DEKA CHAMBERS

BRIEFING
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CLINICAL NEGLIGENCE

Welcome to the Spring Clinical Negligence Briefing. It has been a busy start to 2024 for Deka's clinical negligence team. We are delighted that two members of the team were appointed as silks in March 2024 (Paul Stagg KC and Edward Lamb KC) and we wholeheartedly congratulate them on this achievement.

Articles in this briefing are provided by Richard Collier and Anirudh Mandagere on the topic of fundamental dishonesty and interim payment applications.

Richard Collier provides a useful analysis of Ritchie J's recent decision in *Williams - Henry v Associated British Ports Holding Ltd* [2024] EWHC 806. It concerns fundamental dishonesty and, of most interest, provides persuasive judicial guidance on what should be taken into account when considering 'substantial injustice'. Whilst fundamental dishonesty does not feature as frequently in clinical negligence cases as in some personal injury cases, it is still very much an important aspect of clinical negligence work and one should be aware of its hallmarks and when and how to raise, or meet, an argument of substantial injustice.

Anirudh considers *Cripps v Norfolk and Norwich University Hospital NHS Foundation Trust* [2024] EWHC 615 (KB) in which Allison Morgan KC (sitting as Deputy High Court judge) considered the Claimant's application for an Interim Payment to fund a foreign surrogacy arrangement (following *XX v Whittington*). It serves as a useful reminder of the level of detail and evidence required in such an application.

Lisa Dobie
Joint Head of the Clinical Negligence Team

WILLIAMS-HENRY v ASSOCIATED BRITISH PORTS HOLDINGS LTD [2024] EWHC 806 KB

By Richard Collier

Principal issue

The meaning of 'substantial injustice' in section 57 Criminal Justice and Courts Act 2015.

The claim

The claimant suffered a moderately severe brain injury after falling from a pier which should have had railings. Liability was settled 2/3 in her favour. The claim, valued by the claimant at over £2.35m, proceeded to an 11-day quantum trial before Ritchie J.

Paying close regard to social media posts and the enormous amount of surveillance evidence obtained by the defendant, the Judge found that the claimant had been dishonest and manipulative both in court and in what she said to the medico-legal experts. There was also collateral dishonesty in applications she made for insurance payouts and state benefits. The claim was fundamentally but not totally dishonest – the claimant had suffered a genuine injury with an amount of genuine consequential loss – therefore it landed in the territory of section 57. The genuine part of the claim was valued by the Judge as £895,000 on a full liability basis.

As evident from the judgment extracts below, the Judge did not find that the claimant would suffer 'substantial injustice'. He did however order that the interim payments of £75,000 did not need to be repaid to the defendant, as this would probably mean that the claimant would lose her home.

Legislation

"S. 57 Personal injury claims: cases of fundamental dishonesty

1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim") –

a) the Court finds that the Claimant is entitled to damages in respect of the claim, but

b) on an application by the Defendant for the dismissal of the claim under this section, the Court is satisfied on the balance of probabilities that the Claimant has been fundamentally dishonest in relation to the primary claim or a related claim.

2) The Court must dismiss the primary claim, unless it is satisfied that the Claimant would suffer substantial injustice if the claim were dismissed.

3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the Claimant has not been dishonest.

4) The Court's order dismissing the claim must record the amount of damages that the Court would have awarded to the Claimant in respect of the primary claim but for the dismissal of the claim.

5) When assessing costs in the proceedings, a Court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the Claimant to pay in respect of costs incurred by the Defendant.

....." (my emphasis)

Key parts of judgment

"178. I consider that the correct approach when deciding whether a substantial injustice arises is to balance all of the facts, factors and circumstances of the case to reach a conclusion about SI. The relevant factors in my judgment are all of the circumstances and include:

1) The amount claimed when compared with the amount awarded. If the dishonest damages claimed were small or moderate compared to the size of the assessed genuine damages which were substantial or very substantial this will weigh more heavily in favour of an SI ruling.

