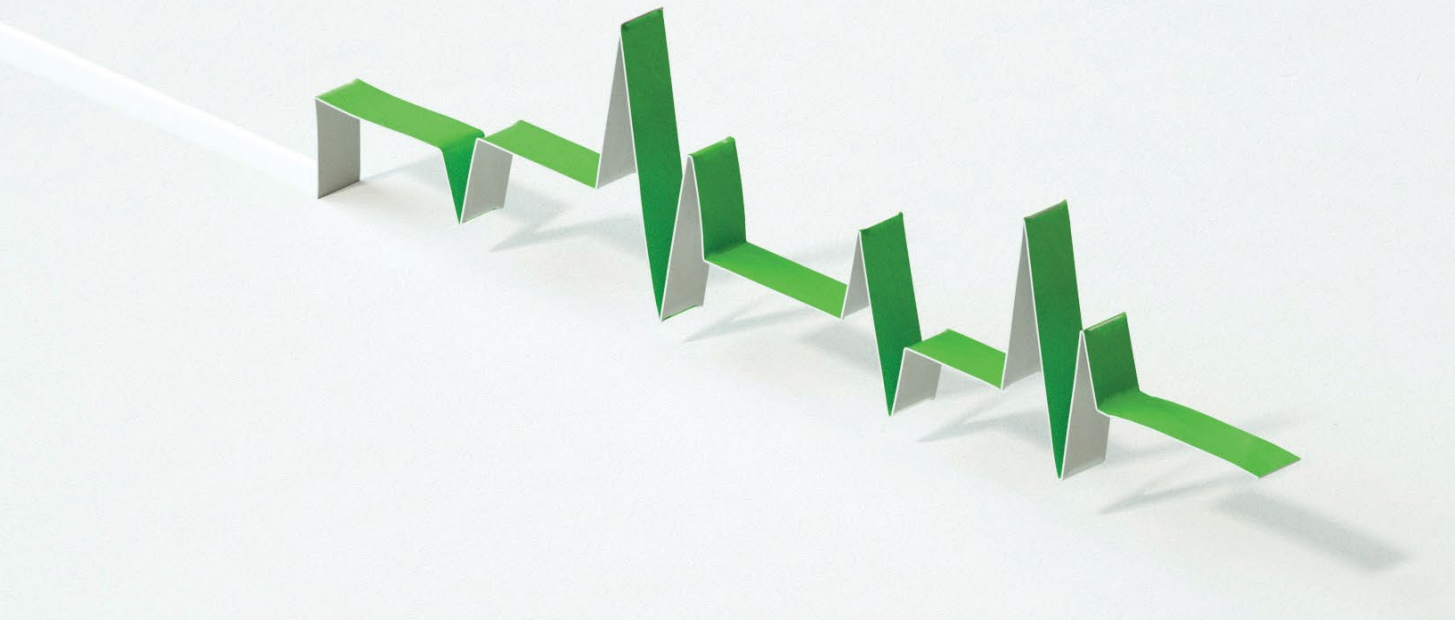
Bevan Brittan

Claims Online

October 2020



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Welcome to the Autumn edition of Bevan Brittan's Claims Online. In this edition, we look firstly at the role of McKenzie friends, secondly at a case which will be welcomed by insurers and NHS defendants familiar with some claimants who escape a finding of fundamental dishonesty and finally a case which concerns whether the costs of an inquest are recoverable even if the defendant has agreed to pay compensation prior to the inquest taking place.

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Over the last 15 years there has been a growth in the number of individuals acting in civil proceedings as litigants in person. This has prompted a rise in the number of litigants relying on McKenzie Friends to assist them with the legal process.

McKenzie v McKenzie [1970] 3 WLR 472 CA confirmed that litigants have a right to receive lay assistance in the course of representing themselves. Historically, McKenzie Friends provided informal support on a one-off basis, usually to someone known personally to them. However, in recent years, a new class of fee-charging McKenzie Friend has emerged. A 2017 report from the University of Bristol found hourly rates typically ranged from £15 to £90 per hour with a day rate ranging from £150 to £250. This has provoked concern within the legal profession.

The role of McKenzie Friends

McKenzie Friends can provide moral support, take notes, help with case papers and quietly give advice on any aspect of the conduct of the case. However, they have no right to act as the litigants' agent in relation to the proceedings, manage litigants' cases outside court (for example by signing court documents) and importantly, cannot address the court, make oral submissions or examine witnesses.

