St John's Buildings

PICN NEWSLETTER

Welcome to the St John's Buildings Personal Injury and Clinical Negligence Bulletin.

In this edition we have articles from three experienced members of the St John's Buildings team, tackling subjects including deceit claims, fundamental dishonesty, the implications of R(LXR) v First Tier Tribunal and CICA [2024] and consent claims.

For those of you who are less familiar with the SJB Personal Injury and Clinical Negligence team, we are a team of 38 expert barristers, ranging in experience from two KCs, right through to our pupil barristers. Our work includes the full range of personal injury and clinical negligence. SJB has four Chambers from which our team primarily operates, covering cases all over the country and beyond. We are clerked by an exceptional team of clerks, led by Senior Clerk, Chris Shaw.

I hope that you enjoy the content of this Bulletin and invite you to submit any ideas you have for topics you would particularly like us to address in our next edition. Contact details are available on the back page.

Best regards,

Daniel Frieze
Head of Personal Injury and Clinical Negligence

LIAR LIAR

BY TIM CONNOLLY

YEAR OF CALL 2004

Over recent years, allegations of fraud in personal injury litigation have become commonplace. Courts have become well used to dealing with allegations of Fundamental Dishonesty and exaggeration. How Courts deal with these allegations is important to both Claimants and Defendants alike, given the potential consequences of such a finding.

Before the arrival of qualified one-way costs shifting, allegations of fraud in personal injury claims were few and far between, with Judges being asked simply to determine whether a Claimant could prove on the balance of probabilities the factual assertions that were set out in a Statement of Case. If a Claimant could not prove those matters, the claim simply failed, absent any direct allegation of dishonesty on a particular issue.

Nowadays, where a Defendant raises allegations of fraud or dishonesty, the Court is still required to make findings on the allegations but is being asked to do so far more often.

In personal injury claims where exaggeration, dishonesty or fraud is alleged, practitioners are well used to the word "Molodi". The case of *Molodi v Cambridge Vibration Maintenance Service and Anor [2018] EWHC 1288 (QB)* provides support for the assertion that Courts should expect a degree of consistency in the evidence presented by Claimants in support of a claim for both general and special damages. Molodi was a claim for both general and special damages which succeeded at first instance before His Honour Judge Main QC in the County Court despite the numerous inconsistencies which existed, including inaccurate witness statements, inaccurate reporting of injuries to doctors and others, and even claims for losses that had not been suffered at all. On appeal to the High Court, Mr Justice Martin Spencer overturned the County Court decision and dismissed the claim, finding that *"His Honour Judge Main QC adopted a much too benevolent approach to evidence from a Claimant which could be demonstrated to be inconsistent, unreliable and on occasions, simply untruthful".*

It is often possible in personal injury claims to identify inconsistencies as between documents such as a Claims Notification Form, pleadings, medical reports and witness statements well in advance of a claim reaching trial. Where those inconsistencies are great in number or otherwise material to the issues in the case, they can lead to a Claimant discontinuing in advance of trial for fear of the consequences of a Defendant's allegations of dishonesty succeeding and the attendant Costs Orders, likely to follow.

LIAR LIAR (CONTINUED)

Where however there are fewer inconsistencies, or where such inconsistencies do not go directly to the heart of the issues in the case, matters often proceed to trial and a Court is asked to make a finding on the allegations on the balance of probabilities, having heard live evidence from the Claimant and any other witnesses. During the course of cross examination at trial, a Claimant must be given the opportunity to answer the allegations of dishonesty. A failure to do so would deny a Defendant the opportunity of putting that argument at the conclusion of the trial.

How a Claimant performs in the witness box at trial will have a significant impact on the result when combined with the documentary evidence that exists. On occasions, inconsistencies can be readily explained by honest Claimants, and Courts accept that honest Claimants make honest mistakes, perhaps as a consequence of confusion or lack of care and attention when reporting matters to experts, or when signing a witness statement.

Where a Claimant fares badly during cross examination, Courts often receive submissions that the evidence of the Claimant was unimpressive, lacking in credibility and not persuasive and the Court is invited simply to take a broad brush to the assessment of the evidence and thereafter reach a conclusion that the claim is dishonest.

Whilst not a personal injury case, the Judgment of Mr Justice Lewison (as he then was) in the matter of *Beverly Painter v Brian Hutchison and Anor [2007] EWHC 758 (Ch)* serves as a useful reminder of how a Court ought to address the honesty or otherwise of a factual witness in a more structured way. The matters identified in that case, which it is said would indicate the dishonesty of a factual witness, are as follows:

(a) Evasive and argumentative answers;
(b) Tangential speeches avoiding the questions asked;
(c) Placing strained meanings on pleadings and witness statements;
(d) Blaming legal advisors for the content of documentation;
(e) Disclosure and evidence shortcomings;
(f) Self-contradiction in cross examination;
(g) Internal inconsistency;
(h) Shifting his case;
(i) New evidence in cross examination not contained in a witness statement.

