Hextalls Law and 6 Pump Court secure significant win and reduction of a bodily injury claim from £6.1m to £272,000 (without surveillance)

Scarcliffe v Brampton Valley Group Ltd [2023] EWHC 1565 (KB)

Background

Mr Scarcliffe was injured at work as a tree surgeon for the insured, Brampton Valley Group Ltd. A large tree trunk was mishandled by a colleague and struck the claimant on his back resulting on 2 or 3 fractured transverse processes – the 'wings' on the sides of the vertebrae. Liability was admitted. As much as "fractured transverse process" sounds significant the expectation was that they should heal in 6-8 weeks, albeit with some possible ongoing discomfort. Mr Scarcliffe did not recover orthopaedically as expected and in fact worsened. His back was extremely painful in the region of the fracture site and hyper sensitive over a large part of the left side of his lumbar region.. He also had significant symptoms travelling from the back down the left leg. By the time of the trial 5.5 years post-accident he had not worked, claimed he was unlikely to do so again and contended he had significant care needs. He was also unable to care for two of his severely disabled children as he said he would otherwise have done and sought commercial care for them in addition. The total loss was valued at over £6.1 million.

The issues

Having accepted liability the defendant was looking to compensate the claimant for his reasonable losses. There remained a number of factors in dispute which prevented that without a trial:

- His pre-accident health
- The extent of his injuries and to what extent they were accident related.
- His functional ability post-accident
- His contribution to the family unit pre-accident
- Where he would have been in terms of work and care provision etc in any event, 'but for' the accident.

There was no surveillance revealing fraud/fundamental dishonesty and his condition was likely explained by his psychological outlook. A tricky tightrope therefore had to be walked in identifying the true picture, both pre and post-accident.

The concerns

Mr Scarcliffe had a disc prolapse at L5/S1. There was a dispute between the orthopaedic experts about whether that was caused by the accident, the defendant's expert being consistent that it was not with the claimant's expert changing his opinion over the course of the case, eventually conceding in joint statements that it was not. However, he disagreed with the defendant's expert's contention that the constitutional condition was so bad Mr Scarcliffe would have been advised by him to change jobs and the lower back symptoms which spread into his left leg had been accelerated by 5-10 years. It was the claimant's expert's opinion that the claimant would have been able to manage the symptoms with over the counter medication with those symptoms merely "waxing and waning".

There was disproportionate pain that could not be explained orthopaedically. Could Mr Scarcliffe improve? There was disagreement between the pain experts with the defendant's expert being clear that with the right support and application by Mr Scarcliffe this could be achieved.

In addition to the post accident non-accident related symptoms the contention by Mr Scarcliffe that he would have been fine if it hadn't have been for the accident was also not borne out by the medical records, with issues relating to his shoulder, occasional tingling with use of vibrating tools at work and low back pain which necessitated A&E attendance.

Mr Scarcliffe contended that he would have provided significant care for his disabled children but this did not sit well with his job in which he worked 70-80 hours a week. He also had numerous hobbies including beating, shooting, stalking, canal maintenance scouts, local festivals, helping local charities, fly fishing walking and game fairs, plus exercise most weekends. In any event there were significant inconsistencies in what he actually could do post-accident, with the defendant's care expert noting a much more functionally capable person on her visit. This was supported by a Child and Family Assessment document first disclosed during the trial itself in which Mr Scarcliffe and his wife only sought an evening a month respite when asked what support they were looking for. This completely contradicted the advanced case that the claimant was so severely disabled by pain that he was unable to provide substantial care. There were areas of inconsistency throughout the records which indicated better functional ability and establishing the true picture involved a forensic review.

Mr Scarcliffe's family increased from 3 to 5 children post-accident and with 2 severely disabled and a third in the early stages of investigation. The reality was that the family unit would not have been able to cope with the way it functioned pre-accident and changes would have been required.

