Case Comment

Atkins v Co-operative Group Ltd

civil evidence - negligence - personal injury
(QBD, Supperstone J, 26 January 2016, [2016] EWHC 80 (QB))

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Subject: Personal injury . **Other related subjects:** Civil procedure. Negligence.
Keywords: Asbestosis; Breach of duty of care; Causation; Change of circumstances; Fresh evidence
Case:
Atkins v Co-operative Group Ltd [2016] EWHC 80 (QB); [2016] Med. L.R. 169 (QBD)
J.P.I.L. C108 The claimant had sought damages for diffuse pleural thickening and asbestosis caused by his exposure to asbestos dust during his employment by the defendant between 1958 and 1962. Both parties were granted permission to rely on expert evidence. On the basis of that evidence, and in particular the evidence that the claimant had asbestosis, the defendant conceded breach of duty and judgment was entered with damages to be assessed.
On 25 March 2015 Master Gidden ordered that:
1)
judgment be entered for the claimant with damages to be assessed; and
2)
the defendant to make an interim payment in the sum of £25,000 in respect of damages and £8,000 in respect of costs by 15 April 2015.
The defendant was granted an extension of time and permission to appeal seeking this order:
1)
there should be judgment for the claimant on breach of duty, with the issues of causation and quantum to be assessed; and***J.P.I.L. C109***
2)
the issue of whether the interim payment made pursuant to the order dated 25 March 2015 should be repaid in part or in whole should be reserved and addressed at the conclusion of the trial on causation and quantum.
The defendant submitted that there had been a material change of circumstances since judgment was entered in that the radiological evidence had since been interpreted by an expert in cardiothoracic radiology, who concluded that the claimant had not in fact developed asbestosis. It therefore argued that it would be wholly artificial for the claimant to be compensated on the basis that he had developed an asbestosis-related condition.
The claimant submitted that there was no new or unforeseen evidence, and that the defendant had had ample opportunity to obtain any medical evidence on which he wished to rely prior to judgment.
Supperstone J held that the evidence which the defendant sought to adduce could not have been obtained with reasonable diligence by the time of the master's order. Practical difficulties would arise if the evidence was not admitted. It could not be appropriate for the defendant's expert to be required to express her opinion on quantum on the false assumption that the claimant did in fact have asbestosis, nor could it be appropriate for the court to proceed in circumstances where the claimant's medical expert, who was not a radiologist, had not had the benefit of considering the evidence as a whole. The claimant's prognosis and the issue of his life expectancy would depend on whether he had developed diffuse pleural thickening and/or asbestosis.
The judge ruled that in those circumstances, it was appropriate to order that judgment should be entered for the claimant on breach of duty only, with issues of causation and quantum to be assessed. The issue of whether the interim payment made pursuant to the order should be repaid in whole or in part was reserved to be addressed at the conclusion of the trial on causation and quantum.
The appeal was allowed.

Comment

The defendant would appear to have been rather fortunate in having its appeal granted in this case given that the judgment being appealed had been made with the defendant's consent. That consent was given in the context of both parties' chest physicians concluding that the claimant had asbestosis (though the defendant's expert did not accept a diagnosis of diffuse pleural thickening). What changed following the original consent judgment of Master Gidden was that: (a) the defendant had the radiological imaging interpreted by its own cardiothoracic radiologist who concluded that there was no evidence of interstitial fibrosis to suggest asbestosis; and (b) the claimant underwent new pulmonary function tests which revealed no worsening of pulmonary function since previous tests some years before. The defendant argued that this new information was a material change of circumstances justifying the appeal, and which also satisfied the test in *Ladd* [1] such as to justify the admission of new evidence on the appeal.

The "special grounds" set out in *Ladd* are:

1)
the evidence could not have been obtained with reasonable diligence for use at the trial;

2)
the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

3)
the evidence must be such as is presumably to be believed; it must be apparently credible, though it need not be incontrovertible.

It was accepted by both parties that (2) and (3) in the *Ladd* test were satisfied, and it was as to (1) where the parties were in dispute on the appeal. Supperstone J duly decided that the evidence which the defendant sought to adduce could not have been obtained with reasonable diligence and therefore allowed reliance***J.P.I.L. C110*** upon the new information. He then went on to allow the appeal on the basis that it would not have been right for the defendant's medical expert to express her opinion on the basis of false assumption regarding interpretation of the radiology.

The defendant was somewhat fortunate because the judge hearing the appeal could, it would seem, have readily come the conclusion that if it wanted to reserve its position on liability pending determination of the imaging by a cardiothoracic radiologist the defendant could have done so at the hearing before Master Gidden (as the defendant's solicitor had intended, but counsel at the hearing did not do), or it could have sought adjournment of that hearing pending the further investigations. It could also have been concluded (as the claimant argued) that this was not a change in material circumstances but a new opinion on the same circumstances.

Once the defendant—through counsel who had ostensible authority to make admissions—consented to judgment without first waiting for more evidence, it was somewhat harsh on the claimant to allow the defendant to, in effect, resile from their admission (thereby impeaching a consent judgment) once further evidence was obtained. Should the claimant be required to repay the interim payment, an issue which has yet to be determined, the consequence of permitting the appeal will have been immensely prejudicial to him. By contrast, although with the benefit of new evidence the judgment may have proved prejudicial to the defendant, it had been willingly entered into.

It is true that had the judgment stood there would have been some artificiality in the defendant's chest physician having to produce an opinion on a claimant who may not in fact have had a compensable condition. However, such "artificial" situations do arise in practice as for example with default judgments, and they do not result in insuperable difficulty.

Practice points

- Finality in litigation is important. By allowing the defendant in this case to resile from its own consent judgment this principle was undermined.
- Never be afraid to seek to adduce new evidence in an appeal if the test in *Ladd* can be argued. Such evidence is often persuasive, particularly if new facts arise post-judgment.
- Judgment should not be entered if an important ingredient of the cause of action is not established. *Judgment on breach of duty with the issues of causation and quantum to be assessed* appears to be an elusive judgment as it gives rise to few of the usual consequences of judgment (interest will not start to run and there will be no entitlement to costs save potentially for those relating to breach). The

better course may be to record in a recital that breach of duty is admitted or no longer in issue rather than entering judgment. It is, of course, important to be very clear in court orders as to the limits of any admissions.

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J.P.I. Law 2016, 2, C108-C110

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1. *Ladd v Marshall [1954] 1 W.L.R. 1489 CA*.