All the above might seem perfectly straightforward, but in the experience of the writer, taking those matters identified in Painter as a framework is of benefit to Claimants, Defendants and Judges alike.

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CONSENT IN CLINICAL NEGLIGENCE CASES

BY DANIEL KINNEAR

YEAR OF CALL 2018

Introduction

The level of costs being incurred in low-valued clinical negligence claims is a hot topic at the moment. Even if the plans to introduce a fixed costs regime in clinical negligence claims worth less than £25,000 ends up being kicked into the long grass following the election in July 2024, the costs being incurred in these types of cases, and their proportionality to the amount of compensation sought, are still being heavily scrutinised on a case by case basis at CCMCs up and down the country.

One obvious way to minimise costs is to ensure that Letters of Claim and Particulars of Claim are streamlined and not fattened up with additional [and unnecessary] allegations which will inevitably fall away at trial.

To quote Sum 41, the pleadings should be 'All Killer, No Filler.'

Often experts, in their preliminary or screening reports, will identify technical deficiencies in the consenting process. This is only the starting point and this initial opinion should not be blindly followed; further enquires will need to be made before determining whether the consent allegations enjoy reasonable prospects of success [remembering that including unviable issues will inevitably make the claim more expensive to prosecute and defend.]

Breach of duty

The legal team's subsequent investigations into breach of duty would cover four main questions:

1. Were adequate pre-operative investigations undertaken and an appropriate diagnosis reached?

a. This is a matter for the expert although their evidence should be tested to ensure that they have correctly applied the 'Bolam' test rather than a higher 'gold standard'. By way of an example, there is merit to commissioning a CBCT scan to check the available bone levels in a patient's jaw prior to the replacement of a tooth with an implant-retained crown but there is a body of reasonably competent dentists who would justifiably not do so.

CONSENT IN CLINICAL NEGLIGENCE CASES (CONTINUED)

b. The Covid-19 restrictions may well have shifted the 'Bolam' standard for a short window at least. In Covid, it was decided to stop doing sentinel lymph node biopsies for all patients with oral cavity cancers and simply proceed to perform wide local excision and neck dissections instead. This decision was made very much on a pragmatic basis and made sure that all patients would only need one operation thereby freeing up the NHS's resources.

2. What were the reasonable alternative treatment options?

a. In McCulloch v Forth Valley Health Board [2023], the Supreme Court held:

i. *"The correct legal test to be applied to the question of what constitutes a reasonable alternative treatment is the professional practice test found in …. Bolam."*

ii. A clinician will not be negligent in failing to inform the patient of a treatment option if the clinician's opinion that the treatment option is not appropriate is supported by a reasonable body of medical opinion.

b. The expert therefore needs to opine on what treatment options would have been considered as reasonable and appropriate by all reasonably competent clinicians in their field at the time in question.

c. Medical science progresses incredibly quickly and, as such, it is extremely important to be mindful of the law on state of knowledge. What was a fringe treatment option in 2019 may have become a mainstream one by 2024 and, accordingly, whether there was a mandate to advise of a certain treatment modality could be contingent upon when the consenting process took place.

3. What were the material risks?

a. In Montgomery v Lanarkshire Health Board [2015], the Supreme Court held that *"The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."*

b. The starting point is for the expert to detail the potential risks associated with each of the various reasonable treatment options.

c. Thereafter, the Claimant will need to give evidence detailing what risks they would, and would not, have been willing to take and why. After all, the assessment of materiality is fact sensitive and sensitive to the individual Claimant.

CONSENT IN CLINICAL NEGLIGENCE CASES (CONTINUED)

4. Were the reasonable alternative treatment options and the material risks disclosed during the consenting process?

a. This is a factual matter for the Court to determine. The legal team will need to consider the contents of the contemporaneous clinical record and take a comprehensive witness statement from the Claimant [along with anyone who accompanied them to the pre-operative consultations] as to what was discussed and how the information was imparted.

