

Carol Sammut v The Dudley Group NHS Foundation Trust (2019, QB)

David Callow obtains finding of fundamental dishonesty in clinical negligence claim.

In *Carol Sammut v The Dudley Group NHS Foundation Trust* (2019, QB), Judge Allen, sitting as a Deputy High Court Judge dismissed the Claimant's clinical negligence claim against the Defendant NHS Trust pursuant to section 57 Criminal Justice and Courts Act 2015.

Following a 2-week history of abdominal symptoms the Claimant was admitted and following overnight observation she was discharged with laxatives. The claimant returned to her GP a few days later with increasing symptoms and was advised to return to hospital. She returned late on the same day and was again discharged early the next morning. Later that day the claimant was taken to the accident and emergency department by ambulance and an urgent CT scan revealed a bowel perforation. The claimant underwent an urgent laparotomy and Hartmann's procedure and subsequently her stoma was reversed and she underwent an incisional hernia repair. In ICU she suffered an extravasation injury.

The Defendant admitted breach of duty as a result of the delayed diagnosis and that some loss occurred as a result.

The Claimant alleged that had she been diagnosed sooner she would have received antibiotics and not suffered a bowel perforation, sepsis, need for emergency surgery, incisional hernia or stoma. As a result of the delayed diagnosis She had sustained substantial damage and required further treatment as a result in including further surgery to improve the cosmetic appearance of her abdomen and further hernia repair. Her social and private life were seriously impaired and she described substantial debility.

The Defendant's case alleged that the standard of care would have been a CT scan and that in turn would have diagnosed substantial diverticular phlegmon/inflammation. This would have been initially managed by antibiotics. By the time the Claimant presented for the second time to the Emergency Department she had already suffered perforation of the colon and therefore the Claimant would still have required an emergency Hartmann's procedure in any event. There was no more than very modest loss for a period of a couple of days.

The parties each relied upon experts in the fields of GI surgery, pain, psychiatry, radiology and care as well as a joint expert in plastic surgery. The Claimant made a claim for special damages of a little over £1/2M. the trial was listed for 5 day in the Birmingham District Registry.

Fundamental Dishonesty

Upon assessment by the Defendant's pain expert, concerns surrounding the claimant's truthfulness about the extent of her losses were raised and investigations were commenced. The claimant's social media profiles revealed photographs of the claimant visiting pubs, restaurants, social clubs and dance venues, contrary to what she told both her own and the defendant's medical experts. On this occasion, no surveillance was undertaken but rather the defendant relied upon the significant social media evidence.

Additionally, the Claimant alleged that she has lost the ability to obtain a new job working additional hours and at a higher rate of pay with a final salary pension scheme. An analysis of the medical, DWP and employment records revealed that the Claimant has multiple comorbidities and had experienced limitations in work before the relevant breach. She had also continued to experienced continuing and worsening symptoms from her pre-morbid problems.

The Judge marginally preferred the claimant's expert evidence and found that the Claimant would only have

required conservative treatment absent the breach. He went on to assess damages arriving at a figure of £123,540.46.

However the Judge agreed with the Defendant that the evidence indicated on a balance of probabilities that there was no such job as the Claimant alleged, stating *"I have to agree ... that the claimant cannot be mistaken about this work. She was either working in various jobs over very long hours or she was not and was either earning the money or was not. The evidence is plain that she was not."*

The Judge concluded that this was, of itself dishonest and indeed fundamentally dishonest as its effect was create an additional loss of over £130,000.

He further concluded that there was clear evidence of that the Claimant had *"...presented to the experts a significantly differently picture in terms of her physical and psychological problems from that presented by the Facebook posts. The Facebook posts are indicative of a person with a fairly active social life who goes out to clubs and bars and is able to eat and drink without any apparent restriction. This contrasts significantly with what she told the experts"*

The Claimant had, in the run-up to trial, provided a witness statement dealing with the social media material and additional explanation which had been given to her care expert. Of these the Judge concluded *"and it was shown on cross-examination that that could not be the case. I think it is proper to characterise this document, as Mr Callow argued, as a document created to attempt to distract from the extent of untruths. The explanations she provided with regard to, for example, eating curry, going to Dweets and the hangover point explained as being the consequence of noise I do not accept. They are again untruths designed to augment her case."*

The Claim was dismissed and the claimant was ordered to pay the defendant's costs on an indemnity basis. In accordance with the application of Section 57, the defendant can enforce its claim for costs against the claimant over and above the level of damages she would have received, but for the dishonesty.

Sammut illustrates the scope of the definition of fundamental dishonesty derived from *Sinfield* and the earlier authorities and that even in serious cases the Court will dismiss the Claim where, as here, the Claimant's overall pain presentation and description of symptoms is deliberately distorted. It also illustrates that one can successfully defeat such a claim where it can be shown that one (albeit important) head of loss is founded in large part on a dishonest averment even if the remainder of the heads of loss are in essence genuine.

David was instructed by Rebecca Lawrence of Weightmans on behalf of NHS Resolution.