Muyepa and Scarcliffe: Some Lessons from the High Court – Bruno Gil

Mr Justice Cotter has handed down judgment in the case of *Scarcliffe v Brampton Valley Group Ltd* [2023] EWHC 1565 (KB). The decision has themes in common with last year's decision of *Muyepa v Ministry of Defence* [2022] EWHC 2648 (KB). Both cases feature excoriating criticisms of experts for both sides and they see substantial sums of claimed losses not being recovered by the Claimant. Read together, they give a clear indication of the issues that are being picked up in personal injury and clinical negligence litigation. It seems that there are points to take away for lawyers on both sides. Points which, if ignored, will be to the detriment of our clients. The intention of this article is to pick out these themes and consider their implications.

To introduce these claims briefly:

- *Muyepa* was a non-freezing cold injury claim. Those familiar with the case will know that it ended in a finding of fundamental dishonesty against the Claimant – a point that is largely irrelevant to the parts of the judgment analysed below. This was a case which, at its highest, was pleaded at £3,766,615. A substantial part of that total came from two heads of loss, namely care and loss of earnings. The quantification of those heads was based upon the calculations set out in the Claimant's expert reports for care and employment. Concessions were made on behalf of the Claimant as the case progressed, and more was abandoned at trial, although the case was never put below £1.6M. At trial, it was held that the claim was, in fact, worth £97,595.33, i.e. 2.6% of the original claim.

- *Scarcliffe* was an orthopaedic injury – fractures of the transverse processes of L2 and L3 - leading to chronic pain. Judgment had been entered in favour of the Claimant. The case proceeded only in respect of quantum. As with *Muyepa*, the care claim formed a very substantial part of the total damages, which ran to a total of £6,189,507.49. Even after some concessions at trial, the Claimant contended for over £5M. The Claimant recovered £275,063.03, i.e. 4.4% of the pleaded value.

Lessons for Both Sides

1) The Role of the Expert

For anyone who reads both judgments, it will be clear that parties are being encouraged to have a paradigm reset when it comes to the role of experts.

In both cases, some (but not all) of the medical and non-medical experts faced criticism, largely resulting from a misconception as to their role. Mr Justice Cotter appears keen to disabuse parties and

experts of this misunderstanding. Their role is not to be cheerleader, nor to think of themselves as part of the Claimant's or Defendant's "team". They are independent, objective Part 35 experts who owe an overriding duty to the Court. If that is not heeded, criticism can be expected. No expert would wish to read the phrase "a *rather unfortunate attempt to shore up an untenable opinion"* as a description of their oral evidence, as occurred in *Muyepa*.

This misunderstanding of the role potentially comes from inexperience. By that I do not just mean a lack of experience of trial, which is an unfortunate and unavoidable consequence of so few high-value personal injuries fighting to trial. I mean also that they have gone relatively unchallenged by their legal representatives for years. Both sides have developed their 'stable' of preferred experts, who have been sequestered away, writing reports and joint statements for the same solicitors time and again. Those who rely on litigation work for their main income understandably want to maintain their source of instructions. They are incentivised to provide reports that serve their side's interests. With both sides' eyes being on settlement rather than trial, reports have been not robustly tested and challenged, and inevitably have inflated over time beyond sustainable limits, as was exposed in both *Muyepa* and *Scarcliffe*.

The loss of objectivity can be further compounded if an expert neglects to consider or address the range of opinions on a given issue. An objective analysis requires setting out and opining upon reasonable alternative views. It is a very important part (or ought to be) of the expert's evidence. It is provided for by Practice Direction 35 3.2(6), yet it is often not heeded (as was the case in *Muyepa* with both the care and employment reports). That frequent omission is either because the experts have forgotten the requirement, or never knew it.