b. Experts should be warned against straying outside their remit and making assumptions as to what information they think was given as it is wildly inappropriate for them to do so. Coulson J could not have been clearer in Stagecoach Great Western Trains v Hind and Steel [2014]; *"matters of fact are for witnesses."*

c. The presence of a signed consent form does not necessarily hand the Defendant a complete Defence to consent allegations:

i. The GMC guidance on decision making and consent, published in November 2020, acknowledges that *"filling in a consent form isn't a substitute for a meaningful dialogue tailored to the individual patient's needs."*

ii. The Department of Health Guide to Consent for Examination or Treatment, published in August 2009, states *"if a person is not asked to signify their consent until just before the procedure is due to start, at a time when they may be feeling particularly vulnerable, there may be real doubt as to its validity. In no circumstances should a person be given routine pre-operative medication before being asked for their consent to proceed with the treatment."*

d. Accurate information must be provided in a manner which is comprehensible to the patient. By way of an example, in Thefault v Johnston [2017], the High Court held:

i. The Claimant was not adequately consented in circumstances where:

1. The prospect of surgery being successful was significantly overstated.
2. The risks of surgery were materially underestimated.
3. The option of not undergoing surgery was not given properly.

ii. The clinician must remove or minimise jargon, so that the information given to the patient is clear and can be understood.

iii. A patient should be given *"adequate time and space"* in which to make decisions.

CONSENT IN CLINICAL NEGLIGENCE CASES (CONTINUED)

Factual causation

Consideration of breach of duty is not enough; there is no free-standing right to compensation for lack of consent if causation of damage cannot be shown.

Accordingly, before advising whether it is worthwhile pursuing allegations in consent, the legal team will need to consider the often-thorny issue as to whether the Claimant would have done anything differently if they were given correct information during the consenting process [and this assessment is done without the benefit of hindsight]. This question of factual causation will turn very much on the Claimant's witness evidence.

The difficulties in making this assessment were highlighted by HHJ Freedman in Diamond v Royal Devon and Exeter NHS Foundation Trust [2017] in which he remarked *"but recalling specific events or conversations is markedly different from attempting to reconstruct what her response would or might have been if given certain information. Expert witnesses, lawyers and others are trained not to use the benefit of hindsight to inform their opinion of what might or should have happened. It is, however, human nature for people to permit that which eventuated to influence their thinking on what they might have done if warned about a particular risk. To my mind, it would be quite impossible for the Claimant to divorce from her thinking, the fact that she was subsequently told by Mr Jones that it would be inadvisable for her to become pregnant because of the mesh and that, in the event, she has not had another child. Unquestionably, in my view, this sad outcome colours and informs her view of what she would have done if she had been appropriately warned."*

As a matter of logic, the hurdle of factual causation must be easier to overcome if the subject matter of the claim is elective and expensive private cosmetic treatments [following dubious social media fashion trends] where the cheaper and less invasive options were not properly explained as opposed to life-saving care on the NHS.

Conclusion

Consent claims can be difficult to prosecute; they need to be pleaded clearly with the subtle dovetailing of lay and expert witness evidence. Their inclusion makes the litigation more complex and expensive and, in the current climate, it is important to be certain that they have legs [in both breach of duty and causation] before running them.

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WHEN IS A CONDITION NOT A CONDITION?

When it lacks a contextual approach:
R(LXR) v First Tier Tribunal and CICA [2024] UKUT 208 (AAC)

BY CRESSIDA O'CONNOR

YEAR OF CALL 2019

The Criminal Injuries Compensation Scheme: finality of outcome (but only sometimes…)

The Criminal Injuries Compensation Scheme exists to provide financial redress to victims of crimes of violence (including sexual abuse) who suffer injury as a direct consequence. Unlike non-provisional awards of damages following civil litigation, which are intended to represent disposal of proceedings once and for all, the Scheme provides its administrative body, the Criminal Injuries Compensation Authority (CICA) with the power to reopen a claim even after a final payment has been made. In order to qualify for a reopening of one's case, a claimant has to show that their medical condition has changed to such an extent that they would suffer an injustice if the original determination was allowed to stand.

Although the Scheme does not define what a 'condition' is for its purposes, it might be thought that what amounts to a 'condition' for the purpose of reopening a CICA case would be straightforward. This may well be the case in a substantial proportion of CICA cases, but cases involving sexual abuse which results in psychological injury (perhaps these cases especially) can pose problems where, for example, there are difficulties in attributing symptoms specifically to the index crime of violence, as opposed to some other incident or even to psychotherapy undertaken to try to mitigate the symptoms. Such was the issue in *R(LXR) v First Tier Tribunal and CICA*, which turned on the correct interpretation of what amounted to a 'condition' and got as far as a judicial review in the Upper Tribunal before the point was satisfactorily disposed of.

