Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

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50 YEARS OF PIONEERING LEGAL EXPERTISE 1969–2019

Welcome to *Insight*

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

- Statistical evidence on life expectancy
- An insurer's exposure to a non-party costs order
- Whether it is permissible for a defence to contain 'non-admissions'

Malcolm Henke
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Life Expectancy / Expert Evidence

In *Mays (Protected Party) v Drive Force (UK) Limited (2019) EWHC 5 (QB)* the claimant had sustained a traumatic brain injury and orthopaedic injuries as a result of an accident at work, which had a catastrophic effect upon his life. He did not have capacity to conduct the litigation or manage his financial affairs. Liability was not in issue.

The case came before a Deputy Master for a costs and case management conference. All matters were dealt with, save for the issue of whether the parties should be granted permission to adduce expert evidence in the discipline of life expectancy. A second hearing was required to deal with that issue. The defendant argued that permission should be granted. The claimant opposed that course.

By agreement the claimant had permission to rely on written evidence from a consultant neurologist, a neuropsychologist, a consultant neuropsychiatrist, a consultant orthopaedic surgeon, a consultant ophthalmic surgeon, a care and case management expert and a deputy cost expert. The defendant had permission to rely on written evidence of a consultant neurologist, a consultant neuropsychologist, a consultant ophthalmic surgeon, a care and case management expert and a deputy cost expert.

The parties agreed that the claim was of substantial value, the defendant suggesting that it was in the region of £1-2m and the claimant that was over £2m. The cost of instructing a life expectancy expert had been cost budgeted at around £15,000 per party. The claimant did not oppose the instruction of life expectancy experts on proportionality grounds.

The Deputy Master held that case law made clear that in an appropriate case the court should consider whether factors other than the index event had impacted on the claimant's life expectancy, and was likely to be assisted by expert evidence in that regard. The issue at the heart of this application was who should provide that expert evidence.

In *Royal Victoria Infirmary (2002)*, statistical evidence had been provided by Professor Strauss. Difficulties had been caused by the fact that no statistical evidence had been adduced by the claimant and Professor Strauss had not

been called to give oral evidence. Tuckey LJ did not accept the argument that the customised life table prepared by Professor Strauss based on his Californian database should be given the status of the tables produced by the government actuary.

However, he held that such evidence was not necessarily inadmissible:

"...[i]n an appropriate case it may well provide a useful starting point for the judge...Such evidence, together with medical evidence, should provide a satisfactory inter-disciplinary approach to the resolution of issues of the kind which arose in this case".

Sir Anthony Evans held that statistical evidence of the sort given by Dr Strauss *"is both relevant and admissible and the judge must take account of all the evidence, including this, when deciding what assumption, he should make as to the future lifespan of the Claimant"*.

He went on to suggest that courts should primarily be guided by clinicians, but that statistical evidence could plays its part. Thorpe LJ also did not accept that judges had to rely on clinicians alone for this evidence and they were entitled to receive whatever expert input they felt was of assistance, in an inter-disciplinary way.

In *Lewis (2007)*, Sir Alistair MacDuff described the *"bottom up"* and *"top down"* approaches to assessing life expectancy. He held that that statistical evidence was highly relevant to the issues he had to decide, providing a *"good guide or a starting point"* for the likelihood of survival, albeit that he then went on to consider the criticisms that had been made of it.

In *Wolstenholme (2016)*, HHJ McKenna (sitting as a judge of the High Court) had admitted the evidence of Professor Bowen-Jones, but ultimately preferred the life expectancy evidence given by the opposing expert.

'...it would be a matter for the trial judge to determine whether statistical evidence was of assistance, and to consider any challenges that were made to the credibility of the evidence'

All of these cases suggested that statistical evidence of the sort provided by Professor Bowen-Jones could be admissible in an appropriate case, alongside the evidence given by the clinicians. There was a basis for concluding that such evidence might assist the trial judge in this case, given the number of potential co-morbid factors in issue, and given that the consultant neurologists had not so far felt able to address them all.

This was a high value claim where the evidence might make a significant difference to quantum. Accordingly, the parties should be entitled to rely on this sort of evidence, and the addition of this expertise was proportionate.

Ultimately it would be a matter for the trial judge to determine whether statistical evidence was of assistance, and to consider any challenges that were made to the credibility of the evidence. For all these reasons both parties were granted permission to rely on expert life expectancy evidence.

Comment

Although this judgment provides a useful summary of the authorities in favour of allowing statistical evidence in claims of this nature, it remains the case that judges will primarily be interested in the views of clinicians in relation to the individual claimant

Non-Party Costs Order

Various Claimants v Giambrone & Law (A Firm) and others (2019) EWHC 34 (QB) concerned a claim for non-party costs against the defendants' insurers who were joined into the action under *S51 Senior Courts Act 1981.*

The insurer had entered into an agreement (the 'HOTS') with the partners in the defendant firm, settling a dispute as to the insurer's liability under the policy.

The claimants had succeeded on all the principal points in their claims against the defendants.

