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MOTOR FRAUD BRIEFING

In this edition of our Motor Fraud Briefing, Francesca O'Neill and Simon Trigger discuss and comment on recent important decisions which give helpful and thorough guidance to courts dealing with road traffic accidents in which low velocity impact and fundamental dishonesty issues arise. These decisions will be particularly significant to Defendants who wish to bring serious inconsistencies in the evidence to light.

Molodi v Cambridge Vibration Maintenance Service & Anor [2018] EWHC 1288 (QB)

The reasoning of Mr Justice Martin Spencer in *Molodi* was music to the ears of Defendants in road traffic accidents. Insurers who have been taking a tough stance against a wave of fraudulent and exaggerated whiplash claims in road traffic accident cases have several years left to run until the Government's proposed changes bite. It is no secret that falsified claims have cost millions of pounds to deal with. The learned judge's reasoning was clear and concise, inviting judges hearing the trials of these matters to have scant regard for claimant witnesses who either by act or omission mislead the Court and the Defendants as to the seriousness of any injuries suffered or damage to vehicles. It is an important judgment, and sets out useful guidance for Defendants at trial.

Summary

The claimant was seeking damages for a whiplash injury which he claimed to have suffered in February 2015 when his car collided with a van driven by an employee of the defendant. The defendant accepted liability for the accident but challenged causation, alleging that the collision was so minor that it could not have caused the claimant any injury. Although the claimant saw his GP the day after the accident, he did not seek any treatment thereafter and, in his claim notification form issued in mid-March he confirmed that he had not taken any time off work or sought any medical treatment as a result of the accident. At the end of March he was examined by a doctor instructed by his solicitors. The resulting medical report indicated that he had an ongoing whiplash injury; that he had had to take time off work in consequence; and that he had been involved in only one previous accident. Although the defendant was challenging causation, the court did not follow the special directions applicable to "low velocity impact" cases. Instead, the case was allocated to the fast-track and the defendant was not permitted to have the claimant examined by a medical expert of its choosing. At trial, the defendant pointed to a number of inconsistencies in the claimant's case.

Judgment

At paragraphs 44-46:

44 The problem of fraudulent and exaggerated whiplash claims is well recognised and should, in my judgment, cause judges in the County Court to approach such claims with a degree of caution, if not suspicion. Of course, where a vehicle is shunted from the rear at a sufficient speed to cause the heads of those in the motorcar to move forwards and backwards in such a way as to be

liable to cause ‘whiplash’ injury, then genuine claimants should recover for genuine injuries sustained. The court would normally expect such claimants to have sought medical assistance from their GP or by attending A & E, to have returned in the event of non-recovery, to have sought appropriate treatment in the form of physiotherapy (without the prompting or intervention of solicitors) and to have given relatively consistent accounts of their injuries, the progression of symptoms and the timescale of recovery when questioned about it for the purposes of litigation, whether to their own solicitors or to an examining medical expert or for the purposes of witness statements. Of course, I recognise that claimants will sometimes make errors or forget relevant matters and that 100% consistency and recall cannot reasonably be expected. However, the courts are entitled to expect a measure of consistency and certainly, in any case where a claimant can be demonstrated to have been untruthful or where a claimant's account has been so hopelessly inconsistent or contradictory or demonstrably untrue that their evidence cannot be promoted as having been reliable, the court should be reluctant to accept that the claim is genuine or, at least, deserving of an award of damages.

45 In the present case, in my judgment, HHJ 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. The most glaring example of this relates to Mr Molodi's clear lie to Dr Idoko, confirmed by Dr Idoko in his Part 35 answers, that he had been involved in only one previous accident when, as conceded by Mr Sweeney, there had been five or six previous accidents or, on Mr Wood's submissions, some seven previous accidents. Not only had the Claimant lied to Dr Idoko in this regard, but he had also maintained that lie in his witness statement, endorsed with a statement of truth. Even when he gave evidence before HHJ Main QC, the Claimant confirmed that he was happy to rely on the contents of Dr Idoko's report even though he must have known that it was wrong in a fundamental respect.