2) The scope and depth of that dishonesty found to have been deployed by the claimant. Widespread and gross dishonesty being more weighty against SI than moderate or minor dishonesty.

3) The effect of the dishonesty on the construction of the claim by the claimant and the destruction/ defence of the claim by the defendant. This would be measured by considering all matters including the costs consequences of the work done in relation to the dishonesty compared with the work done had there been no dishonesty.

4) The scope and level of the claimant's assessed genuine disability caused by the defendant. If the claimant is very seriously brain injured or spinally injured, then depriving the claimant of damages would transfer the cost of care to the NHS, social services and the taxpayer generally and that would be more unjust than if the claimant had, for instance, a mild or moderate whiplash injury. The insurer of the defendant (if there is one) has taken a premium for the cover provided. Why should the taxpayer carry the cost?

5) The nature and culpability of the defendant's tort. Brutal long term sexual abuse, intentional assault or drug fuelled, dangerous driving being more culpable than mere momentary inadvertence.

6) The Court should consider what the Court would do in relation to costs if the claim is not dismissed. The Judge should ask: will the Court award most of the trial and/ or pre-trial costs to the defendant in any event because fundamental dishonesty has been proven? Also, will the claimant have to pay some or all of his/her own lawyers' costs out of damages if the claim is not dismissed? These both aim towards answering the question: "what damages will be left for the claimant after costs awards, costs liabilities and adverse costs insurance premiums are satisfied?" If the genuine damages to be received by the claimant will be substantially reduced or eradicated by the adverse costs awards, then it is less likely that SI will be caused by the dismissal.

7) Has the defendant made interim payments, how large are these and will the claimant be able to afford to pay them back?

8) Finally, what effect will dismissing the claim have on the claimant's life. Will she lose her house? Will she have to live on benefits, being unable to work?

.....

205. For the decision on SI I shall take each relevant factor in turn. (1) <u>The amount claimed when compared with</u>

the amount awarded. The Claimant sought £2.5 million and recovered just under £600,000. The difference is not outside the usual bounds of claims and awards in personal injury claims, however the dishonest parts of the claim inflated the damages sought by over £1 million. (2) The scope and depth of the dishonesty found to have been deployed by the Claimant. The scope of the Claimant's untruths was wide. They related to her asserted pain, her ADL, her social life, her physical disabilities and her mental disabilities. The level of dishonesty was high in my judgment and was for financial gain. The Claimant told ancillary untruths to the DWP and the life insurer L&G for financial gain alongside her many fundamental untruths to this Court, her treating clinicians and the experts. (3) The effect of the dishonesty on the construction of the claim by the Claimant and the destruction/defence of the claim by the Defendant. I consider that the Claimant's dishonesty had a very substantial effect on the trial, on the preparation for the trial and on the evidence relating to the claims for case management, care, therapies, loss of earnings and the figure for pain and suffering and loss of amenity. It also led to many more experts' reports. (4) The scope and level of the Claimant's assessed genuine disability caused by the Defendant. The Claimant is moderately severely brain injured but has made a very good physical and cognitive recovery. Depriving the Claimant of damages will not transfer much, if any, cost of care to the NHS, social services and the taxpayer generally. In my judgment she can work and live independently. (5) The nature and culpability of the Defendant's tort. The Defendant's tort was at the lower end of the culpability scale. The pier had stood in the state it was in for years with no previous accidents. (6) The Court should consider what the Court would do in relation to costs if the claim is not dismissed. If I were to find SI, I would almost certainly award the trial and pre-trial costs to the Defendant in any event because fundamental dishonesty has been proven. These costs may be very substantial considering the size of the Defendant's costs budget. I have, of course, not seen any Part 36 offers, but the fundamental dishonesty will have an overarching effect on the costs orders which usually flow from Part 36 offers. The Claimant would most likely have to pay some of her own lawyers' base costs and success fees out of damages if the claim is not dismissed because of my probable adverse costs orders against her. What damages will be left for the Claimant after adverse costs awards, her own lawyers' costs and insurance premiums are satisfied? Will her adverse costs insurance cover fundamental dishonesty? I doubt it, but have not been shown any policy. In my estimation the genuine damages to be received by the Claimant will be reduced (or potentially eradicated) by the adverse costs orders and the standard terms of her own CFA (which I have not seen but which usually entitle the lawyers to recover their costs on recovery of any sum in damages). It would have assisted the Court if I had been shown the CFA and the adverse costs insurance policy for the SI issue. (7) Finally, what effect will dismissing the claim have on the Claimant's life. I am unsure what the effect will be on the Claimant's life. I consider that she is capable of work, physically and mentally, from the perspective of the injuries caused by the Defendant. I take into account the evidence of the Claimant's suicidal ideation. I consider that the Claimant's current unstable state of mental health has been caused by her own dishonesty. The advice she received to take a sabbatical and later, to give up work, was likewise so caused. The Claimant was in work until October 2022. In my judgment her stopping work was not caused by the tort. I am unclear whether the dismissal of the claim will lead to the Claimant being unable to