If a litigant would like their McKenzie Friend to be granted a right of audience, an application must be made. However, the courts are taking a cautious approach. In *Ameyaw v McGoldrick & Ors [2020] EWHC 1741 (QB)*, the Judge refused a McKenzie Friend permission to speak on behalf of a litigant, stressing the Claimant was well-educated and clearly able to speak on her own behalf.

Recent cases

It is important to acknowledge that the media will inevitably focus on examples where McKenzie Friends behave in problematic ways in the courts. Advocates for McKenzie Friends point to the fact that a large amount of work is done outside the court room and they provide much needed support. However, recent case law does highlight the dangers of relying on a McKenzie Friend

- Wright v Troy Lucas & Co & Rusz [2019] 3 WLUK 375 - Mr Wright pursued a personal injury claim following an operation at Basildon & Thurrock University Hospital NHS Foundation in 2004. Mr Wright sought assistance from George Rusz (who was not a qualified lawyer) who ran a 'litigation firm' Troy Lucas. The Court ruled that Mr Rusz and Troy Lucas were professionally negligent in relation to a large number of failings in their work, including advancing a claim which was heedless of the evidence, causing a series of adverse costs orders to be made against Mr Wright, failing to make or respond to offers appropriately and failing to secure and retain the services of the appropriate expert. Whilst the defendant had not said he was a solicitor, he had held himself out to be an experienced 'legal professional' and the court found that is the standard to which he must be held. The Defendants were ordered to pay £263,759 in damages and over £70,000 in costs. This case made it clear that those who assist litigants who are unqualified (such as McKenzie Friends) and act outside the scope of their role, could be held liable for damages and costs.
- *Lincolnshire County Council v J.MCA 2018 IEHC 514* - An English couple took their child to Ireland in defiance of an interim care order, claiming a McKenzie Friend had said it was not forbidden for them to leave England and Wales with the child. The Court ruled there had been a wrongful removal of the child. Although the McKenzie Friend was not explicitly criticised in the judgment, it is clear the McKenzie Friend provided incorrect advice and highlights the danger of relying on unqualified advisors.

Reform

In recent years, there has been growing concern amongst the legal profession that Mackenzie Friends who are without training, regulation and insurance could expose vulnerable litigants to disproportionate risk.

In February 2019, the Judicial Executive Board issued a consultation focussing on possible reforms to the industry and published the response in February 2019. This showed there was widespread support to the implementation of a Code of Conduct but the majority of respondents opposed a blanket prohibition on fee-paid McKenzie Friends. There was concern a blanket ban would adversely affect the likelihood of individuals or charities helping litigants-in-person and a reduction in skilled assistance would place litigants in a worse position. In addition, any blanket ban would be almost impossible to enforce.

Despite the initial consultation, progress has halted. However, in light of more recent case law the Court's attention may be turning again to this rapidly expanding quasi-legal sector.

Practical tips

Dealing with litigants on the other side is often fraught with difficulty. This can frequently be made more complicated by the addition of a third party. Legal practitioners should consider the following

1. Send the litigant a copy of the Judicial Guidance on McKenzie Friends in Civil and Family Courts so there is no confusion as to what a McKenzie Friend can or cannot do and what is required of them.
2. Strongly recommend the litigant seeks legal advice and remind them free legal advice is available from the Litigants in Person Service, the Personal Support Unit and Citizens' Advice Bureau
3. Do not allow a McKenzie Friend to act outside the scope of their role. Only correspond directly with the litigant. If the McKenzie Friend requests that all correspondence should be sent to them, explain why you cannot agree to this and refer them to the Judicial Guidance.

Positive lies and deafening silences - when is a Claimant being fundamentally dishonest?

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In *Pegg v Webb and another [2020] EWHC 2095 (QB)* the High Court, reversing the decision of the trial judge, found the Claimant had been fundamentally dishonest in the presentation of his injuries to a medical expert and to the Court.

This decision will be welcomed by insurers and NHS defendants familiar with some claimants who escape a finding of fundamental dishonesty, despite giving evidence at trial that profoundly contradicts their witness statement and expert medical evidence.

Background

The Claimant was a passenger in a car involved in a road traffic accident on 2 June 2016. He allegedly suffered soft tissue injuries to the neck, left elbow and left knee as a result of the collision. At trial, the Defendant had two arguments.

Principally, that this was a bogus claim based upon a collision which never happened or that was contrived between the parties. The trial judge found that this was not a dishonest claim and that the Claimant had proved there was a genuine collision. The Defendant did not appeal this finding.

