

Legal update

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Two cases - three lessons

- *Muyepa v MOD* [2022] EWHC 2648 (KB).
- *Scarcliffe v Brampton Valley Group Ltd* [2023] EWHC 1565 (KB).

Muyepa - the facts

- NFCI.
- Large care and earnings claims.
- Surveillance evidence.
- £3,766,615 claimed v FD/£97,595.33.

Scarcliffe – the facts

- Spinal fractures leading to chronic pain.
- Complex family arrangements prior to the accident = large care claim.
- £6,189,507.59 claimed v £275,063.03 awarded.

Lesson 1 – Be realistic

- Parties can have high expectations.
- Experts can be overly optimistic/pessimistic.
- Stress test.
- Be neutral.

Lesson 2 – Prepare for trial

- Early disclosure.
- Read the notes and make a chronology.
- Put down the broad brush!

Lesson 3 – Part 35 matters

- ‘The Ikarian Reefer’.
- Cheerleading.
- Changing opinion.
- Balance of instructions.

Praeter v Betsi Cadwaladr UHB (2022)

- Clinical negligence claim following vaginal mesh insertion in 2014.
- C had developed fibromyalgia, probably caused by chronic pain following surgery
- Liability agreed 85% in C's favour (D apparently lost all of C's clinical notes!)
- Nearly £1.3 million claimed v FD/£20,000-50,000 (PSLA only).

The issues

- D alleged FD, which took up most of the 7 day trial:
 - surveillance evidence: higher level of function than claimed;
 - Social media evidence: significant loss of earnings and care claim when C apparently carrying out paid work;
 - 'exaggerated presentation of disability to medical experts'
- HHJ Howells endorsed Knowles J in Woodger v Hallas [2022] EWHC 1561 (QB):
 - two-stage test for dishonesty (*Ivey*); which must go to either 'root' or 'substantial part' of claim
 - has '*substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant in a significant way...*'

Judgment

- *“The evidence in this case both from a lay and expert position is problematic. I have had to take a step back and look at it in the round...”*
- *“...no doubt that the Claimant told no professionals involved in her case...that she was operating as a beautician to any level, until the social media evidence...was disclosed...”*
- But: emphasis on context and C’s subjective belief
- No FD!

A few takeaways...

- Consider: quality of evidence giving rise to FD allegations and the way it needs to be dealt with in expert and lay evidence
- Evidence from C's pain management expert specifically on the effect that a finding of FD would have on C: *"...very major effect on her, particularly her mood... she would be at risk and her pain would be increased..."*

A few takeaways...

- Good lesson in how (not) to deal with surveillance/social media evidence
 - *“the majority of the experts accept that they never asked the Claimant about whether she had good days or bad days...”*
- Evidence/analysis by experts:
 - ‘Not within expertise’ (almost everyone apart from the pain experts...)
 - ‘not providing a balanced view’
 - Importance of precision/experts keeping careful notes of discussion
 - Both C and D’s care experts should have taken more care...



...and a reminder

*“...There were very many assumptions in [the expert’s] evidence...which are fundamentally flawed. The bedrock of her evidence is based on very unsteady foundations. **I have considerable difficulty in accepting that her approach was one of neutrality.** It does seem to me that she had formed a view as to the veracity of the claimant’s presentation and a report was framed against that background.”*



Thank you