The question that arose in the particular circumstances of this case was whether, as a matter of fact, the defendants effectively controlled the defence to the litigation, and the insurer was thus protected from a successful *S51* application. The High Court judge did not think so, it would involve shutting one's eyes to the circumstances in which the ceding of this power came about.

'Whilst the "deal"...may have been commercially sensible as between the insurer and the defendants, it could not operate to exclude the protection from adverse costs consequences afforded to the claimants by S51'

The power was conceded on a basis that left the insurer either with virtually no effective control or with control that it decided, for whatever reason, not to exercise. Large sums of money were expended on the litigation which, given what the insurer must have known by the time of the HOTS, was foreseeable.

Whilst the 'deal' reflected in the HOTS may have been commercially sensible as between the insurer and the defendants, it could not operate to exclude the protection from adverse costs consequences afforded to the claimants by *S51*. The fact that the claimants commenced and maintained their claims knowing the terms of the HOTS did not alter that position.

The obverse position was that the insurer took its chances that the HOTS would not have the impact on any *S51* application made in due course that it contended it would, the threat to make such an application having been made on behalf of the claimants at an early stage.

Where an indemnity insurer substantially relinquished control of the conduct of the litigation to the insured (or failed to take steps to control it when there were grounds for intervening), and did so in the expectation that it would be immune from a costs liability towards the opposing party - if the opposing party was successful - that expectation was open to be falsified by the court in a S51 application, particularly if the prospects of success for the insured were assessed as poor.

In principle, the claimants had established their entitlement to some award under *S51*. However, there was one other factor to be considered, namely causation and, following from that if established, quantification.

The insurer submitted that the defendants would still have

caused the claimants to incur materially the same costs even without its own funding of the partners' defence costs.

On the evidence now available, it had been demonstrated that quite a number of further obligations in relation to costs orders were met from funds actually made available to the defendants by the insurers, although not supplied by the insurers for express purposes.

It must have appeared to the insurer that the defendants were using the monies provided by them for the purposes of discharging liabilities in connection with the litigation. Accordingly, the inference that the defendants had substantial other resources upon which to draw could not properly be drawn. The inference could not be drawn that the defendants lay their hands on the kind of money (approximately £1.5m) required to fund the defence of the claims if the insurer had not been the funder.

It followed that the insurer's funding of the defence did materially increase the costs expended by the claimants in pursuing the claims. The question was by how much?

It was quite impossible to perform the task of deciding what proportion of the costs incurred by the claimants would not have been incurred but for the support for the defence given by the insurer, other than on a broad impressionistic basis from the vantage point of being the judge who presided over the trial. The claimants would have spent twice as much on pursuing their claims than they would have done if the insurer had not funded the defence of the claims in the way it did after the HOTS were concluded. That might be being somewhat generous to the insurer, but it erred on the side of caution.

Counsel were invited to agree a form of order giving effect to the decision, but on the basis that it would be an order that required the insurer to pay one-half of the costs of the claimants, to be assessed on the standard basis if not agreed.

The claimants were represented by Penningtons Manches LLP and Edwin Coe LLP

The defendants were not represented

The insurer/*S51* respondent was represented by Kennedys Law LLP

Comment

This judgment is a warning to any insurer that great care must be taken where an agreement is reached with an insured which seeks to reduce the insurer's exposure but allows the insured to continue to defend a claim. If the insurer retains any interest in, or control over, the litigation it will be a target for a *S51* application.

Defences Containing 'Non-Admissions'

SPI North Limited v Swiss Post International (UK) Limited and another (2019) EWCA Civ 7 looked at how *CPR 6.5(1)* should be interpreted. The rule says that the defendant must state in his defence:

a) *which of the allegations in the particulars of claim he denies;*

b) *which allegations he is unable to admit or deny, but which he requires the claimant to prove; and*

c) *which allegations he admits.*

The Court of Appeal recognised that although the rule did not use the language of 'non-admission', it was still common practice in a professionally drawn defence for the pleader to state that a particular allegation in the particulars of claim was 'not admitted', when the intention was to say that the allegation fell within paragraph (1)(b) as one which the defendant was unable to admit or deny, but which he required the claimant to prove.

So used, the expression was a convenient form of shorthand, provided that the requirements of the sub-paragraph were not thereby overlooked or watered down. Under the CPR, unlike the previous Rules of the Supreme Court (RSC), a non-admission might only properly be pleaded by a defendant where he was, in fact, unable to admit or deny the allegation in question, and therefore required the claimant to prove it.

Plainly, a defendant was able to admit or deny facts which were within his own actual knowledge, or which he was able to verify without undue delay, difficulty or inconvenience, by reference to records and other sources of information which were under his control or otherwise at his ready disposal. Furthermore, in the case of a corporate defendant, which could only act through human agents and had no mind of its own, its actual knowledge must clearly be understood as that of its individual officers, employees or other agents whose knowledge was for the purposes of applying *CPR16.5* to be attributed to it, in accordance with the relevant rules of attribution.

But did paragraph (1)(b), properly construed, go further, and require a defendant to make reasonable enquires of third parties before it could be said that he was 'unable' to admit or deny a particular allegation? That was the novel question of principle which arose on this appeal.