46 The medical evidence is at the heart of claims for whiplash injuries. Given the proliferation of claims that are either dishonest or exaggerated, for a medical report to be reliable, it is essential that the history given to the medical expert is as accurate as possible. This includes the history in relation to previous accidents as this goes to fundamental questions of causation: whether, if there are ongoing symptoms, those are attributable to the index accident or to previous accidents or to some idiopathic condition of the claimant. Furthermore, the knowledge that a claimant has been involved in many previous accidents might cause a medical expert to look rather more closely at what is being alleged on the incident occasion to see whether the claimant is being consistent and whether his reported injuries are in accordance with the reported circumstances of the accident. Once, as here, the Claimant could be shown to have been dishonest in respect of a fundamental matter and then to have maintained that dishonesty through his witness statement and into his evidence before the Court, it is difficult to see how the Learned Judge could have accepted any other part of the Claimant's evidence or the medical report itself - and, without these, there was nothing left.

Conclusions

This judgment can, and should, be drawn to the attention of county court judges hearing low velocity impact road traffic claims. It sets out clear guidance on the level of precision that should be expected of claimants who hope to obtain damages. Serious inaccuracies in medical reports, and in documents bearing a statement of truth, will be taken into account. And for those claims which succeed despite the concerns and evidence of Defendants, the case could not be clearer: appeals, even in fact heavy cases where much depends on live witnesses, can — and will be — appealed.

By Francesca O’Neill

Richards (2) McGrann v Morris [2018] EWHC 1289 (QB)

The appeal in the case of Richards v Morris was heard by Mr Justice Martin Spencer at the same time as the appeal in Molodi v Cambridge Vibration. Judgment was handed down on the same date. Both cases were appeals from decisions of HHJ Main QC and were conducted by the same Counsel. Many of the issues that arose for consideration in Molodi arise in Richards. The fact that Mr Justice Martin Spencer was hearing two similar cases at the same time may go some way to explaining why he was not prepared to take a more charitable approach to the evidential inconsistencies that arose within the two cases.

The facts

The two Claimants made a claim for whiplash injuries arising as a result of a minor road traffic accident. Liability for breach of duty was not in dispute but causation was. Low Velocity Impact was not expressly pleaded but the case was to an extent contested on that basis.

First Instance - HHJ Main QC

HHJ Main QC held that the Claimants were "hopelessly inconsistent" in their evidence. There were inconsistencies in both of the Claimants accounts over the duration of their symptoms, the onset of their symptoms, their past medical histories and over the special damages claims. Despite those inconsistencies the Judge awarded each Claimant £2,500. In doing so he relied in particular on two key issues. The first was that in his Judgment the force of impact had been stronger than as suggested by the Defendant. The Judge held "there has been a sufficient collision to give rise to a potential injury".
The second issue he relied was that on examination by the medical legal expert "spasm" had been noted. This finding, the Judge concluded, was "not a feigned or subjective response – it is elicited on objective clinical examination". He found that the presence of muscle spasm "reflects an objective finding of an actual nerve root irritation and it is more probable than not that has been caused as a consequence of the accident".
The Judge therefore accepted for each Claimant a short lived neck injury caused by the accident.

Appeal – Submissions

On appeal the Defendant argued that the inconsistencies in the Claimants evidence were such that the Court ought to have dismissed the entire claims as dishonest. In relation to spasm and the force of the impact the Appellant argued that the Judge had exceeded the reasonable range of Judicial notice and he was not entitled to make findings as to the meaning of spasm on the evidence before him.

The Claimants perhaps unsurprisingly attempted to maintain the Judgment as being one within the reasonable range of the Trial Judge using their experience.

Appeal - Decision

As with Molodi, Mr Justice Martin Spencer took the opportunity to remind the parties of the Courts particular concerns relating to low value whiplash cases. He reiterated that the Courts should approach such claims with caution and even suspicion. He stated that the Court would expect a Claimant in such a case to have sought medical assistance. He ultimately concluded that the Judge had been too benevolent to the evidence of the Claimants. Instead the Court ought to have found that the Claimants had failed to prove their cases on the balance of probabilities in light of the manifold inconsistencies in the evidence. He declined to make a finding of Fundamental Dishonesty as the Trial Judge having heard the Claimants had not done so and the evidential inconsistencies did not mandate such a finding on appeal.