It is incumbent upon us lawyers to ensure that the experts instructed in our cases truly understand what CPR 35.3 means. This extends to the principles set out in "*The Ikarian Reefer"* [1993] 2 Lloyd's Rep. 68 (Comm Ct)[1], which can be found in a distilled form in Practice Direction 35. We need to be satisfied

[1] *(i) expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation*
(ii) an expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters of his expertise
(iii) an expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion
(iv) an expert witness should make it clear when a particular question or issue falls outside his expertise
(v) if an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional on. In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report
(vi) if, after exchange of report, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court

that the expert is not simply telling us what we want to hear. This rigour will allow us to identify the true strengths and weaknesses of the case, but is also for the expert's own benefit to avoid embarrassment and professional damage at trial. It is also why there is a call within the judgment of *Muyepa* for experts to provide a breakdown of their claimant:defendant split, so that parties and the Court can be alive to the risk of a partisan view (conscious or unconscious).

2) Updating Experts

Both cases remind parties of the need to keep experts up-to-date on developments so that they have a complete picture and can consider whether their opinion has changed. Even after the reminder in *Muyepa* on this point, in *Scarcliffe* both the Claimant's pain expert and care expert were being called to give evidence at trial without having adequately considered and addressed relevant important changes. This fell foul of the sixth *Ikarian Reefer* principle.

Clearly, a failure to heed new information and to change opinion as necessary will lead to difficult and embarrassing cross-examination for the expert. Perhaps more importantly it may mean that parties are approaching the case (and negotiating) on a fundamentally incorrect basis.

The solution is for legal representatives to notify the experts of any evidence which may materially alter their opinion, and for the experts to then be tested and pushed to ensure they are considering the new developments objectively, providing an updated opinion as necessary.

In practical terms, this might look like the following: (i) obtain a care report, (ii) conference with the care expert to test their evidence and ensure they understand their duties (iii) obtain finalised medical evidence from other disciplines (iv) further conference with care expert to understand how matters have changed (v) updating report as necessary (vi) draft finalised schedule. That example is without any surveillance and allegations of fundamental dishonesty which would only add to the requirement for further conferences and addenda.

Clearly there is a tension between that approach and the case management directions we are used to seeing at CCMCs. We will all be familiar with the "*one and done"* approach many judges take to conferences, allowing a single conference in the Expert phase and nothing further. But *Muyepa* and *Scarcliffe* should send a clear message, and can be relied upon by parties at CCMC to show, that expert evidence cannot sensibly be considered as complete with the simple report-conference-joint statement model in high-value litigation. Even if parties have only achieved permission for the one conference in

(vii) where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

directions, if evidence arises which may materially alter the opinion of the experts, that could be considered a significant development for budgeting purposes.

3) Critical Analysis for Quantum

It would be wrong to think that the problem lies entirely with the inexperience of experts. Mr Justice Cotter observes in *Scarcliffe* that, all too often, lawyers are simply transposing the erroneous content of care (and it equally applies to employment) reports into their schedules and counter schedules. There is limited critical analysis or challenge, and insufficient thought on whether the sums can properly be sustained at trial. As mentioned above, we lawyers should be making sure that the experts aren't getting their reports wrong in the first place. Beyond that, we should be making sure that the schedules and counter schedules we produce properly align with the relevant legal principles for recovery of damages, regardless of what the experts have opined. This point particularly applies to claimants, as discussed below.

Lessons for Claimants – Legal Principles of Recovery

As Mr Justice Cotter put it in *Muyepa*: "*comparatively few personal injury/clinical negligence cases reach a hearing where the issues of care/aids and equipment are contested, and as a result few reminders are given by the Courts of the correct approach"*. Unfortunately, in carrying the burden of proving loss, the Claimant, his legal representatives, and his instructed experts are especially exposed to criticism if the incorrect approach is taken to trial.

Mr Justice Cotter has gone to lengths within the judgments to remind claimants of the relevant principles of recovery in care and/or aids and equipment claims. Very briefly, the principles are that:

1) the *sine qua non* is the need must have been caused by the injury;
2) need *simpliciter* is not enough, it must be a reasonable requirement (i.e. no recovery if the cost is disproportionate to the benefit);
3) when assessing reasonableness, all relevant circumstances must be considered, including whether care might negate the need for items of equipment/aid and vice versa; and
4) damages cannot be recovered if the loss would always have been incurred in any event e.g. buying a new microwave, or providing care that always would have been provided.