The findings

Mr Justice Cotter ultimately found the following:

- Mr Scarcliffe had exaggerated the amount he did pre-accident and the effect of the impact of the symptoms post-accident.
- Mrs Scarcliffe underplayed the claimant's functional ability.
- The constitutional low back complaint had been accelerated by 7.5 years
- Mr Scarcliffe was vulnerable to emotional distress and he was likely to experience magnified pain perception.
- The pain symptoms were amplified by his constitutional low back condition and other psychosocial issues such as family circumstances.
- Mr Scarcliffe quickly decided he would not return to work which better suited his family commitments and his wife's work pattern.
- Mr Scarcliffe has done and can do more for his children than he admits. The fact that the child and family assessment only received a request for relatively modest assistance supported this.
- The reality of the situation was the family unit had grown and 2 of the children were severely disabled meaning Mr Scarcliffe would likely have adopted the full time carer role, particularly when factoring in that his own non-accident related health was such that he would have had to change jobs anyway.
- Drawing this together awards were capped at 7.5 years in line with the acceleration period but a 'Blamire' type award for lost earnings and pension.
- Rehab treatment was allowed for 1.5 years of the amounts calculated by the defendant's care expert for the care package.

Implications

Beyond the level of damages falling significantly below that claimed it was below a Part 36 Offer meaning the costs post expiry will be taken from Mr Scarcliffe's damages. After offsetting interim payments (£60,000) and CRU, Mr Scarcliffe will likely receive as little as £25,000.

In addition, the costs of the reports of his care expert are not recoverable owing to the criticisms of her evidence in the judgment and overall recoverable costs pre-Part 36 expiry have been restricted to 72.5% of those assessed as reasonable.

Expert Evidence

Following on from *Muyepa V M.O.D. [2022] EWHC* Mr Justice Cotter has again highlighted the importance of experts focussing on the evidence, particularly where there have been changes, and ensuring any changes of opinion are brought to the attention of the parties and when appropriate, the Court. Experts certainly should not step into the witness box before having done so. For example, the claimant's pain expert had not been informed of the change in

orthopaedic evidence upon which he based his opinion and which had a profound effect on his own opinion.

The claimant's care expert came in for the biggest criticism for failing to properly address the evidence before her. Mr Justice Cotter was very clear of the role of a care expert in that he or she should *"be able to fully justify any aspect of care, therapy or equipment which the court is being advised should be provided. The advice should be very carefully considered and automatically stress tested against the realities of life. Anything less is inadequate"*. By way of examples there were criticisms concerning her assessment of the claimant's post-accident functional ability and the compartmentalising of care for children when the reality was they would be cared for at the same time. Carers rates should not be paid for menial tasks and what the average person would, in reality, pay for such services cannot be ignored. The expert had costed for dog walking for the life of the claimant at full care rates producing a claim of £184,000 when the evidence was the dogs would not be walked, particularly as one had died already and the other's life expectancy would naturally end before Mr Scarcliffe's; elsewhere she had allowed for care for two non-disabled children including getting them dressed in the morning when the period to which that costing related was when they would be aged 27 and 28 respectively!

Take aways

1. The devil is in the detail. There is no substitute for securing all relevant records including medical (GP/Hospital/physio/psych/pain management), DWP, personnel and occupational health and trawling through them, creating a chronology and analysing the same. Only then will a true picture develop and the evidence be pieced together

2. Continually check your expert evidence, not only against how it fits with the overall expert evidence in the case, but also with the realities of life.

3. Be prepared to back your conviction. Credit must go to Tokio Marine HCC for steadfastly refusing to be intimidated by the size of the claim and and for having confidence in and backing its own evidence.

Mark Brenlund and Alex Padfield of Hextalls represented the defendant throughout the proceedings with support throughout from Nicholas Baldock of 6 Pump Court who also conducted the trial. All were instructed by Peter Hamberger and Jacqueline Alexander of Tokio Marine HCC.

SIX PUMP COURT

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