INSIDE 18

PERSONAL INJURY CASE LAW REVIEW

In the first part of his article on witness evidence in June, IAN HUFFER considered the evidential issues relating to the failure to call witness evidence. In the second part he focuses on how the courts weigh and assess a witness' oral account particularly in the context of contemporaneous documentary evidence.

THANKS FOR THE MEMORIES...

For practitioners, this is a recurrent forensic issue from tripping accident and accident at work claims where there is conflict between the stated and pleaded account of the injury with that set out in hospital admission notes to serious clinical negligence claims where the Claimant's recollection and account of what happened or was said does not accord with recorded medical notes.

Witness memory

There is a helpful summary and review of the recent authorities (Gestmin SGPS SA v Credit Suissse (UK) Limited [2013] EWHC 3560 (Comm), Lachaux v Lachaux [2017] EWHC 365 and Carmarthenshire County Council v Y [2017] 4 WLR 136) by Stewart J at paragraphs 96 and 97 of his judgment in Kimathi v. Foreign and Commonwealth Service [2018] EWHC 2066 (QB).

"Rather than cite the relevant paragraphs from these judgments in full, I shall attempt to summarise the most important points:

Gestmin :

We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.

Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.

Events can come to be recalled as memories which did not happen at all or which happened to somebody else.

The process of civil litigation itself subjects the memories of witnesses to powerful biases.

Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.

The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no

useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

Lachaux :

Mostyn J cited extensively from Gestmin and referred to two passages in earlier authorities. I extract from those citations, and from Mostyn J's judgment, the following:

"Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"

"…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"

Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty."

Carmarthenshire County Council : a

The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.

However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of Gestmin, Mostyn J said: "…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context."

Of course, each case must depend on its facts and (a) this is not a commercial case and (b) a central question is whether the core allegations happened at all, as well as the manner of the happening of an event and all the other material matters. Nevertheless, they are important as a helpful general guide to evaluating oral evidence and the accuracy/ reliability of memory."

Memory v records

Two recent clinical negligence cases state the courts' approach to be that of undertaking a careful review of the evidence as a whole without giving preference or primacy to clinical notes over witness recollection but show in the analysis that there is an underlying tension.

In Taylor v Chesterfield Royal Hospital NHS Foundation Trust [2019] EWHC 1048 (QB), a birth shoulder dystocia case, the judge (Kimbell QC, sitting as a Deputy High Court Judge) had to consider what occurred in a 2 minute period 25 years previously. Whilst the judge assessed all the evidence including that of the parents, he attached decisive weight to a doctor's signed note of events in the delivery room at the time in resolving the conflicting accounts, quoting what

Tomlinson LJ said in Synclair v East Lancashire Hospitals NHS Trust [2015] EWCA Civ 1283 (see below) about a doctor's professional duty in relation to notes making them inherently likely to be accurate.

CXB v North West Anglia NHS Foundation Trust [2019] EWHC 2053 (QB) concerned a case where children's birth complications could have been avoided by way of elective caesarean section. There was a conflict between the Claimant mother's account that she had chosen caesarean section and the note of a senior Registrar that recorded that the mode of delivery had been discussed at length and the mother being keen for induction of labour, this account being disputed by mother and father. Although the judge (HH Judge Gore QC) found for the Defendants, having carried an assessment on the evidence as a whole including internal and external inconsistencies in the Claimant's account, he did not accept the Defendant's argument that there was a principled preference based upon the case law cited to him. The judge considered that Leggatt J's statements in Gestmin should be treated with caution, as no authority or legal analyses was relied upon in producing the judgment and no expert evidence or professional literature informed the remarks. He regarded Synclair v East Lancashire NHS Trust as a case on appeal upholding the lower court's observations in relation to the lesser reliability of oral testimony and justified on the basis of the overall evidential assessment carried out by the lower court.

