

Mathieu –v- Hinds & Aviva - A review of the case and its implications !

Speakers:



Marcus Dignum QC



Hugh Hamill

Mathieu -v- Hinds & Aviva

[2022] EWHC 924 (QB)

- On 13th April 22 Hill J handed down judgment in this important case which has lessons for Claimants and Defendants alike.
- Aside from the fact that the Claimant was awarded less than 10% of his pleaded case, the central aspect of the judgment for Aviva was the Judge's findings in respect of Provisional Damages for Dementia arising out of a TBI.
- However the Judge also made significant findings of general importance in respect of the following issues : -

- i) Mitigation of Loss - How to plead it, prove it and how high is the burden for Defendants ?
- ii) Taxation of Damages – Uncertainty over foreign Claimants – Who has the burden ? Gourley or Wood Mitchell ?
- iii) Ogden / Blamire / Loss of a Chance – Assessing a lifetime loss in a volatile and unproven marketplace.
- iv) Provisional Damages for Dementia – What is required and how strong is the scientific evidence – is it a suitable candidate?

The background

- On 28th November 2015, a young Haitian artist, who lived in Montreal was knocked down by a stolen motorcycle as he left Goldsmiths College in South London.
- On any view he suffered a severe TBI with associated fractures of his skull and facial bones. Scans provided evidence of subarachnoid haemorrhage and frontal lobe contusions. He was hospitalised for 13 days and initially suffered with impaired hearing and vision.
- On discharge, he returned to Canada to recuperate but returned to London to continue his studies in early 2016 and was able to produce work for his graduation show, which was an acclaimed success.
- Despite the initial severity of his injury it was common ground that he had made remarkable progress which was captured in a video which the Claimant made for a Head Injury charity in October 2016.
- He returned to live and work as an artist in Canada where his work is prolific, is sought after by leading museums and institutions and he exhibits internationally in Europe, China and the US.
- Despite his physical recovery which he acknowledged plateaued in October 2017 he complained of disabling headaches and fatigue which impacted on his ability to produce more works of art.
- Just to complicate matters further he suffered a 2nd RTA in Montreal when he was hit by a drunk driver and broke his leg. This claim was dealt with under a Canadian statutory compensation scheme.

The Claimant's Career

- On his return to Canada his career blossomed and he was soon picked up by prestigious galleries, museums and collectors around the world.
- On any view of the evidence the Claimant's post accident production was prolific and he accepted that he always managed to produce what was required of him for exhibitions or galleries.
- His case which the Judge accepted, was that but for his headaches, and the fatigue which they generated, he would have produced and sold even more work.
- Surprisingly, there was not a single document, e.mail, text or note from any gallery suggesting they could have sold more, if he had produced it, but that was his and their evidence to the Court.
- He was exceedingly popular and sought after, but how long would it all last ?

His Pleaded Claims over time !

- 1st Schedule of Loss in 2018 asserted a deficit of 5 works of art over 10 years which was valued at @£186k net of tax.
- 2nd Schedule in 2020 asserted a shortfall of 34 paintings (10 Large / 12 Medium / 12 Small) and valued past LoE @ £640k and future LoE @ £12m (Gross of Tax) along with £750k immediate Dementia damages at age 80 & PD's for pre-80. £13.5m
- Final Schedule – November 2021 – 3 months pre-trial – dropped the shortfall to 14 paintings per year (10L / 4M) but to reflect his predicted lifetime of success sought past LoE of Cad\$1.4m and future LoE Cad\$46m plus Cad\$8m immediate Dementia damages from 60.
- Cad\$ 56m or £33.6 plus PD's for dementia pre 60

Mitigation of Loss

- Two areas of attack – Medication for headaches and engagement in Fatigue Management sessions.
- Whilst settled law that a Claimant must take all reasonable steps to mitigate his losses –
 - Burden on the Defendant to plead and prove that his past or future actions are unreasonable AND to set out and prove what the beneficial result might be and in that context this particular Claimant was being unreasonable.
 - The Claimant had given different evidence at different times as to the extent of his overuse of Advil (Paracetamol). He told Dr. Foster that some weeks he took 20-30 and 8/10 in a day !
 - He considered a 50% reduction in frequency and severity of headaches if he ceased this. Dr. Orrell initially agreed C should trial amitriptyline for 3-6 months, but later changed his opinion for reasons the judge was unclear of.

