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PERSONAL INJURY CASE LAW REVIEW

Ian Huffer considers how easy it is for Defendants to withdraw pre-issue admissions.

This article seeks to address the question of how easy is it for Defendants and their insurers to withdraw pre-issue admissions in personal injury claims when they have been negligent in making such admissions and the related question of whether the fact of the value of the claim becoming larger than first envisaged is of itself sufficient justification for a court to give its permission to withdrawal.

Practitioners with be familiar with the changes to the rules introduced and applied to all admissions made after 6th April 2007 and the discretion the court now has, on application, to permit withdrawal of an admission where the person to whom the admission was made declines to give their consent (CPR 14.1A).

The Practice Direction to CPR 14 (7.2) sets out a non – exhaustive list of matters which the court must take into account when considering an application for withdrawal of a pre-action admission.

"In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including

(a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;

(b) the conduct of the parties, including any conduct which led the party making the admission to do so;

(c) the prejudice that may be caused to any person if the admission is withdrawn;

(d) the prejudice that may be caused to any person if the application is refused;

(e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;

(f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and

(g) the interests of the administration of justice.

Guidance is given in the cases of Woodland v Stopford[1], Moore v Worcestershire NHS Trust[2] and in the recent decision of the Court of Appeal in Wood v Days Health Care Ltd[3]

Nature of discretion: It is clear from the wording and how the discretion has been exercised in the reported cases that consideration is given to "all the circumstances" "including" but not limited to the listed matters in the context of furthering the overriding objective. It follows that there may be not listed. For example, in Wood the fact that summary judgment had been obtained against another Defendant "was at the least a relevant matter required to be taken into account".

1 [2011] EWCA Civ 266 2 [2015] EWHC 1209 (QB) 3 [2017] EWCA 2097

The editors of the White Book suggest that it is unclear whether the adjudicating judge should deal with each of the listed matters in their judgment (generally the approach in the reported cases) but I agree that it might be prudent for those representing applicants to follow this advice when drafting supporting applications/witness statements. In Woodland, Lord Justice Ward said

"These factors are not listed in any hierarchical sense nor is it to be implied in the Practice Direction that any one factor has greater weight than another. A judge dealing with a case like this must have regard to each and every one of them, give each and every one of them due weight, take account of all the circumstances of the case and, balancing the weight given to those matters, strike the balance with a view to achieving the overriding objective. Cases will vary infinitely and the weight to be given to the relevant factors will inevitably vary from case to case. Sometimes the lack of new evidence and the lack of explanation may be the important considerations; in others prejudice to one side or the other will provide a clear answer and in all the interests of justice will sway the balance. It would be wrong for this court to circumscribe the manner of the exercise of this discretion or to give any more guidance than is trite, namely, carry out the task set by the Practice Direction, weigh each of the identified factors as well as all the other circumstances of the case and strike a balance with due regard to the overriding objective."

Finality: In Wood, the Court of Appeal made it clear (in so far as the judge might have implied differently) that the overall exercise of the discretion was not to balance the interests of "finality" on the one hand against the interests of a "fair outcome" on the other hand. "The Rule and Practice Direction require a global approach, requiring evaluation of all the relevant circumstances in deciding whether it is just and fair to permit a party to withdraw a pre-action admission" (Davis L.J.)

New evidence: It is clear from both the Woodland and Moore cases that the emergence of "new evidence" since the admission was made is not a strict requirement and an application can be successfully based upon a subsequent tactical re-appraisal of the evidence on which the admission was made (Woodland) or realisation that the admission was made because of negligence, a "careless and cursory reading" by the Defendants' professional advisors of a commissioned report (Moore). In the latter case the judge, on appeal, referred to a "genuine mistake" as opposed to "deliberate conduct". In Wood, the Defendants' loss adjusters had negligently failed to call for a report on the equipment, a "self-induced error" in that if it they had called for it and seen it, they would not have admitted liability. The Court of Appeal in Wood regarded subsequent medical evidence obtained on behalf of the Claimant indicating that an injury was more serious than that intimated in the letter of claim was "new evidence".

Conduct of the parties: In Moore, although the Claimant's conduct had not induced the Defendant's negligently given admission the application to withdraw was still successful. The appeal judge in Moore (Judge Bidder QC) said that, whilst that the parties conduct should be "assessed against the revitalised robustness of the Court of Appeal's approach in Mitchell and Denton, this "did not necessarily import the full factors relevant to an application for relief from sanctions". On the facts, he observed that the Defendant's conduct was not that of repeated misconduct in the sense in which the court understood it in Mitchell and Denton. In Wood there was no culpable delay by the Defendants in bringing their application for permission to withdrawal.

Prejudice to parties: This is often the key consideration. In Moore the delay in the Claimant obtaining their own medical evidence caused no significant disadvantage (the wasted costs of the Claimant's quantum reports being specifically provided for) compared with the Defendants' loss of a genuine and real defence. Sometimes there is real prejudice to the Claimant which could be evidential. A tripping claim in which I was recently involved comes to mind where liability was admitted, and the hazard infilled before its size had been measured by the Claimant and the proposed Defendants then sought to withdraw their admission.