The Defendant's second line of defence was in relation to the damages claimed by the Claimant based upon the medical report. It was argued that the Claimant misled the medical expert by exaggerating his injuries and by failing to disclose relevant information. The Defendant submitted that the following issues were evidence of fundamental dishonesty:

- Failure to disclose relevant pre-existing injuries. The disclosure of the Claimant's GP records showed that he had reported ankle, foot, knee and back pain at various attendances between 2013 and 2015. He was therefore unable to say how long he had suffered symptoms in his knee as a result of the accident. The Claimant failed to inform the expert of these previous musculoskeletal injuries and they were not mentioned in his witness statement.
- Failure to disclose a separate incident. The Claimant had a quad bike accident in July 2016 after which he experienced pain in his back and left leg. The note of his subsequent hospital attendance made no reference to the road traffic accident or the injuries resulting from it. Although occurring four weeks after the index accident and six weeks before the appointment with the medical expert, the Claimant did not tell the expert about the incident or the hospital attendance. Again, the quad bike incident was not mentioned in his witness statement.
- Inconsistent evidence provided at trial. On the basis of the expert medical examination, the report predicted a full recovery for the Claimant in six months from the date of the accident. This was endorsed in the Particulars of Claim and the Claimant's witness statement. In the course of cross-examination the Claimant conceded that he had made a recovery from his neck injury within *three to four weeks* and from his elbow injury within *four to five weeks* of the accident.

Trial judgment

The trial judge partly accepted the Defendant's submissions. He found that the Claimant had failed to tell the medical expert about his relevant pre-existing injuries but that this did not amount to dishonesty. He accepted that the medical expert had asked about previous musculoskeletal injuries but, since he could not be certain of what precisely the question was, he was not satisfied the Claimant had deliberately hidden this information.

The trial judge distinguished this from the quad bike accident, which he accepts the Claimant knew was relevant information to tell the expert but that he did not do so. However, he did not make a finding of fundamental dishonesty. As to the discrepancy between the evidence at trial and the Court documents, the trial judge was not satisfied that this was dishonest, accepting the argument that after three years, the Claimant may have trouble recalling the precise longevity of relatively minor injuries.

Summary: The trial judge dismissed the claim on the basis that the Claimant could not rely on the medical report but did not find evidence of fundamental dishonesty. The Defendant was ordered to pay 60% of the Claimant's costs, having turned a one-day fast track trial into a two- day multi-track claim with its fundamental dishonesty defence.

Appeal

The Defendant submitted that the trial judge failed to follow through his reasoning to its logical conclusion, which was that the Claimant had been fundamentally dishonest. In particular, if the Claimant knew at trial that he had recovered from his injuries within five weeks of the accident, he should have told the medical expert that he had no residual symptoms in the neck or elbow and the symptoms in his left leg were similar to those he had previously. He would have been aware of his recovery when signing the Particulars of Claim and his two witness statements.

Factors pointing to dishonesty

Martin Spencer J allowed the appeal, concluding that there were factors which, '*pointed strongly, if not inexorably, to the conclusion that the Claimant had been dishonest in his presentation of his injuries to the expert instructed… and also to the court*' [25].

These factors were as follows:

1. The Claimant did not seek medical attention after the index accident. His solicitors arranged for physiotherapy after instruction.
2. The Claimant did not reference the accident when attending hospital for the quad bike incident. Martin Spencer J referred to this as the 'first deafening silence'.
3. The Claimant failed to inform the medical expert of the quad bike accident – the 'second deafening silence'
4. The Claimant positively lied about the longevity of the injuries in the Claim Form and his witness statements. He adopted the expert's description of the injuries despite knowing that he had misled him into providing that prognosis. This was not explained by the length of time between the accident and the trial.

In his view, '*no judge could reasonably have failed to have come to the conclusion that the claim for damages as presented by the Claimant in this action was a fundamentally dishonest one, perpetrated by fundamentally dishonest accounts to the only medical expert and in the various court documents.*' [26] The Claimant was ordered to pay 70% of the Defendant's costs, assessed on the indemnity basis.

Practical implications

- Other courts and judges should be encouraged to take a more robust approach to findings of dishonesty where the Claimant's conduct goes beyond genuine confusion or mistakes in evidence. Claimants who fail to disclose relevant information to medical experts and in their witness statements should be held responsible for their 'deafening silences'.
- If the evidence of such conduct is unambiguous, defendants should seriously consider submitting appeals where claims are dismissed without findings of fundamental dishonesty. This will be an important deterrent against fraudulent claims.
- Defendants must continue to be wary of penalising costs orders where arguments of fundamental dishonesty are not successful. Even on appeal, Martin Spencer J reduced the order from 100% to 70% of the Defendant's costs to reflect the failure to prove dishonesty in respect of the accident itself.