repay her mortgage. She paid part of it off out of the £108,000 she received from an insurance policy after the fall. She should be able to afford the reduced mortgage repayments if she gets back to work. She has minimal savings."

Ancillary and commentary

Despite being a personal injury case, this judgment is essential reading for clinical negligence practitioners. For the casual reader (an odd hobby) it is punishingly long, but the analysis is supreme and the reasoning commendably clear. The roadmap for assessing whether a claimant has suffered 'substantial injustice' is welcome; a brave judicial attempt to populate the abyss. Whether it will be applied by other High Court judges – one assumes it will at least be considered – remains a mystery. Most likely there will be some refinement (some useful, some not) before a meaningfully predictable method emerges. Perhaps the Court of Appeal will one day enlighten us.

Equipped with newfound guidance, claimant litigators are surely now obliged to turn their minds more acutely to whether their client, if found to be dishonest, can make a credible submission. This presents a sensitive practical challenge in Fast Track cases heard in a day or less. The judge will expect submissions immediately after judgment, most likely immediately before moving onto costs. This leaves no, or at best very little, time during the hearing to take instructions. The judge may or may not grant a short adjournment for this purpose after delivering the substantive judgment. Best practice is surely therefore to obtain instructions in advance of the hearing, which makes for an awkward conversation. Especially where the litigator is advising their client that the risk of a dishonesty finding is negligible.

On an ancillary note, regrettably beyond the scope of this article, Richie J makes a number of interesting comments about the experts. He was understandably critical of the defendant's care expert who was an occupational therapist with no qualifications or experience as a brain injury case manager and no experience of organising care packages. She should not therefore, he said, have been "stepping outside the boundaries of her professional OT experience and advising the Court on care packages.... Her assertion that she had case management expertise because she had seen others arrange care packages in MDT meetings is wholly unsatisfactory". The Judge made a similarly forthright criticism of the defendant's care expert, also an occupational therapist, in the recent case of *C v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1770 (KB).

INTERIM PAYMENTS FOR FOREIGN SURROGACY ARRANGEMENTS

By Anirudh Mandagere

Introduction

In *XX v Whittington Hospitals NHS Trust* [2020] UKSC 14, the Supreme Court held that a claimant was entitled to recover damages to fund the cost of commercial surrogacy arrangements using donor eggs in a country where such arrangements are not unlawful. The majority identified reached this conclusion on three issues:

1. On the facts of the case, there was a reasonable chance that the surrogacy would be successful.
2. Damages to fund arrangements using donor eggs was the closest the court could get to putting the claimant in the position she would have been in had she not been injured.
3. An award of damages for foreign commercial surrogacy would not be contrary to public policy.

Lady Hale identified a tripartite test for determining whether such damages can be awarded:

1. The proposed programme of treatments must be reasonable.
2. It must be reasonable for the claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK.
3. The costs involved must be reasonable.

Cripps v Norfolk and Norwich University Hospitals NHS Foundation Trust [2024] EWHC 615 (KB) explores the ambit of this new head of loss in the context of interim payments. This article will explore the facts of the case, the judgment, and the practice points arising for claimants and defendants.