Time/stage of proceedings: Plainly different considerations would apply in respect of late applications (e.g. shortly before trial) than to

applications made at an early stage where a court can case manage and control expenditure which was the position in all the discussed cases.

Interests of justice: This interrelates with the other factors and the overriding principle. In Moore, the judge on appeal referred to the modest delay and extra cost over what would have happened anyway. He acknowledged that the making of admissions was important and in the interests of justice and should not be set aside lightly but it was not in the interests of justice to deny the Defendant a real defence and create satellite litigation for professional negligence.

Increase in value: In Wood, the Claimant, a paraplegic and reliant upon her motorised wheelchair, was injured when she was catapulted out of the chair because of a defect in the wheelchair/seat. The wheelchair was provided by the Primary Care/Community Health trust (D2) and supplied by a care equipment supplier (who subsequently became D5) who had acquired the chair and seat riser from Days (D1) who had modified the frame of the seat riser unit in the process. The seat riser unit had been acquired from a foreign (Danish) company (which subsequently became D4). The Claimant had obtained summary judgment against D2.

In the letter of claim to Days, the Claimant's solicitors had, indicated that the Claimants injuries were a rotator cuff shoulder injury which had necessitated the use a TENS machine for pain relief and serious bruising to her rib cage. It was proposed that expert evidence be obtained from a consultant orthopaedic surgeon. Days loss adjusters asked whether it was considered to be a fast track case. The Claimant's representative responded by saying that "Currently we consider this case will fall into the fast track" and indicated that a schedule of special damages would be produced in due course. Days' loss adjusters had inspected the wheelchair but were not aware that the original chair and riser had been replaced (having not then seen the relevant report). They admitted liability. Subsequently, a forwarded orthopaedic report recorded details of a more serious shoulder injury, that the Claimant had had surgery, that there was loss of movement in the hand and continuing disability severely reducing function and having serious effect on the Claimant who was wheelchair bound. The Claimant's solicitors admitted that their client's claim has changed entirely in character and amount. When issued, the claim was pleaded as being valued at more than £300,000.

Days application to withdraw their admission was refused by Mrs Justice Laing. She did not consider that the fact that the potential value of the claim had increased since the admission was a good reason for allowing Days to withdraw the admission. It was, she said, a risk inherent to a personal injury claim being a commercial decision by experienced loss adjusters to avoid the cost of fighting liability what they then thought was a low value claim, taking a "calculated risk" that the claim might increase after the admission.

Days successfully appealed. Lord Justice Davis, delivering the court's decision, said "My own view is that the entire "change in character and amount" of the claimant's claim in 2012 (to adopt the language of her own solicitors) should, given all the circumstances, have justified the grant of permission to withdraw the pre-action admission. That conclusion is then reinforced when one has due regard to the existence of the summary judgment against D2. In such circumstances, this court is entitled to interfere and should do so". The judge's failure to have any real regard to "the new evidence as to injury, causation and quantum of itself vitiated the exercise of her discretion"

The Court of Appeal disagreed with Mrs Justice Laing's view that Days loss adjusters had taken a calculated commercial risk. It was a reasonably based decision on what was then adjudged to be a relatively modest claim on the information which the claimant was herself providing and they had no reason to contemplate the amount of the claim increasing so dramatically. The Court was critical of the judge's stark approach that a risk of increase in quantum is inherent in any such claim as undermining the incentive to settle cases at proportionate cost by discouraging Defendants from making a speedy admission of liability in apparent small claims. "It would tend to discourage them for fear of a subsequent withdrawal of admission of liability being refused on the basis advocated by the judge, even where

quantum has in the interim enormously and unexpectedly increased".

Comment: Limited conclusions can be drawn from the case law. First, the decision in Wood is underpinned by the fact that Mrs Justice Laing was satisfied that Days had a credible defence that it was not the producer of the 'accident' wheelchair. I would suggest that a Court is very unlikely to give permission to a Defendant to withdraw a pre-action admission where they do not have a reasonable and credible defence. Secondly, it is difficult to envisage circumstances when this has not arisen other than because of some misunderstanding/culpability by the Defendant or their representative as the discussed cases demonstrate. It is unclear whether there is a magnitude of Defendant fault falling short of deliberate conduct which, of itself, might prevent an application succeeding. Thirdly, notwithstanding the decision in Wood, in my opinion, it is also difficult to envisage circumstances in which an application to withdraw permission would succeed solely on the basis that the quantum of the claim was substantially more than was known at the time of admission and in the absence of a reasonably arguable and credible defence to the claim. Fourthly, there is probably little that Claimant's representatives can do in advance to negate an application by a Defendant to withdraw a previously given pre-action admission save perhaps to exercise care and accuracy in the letter of claim or CNF when setting out the factual details that found liability and the nature and extent of injury and resulting loss.

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