Mitigation -

- Judge found issue *finely-balanced* and that the issue was more subtle than simply saying he should try the medication given the weight of evidence.
- C. was worried about the impact it would have on his creative work and life. He had worked hard to reach a balance.
- She held - *On balance, in my view, it is entirely understandable for him to decline medication which might generate two side-effects of which he is particularly fearful: further drowsiness that is likely to dull his creativity and further cognitive decline in the form of dementia that would be likely to have the same effect.*
- She was also not satisfied that his over-use of medication was regularly high, and accepted Dr. Orrell's evidence that he was not obviously placing himself at risk of over-use headaches on his current regime.

Mitigation

- The Judge drew support from the recent cases of
- Edmunds and Stansfield v BBC (2021 Yip J.)
- On the issue of Fatigue Management - raised at trial – not in the Defence or Counter Schedule – Claimant not given fair notice so not entertained by the Judge, albeit C had responded to it in closing submission.
- No clear evidence advanced as to the impact of this treatment would have on his losses.
- Overall - the lesson is plead a positive case early and set out what the benefits would look like and then prove them to a high standard at trial !

Taxation -

- C pleaded that he would be taxed on his damages on his return to Canada and so Gourley should be disapplied and the Claimant awarded damages for LoE gross of Tax (Agreed to be 53.31%)
- The Judge noted that as to the role of Canadian or foreign law, the parties agreed the key principles summarised in *Bank Mellat v HM Treasury* [2019]
- (i) in English private international law, foreign law is a question of fact, to be proved by a duly qualified expert in the law of that foreign country and the function of such an expert extends to both the interpretation and application of the foreign law;
- (ii) the burden of proof rests on the party seeking to establish the proposition of foreign law in question; and (iii) although the English court will scrutinise the evidence adduced, it will not undertake its own researches into questions of foreign law, any more than it will into other areas of evidence.

Taxation

- However, there was no evidence before the court as to how, and if so to what extent, any damages awarded to the Claimant in London would be taxed at a federal or local level in Canada.
- The Judge having sought recourse to McGregor on Damages noted that
- “The presence of two factors was necessary to set the stage for the problem which was posed for their Lordships’ decision in *Gourley’s* case: (1) the sums for the loss of which the damages awarded constitute compensation would have been subject to tax; and (2) the damages awarded to the claimant would not themselves be subject to tax.
- *149. However, in respect of Gourley factor (2), there is simply no evidence as to whether or not the damages awarded to the Claimant will themselves be subject to tax.*
- *150. In terms of what this lack of evidence means for the calculation of the Claimant’s award, having considered the competing arguments, I prefer Mr Huckle’s submissions. In my view, as a matter of English law, the Wood Mitchell principle applies. That principle is to the effect that the Gourley or Rought netting exercise is not undertaken unless it is “clear beyond peradventure” that the damages in question will not be taxed in future.*

Taxation

- *154. Here the Second Defendant has chosen to place no foreign law evidence before the court and so in my view the Gourley rule is ousted. However, in my view the fact remains that – whichever side bore the burden of proof – the taxation position remains unclear, such that Wood Mitchell applies.*
- *155. Similarly, I consider that the fact that one of the reasons for the uncertainty in this case is the potential role of foreign law makes no difference. Indeed, even if one does approach this issue as a question of private international law, the result is the same: this court has an absence of any evidence of the Canadian or other tax law in question, such that the court is bound to apply English law. English law on this particular point is set out in Wood Mitchell, with the consequences set out above.*
- Aviva are seeking permission to appeal on this point not least because of the problems it gives rise to in ascertaining where a foreign Claimant might wish to deposit his damages, or the impact on a UK Claimant who intimates that he is intending to live abroad following the conclusion of the claim.

Ogden / Blamire / Loss of a Chance

- Given the multiple uncertainties as to future productivity / prices / popularity / economic factors D.2 asserted that assessment or future loss was a *Blamire* case. The Judge noted that -
- 232. Mr Francis and Mr Sainty broadly agreed that the potential scenarios for the Claimant's future income are that (1) his prices continue to rise; (2) his prices level out and "hold"; (3) his prices fall; or (4) some combination of these scenarios.
- 233. Predicting the future loss of income for any artist will be difficult. The Second Defendant accurately summarised the general uncertainties of the art market as "staying in vogue, market preferences, changes of gallerist, variation of discounts, economic calamities, geopolitical instabilities, sustainability of pricing, competition, physical health, other emotional demands, perhaps even another pandemic".
- 235. Mr Francis and Mr Sainty agreed that predicting the evolution of any artist's work, its value and pricing beyond the next two to three years involves speculation. Mr Francis volunteered that when he was working with Anthony Gormley and Jean-Michel Basquiat at the outset of their careers, he would not have been able to predict what they would be earning two to three years later.

