Insight 207

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight, in which we report on the recent Court of Appeal ruling in the case of *J v A South Wales Local Authority*. The Court of Appeal considered whether the defendant should be permitted to withdraw an admission of liability made pre-litigation.

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Has something made you change your mind?

J v A South Wales Local Authority

Background

J was born in 2000. He had a troubled childhood. In 2012 J began proceedings against the local authority alleging breach of statutory duty and that the local authority had failed to remove J from the care of his mother in the first month of his life and place him for adoption. Before proceedings began the local authority admitted liability and admitted that, but for the breach, he would have been removed from the care of his mother and placed for adoption.

That admission was repeated in the local authority's defence served in December 2012.

In July 2019, almost 7 years later, the local authority applied for permission to withdraw the admission. The reason for the application was the Local Authority considered that the law relating to its duty to children had been altered by the UKSC decision in *Poole BC v GN (2019)*.

At first instance the application was granted and then reversed on appeal to the High Court.

The defendant appealed.

The Court of Appeal decision

The Court of Appeal dismissed the defendant's appeal. In particular, it was noted that

- The Local Authority had made wide ranging admissions as to duty, breach and the consequences of breach made carefully and deliberately in their defence served as long ago as 2012.
- There was clear and obvious prejudice to J if the local authority was allowed to withdraw its admissions so late in the day giving rise to the need to obtain evidence about events over 20 years ago.
- As a result of the non-adversarial approach evidenced by the admissions, J and his advisors had not sought judgment or any interim payments and had not begun any preparations for trial. If the litigation had been adversarial, J's advisors would have taken a different approach.
- There was a clear potential conflict as the local authority was at the same time the

defendant to J's claim and the entity having care of J pursuant to a care order issued in 2007 with an obligation to act in J's best interests.

- *Poole BC v GN* did not represent a sea change in the law.

Comment

This is an unusual claim, and the decision of the Court of Appeal is not surprising. On the specific facts the local authority's attempt to withdraw their longstanding admission of liability was always going to be an uphill struggle.

When will an application to withdraw succeed?

Legal Principles

The jurisdiction of the court to give permission for the withdrawal of a pre-action admission is conferred by CPR Part 14.1A

The matters taken into account by the court are set out in Practice Direction 14 paragraph 7.2. In addition to all the circumstances of the case the court will have regard to:

a) The grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;

b) The conduct of the parties, including any conduct which led the party making the admission to do so;

c) The prejudice that may be caused to any person if the admission is withdrawn;

d) The prejudice that may be caused to any person if the application is refused;

e) The stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;

f) The prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer (sic) was made, and

g) The interests of the administration of justice.

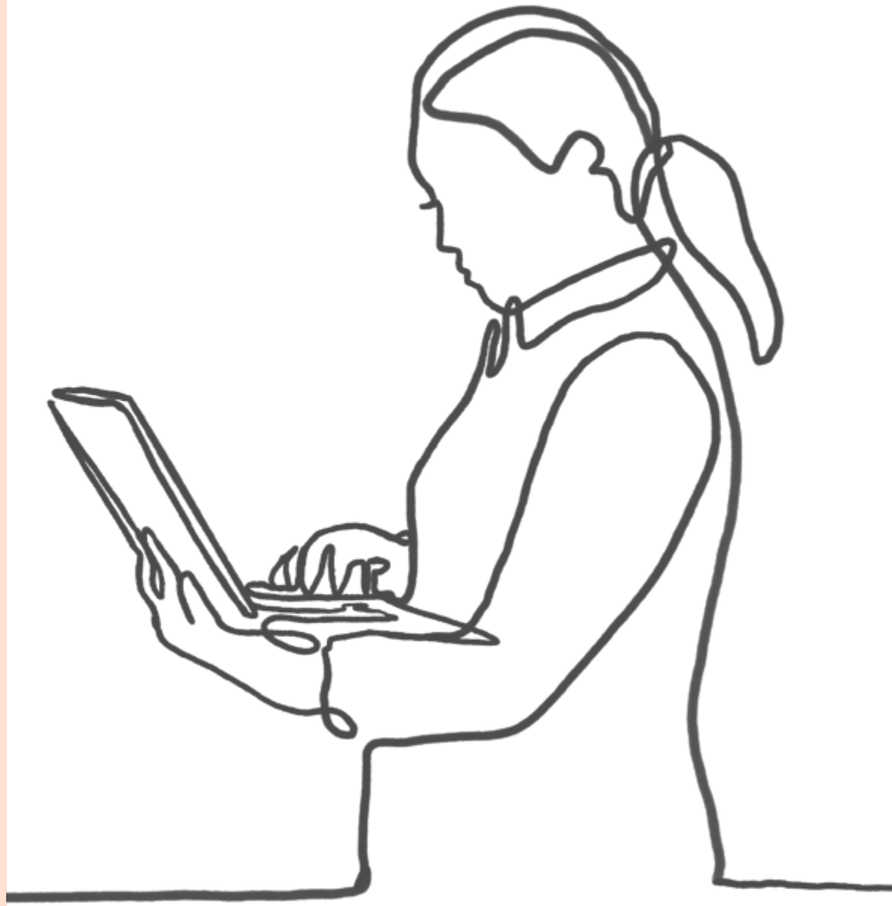
A wide discretion is conferred on the court to allow withdrawal of a pre-action admission.

