) that the expert reports would provide the Court – and will have been designed to provide the Court – with the information that the parties wish to adduce to assist the Court in that quantification;

(iv) there is no special feature of provisional damages that introduces a series of questions, relating to deterioration risk or the future, that would not otherwise have been addressed in the expert reports;

(v) the expert reports prepared by the parties do as a clear theme grapple with precisely these issues;

(vi) even if that were wrong and there was something in the nature of the amendment to the pleading which made it relevant to revisit with an expert or experts what, precisely, they are saying to the Court, there is no reason why that could not be done and done effectively for the hearing and at the hearing next month.

Conclusion on amendment:

Allowing the amendment Fordham J stated that "For all those reasons I am persuaded that it is necessary and appropriate, having regard to the interests of justice in this case and the overriding objective, that the claimant should have permission to amend the particulars of claim" and went on to provide for the amendment and practicalities for drawing up the order.

With a backlog of cases and trial dates becoming as rare as hen's teeth, it is understandable why this trial has not been adjourned and clearly demonstrates the judiciary's desire to keep calm and carry on.

The defendant may feel aggrieved that the amendment for provisional damages to be considered has been allowed, but as clearly emphasised by the judge, that does not mean that an award will be made.

Finality may not be achieved at trial if the claimant succeeds and a further hearing may be required to assess the accommodation costs. However, it may all be over bar the shouting in a few weeks. If not, the defendant knows the additional claim it may have to meet, and one would hope that if necessary, it can be resolved pragmatically and with minimal additional cost.

Horwich Farrelly