The Judge's approach -

- The Judge rejected D.2's submission –
- *236. I do not agree. As Keene LJ observed in Bullock at [19]-[21], all assessments of future loss of earnings necessarily involve some degree of uncertainty. As Langstaff J said in Van Wees at [100], where there are “a number of uncertainties and imponderables which are not amenable to any precise answer”, the court needs to perform “the best jury assessment [it can] in the light of all the material, having seen the witnesses and considered what [it thinks] to be the realities of the situation”. Having conducted the assessment, the award may be very much smaller than that claimed, or may indeed be nil, but this does not mean the court should not carry out the process.*

The Judge's approach -

- Doing the best she could – the Judge utilised Ogden along side a loss of different chances over different periods, to ascertain his future loss of earnings and significantly reduced the Claimant's future loss claim, but she very firmly kicked *Blamire* into touch.

285. I have therefore found myself able to continue to use the conventional multiplicand/multiplier approach advanced by the Claimant for this period of loss, albeit with very substantial modifications and assessing the multiplicand in a broad-brush way. That is consistent with the authorities indicating that judges should not resort to the Blamire approach unless essential.

Dementia – Provisional Damages

- The Statutory Framework
- Section 32A of the Senior Courts Act 1981 provides the framework to enable the court to order provisional damages to be paid in the future where *“there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition”*.
- CPR 41.2(1) states that the court may make such an award if (a) the particulars of claim include a claim for provisional damages; and (b) the court is satisfied that the criteria in section 32A or the comparable provision in or the County Courts Act 1984, section 51 are met.

Dementia – Provisional Damages

- The power to award provisional damages was considered by Scott Baker J in *Willson v Ministry of Defence* [1991] ICR 595.
- He identified three questions to decide, namely (1) is there a chance of the claimant developing the disease or deterioration in question? (2) is the disease or deterioration serious? and (3) if so, should the court exercise its discretion to make an award of provisional damages?
- His approach was approved by the Court of Appeal in *Curi v Colina*.
- Whilst claims for PD's are not uncommon, and awards particularly in the context of asbestos litigation, or TBI were not unusual, to date no Court has awarded them for the future risk of Dementia.

Dementia – Provisional Damages

- a) The chance has to be more than fanciful, or has to be measurable, no matter how small. In *Kotula Irwin J* it was concluded that a 0.1% risk of serious consequences of syringomyelia (1 in a 1,000 patients) was sufficient for these purposes.
 - b) The seriousness of the deterioration is a question of fact and depends on the circumstances of each case and the impact on a particular Claimant.
- In *Curi*, the Court of Appeal confirmed this approach, indicating that a disease or deterioration could be serious because of the effect on the activities, capabilities, life expectancy or financial position of the claimant.

Dementia – Provisional Damages

- Further, the Court held that the disease or deterioration must be “such that an award of damages which included a sum for the ‘chance’ will be wholly inadequate to compensate the Claimant for the position in which he would find himself once the chance had materialised.”
- C) The Discretion –
- The cases indicate that the discretion is only to be exercised in the clearest of cases – so
- In Willson it was “*desirable to limit the employment of this valuable new statutory power to cases where the adverse prospect is reasonably clear-cut and where there would be little room for later dispute whether or not the contemplated deterioration had actually occurred*”

Dementia – Provisional Damages

- In Allott v CEGB Michael Davies J indicated that he would not be enthusiastic about awarding provisional damages save “*in the clearest case*”
- Scott Baker J in Willson - *In my judgment, the section envisages a clear and severable risk rather than a continuing deterioration, as is the typical osteoarthritic picture...many disabilities follow a developing pattern in which the precise results cannot be foreseen. Within a general band this or that may or may not occur. Such are not the cases for provisional damages. The courts have to do their best to make an award in the light of a broad medical prognosis. In my judgment, there should be some clear-cut event which, if it occurs, triggers an entitlement to further compensation*”

Dementia – Provisional Damages

- In *Kotula v EDF Energy Networks*[2011] Irwin J said of the discretion in the context of a risk of a syringx –
- *“We are not here dealing with the development of osteoarthritis, or even of a psychiatric condition... Those are very general conditions which are Protean [ie. variable] in their form and effects. It will often be difficult to establish the cause of osteoarthritis particularly later in life. It may often be difficult to establish the origins of a psychiatric condition. It seems to me to be relatively easy to establish what has flowed from the development of a syringx in a given patient,..... By contrast to potential claims arising from osteoarthritis or psychiatric condition, one truly is contemplating a trickle not a flood.”*