It was stated by the Court of Appeal in *Woodland v Stopford (2011)* that the factors above are not to be taken as listed in any hierarchical sense, nor is it to be implied one factor has any greater weight than another.

a) New evidence

New evidence is evidence which comes to light after the admission is made. If an admission is made after careful consideration of the evidence available at the time of the admission the court are unlikely to allow a defendant to withdraw an admission merely because the decision to make the admission was wrong. *Cavell v Transport for London (2015).*

New evidence is not merely restricted to new evidence concerning the issue of liability or contributory negligence. If the rationale for



making the admission is based on the perceived value of a claim at the time of the admission and subsequently the claim increases significantly in value, the change in value of the claim can be considered as new evidence.

In *Wood v Days Health UK Ltd (2017)* the defendant had made a pre-action admission based on the assumption that it was facing a Fast Track claim but subsequently the value of the claim increased to £300,000.

The defendant's application to withdraw its admission was refused at first instance ,the judge finding that the risk of quantum increasing was inherent in any personal injury claim.

The Court of Appeal did not agree Lord Justice Davis stating:

"If one is facing a claim reasonably considered to be worth less than £25,000 an increase of a few thousand pounds perhaps may be considered an acceptable and foreseeable inherent risk. But a ten-fold increase to over £300,000 is surely another thing altogether"

"It seems to me indisputable that highly material new evidence had come to light. This was in the form of further evidence as to the extent of the injury allegedly caused and, in consequence, quantum"

Lord Justice Davis also considered proportionality and the reason the defendant made the early admission:

"Changes in litigation procedures provide every incentive on the grounds of proportionality for parties and particularly defendants and their insurers to speedily settle such claims. The Personal Injury Protocol was designed to facilitate that. The judge's approach would in my view tend to discourage speedy admissions of liability such admissions having been made having regard to considerations of saving costs and of proportionality. It would tend to discourage them for fear of a subsequent withdrawal of admission of liability being refused on the basis advocated by the judge even where quantum has in the interim enormously and unexpectedly increased"

In *Blake v Croasdale (2017)* the defendant had admitted primary liability in respect of a portal claim stated to have a value not exceeding £25,000. Contributory negligence was alleged and as such the claim dropped from the portal. Subsequently following the issue of proceedings, the schedule of loss valued the claim at between £3 million and £5 million.

The defendant applied to court to withdraw the admission. The defendant wished to raise the defence of *ex turpi causa* i.e., the claimant could not benefit from his own illegal act. The defendant's application was successful, the judge stating:

"Esure could not then have foreseen that this was what is now described as "a catastrophic" claim running into millions of pounds. Accordingly Esure should be entitled to withdraw its admission and that to refuse to do so would discourage defendants, especially insurers, from

acting proportionately, which would make the giving of admissions in like cases where it is appropriate, in the interests of reasonableness and proportionality, to give them, more difficult to secure."