The Deputy High Court judge at first instance answered this question in favour of the defendants, which were both UK companies, when dismissing an application by the claimant for an order striking out their defence unless it was amended to comply with *CPR16.5*.

The argument before him revolved around a list of 13 alleged breaches of paragraph (1)(b) where according to the claimant the defendants had improperly pleaded a non-admission in the defence which counsel had settled on their behalf. In some of those instances, it was said that the defendants would, or at least might, have been able to admit the relevant allegation had they taken reasonable steps to contact certain key individuals who had been closely involved in the transactions in issue as employees of the defendants, but had subsequently left their employment.

Dismissing the defendants' appeal, the Court of Appeal held that a number of factors pointed towards the conclusion that a defendant was 'unable to admit or deny' an allegation within the meaning of *CPR16.5*(1)(b) where the truth or falsity of the allegation was neither within his actual knowledge (including attributed knowledge in the case of a corporate defendant) nor capable of rapid ascertainment from documents or other sources of information at his ready disposal.

In particular, there was no general obligation to make reasonable enquiries of third parties at this very early stage of the litigation. Instead, the purpose of the defence was to define and narrow the issues between the parties in general terms, on the basis of knowledge and information which the

defendant had readily available to him during the short period afforded by the rules for filing his defence.

"...it did not seem practicable to impose a general obligation on defendants to make all reasonable enquiries of third parties... before filing the defence"

There were two main reasons in support of this conclusion. The first reason had to do with the procedural timetable laid down by the CPR for all *Part 7* claims, whatever their magnitude or value, and whether commenced in the High Court or the County Court. The default position was that a defence must be filed within fourteen days after service of the particulars of claims, extended to twenty-eight days if more time was needed and an acknowledgement of service was filed. This was a relatively short period, designed to encourage expedition and the rapid progress towards trial of an action once it had been started.

Within such a short period, it did not seem practicable to impose a general obligation on defendants to make all reasonable enquiries of third parties who might be in possession of relevant information before filing the defence. The action was still at its earliest stages, and in most cases the preferable course would be for the parties to follow the strict timetable prescribed by the CPR, leaving the making of wider enquiries and further refinement of the issues to subsequent stages in the pre-trial procedure, including requests for further information under *Part 18*, disclosure and the exchange of witness statements.

The second main reason was to do with the difficulty of drawing a sensible line if a general duty of that type were held to exist at the stage of filing the defence. There would be endless scope for disagreement about the enquiries which the defendant ought reasonably to make in the limited time available to him, particularly as there was no relevant guidance in *Part 16* itself or its associated Practice Direction, nor was there any requirement for a defence to be accompanied by a statement explaining what enquiries had been made.

By contrast, where an application for further information was made under *Part 18,* the focus would be on a specific request for clarification or additional information in relation to a matter in dispute in the proceedings, evidence relevant to the application would usually have been filed on both sides, and the court should be well placed to decide whether or not to make an order.

A related point, of equal importance, was that a defence had to be verified by a statement of truth signed by the defendant or their legal representative. There should be no difficulty in complying with this requirement where the contents of the defence were based on the defendant's own knowledge, but the position might be very different where an admission or denial was based on information obtained from a third party.

Again, the appropriate stage for dealing with issues of this kind was not when the defence was being drafted, often under considerable time pressure, but at later stages when the court had ample tools in its armoury to review and refine the issues, and to require the provision of relevant information or documents by a reluctant or obstructive defendant. What was unreasonable was to accuse a defendant of acting improperly and in breach of CPR16.5(1) merely because he did not make allegedly reasonable enquiries of third parties before stating in his defence that he is unable to admit or deny an allegation.

For these main reasons, the wording of *CPR16.5(1)(b)* did not import any duty to make reasonable enquiries of third parties before putting the claimant to proof of an allegation which the defendant was "unable to admit or deny".

But that was not the end of the matter. To justify striking out the defence (or parts of it) if the offending non-admissions were not remedied, it would have been necessary for the claimant to establish, to the civil standard of proof, that the defendants actually could have had available to them knowledge (whether or not derived from third parties) which meant that they were in fact able to admit or deny specific allegations which they had chosen not to admit. In other words, it would not be enough merely to show that the defendants failed to make reasonable enquiries of third parties which they ought to have made. It would be necessary to go further, and to establish that the impugned non-admissions were in fact improper because the relevant allegations should have been either admitted or denied.

More generally, the present case provided a good example of the disadvantages inherent in the claimant's approach to *CPR16.5(1)(b),* generating unnecessary and expensive inter-solicitor correspondence and satellite litigation at a time when the energy and resources of the parties should be devoted to getting on with the action in a proportionate and cost-effective manner.

The clamant was represented by Milners Solicitors

The defendants were represented by Peters & Peters LLP

Comment

This is an important decision for defendants. Particularly in cases of suspected fraud, 'non-admissions' are vital to preserving the insurer's rights. It would be unreasonable if this practice was subject to the insurer attempting to make enquiries of third parties prior to filing a defence.

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