Dementia – Provisional Damages

- Causation –
- The Court of Appeal in *Curi* held if the serious disease or deterioration occurs “*the fact that...there may be an issue on causation should not prevent the court from exercising its power [to award provisional damages], provided that it has been proved on the balance of probabilities that there is a measurable chance of the disease or deterioration materialising*”
- In *Fairchild v Glenhaven Funeral Services Ltd* the Court of Appeal held that while the power to award provisional damages required the court to decide whether there was a proven or admitted chance that at some definite or indefinite time the claimant would develop mesothelioma on the basis of the evidence then available and on the law as then established.

Dementia – Provisional Damages

The Evidence for a link between TBI and Dementia

- C's case was that there was a growing body of evidence which supported an increased risk of developing dementia consequent on TBI.
- C pinned his case to the Barnes paper - *Association of Mild Traumatic Brain Injury With and Without Loss of Consciousness With Dementia in US Military Veterans, JAMA Neurol 2018: It suggests that even absent loss of consciousness there was a 2-fold increase in the risk of dementia consequent on mild TBI.*
- Dr. Orrell in his report estimated a cumulated risk of dementia at age 60 of 20% and 55% at age 80. This was equivalent to a two – four times increased risk in the normal population risk.
- In cross-examination he distanced himself from *Barnes* – and accepted it was an *outlier* and was controversial and he then fell back on the more commonly promoted papers by Fann et al and Nordstrom. These papers too had flaws since the risks were greatest in the first year suggesting conflation with TBI.
- Fann et al, *Long-term risk of dementia among people with traumatic brain injury in Denmark: a population-based observational cohort study*, Lancet Psychiatry 2018 and Nordstrom and Nordstrom, *Traumatic brain injury and the risk of dementia diagnosis: A nationwide cohort study.*

Dementia – Provisional Damages

The Evidence for a link between TBI and Dementia

- Shortly before trial Dr. Orrell sought to rely on a further paper from Graham and Sharp, *Understanding neurodegeneration after traumatic brain injury: from mechanisms to clinical trials in dementia, Journal of Neurology, Neurosurgery and Psychiatry 2019. It asserted that it was now clear that TBI could trigger progressive neuro-degeneration and dementia.*
- However in the witness box he accepted this was an overstatement and that he accepted that the pathological mechanism between TBI was simply not known and he would need a time-machine to assist the Court on causation.
- D.2's case supported by the evidence of Dr. Foster was that causation could not be made out and that the quality of the research papers was flawed.

Dementia – Provisional Damages

The Evidence for a link between TBI and Dementia

- Dr. Foster relied upon a series of meta-analyses which all had mixed results. (Julien et al 2017; Li et al 2017; Huang et al 2018; and Hicks et al 2018).
- Only one paper *Plassman et al 2000* was considered to be methodologically sound but this in itself was open to criticism as it, like *Barnes* involved a study of veterans which was subject to multiple confounding factors.
- Dr. Foster also considered that the risks of Dementia, even if established had to be adjusted for the Claimant's excellent recovery (top 1%), and lifestyle factors which Dr. Orrell was unable to quantify.

Dementia – Provisional Damages

The Judge’s Approach

- 328. *The Claimant needs to prove, on the balance of probabilities, that there is a more than fanciful chance that the TBI will cause him dementia in the future. This requires him to prove that as a matter of generality a single TBI can cause dementia, and that this risk applies to him.*
- 329. *In my view the answer to this first, general question remains doubtful as a matter of science.*
- 334. *The Hicks team’s conclusions surely cast significant doubt on those previous studies which found an association between a single TBI and dementia. This is not to resort to “nihilism” as Mr Huckle said Dr Foster was doing, but to recognise that the most recent meta-analysis is itself leaving open the question of whether there is a sound scientific basis for the assertion that a single TBI can cause dementia.*
- 335. *The Huang et al meta-analysis published the year before the Hicks paper reached similar conclusions.*

Dementia – Provisional Damages

The Judge’s Approach

338. Moreover, I agree with Dr Foster that an association between two things does not necessarily mean that one thing has caused the other, especially, as here, where there is no clear understanding of what the causative “route” may actually be.

