Intermediary served no useful role in personal injury case involving a vulnerable claimant (Morrow v Shrewsbury Rugby Union Football Club)

12/03/2020

Personal Injury analysis: It is well-established that a court has an inherent power to lay down 'ground rules' before a vulnerable witness is to give evidence in order to determine any directions required to ensure best evidence, the questions to be asked by the advocates and any other necessary modifications of the court's procedures. One of the special measures available is for the witness to be supported by an intermediary to assist them to understand questions and communicate answers. In this case the court had strong reservations about whether ground rules were necessary and, after the hearing, concluded the intermediary did nothing that could not have been done by counsel and solicitors or by the court in the exercise of its wide discretion to control proceedings. Written by Emily Formby, barrister, at 39 Essex Chambers.

Morrow v Shrewsbury Rugby Union Football Club Ltd [2020] EWHC 379 (QB), [2020] All ER (D) 161 (Feb) Mrs Justice Farbey

What are the practical implications of this case?

The judgment refers to the Civil Justice Council consultation on vulnerable witnesses and parties within civil proceedings, the final report of which was published on 20 February 2020. You can find the report here https://www.judiciary.uk/announcements/civil-justice-council-proposes-better-assistance-for-vulnerable-witnesses/. Whether its recommendations would have assisted the judge in this case are less clear.

The judge held a ground rules hearing and acceded to an earlier order to permit the claimant to have an intermediary while giving evidence. But practitioners should read this judgment before taking a similar route. Clear indication of how the intermediary will help are required. The court's inherent powers may well be sufficient to provide necessary protection for witnesses.

The intermediary said she would assist communication and ensure anxiety was not a barrier for the claimant. In the words of the judge, para [35], after questions at the ground rules hearing:

> 'I was left uncertain as to how the intermediary was qualified to do this. She was in my judgment unable to demonstrate any qualification, expertise or experience in determining when a person's anxiety becomes a bar to effective communication. In a case involving extensive expert opinion about the claimant's anxiety and other psychological problems, she could in my judgment have nothing to add.'

More damning still, at the end of the claimant's evidence, at para [46] the judge held:

> 'The intermediary's contribution to the proceedings was negligible. On a couple of occasions, she asked whether the court could take a break during the evidence but I was unsure why she chose those moments to make such a request as opposed to other moments. She gave some minimal assistance to the claimant when he was looking for documents in the bundles but he was capable of finding the documents for himself.'

So much for the intermediary and the conduct of the hearing. Turning to an analysis of the extensive evidence, the judge had to adjudicate on every point: all medical evidence and every head of loss.

On causation, careful analysis by the judge reiterated the *Page v Smith* principle (*Page v Smith* [1995] 2 All ER 736) that an egg-shell personality was no bar to recovery. The claimant suffered a severe somatic and psychiatric reaction which was caused by the accident and which would otherwise not have happened.

The fact that the claimant was initially treated for (and believed he had) a brain injury when in fact he had suffered a head injury was no bar to recovery. There was no reason to depart from the 'but for'

test or for the judge to substitute her own value judgment for that of the experts. In this case, the judge felt there was no special or peculiar difficulty in identifying the extent of the loss for which the defendant was responsible or ought to be liable. With hindsight, the evidence showed that initial treatment for a brain injury was not the right one. The defendant did not however prove that this treatment obliterated the defendant's wrongdoing or that, as an intervening act, it broke the chain of causation.

Whether the claimant suffered a head injury or a brain injury would affect the claimant's treatment. It was therefore an important distinction for the clinical practitioners so as to ensure the overall effect of diagnosis and labels of injury. However, in quantum terms what was more important was the link between tort, injury and harm caused: the claimant was sufficiently injured that he could not work. He required help and treatment. Specific diagnosis was no bar to recovery of loss. Therefore he recovered full damages including future loss of earnings up to his 55th birthday.

What was the background?

The claimant suffered injury on 28 February 2016 when he was struck on the head by a collapsing rugby goal post. While watching a match he was hit and suffered facial injuries. Liability was admitted but every aspect of quantum was challenged. Elements of harm: loss of smell, tinnitus and postural vertigo were accepted. The main nature of the injury: brain injury or head injury, recurrence of pre-accident epilepsy and development of a somatoform disorder were challenged. At trial, causation and harm were all dealt with over six days of evidence (from 18 live witnesses) and a day of submissions from counsel. Leading medical experts gave extensive evidence. Bundles of more than 4,400 pages and a tour de force of a judgment at the end make this a case worth reading in an era when so few large claims go to a full trial. This analysis draws on two key areas: the use of an intermediary to assist the claimant and the issue of causation.

The claimant asserted that as a result of the accident he suffered a brain injury which caused a resurgence of pre-existing epilepsy and a new somatoform disorder. He claimed that the somatoform disorder resulted in symptoms such as fatigue, stress and anxiety which forced him to give up his pre-accident work as an independent financial adviser. The major part of his claim therefore related to loss of past and future earnings as a consequence of psychiatric damage.

The club admitted liability but disputed the nature and extent of the claimant's injuries. It asked the court to find that his evidence was unreliable, and it argued that there was a significant correlation between the claimant's pre- and post-accident presentation, that he was not materially less able to work than he would have been had the accident not occurred. It argued that it would be unfair to award damages for the effects of the claimant's belief that he suffered a brain injury, when in fact he had sustained no significant injury beyond the short-term effects of a head injury.

What did the court decide?

The court decided that it gained little, if any, benefit from the intermediary. There was not much value added benefit that the court could not have managed alone (and one suspects rather better). As to the claim, the court held that, notwithstanding the claimant's considerable over-egging of the pudding, he suffered a previous eggshell personality and the claimant's somatic and psychiatric reaction to the accident caused sleep disturbance and psychological upset which altered the claimant's threshold for seizures, resulting in the recrudescence of his pre-existing epilepsy. But for the accident, seizures suffered by the claimant in November 2016 would not have occurred. Moreover, the combination of fear of further seizures and the more general somatic disorder caused the claimant to be overwhelmed by his work as an independent financial adviser which caused him to stop work. But for the accident, he would not have stopped work when he did but would have worked to 55.

Case details

- Court: Queen's Bench Division
- Judge: Mrs Justice Farbey
- Date of judgment: 21 February 2020

Emily Formby is a barrister at 39 Essex Chambers. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.