Background

The Claimant underwent a cervical smear test at her General Practitioner's Surgery. The sample was misreported as "HPV Positive. Cytology Negative". A year later, she attended another smear test and the result was reported as "High risk HPV Detected". This led to the Claimant's diagnosis with a Grade 3 primary squamous cell carcinoma of the cervix.

She underwent treatment for her cancer. However, the Claimant's natural fertility and ability to carry a pregnancy was permanently lost due to irreversible damage to the ovaries, uterus and endometrium, consequent upon the treatment. She was unable to conceive naturally or carry a pregnancy. The Defendant admitted liability.

The Evidence

The Claimant argued there was a pressing need for her to begin the process of surrogacy based on her age and that of her husband. She had made enquiries with "Brilliant Beginnings" (a surrogacy agency based in the UK), and had used funds from her earlier interim payment to start taking steps on the surrogacy pathway. This included (1) taking a sample of semen from her husband (2) examining the timescales for identifying a potential surrogate, (3) submitting an application to Brilliant Beginnings and making initial payments.

The court also had the benefit of expert evidence from both the Claimant and the Defendant. The four key issues concerned the following:

1. **The Claimant's ability to have children in any event.** The experts agreed that the Claimant's fertility would have been

normal for her age. The Defendant's expert noted a potential sperm abnormality of the Claimant's husband and the Claimant's high BMI.

2. **Surrogacy Arrangements in the UK.** The experts agreed that surrogacy was well established in the UK. They disagreed as to the wait times and the ease of arranging surrogacy in the UK.
3. **Surrogacy Arrangements in the USA.** The Defendant's expert noted that there was some complexity in such arrangements (the need to complete a parental order process via the UK High Court, the lack of close contact with the surrogate and inconvenience). The Claimant's expert did not view these as meaningful downsides.
4. **Costs.** Broadly speaking, there was agreement as to the expected costs of surrogacy arrangements in the UK and USA.

Judgment

The application was heard by Alison Morgan KC (sitting as a Deputy High Court Judge). It was agreed that the test in *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 304 applied. Namely, that it was necessary for the court to determine whether it could say with a high degree of confidence that a future trial judge would conclude that it was reasonable for the Claimant to be awarded damages to enable her to pursue a foreign commercial surrogacy arrangements.

Ms. Morgan KC dismissed the application on the following grounds:

1. The parties had not gathered all the expert evidence that may yet be obtained in relation to surrogacy issues. The precise details of the surrogacy arrangement that the Claimant aimed to seek in the United States had not been identified. There was no evidence of detailed enquiries made in relation to surrogacy arrangements in the UK.
2. The evidence was far from complete. A future trial judge would have the benefit of (a) a fully particularised schedule of loss (and the appropriateness of a periodical payment order), (b) further details of the Claimant's proposed surrogacy arrangements, and (c) further evidence as to the competing merits.

The above matters would affect a future trial judge's determination of the tripartite test. There was also disagreement between the parties as to how the courts should approach the tripartite test. Namely, whether the disparity in costs between the UK and foreign surrogacy arrangements is a feature which the court should take into account when determining the reasonableness of the Claimant selecting the USA route.

Comment

Notwithstanding the pressing need identified by the Claimant, the court dismissed the application. Part of the reasoning concerned the novelty of foreign surrogacy arrangements. There is a need for judicial guidance as to the proper approach to be taken to ascertain the reasonableness of the foreign surrogacy arrangements. Nevertheless, there are a number of practice points that can be taken from this judgment:

1. Evidence of foreign commercial surrogacy arrangements ought to include details of the proposed surrogacy arrangement.
2. If the Claimant wishes to arrange commercial surrogacy in the United States, then the particular State must be identified. This is particularly important given the competing merits of the UK and USA systems in terms of legal certainty.
3. Enquiries should be made in relation to domestic surrogacy arrangements. Evidence should be adduced as to why a foreign arrangement is more appropriate.