Bevan Brittan

Claims Online

February 2021

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Welcome to the Spring 2021 edition of Bevan Brittan's Claims Online. In this edition, our first article reminds us that the Court will not always view the COVID-19 pandemic as a reason for missing court deadlines. Our second article reviews a recent case that has intriguing implications for potential psychiatric injury claims arising out of events witnessed by children. Our final article assesses the impact of COVID-19 on elective care.

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COVID-19 is no excuse for non-compliance

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Introduction

As the UK national lockdown continues, the High Court judgement in the case of *Masten v London Britannia Hotel Ltd 2020*, **provides a reminder that the Court will not always view the COVID-19 pandemic as a reason for missing court deadlines.**

The Senior Courts Costs Office (SCCO) refused an application to set aside a Default Costs Certificate (DCC), where the Defendant's failure to serve a Points of Dispute (POD) on time was due to the organisational impact of COVID-19. In doing so, it provided guidance on the correct way to deal with the prospect of missing a court deadline, and an indication of how it will approach similar applications in the future.

Facts of the case

In light of the Claimant's successful personal injury claim, the Claimant's representatives served a Notice of Commencement and a Bill of Costs (claiming just over £363,500). The parties agreed extensions for service of the POD up to 28 February 2020. When this deadline was not met by the Defendant, the Claimant's representatives filed a request for a DCC, which was issued on 16 June 2020.

There was a delay in preparing the POD and processing the DCC by the Defendant's costs draftsman. In attempting to respond to the DCC, they encountered issues with the SCCO's CE-filing system, and the application was not successfully filed until 26 August 2020.

The Judgement

In considering whether the application to set aside the DCC had been made promptly, the court acknowledged the issues with the SCCO's filing system. Furthermore, the relevant date was deemed to be the date that the Defendant knew, or should have known, that a DCC had been issued, rather than the due date of the POD.

The Defendant's cost draftsman submitted that they were late in preparing the POD and responding to the DCC because the file handler had prioritised other work without re-allocating the file. Moreover, the COVID-19 pandemic had led to an increase in staff workload, and as the firm operated on a predominantly paper-based file system, this had caused difficulty with the majority of their staff

working from home. The court held that this was not sufficient to excuse the negligent mismanagement of files, particularly as there was an option to make an application for an extension of time when it became clear that they would miss the deadline, which was not exercised.

In refusing the application, Master Leonard highlighted an avoidable delay of four months, with no good reason. He emphasized the importance of "dealing with cases expeditiously, of complying with rules, practice directions and orders".

Subsequent cases

In the case of *Stanley v London Borough of Tower Hamlets 2020*, the High Court took a different view and set aside a default judgement when the failures of the Defendant to respond arose out of the COVID-19 pandemic, as these were deemed to be outside their control. In the Masten case, the court viewed the inaction of the Defendant's costs draftsman in failing to prioritise or reallocate the case to be inexcusable. Conversely, in the Stanley case, it accepted that the Defendant council had no choice but to close their office due to government restrictions, and took the view that the Claimant should have considered the effects of office closure on the Defendant's ability to receive correspondence.

Learning

The Masten case demonstrates that the court will not look favourably upon those that allow deadlines to be missed without undertaking any action to prevent this, even if such inaction is due to the organisational impact of COVID-19.

It is also relevant when considering co-operation between parties in agreeing extensions. By the time the Defendant had contacted the Claimant inviting them to set aside the DCC, there had been a four-month delay. For that reason, the court was sympathetic to the Claimant for their refusal to do so. This is of importance given that Practice Direction 51ZA (which increased the time limit that parties could agree between themselves to extend time for compliance with deadlines to 56 days) has expired, and practitioners are operating under the previous CPR 3.8 limit of 28 days. The lesson to be taken from these two cases is that the Courts are more likely to be sympathetic to delays caused by the pandemic (whether that be because of a lack of access to the offices/file and/or staffing issues) if an extension has been requested in advance. Any delays should be kept to a minimum and applications made promptly.

Finally, both the Masten and Stanley cases involved missed deadlines by legal advisors due to circumstances surrounding COVID-19, rather than a clinical negligence setting in which a party is unable to comply with a deadline (a defence, or service of witness statements) due to clinical demands. Therefore, it is open to interpretation whether the court will be more sympathetic if the reason for the delay is due to clinical pressures as a result of the pandemic. We suspect that they will be, but again, any application should be made promptly and be supported by evidence detailing the cause and extent of the delay.

Young v Downey: Impact on children as secondary victims

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The recent High Court case of Young v Downey has intriguing implications for potential psychiatric injury claims arising out of events witnessed by children.

The Claimant, Sarah Young, brought a claim for damages arising from the death of her father, who was killed in 1982 by an Irish Republican Army car bomb close to his barracks in Hyde Park, London, whilst on duty as a lance corporal. The Defendant was a member of the IRA responsible for the bomb. The Claimant was four years old and in the barracks' nursery at the time of the incident. She remembered waving goodbye to him, then hearing the explosion and seeing injured soldiers returning to the barracks. Around "home time" the Claimant made the comment *"Daddy should be coming home now"*. The claimant sought damages as a secondary victim for her psychiatric injury among other forms of damages.