Medical records

As regards clinical notes, in Synclair v East Lancashire Hospitals NHS Trust [2015] EWCA Civ 1283 Tomlinson L.J said "Clinical records are made pursuant to a clear professional duty, serious failure in which could put at risk a practitioner's registration. Moreover, they are not compiled simply as a historical record, they fulfil an essential and ongoing purpose in informing the care and treatment of a patient. Contemporaneous records are for these reasons inherently likely to be accurate."

Over the years I have had reason to doubt and have argued (both successfully and unsuccessfully) that parts of medical or triage notes whose contents are irrelevant or peripheral to treatment issues can be treated with less reverence as to accuracy particularly when made late at night in hard pressed Accident and Emergency Departments. Like many litigators, I have advised in cases (for example, where liability and causation are not in issue or there is other unimpeachable evidence of causation) where there has plainly been an inaccurate entry as to the circumstances, mechanism and sometimes even place injury.

Claim Notification Form and Letter of Claim

Given the weight which court's attach to contemporaneous or early documentary records, parties representatives should strive to produce as accurate account as possible in the documentation which a party creates or which they have control over.

The contents of the Claim Notification Form set out an early account of a Claimant's accident and injuries and practitioners representing Claimants should be particularly careful in obtaining full and accurate instructions. In Richards v Morris [2018] EWHC 1289 (QB), Martin Spencer J said that CNFs are important documents because they the first notification of a claim to the potential Defendant's insurer and they are endorsed with a statement of truth. "CNFs should be reliable documents and should be taken seriously". I am informed by colleagues in chambers that this is not always being taken seriously by those completing CNFs on their client's behalf.

Whilst the Pre-action Protocol says that "letters of claim and response are not intended to have the same status as a statement of case in proceedings" and that generally "it would not be consistent with the spirit of the Protocol for a party to 'take a point' provided

that there was no obvious intention by the party who changed their position to mislead the other party", my experience confirms the unwisdom in expecting the courts to ignore a clear and unexplained inconsistency in a letter of claim.

Procedure

Practitioners may be familiar with the Obiter dicta of Buxton L.J. in Fifield v Denton Hall [2006] EWCA Civ 169 as to the procedure to be followed in cases whether there is or appears to be a conflict between an account and an entry in the medical notes. First, the party who seeks to contradict a factually pleaded case on the basis of medical records, usually the Defendant, should indicate this in his pleadings, by amending his pleadings or by informal notice. Secondly, the other party, usually the Claimant, must indicate the extent to which they object to the accuracy of the records by a reply or informal notice. Thirdly, with the area of dispute identified, the Defendant needs to decide how the records need to be proved. This will usually be either under section 4 of the Criminal Procedure Act 1865 or section 1 of the Civil Evidence Act 1995.

Lord Justice Buxton goes on to comment that where this approach is not followed a trial judge might then be reluctant to allow reference to the Claimant's statements in the medical evidence for the purpose of contradiction. However, I remain unconvinced that it can give Claimants the procedural advantage that some commentator's claim. In my experience, Defendants with access to medical records, generally plead contradictory entries in the notes. Secondly, if objection to the accuracy of the notes results in busy doctors being brought to court to give evidence upon notes upon which they are unlikely to have independent recollection, there is likely to be a cost sanction. Thirdly, the Defendants can serve a Civil Evidence Act notice and even if they neglect to do so, failure to comply does not affect admissibility and the court could still be invited to take it into account with only the weight to be attached to it affected (section 4 of 1995 Act). Claimant advisors also need to be careful because if they permit medical notes to form part of an agreed bundle for a hearing, the documents are admissible at that hearing as evidence of their contents (paragraphs 27.1 and 27.2 of Practice Direction 32).

IAN HUFFER

Ian Huffer is a member of the Civil and Personal Injury Department dealing in all areas of Personal Injury litigation including high value claims, road traffic and industrial accidents, industrial disease claims and clinical negligence.

For further information please contact:

civil@18sjs.com

You can notify us by email via:
John Hammond,
Senior Clerk
e: jhammond@18sjs.com

18 St John Street
Manchester
M3 4EA
T • 0161 278 1800
F • 0161 278 8220
E • clerks@18sjs.com
• @18stjohn
www.18sjs.com