- 339. I therefore prefer Dr Foster’s interpretation of the research.*
- 340. Even if the existence of a generalised enhanced risk was clearer on the evidence, given the Claimant’s unusually good recovery from the TBI so far and the other apparently protective factors he has in place, how any such risk would apply to him remains unclear.*
- 341. Accordingly, I do not consider, on the current state of the science, that the Claimant can show, to the balance of probabilities standard, the existence of a more than fanciful chance that the TBI will lead to him developing dementia. The Claimant cannot therefore meet the requirements of Willson question (1).*

Dementia – Provisional Damages

The Judge’s Approach

- The Discretion
- Even though she rejected the claim for PD’s at the first hurdle, the Judge went on to consider whether she would have exercised her discretion. She gave very cogent reasons why she would not have done so.
- *344. Dr Orrell accepted that there are perhaps 100 different types of dementia and modern science continues to find more sub-types. There is not yet a specific sub-type of post-traumatic dementia. Dementias progress at different rates. Some types of dementia, including their causes, are understood better than others. There is a great deal still not understood about how dementias develop. It is increasingly recognised that there can be a genetic basis to dementia.*

Dementia – Provisional Damages

The Judge’s Approach

- 345. *Dr Orrell agreed that if the Claimant develops TBI in the future, he cannot say now that the TBI will have caused it: he would need to have a ‘time machine’ to do so. However future clinicians would be in a better position to determine whether the TBI had caused the dementia:*
- 349. *The case law summarised above suggests that the factors to be considered in exercising the discretion to award provisional damages include (i) the clarity of the development of the condition relied upon, the extent to which the developing condition can be “severed” or separated from the original condition and the ability to identify the cause or origin of the developing condition; (ii) the degree of the risk and the consequences of it; and (iii) the extent to which the claimant will be under-compensated without a provisional damages award if the risk eventuates, balanced against the lack of finality such an award creates for the defendant.*
- 350. *Of these factors, if the element of chance was made out, (ii) and (iii) would support an award of provisional damages in this case. It is agreed that there would be serious consequences for the Claimant if he developed dementia. I also appreciate that a once and for all award of damages including a sum for the chance of developing dementia may prove to be inadequate to compensate the Claimant for the position he*

Dementia – Provisional Damages

The Judge’s Approach

- 353. *While the optimism expressed by Dr Foster and in the Graham and Sharp paper about future diagnostic developments may prove merited, I need to decide whether to exercise the discretion now. In my view, therefore, the various elements of factor (i) need to be present now.*
- 354. *Second, on the basis of the current scientific evidence, any post-TBI dementia that develops would not be “reasonably clear-cut” and there may well be “room for...dispute whether or not the contemplated deterioration had actually occurred”: these were the factors which led Simon Brown J to consider the risk of further pleural thickening unsuitable for a provisional damages award in Patterson.*
- 355. *On the current state of scientific knowledge, a post-TBI dementia is often not severable from the consequences of the initial TBI. As Graham and Sharp said, “it is not usually possible to disentangle the direct effects of TBI from those due to neurodegenerative processes on the grounds of clinical features alone” and I do not understand there to be any other basis for doing so at present. This is apposite to this Claimant, whose consequences of the TBI include matters such as memory and concentration issues that in future are likely to be similar to those which could suggest dementia.*

Dementia – Provisional Damages The Judge’s Approach

- *356. Third, the experts agreed that dementias have many causes and effects. I accept Mr Dignum’s submission that post-TBI dementia is akin to osteoarthritis or certain psychiatric conditions, which were considered by Irwin J in Kotula to be unsuitable for provisional damages because they are “very general conditions which are Protean in their form and effects” and where the cause is often difficult to establish.*
- *357. For these reasons the development of post-TBI dementia cannot be said to be an example of “the clearest case” envisaged in Allott; a “clear and severable risk”, “clear-cut event” or “clear-cut identifiable threshold” as described by Scott Baker J in Willson; or one where, with ease, it could be separated from the existing medical condition”, per Yale-Helms and XX.*
- *358. I therefore consider that it would not be appropriate to exercise the discretion to award provisional damages in respect of dementia, even if I had considered the first Willson question could be answered positively.*

Dementia – Provisional Damages

- Where does this leave the argument ?
- C needs to prove a causal link using methodologically sound evidence
 - This will take time and possibly a time-machine !
- Will this ever be a suitable head of loss in which to exercise the discretion ? Requires advances in medical research and the classification of a clearly distinct post-traumatic dementia where onset is clear and not progressive.
- Any attack on this decision requires Epidemiological and Neuro-Psychiatric evidence both of which Dr. Orrell called for.
- Still possible for C. to seek a final award, based on risk but only with sound evidence on causation.
- C needs to be wary about arguments on L.E. on the value of future loss.