The Judge however dealt with two specific issues that did not arise for consideration in Molodi. The Judge took the opportunity to comment on the status of Claims Notification Forms in such cases. He also commented on the nature of medical reports and the scope of judicial notice in such cases. The Judges comments are likely to be of

assistance to parties conducting such cases in the future.

Claims Notification Forms

Each Claimant had sent Claims Notification Forms ("CNF") pursuant to the relevant Pre Action Protocols. The CNF's had been signed by the solicitor not the Claimant. As will be familiar to anyone who practices in this area the details contained in the CNF's were factually inconsistent with the Claimants evidence. In dealing with those inconsistencies HHJ Main QC said that:

"I do not find them (the CNF's) reliable documents. They are done shortly. They are all very summarised. They are simplistic documents which do not permit there to be details of clinical presentation that can be relied upon by a trial judge and I just ignore them".

On appeal Mr Justice Martin Spencer held that he could not associate himself with these comments. Instead he held:

"On the contrary in my view they (the CNF's) are important documents: they provide the basis for possible proceedings for contempt of court, as seen they provide valuable information at an early stage in the litigation process. Endorsed with a statement of truth as they are CNF's should be reliable documents and should be taken seriously".

The Court then proceeded to find that the inconsistencies in the CNF's undermined the credibility and reliability of the Claimants as witnesses.

These comments are a salutary reminder to us all. Errors in CNF's should not simply be brushed aside as meaningless or part and parcel of low value litigation as they so often are. Instead a Defendant should be able to rely on these documents. Where they are factually wrong this calls into question in and of itself the reliability and credibility of the Claimant. It also calls for an explanation from the Claimant. Many Judges in my experience routinely ignore errors in CNF's, taking the view that such errors are a product of the way in which such litigation is conducted. The interview with the Claimant has often taken place over the telephone and the Claimant has usually never seeing the document. Therefore Judges tend to ignore errors in a CNF. Richards is a useful reminder to Judges of the importance of such documents. Errors should not be ignored or accepted. Instead they should call for a detailed and cogent explanation to be given. If it isn't this should count against the Claimants reliability and credibility.

Presence of Spasm

The second specific issue that arose was the effect of the noted presence of spasm. The Trial Judge found that the presence of spasm found by the expert was an objective piece of evidence that supported the existence of injury. However Mr Justice Martin Spencer held that in doing so the Trial Judge had fallen into error. As with the Judge in the case of Hughes v Lancaster Steam Collieries [1947] 2 All ER 556 HHJ Main QC had reached his decision based on his own conclusions or evidence from other cases. He had not based his conclusion on the evidence before him. This took his conclusion outside the reasonable range of Judicial Notice open to him. The expert in the case had not stated that muscle spasm was an objective indicator of injury. Therefore it was not open to the Judge to make such a finding.

This is a useful reminder to Judges to ensure that the findings they make are based on the evidence before them not evidence they may or may not have heard in other cases or matters that they consider to be common sense. Judges in my experience often find that muscle spasm is an objective indicator of injury when in truth that conclusion is not based on the evidence before the Court.

Importantly however Mr Justice Martin Spencer then went further. He noted that the medical reports served by the Claimants were "extremely formulaic" and in his view they did not adequately distinguish between the two Claimants. Both reports had used similar wording and gave identical recommendations for treatment and the prognosis

for each Claimant. These factors meant that the Judge should have placed little if any reliance on the reports.

Those of us who practice in this area will be familiar with the routine formulaic nature of medical reports. They often appear to bear only a tangential relationship to the underlying facts or the Claimants evidence. Set prognosis periods are applied with little regard to pre existing history or subsequent events. The case of Richards is perhaps a useful reminder to the Courts that such medical reports are not unchallengeable pieces of evidence. They need to be viewed as only a part of the evidence presented by the Claimant, to be weighed in the balance when assessing the reliability, credibility and honesty of each Claimant. "

By Simon Trigger