The Judgement

Mr Justice Martin Spencer ruled that the Claimant did not meet the threshold for a secondary victim. The threshold for a secondary victim is set out by *Alcock v Chief Constable of South Yorkshire Police*, arising out of the Hillsborough disaster, which includes the following criteria:

1. a close tie of love and affection to the primary victim;
2. to have been close to the event or its immediate aftermath in time and space;
3. to have witnessed the event with their own unaided senses;
4. the psychiatric injury must have been caused by a sudden shocking event.

Crucially, Mr Justice Spencer pointed to the need for the secondary victim to understand and appreciate that their loved one was, or might have been, involved in the shocking event in question. In this case, the Claimant was only four years old at the time of the event. Mr Justice Spencer ruled that the evidence did not show an awareness or understanding by the Claimant that her father might have been killed or injured in the bombing that she had heard/witnessed, despite the Claimant's psychiatric expert saying otherwise. The Judge accepted that the Claimant had heard, and was probably aware, that there had been an explosion, but he was not persuaded that she was aware that her father could have been injured or killed in it. He attached weight to the Claimant's comment "*Daddy should be coming home now*" and interpreted this as meaning that she was expecting him to be picking her up (and therefore all was well). Her claim for psychiatric damage failed.

Impact

This is the first case that has considered the position of a child in a secondary victim claim. The key decisive factor was the perceived lack of comprehension by the Claimant that her father may have been harmed. The ruling potentially makes future secondary victim claims brought by Claimants who were children at the time of impact more difficult.

The Claimant's psychiatric expert said that the comment made by the Claimant suggested that the Claimant was anxious about whether her father would come pick her up. Mr Justice Spencer rejected this expert evidence and instead interpreted the comment as the Claimant being reassured that her father was collecting her. This is an interesting interpretation given the limited ability of children of that age to express themselves clearly. The Judge accepted that had the Claimant been an adult at the time of the incident, she would have fulfilled the criteria of a secondary victim as a reasonable adult would have been able to comprehend the potential harm done to the father.

This case further demonstrates that overcoming the control mechanisms of meeting the definition of a secondary victim can be quite a challenge for Claimants. This area of law continues to generate litigation and there is yet another secondary victim claim *(Paul v The Royal Wolverhampton NHS Trust)* before the Court of Appeal at the moment, so we wait the outcome of that with interest!

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Elective Care in England: Assessing the impact of COVID-19 and where next

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Introduction

Analysis by the Health Foundation UK has shown that there were approximately 4.7 million fewer patients referred for routine hospital care between January and August 2020 compared with the same period last year. This highlights the likely scale of the backlog of routine care needs (incorporating elective and routine hospital care, such as hip, knee and cataract surgeries) since the onset of the COVID-19 pandemic.

To comply with the NHS Constitution guidelines the maximum waiting time for routine consultant-led care should be no more than 18 weeks. However, of the 4.2 million people currently waiting for routine elective care, 2.3 million have already waited longer than 18 weeks. This reveals a concerning level of unmet patient needs which will be challenging for the NHS to recover from.

The Impact of COVID-19 on NHS treatment

The BMA reports that new data released by NHS England also casts light on the cumulative impact the current pandemic has had on NHS services in England.

In order to ensure the NHS was able to cope with the large influx of COVID-19 patients this year many NHS Trusts were required to cancel planned operations, discharge large numbers of patients into the community and conduct GP consultations remotely. The data also suggests that there has been a drop in GP referrals (presumably because patients are not attending) which could also impact on the level of future demand for healthcare.

Added to all of this the research suggests that there are concerns that in the haste to ensure that NHS services return to "near-normal" levels for elective and outpatient care, doctors are being given unrealistic targets with the latest figures showing that most services are failing to hit them. This could have the effect of compounding the pressures on the clinical staff responsible to providing the services and potentially result in financial penalties from the Government for not meeting these targets. It is not yet known to what extent front-line healthcare professionals have been effected psychologically as a result of the pandemic, but added pressure in terms of targets and dealing with a heavy backlog could have a detrimental effect on health and well-being.

How could this affect future claims?

The concern is that the referral backlog will inevitably result in delayed diagnosis and treatment and that this will have a knock on effect an already stretched healthcare system. It is not yet clear how the Courts will modify the legal duty of care test to reflect these unprecedented times. It can be hoped that the courts will adopt a sympathetic approach to the impact of the COVID-19 emergency on referral and treatment times. Accordingly, there is scope for the number of delayed diagnosis and delayed transfer of care claims to increase and a concern that errors will creep into clinical practice as staff try to cope with the effects of pent-up demand. It seems likely whilst the immediate grip of the pandemic loosens over the coming months/years its legacy in terms of the overall impact on our healthcare system and front-line staff will be felt for many years to come.

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