When is an admission not an admission?

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Mrs Veevers' son, Stephen Hunt, a firefighter, tragically died fighting a fire in July 2013. Mrs Veevers brought a claim alleging that her son's employer did not take reasonable care to ensure that he was monitored while using breathing apparatus and personal protective equipment, to protect him from exposure to the flames for more than 20 minutes. The reported case of *Greater Manchester Fire and Rescue Service v Susan Veevers [2020] EWHC 2550 (Comm)* concerns the appeal of the decision of a Costs Judge brought by the Fire Service ("the Appellant").

Before an inquest into the events took place the Fire Service reassured Mrs Veevers ("the Respondent") that they would meet the claim in full to spare her the stress and strain of proving her case. This court decision concerns whether the substantial costs of preparing for and attending the inquest (£141,000 out total costs of £334,000) were recoverable from the Fire Service when the Appellant had agreed to compensate Mrs Veevers in full prior to the inquest hearing.

Costs "of and incidental to" proceedings

Costs 'of and incidental to' proceedings can be awarded in the discretion of the Judge under Section 51 of the Senior Courts Act 1981. The recoverability of inquest costs as costs 'incidental to' civil proceedings was considered in *Ross v The Owners of the Ship 'Bowbelle' [1997] 2 Lloyd's Rep 196*. In this case, inquest costs were not deemed recoverable as liability had been admitted.. Many cases have subsequently followed this decision. In principle inquest costs are recoverable but admitting liability prior to the inquest minimises the risk they will be awarded.

Why were the inquest costs awarded in this case?

The problem for the Appellant in this case was that the concessions made were ambivalent and made relatively shortly before the inquest after much of the preparatory work had been done.

The timeline was as follows:

- In a letter dated 4 February 2016 the Fire Service said that they had '*not made an assessment of the potential for liability*' and '*were not in a position to consider an admission of liability*' but they would meet the claim for '*any loss which they* (Mrs Veevers) *may prove to be attributable to the incident on 13 July 2013 together with payment of their reasonable costs*'.
- In response Mrs Veevers' solicitors said by way of a letter dated 16 February 2016 that they would continue to prepare for the inquest until liability was admitted.
- The Fire Service responded by email on 4 March 2016 stating that there was no need for Mrs Veevers to prepare a Letter of Claim.
- The inquest was held from 4 April to 18 May 2016.
- Proceedings were issued in July 2016 and served in November 2016. The claim settled settled for £80,000.

The court considered that the inquest investigation was a valid mechanism for the Respondent's solicitors to obtain the information needed to bring a claim. The court also considered the effect of CPR Part 14 which deals with admissions made before the commencement of proceedings and the rules about applying to withdraw such an admission. If an admission is made before service of a Letter of Claim technically these rules do not apply. It could be withdrawn without overcoming the hurdle of proving this would be just. The Costs Judge decided that the Fire Service had not admitted liability so the inquest costs were 'of and incidental' to the claim. A willingness to settle is not the same as an admission of liability. The Appeal Court agreed.

Practical Implications

What lessons can be taken from this decision? Reviewing the arguments the Judge found persuasive it is clear the points to bear in mind are:

Unqualified admission - Admissions of liability must be *unqualified* to establish that inquest costs are not incidental to issues in the civil claim. To underline this it is wise to state that any admission made pre-action is in accordance with Part 14 of the Civil Procedure Rules so that there can be no argument that the Claimant could not rely on it.

Timely admission - The admission should be made as soon as practicable. Any costs relating to preparation for the inquest will probably still be considered incidental to a claim if incurred prior to the admission. The longer the time interval between the admission and the inquest, the harder it will be for a claimant to persuade a costs Judge that the costs were incidental to the claim.

It is uncertain whether even an unequivocal admission of liability will provide costs protection against a Human Rights Act claim seeking a declaration, though time limits are stricter for these cases and current coroner's court backlogs daunting.

Even if a full admission is not made before the inquest, all is not lost. Costs must still be reasonable and proportionate. The full inquest costs can be divided up by the Judge, allowing only those which are properly relevant to the litigation process following the case of *Lynch v Chief Constable of Warwickshire Police SCCO 14/11/2014.*

Calls to extend legal aid to families in inquests where the state is legally represented have been rejected by the Government on the grounds of cost and the need to preserve the inquisitorial as opposed to an adversarial process. Arguably, the current funding system could encourage families to seek to bring a civil claim so that they can secure legal funding for representation in the most distressing of circumstances where the presence of lawyers for only one party does not seem fair.

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