In both *Muyepa* and *Scarcliffe*, the care experts fell foul of these principles.

In *Muyepa*, the care report included things such as:

a) equipment, the need for which was not caused by the accident (for example, a chair to help the Claimant stretch his back out in a case to do with peripheral neuropathy of the extremities with no associated back pain);
b) equipment that was plainly not reasonably necessary as the cost was disproportionate to the benefit (for example, a wash dry toilet, whirlpool bath, and body drier); and
c) equipment and expenditure that the Claimant was going to have purchased himself in any event (such as car breakdown assistance)

In *Scarcliffe*, the care report did things such as:

a) included sums for walking two dogs for 40 years when one of those dogs had already died and the other was 8 and was content exercising itself in the large garden;
b) ignored the reality that grandparents would have always provided some childcare;
c) failed to acknowledge that the Claimant's wife would have done many of the domestic activities claimed but for the injury;
d) failed to consider the provision of statutory care in the immediate or long term;
e) used the full care rates for any task, no matter how menial; and
f) included a "need" for assistance looking after/supervising children, doing the school run etc post-retirement, at a time when the Claimant's eldest children would be in their late twenties.

As above, fault does not simply lie with the experts who had lost sight of (or never knew) the relevant principles. Criticism was equally levelled at the legal representatives for adopting the erroneous approach within the schedules. It is worthwhile all lawyers reading paragraphs 292 to 298 of *Muyepa* for a reminder of the principles.

Lessons for Defendants – If You Want Peace, Prepare for War

The received wisdom for some time in personal injury and clinical negligence litigation has been that fighting to trial is too expensive. It is, therefore, more cost effective to settle claims and they should be run accordingly.

The cost-benefit analysis held true in the past, but less so now. First and foremost, the mathematics have altered with the change in discount rate in 2017 and 2019, pushing damages far higher. When one compounds that with the issue of care (and to an extent employment) report inflation over the same period, the analysis can change substantially.

Take the example of an accident in early 2016 (the same period as *Muyepa)*. At that time, the discount rate was 2.5%. Let's say that the claimant claimed future care of £25,000 per year for life when 40 years old. The multiplier would have been 26.25 (£656,250). At hypothetical trial, the Defendant manages to

reduce the multiplicand to £17,500 (£459,375). The Defendant saved £196,875 on damages, but the litigation costs might have made it a close-run thing.

Transpose the example to today, but assume a higher degree of inflation of the care claim (with a few errors in principle such as those seen in *Muyepa* and *Scarcliffe*). Let us say £35,000 claimed per year, but with the same result of the Defendant achieving £17,500 at trial. At -0.25%, with a multiplier of 47.6, the Defendant's saving has grown to £833,000. A sum that would more likely than not cover both costs budgets with plenty left over.

One can see that in cases where mistakes have been made by the experts and the claimant's legal representatives, as in *Muyepa* and *Scarcliffe*, the expense of trial for the Defendant is quickly surpassed by the savings that can potentially be made on assessment of damages. The economic argument for settlement did not stack up in these cases. Cost efficiency was found in fighting.

There will be further such cases where there are substantial savings on offer to the defendant who is prepared to fight to trial. This will be so until care claims (and loss of earnings claims) are properly and objectively advanced by the experts, based upon the entirety of the evidence and the correct legal principles.

Final Thought

Muyepa and *Scarcliffe* provide some important lessons on how to get claims right, and why many of the cases currently working their way through the litigation process may not be worth as much as the parties believe due to misunderstandings on the part of the experts and the lawyers. It would be a mistake to suppose that this is a storm in a teacup relating to just one High Court Judge. Parties should not continue with business as usual and hope that they get a different judge should their matter go to trial. The more prudent course would be to assume that the senior judiciary with personal injury/clinical negligence experience talk to one another about these issues, provide/devise training to more junior judges, and that these cases will be cited regularly in front of judges of all levels who will pick up the baton. It seems likely that the issue of the role of experts and erroneously overstated damages is not going to go away soon.

Bruno will be running seminars on these topics for his instructing solicitors. If you would be interested in receiving a seminar at your firm, please get in touch with Will Meade.