Use of surveillance evidence in personal injury claims (Karapetianas v Kent and Sussex Loft Conversions)

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Personal Injury analysis: The High Court has found a significant discrepancy between a claimant's presentation in covert surveillance evidence with that of the the medico-legal evidence in a personal injury claim. However the High Court declined to strike out the claim for abuse of process. Jack Ferro, barrister at Crown Office Chambers, comments on what lessons can be learned from this case for practitioners.

Original news

Karapetianas v Kent and Sussex Loft Conversions Ltd [2017] EWHC 859 (QB), [2017] All ER (D) 134 (Apr)

The Queen's Bench Division held that the defendant company had been liable to compensate the claimant for injury he suffered in 2012 when, while working for the defendant, he fell through the floor of a loft and sustained, among other injuries, a pelvic fracture. Due to the content of video surveillance evidence of the claimant, the court ruled that the claimant had made a recovery approaching normal functionality by the mid-part of 2014. The claimant was awarded a total of £110,919.17 in damages.

What are the practical implications of this case?

Surveillance is a useful tool for defendants where there are complaints of ongoing pain with no apparent organic cause. In this case, there was an obvious contrast between the claimant's presentation of his mobility in medico-legal examinations and that when under covert surveillance. This left the claimant's own medical experts unable to explain his presentation. It also led to the judge's finding of fact that there were no ongoing significant symptoms attributable to the index accident beyond mid-2014.

There was a suggestion that there may have been a psychological explanation for the ongoing presentation and for its variability. However, in the absence of expert psychiatric evidence, the judge neither accepted that there was any such explanation, nor that it could be attributed to the effects of the accident. For claimants, this underlines the importance of obtaining expert psychiatric evidence in cases where it is suggested that a claimant exhibits 'illness behaviour'.

The award of damages made was less than the defendant's offer under part 36 of the Civil Procedure Rules 1998(CPR), SI 1998/3132 so the defendant recovered its costs from that point on. However, even before this part 36 offer was made, the claimant had been uncooperative with the defendant's attempts to engage in alternative dispute resolution (ADR). Although he attended a round table meeting he refused to authorise his counsel to make any offers of settlement whatsoever. While he later agreed to mediation he then cancelled the mediation appointment at short notice.

In these circumstances, the judge made no order for costs between the date of the abortive round table meeting and the defendant's part 36 offer. This thereby effectively denied the claimant any costs recovery during the period when he was not actively engaging in the ADR process. The implication is that litigants not actively participating in an ADR process proposed by the other side should expect a costs sanction to be imposed by a court.

What issues did this case raise?

This case raised these main issues:

- the use of covert surveillance evidence in personal injury cases,
- costs sanctions that should be applied where a litigant has failed to engage with ADR, and
- the appropriate multiplier where loss fell to be assessed after a change in the rules

To what extent is the judgment helpful in clarifying the law in this area?

The decisions made on the above issues were all highly fact sensitive. However, the case is a useful illustration of the consequences of failing to engage in ADR. It is also useful on the issue of where future loss is calculated on a multiplier/multiplicand basis, multipliers should be quantified as at the date of judgment rather than the date of trial.

What are the implications for practitioners? What will they need to be mindful of when advising in this area?

In *Fairclough Homes Limited v Summers* [2012] UKSC 26, [2012] All ER (D) 179 (Jun) the Supreme Court ruled that a court does have jurisdiction to strike a claim out for abuse of process, but it declined to exercise that power.

However it rejected a submission that unless exaggerated claims are struck out, dishonest claimants will not be deterred.

The language of the CPR supports the existence of a jurisdiction to strike a claim out for abuse of process even where to do so would defeat a substantive claim. The express words of CPR 3.4(2)(b) give the court power to strike out a statement of case on the ground that it is an abuse of the court's process. In *Summers* it was common ground that deliberately to make a false claim and to adduce false evidence was an abuse of process. It followed from the language of CPR 3.4 that in such a case a court has power to strike out the statement of case. There is nothing in the rule itself to qualify this power. The only restriction is that contained in CPR 1.1 and 1.2 that a court must decide cases in accordance with the overriding objective of determining cases justly.

However, in *Summers* Lord Clarke ruled that as a matter of principle a court should only exercise this power in very exceptional circumstances. Under the CPR the court has a wide discretion as to how its powers should be exercised. The power to strike out a claim at the end of a trial should only be exercised if a court is satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined. This remains a largely theoretical possibility. It must be a very rare case in which at the end of a trial it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits.

Here deputy judge, Jonathan Swift QC did not make a finding that the claimant was giving dishonest evidence about his true physical condition. Had he done so, he acknowledged that this might in theory justify an argument that the case should be struck out for abuse of process notwithstanding that liability was admitted and the case had already progressed to trial. However, even in cases of dishonesty, a court would only in exceptional circumstances strike out a case at trial.

Are there still any grey areas or unresolved issues practitioners will need to watch out for? If so, how can they avoid any possible pitfalls?

Although the trial took place two months before the Lord Chancellor's change to the discount rate, the judgment was handed down after the change. The judge allowed the claimant to increase the sums being claimed for future care and equipment by way of multiplier between the date of circulation of his draft judgment and the date for the formal handing down of the judgment. This has ramifications for any other cases heard before the change in the discount rate but where judgment is still awaited. It effectively means that the value of a claim for future loss could increase dramatically just because of the time taken by a judge to hand down a reserved judgment.

Jack Ferro is common law and commercial barrister at Crown Office Chambers in London and was counsel for the defendant in this case.

Interviewed by David Bowden.

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