The facts of LXR

LXR applied to CICA for compensation in respect of sexual abuse that he suffered as a child in the 1980s. An award was made in respect of the sexual assault, but CICA declined to make any award in respect of mental injury. Although the Scheme provides for awards in respect of both physical and mental injuries, sexual abuse cases are treated uniquely in that compensation is awarded for the sexual assault or the mental injury, whichever carries a greater award under the Scheme's tariff, but not for both.

WHEN IS A CONDITION NOT A CONDITION? (CONTINUED)

In justifying this stance, CICA acknowledged that LXR had sustained deep psychological trauma, but noted that his expert psychiatric evidence attributed the psychological injuries to a separate incident of sexual abuse that LXR had suffered in adulthood. That latter incident did not involve physical contact between the perpetrator and LXR, and so it could not be classed as a 'crime of violence' for the purposes of the Scheme; rather, it had comprised the perpetrator gaining pleasure, in voyeuristic fashion, from listening to LXR describe his experience of having been abused as a child. Accordingly, LXR's application to CICA in respect of the abuse he suffered as an adulthood was rejected, and CICA's rejection of the application was upheld by the First Tier Tribunal. LXR's claim for compensation for the adulthood abuse went no further – at least, not directly.

LXR accepted CICA's award of compensation in respect of the childhood abuse that he had suffered. However, just under two years later, he sought to have the application reopened on the basis that there had been a material change in his condition since he had accepted the original award. The substance of this assertion was that, following the original CICA award and after having undergone psychotherapy, LXR came to attribute his mental ill-health, not to the isolated incident of abuse that he had suffered as an adult, but instead to the abuse that had taken place during his childhood. This re-assessment appeared to have done LXR no immediate good, as his mental symptomology deteriorated markedly, as did his ability to address it. This was prayed in aid as the 'material change' of medical condition that LXR had to satisfy CICA had taken place before his application to reopen his case could be countenanced.

CICA, however, rejected the application (a decision that was later upheld by the First Tier Tribunal) on the basis that LXR had not suffered a material change in his medical condition since the original award. In upholding CICA's decision, the First Tier Tribunal cited dictionary definitions of the word 'condition', and found that a change in a person's understanding of his symptoms and ability to engage with treatment did not amount to a 'condition' which could, if it materially changed, justify reopening a CICA case.

Decision of the Upper Tribunal: endorsement of flexibility over rigidity of approach

The Upper Tribunal quashed the refusal to reopen LXR's case and remitted the matter to the First Tier Tribunal for substantive disposal. In so doing, it made clear that there was nothing inherently wrong in using dictionaries to identify the meaning of a term that is not specifically defined in legislation. Where the lower tribunal had gone wrong, however, was in placing unduly heavy reliance on dictionary definitions of the word 'condition' at the expense of the broader context. The dictionary was no more than an aid to identification of the definition of 'condition' in this context, rather than the sole authoritative source of the definition. The fallacy of treating dictionary definitions as the be all and end all is highlighted by the fact that the Upper Tribunal was able to identify four definitions of 'condition' in as many dictionaries, none of which exactly matched any of the others, and none of which featured any reason why it should be preferred over any of the others.

WHEN IS A CONDITION NOT A CONDITION? (CONTINUED)

The correct approach in cases such as this, where success or failure depends on interpretation of a legal term that is not specifically defined in the relevant legislation, is instead to consider the term in the wider context of the provision in which it appears. This militates against rigidity of interpretation and demands the application of common sense to the interpretative exercise. In applications to reopen CICA cases based on a material change in condition, the decision-maker (be it CICA or the Tribunal) should assess whether it would be an injustice to maintain the original award; that assessment depends on whether there has been such a material change in the claimant's condition as to give rise to such an injustice. Imprecision is often anathema to legal practitioners, but the very imprecision of the word 'condition' in the context of the Scheme is what gives it value, by allowing a flexible approach to be taken when set against the various injuries, and degrees of severity thereof, set out in Annex E to the Scheme. In LXR, the Upper Tribunal remarked that LXR's understanding of his symptoms and their causes was fundamental to the nature and treatment of his condition, and that this could amount to a material change in condition. However, these were obiter comments; whether or not LXR's condition had so materially changed as to justify a higher award would depend on the First Tier Tribunal's assessment of the factual and expert evidence. As in so many other fields, context is all. Solicitors wishing to pursue a reopening of a CICA claim – or any other claim where context and interpretation are significant factors - may therefore find that an early conversation with counsel to assess prospects is likely to be fundamental to a satisfactory outcome.

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DECEIT CLAIMS AND INSURANCE POLICIES

BY TIM CONNOLLY

YEAR OF CALL 2004

There appears to be an ever-increasing enthusiasm on the part of insurers to pursue former customers where fraudulent claims have been made on insurance policies, often home insurance policies. So what has changed?

