

Mathieu v Hinds - the outer limit for provisional damages?

Published 31 May 2022

The boundaries of allowable damages in complex injury claims are constantly being pushed, or so it seems. One of the more recent areas in which attempts have been made to extend the range of damages flowing from an instance of personal injury has been in claims for provisional damages for post-TBI dementia.

In *Mathieu v (1) Hinds (2) Aviva plc [2022] EWHC 924 (QB)* Mrs Justice Hill addressed the issues surrounding this and other heads of claim in detail. In rejecting the claimant's arguments for a provisional award for post-traumatic dementia, she found that there was insufficient evidential underpinning to satisfy the relevant test to allow such a claim to be successful.

The accident

The claimant (C), then aged 29, was studying for a Masters' degree in Fine Art at Goldsmiths College, London. On 28 November 2015 he was crossing a road at a pedestrian crossing when he was struck by a moped ridden by the first defendant which he had stolen earlier that day. The moped was insured by the second defendant (A), but the first defendant was not insured to ride it.

The claimant's injuries and claim

C suffered a serious brain injury in the accident but fortunately made a very good recovery from his injuries and went on to develop a successful artistic career. However he claimed that he continued to suffer from headaches, fatigue and cognitive issues as a consequence of his brain injury and these hampered his productivity to the extent that he was not able to produce and sell as much art as he would otherwise have been able to. A disputed the alleged effect on his productivity, based to some extent on the fact that C had been prolific in his artistic output post-accident, and argued that C had not mitigated his loss.

The claim included damages for pain and suffering, past and future loss of earnings and provisional damages. The differences between the parties is highlighted by the fact that whilst C ultimately valued his claim at over £33m, A argued that C could not prove a continuing loss beyond the end of 2018 (i.e. just over three years post-accident).

Provisional damages - the law

C made claims for provisional damages both for the alleged increased risk of his developing both epilepsy and dementia as a result of his TBI.

As a reminder, the law relating to provisional damages is set out in s32 of the Senior Courts Act 1981 under which the court can order that provisional damages can be paid where "there is proved or admitted to be a chance" that the injured person will develop some serious disease or deterioration in his physical or mental condition.

In *Willson v Ministry of Defence [1991] ICR 595* three questions were identified as needing to be decided in relation to the award of provisional damages:

- (1) Is there a chance of the claimant developing the disease or deterioration in question?
- (2) Is the disease or deterioration serious?
- (3) If so, should the court exercise its discretion to make an award of provisional damages?

In the same case, the judge considered that the chance referred to must be "measurable rather than fanciful" however small that measurement might be. This view has been approved and is now regarded as the correct approach. To illustrate, in *Mitchell v Royal Liverpool and Broadgreen UH NHS Trust (unreported, 17.7.06)* the court ruled that the claimant should be allowed to amend his claim to plead a 0.15% risk of serious consequences of a syringomyelia (the development of a fluid-filled cyst within the spinal cord).

It is for the claimant to establish on a balance of probabilities that there is a chance that, in the future, he will suffer some serious deterioration in his physical condition.

The claim for provisional damages for epilepsy

The relevant experts from both sides agreed that C had an increased risk of developing epilepsy directly related to the TBI. A's expert put the chance at 5 - 7% whilst C's put it at 8%. This was clearly measurable, as the judge noted. The court

referred to the decisions in *Sarwar v Ali* [2007] EWHC 1255 (QB) in which the condition was described as sufficiently serious for a "once and for all" damages award to be inadequate should the condition in fact occur and *Loughlin v Singh* [2013] EWHC 1641 (QB) in which the judge noted that, should the condition occur, there was a risk that uncontrolled epilepsy would develop meaning that the claimant would be seriously under-compensated by a conventional award of damages.

For these reasons, the first two *Willson* questions could be answered positively. As to the third question, the court was satisfied that epilepsy was identifiable and severable from C's present conditions. Leaving C without recourse to further damages should the condition arise would be unfair. On this basis the court awarded provisional damages for C's lifetime in respect of the chance of his developing epilepsy.

The claim for provisional damages for dementia

The judge noted that the issue of a link between TBI and dementia has been researched and debated in recent years.

In this case C's expert's view was that there was growing evidence of a risk of developing dementia or similar following a TBI. A's expert's view was that there was insufficient evidence of such a risk. Any general risk which might exist was likely to be lower in C's case because his recovery has been exceptional and he was in the top 1% of patients with his level of brain injury.

C's expert estimated that the cumulative chance of dementia for C would be around 20% at age 60 and around 55% at age 80 as against background incidences of around 5% and 25% at these ages respectively. In saying this, C's expert accepted that there was a wide range of opinion and uncertainty and suggested further expert assistance might be necessary.

A's expert, in accepting that there was a large body of evidence suggesting a link between TBI and dementia, described the literature as "a mess". The research was flawed by various issues. C's expert agreed with many of the criticisms of the research.

Both experts agreed that other potentially inter-relating factors in individual cases independent of brain injury can predict the onset of dementia. They include the potential effects of advanced age, sex, deafness, obesity, diabetes, hypertension, the level of physical and mental activity, the level of education, alcohol, depression, sleep deprivation/fatigue, social isolation, nutritional factors and other lifestyle factors.

In considering the evidence, the Judge confirmed that C needed to prove that there was more than a fanciful chance that the TBI would cause him dementia in the future. C was required to prove as a matter of generality that a single TBI could cause dementia and that this risk applied to him. The Judge's view was that the answer to this first question remained doubtful as a matter of science and preferred A's evidence. Fundamentally C could not show, on the current state of the science, the existence of a more than fanciful chance that the TBI would lead to him developing dementia. The requirements of the first *Willson* question (i.e. is there a chance of the claimant developing the disease or deterioration in question?) were not met. A's submission that C's claim for provisional damages failed was accepted by the court.

Conclusion

The decision is useful not least because the judge, in finding for the claimant in relation to a further claim for provisional damages for the chance of developing post-traumatic epilepsy, compared the evidential support for each and applied the relevant test to both.

The Judge commented that the trial bundle ran to nearly 4,000 pages. There is no indication how much of that comprised the research evidence intended to support C's contentions regarding his claim for provisional damages for post-traumatic dementia but it is clear that a deal of such evidence was advanced. Nonetheless the Judge was not sufficiently impressed by it to find for C on this point.

Notwithstanding his evidence in support, C's expert neurologist was bound to admit that the research evidence was not conclusive. As noted above, both experts agreed, that many other "confounding factors" were an issue in the research.

Unlike the claim for provisional damages for epilepsy, which is by now well-established as a head of claim and was successfully argued here, this decision will give defendants and insurers some comfort that the research which might be presented in support of a claim for post-traumatic dementia is not likely to be regarded as sufficiently definitive to support such a claim. Not yet, at any rate.

Our [Complex Injury Team](#) deals with cases like this on a regular basis. For more information or advice, please contact one of our experts.

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