It is worth noting following the withdrawal of the admission the trial of the action took place in July 2018. The defence of ex turpi causa succeeded and the claim was dismissed.

b) The conduct of the parties

The court will look at the conduct of both the claimant and the defendant. In *J v A South Wales Local Authority*, the non-adversarial conduct of the claimant carried significant weight. In *Woods v Days Heath UK Ltd* adjusters acting for the defendant insurer had assessed the benefit of an early admission, taking into account the perceived value of the claim and the cost of mounting a defence.

c) Prejudice arising if the admission is withdrawn

The principal prejudice is to the claimant. The claimant has lost the certainty provided by the admission and may as a result of the admission being withdrawn be disadvantaged in pursuing the claim. In *Blake v Croasdale* the judge stated:

"there is obvious prejudice to the claimant; the claimant now no longer has a claim which is admitted. However, if that is to be treated as a determining factor then permission to withdraw an admission would never be given after the commencement of proceedings. Emphasis was placed on the difficulties of proof which have increased over the three years since the admission was made. That is a matter which I should take into account, but which can be exaggerated."

By contrast In *Royal Automobile Club Ltd v Wright (2019)* the High Court rejected the defendant's application to withdraw its admission. The defendant had admitted liability in July 2016 and received a detailed schedule of loss in August 2017. The application to withdraw the admission was not made until late 2018. In the meantime, various interim payments had been made to the claimant. The judge commented:

"If clear and unequivocal admissions which have led to a substantial investigation of quantum and to interim payments being made apparently without question can be withdrawn many months later, there will be real danger to the administration of justice. It undermines the basis on which parties to this type of litigation conduct themselves"

Delay in bringing the application following receipt of new evidence and the provision of interim payments will inevitably weigh in the claimant's favour when the court considers any application to withdraw an admission from the defendant.

d) Prejudice arising if the application to withdraw is refused

The principal prejudice is to the defendant. The defendant may lose the prospect of successfully defending the claim as in *Blake v Croasdale* or the opportunity of reducing the overall damages payable by successfully arguing contributory negligence.

e) The stage of proceedings when the application is made

The earlier the application is made the better. In *Blake v Croasdale* the application was made shortly after proceedings were served. In *J v A South Wales Local Authority*, the application was made after the proceedings had been progressing for 7 years.

If a trial date has been fixed the court are unlikely to look favourably on any application to withdraw an admission. See *Cavell v Transport for London (2015).*

As a rule of thumb, the prospects of an application succeeding are greater if the application is considered before the court has set the timetable for the claim.

f) The prospects of success of the claim if the admission is withdrawn

The court will not conduct a mini trial to assess the prospects of success. The court will assess whether there is a realistic prospect of the defence or allegation of contributory negligence succeeding.

g) The interests of the administration of justice

In *Wood v Days Health UK Ltd* the Court of Appeal adopted a "stand back and consider" approach.

Lord Justice Davis added:

"the Rule and Practice Direction require a global approach, requiring evaluation of all relevant circumstances in deciding whether it is just and fair to permit a party to withdraw a pre-action admission"

The practical lessons to be learned are:

- When making any admission the rationale for making the admission should be recorded.
- The court will not allow an admission to be withdrawn if the reason for withdrawal is merely a realisation following review of the claim that the admission was erroneous.
- The admission should be re-evaluated as the claim progresses and upon receipt of any new evidence inconsistent with the decision to make the admission.
- An unexpected increase in the quantum of the claim after the admission has been made is a ground for applying to withdraw an admission as is any new evidence regarding liability or contributory negligence.
- New evidence is restricted to evidence that is received after the admission has been made. The evidence should be such that had it been available at the time the admission was made the decision to make the admission would not have been made.
- Any application to withdraw an admission should be made promptly after receipt of new evidence and preferably before the timetable for the claim has been set by the court.
- The court are unlikely to allow a defendant to withdraw an admission once a trial date has been fixed.
- Any application to withdraw an admission should be made in accordance with CPR Part 23 and supported by witness evidence specifically dealing with the matters set out in Practice Direction 14.7.2.

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