Typically, when an insurance customer makes a claim on a home insurance policy, that claim involves a claim for substantive loss, perhaps following fire, flood or compromised structural integrity, but also ancillary losses said to have been suffered, for example, the cost of alternative accommodation whilst building works are carried out.

Perhaps given the manner in which insurers can now scrutinise claims more thoroughly by the use of technology, more and more instances of fraud are suspected or discovered.

This is not a new concept but a good illustration of conduct of that type and the consequences of it is found in the matter of *Direct Line Insurance Plc v Khan and Anor [2001] EWCA Civ 1794.* In that case, the Court considered the consequences of representations made by the Claimant. In or around January 2000, a fire had occurred at the property of Mr and Mrs Khan (the two Defendants). They had lost possessions and had to move out of the property. Prior to the fire, Mr and Mrs Khan had lived at the property together. Following the fire, Mrs Khan had become unwell and the insurance claims made on the household insurance policy were made by Mr Khan on behalf of both of them. As part of the claim for the ancillary losses, Mr Khan presented the costs of alternative accommodation for which he claimed to have paid a deposit and rent. A false Rental Agreement was presented to the Claimant. The Claimant paid to Mr Khan sums to cover the rent that he claimed to have paid for the alternative accommodation. Unfortunately for Mr Khan, it was discovered that no rent was payable because Mr Khan owned the property he claimed to be renting, contrary to the assertion that he had earlier made that the property was owned by a friend of his, Mr Gabriel. The Claimant made significant payments both for the remedial works to the damaged property, the replacement of the contents and also the alternative accommodation costs, approximately £70,000 in total.

DECEIT CLAIMS AND INSURANCE POLICIES (CONTINUED)

The Claimant relied on the assertion that an insured customer loses any rights to recover in respect of a policy if a material part of the claim (one that is not *de minimis*) is fraudulent. The Claimant relied on the matter of *Galloway v Guardian Royal Exchange UK Limited [1999] Lloyd's Report 209*. At trial, Mr Khan advanced the argument that he had lost the sums claimed on the insurance policy by reason of not being able to rent out the property because he needed it for his own accommodation. The Judge at trial rejected that argument and concluded that the claim made on the insurance policy for rent was made dishonestly. There was an argument advanced by Mrs Khan that she ought to be able to recover on the policy on the basis that the fraud had been committed by her husband without her knowledge. Mrs Khan asserted that she did not know anything of her husband's dishonesty.

On Appeal, it was argued on behalf of Mrs Khan that even though she accepted that her husband had fraudulently exaggerated the claim which he made on her behalf, and that the fraud was substantial so as to permit the Claimant to terminate the insurance policy from the outset, she ought to be able to recover the costs of the reinstatement of the property and the replacement of the contents as she did not know that a dishonest claim was being presented for the alternative accommodation. Further arguments were raised in relation to the unfair terms in Consumer Contracts Regulations 1994.

The conclusion was that both Mr and Mrs Khan had joint and not several interests in the policy and that at all material times, Mr Khan had acted as the agent for his wife making the claims. By reason of the principles of agency, Mrs Khan must suffer the consequences of the dishonesty of Mr Khan. The conclusion was that the making of a fraudulent claim enabled an insurer to bring the policy of insurance to an end and such an approach was a principle of law to act as a deterrent, and in furtherance of a policy in discouraging fraudulent claims thereby taking precedence over any perception of unfairness on the part of Mrs Khan. The Claimant was not required to make any payments under the policy.

The principles in the matter of *Direct Line v Khan* remain good and should act so as to discourage individuals presenting dishonest claims in the context of an insured event having taken place. The net result is that if a claim has been paid by an insurer before dishonesty is discovered, the insurer can recover all sums paid even if they are not directly connected to the fraudulent assertion. In the event that payment has not been made by an insurer by that time, they would not be recoverable under the contract of insurance.

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THE TEAM

'St John's Buildings has an excellent set of personal injury counsel who offer vast experience and expertise at various levels and complexity.'
'This is a fantastic set and one of the leading personal injury sets in the North West with huge talent to cover any and all complex personal injury cases.'
– Legal 500 2024

'A very strong set of chambers in an extremely competitive city. They have a wide breadth of experience and skills, which means that when complex cases require input from other specialist counsel, it can remain within chambers, which is of a benefit to clients.'
– Chambers UK Bar 2024

"The whole team is outstanding."

"The clerks provide exceptional service and are very responsive. There are no delays, they always deliver, and are reliable and top quality."
– Chambers UK Bar 2024

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