EARLY DECISION

CHRISTOPHER SHARP KC AND BEN HANDY ON CHOOSING BETWEEN EARLY SETTLEMENT OR DEFERRED TRIAL IN CHILD BRAIN INJURY CLAIMS

A child's body and brain will inevitably change as they grow. For children who have suffered a brain injury, growth spurts and physiological, emotional and psychological changes may radically change the nature of the child's needs.

Where there are issues of spasticity, surgery may be needed, and in particular there may be significant spinal scoliosis or kyphosis that requires surgery or treatment – the outcome of which will determine equipment needs, and may impact on care needs. Orthotics will have to be reviewed, and the ultimate nature of what will be required will not necessarily be known for some (maybe many) years. Cognitive recovery (or deterioration) in future may be relevant to needs, and to likely losses in terms of earnings or care.

For all these and other reasons, settlement at an early stage may be unwise, or even negligent on the part of the claimant's team, while the insurers will often be pressing for an early settlement to clear the case from their books and / or to secure a more modest award. The court may be looking to progress a case that has perhaps been started primarily to secure early interim payments, rather than to rush to final settlement. What, then, can be done?

Potential options

In an appropriate case, it may be possible to obtain an award of provisional damages where a chance can be proved that there may be a serious deterioration in C's mental or physical condition. However, this deterioration must be specified and defined in a way that may be too constraining to allow a fair settlement.

Another option is to assume a deterioration but allow a discount for it not happening; but then if it does, the claimant will be under compensated. Further, it may not be possible to foresee exactly what changes may develop.

Especially in the case of children not yet into their adolescence - but where changes deriving from all the changes that adolescence brings may be important - it may be appropriate to defer at least some aspects of the case.

Part 3.1(2) of the CPR allows for a court to try some issues and adjourn others (3.1(2)(b), direct a separate trial of an issue (3.1(2)(i)), stay aspects of a case (3.1(2)(f)) and generally manage the case flexibly.

Cook v Cook [2011] PIQR P18, [2011] EWHC 1638 (QB) was such a case, where the long-term prognosis for the 10-year-old claimant was speculative and uncertain. There was expert evidence that there were too many uncertainties and risk factors to attempt a final prognosis. While recognising that it was a very exceptional course to take, Eady J, exercising the court's powers under r.3.1, directed that the forthcoming quantum trial should be confined to the determination of damages up to the claimant's 16th birthday; with the assessment of longer term losses being adjourned until such time as solid evidence becomes available - so avoiding the need for speculation and achieving a more accurate and realistic assessment of the claimant's actual needs.

A more recent example is *Benford (a child represented by her mother (as litigation friend)) v East and North Hertfordshire NHS Trust* [2022] EWHC 3263 (KB), [2022] All ER (D) 65 (Dec) in which it was the defendant who, having admitted negligence, sought a four-year delay in the trial on the basis that the assessment of future loss and expense arising from the claimant's injuries was either impossible, or so speculative that it would be unjust to the defendant.

Ritchie J refused the application in circumstances where the Trust had previously agreed to a trial in May 2023, and ruled that the overriding objective of achieving justice between the parties would be achieved by a trial taking place as agreed; and that the general rule should be that the parties should stick to their choices.

The court took account of, among other things: (i) The defendant's delay in making the application; (ii) whether either party would suffer prejudice (from delaying or not delaying); (iii) the fact that 24 experts had assessed the claimant in the last year and that an adjournment would be likely to lead to at least 24 further assessments; (iv) the need for finality in litigation; (v) the need for justice to be done without unreasonable delay on behalf of insurance companies, the NHS Legal Authority, the tax payer and on behalf of claimants; and (vi) the wishes of the parents 'who carried the burden of caring for the claimant, running the litigation and being present at each assessment by experts'. The court held that, after balancing all the factors, the trial date should stand, that the balance of prejudice did not favour the defendant and that the trial would not result in unfairness for the asserted reasons.

It will be apparent that the decisions are fact specific, and in *Cook*, a very important aspect was the evidence that the long-term prognosis was speculative and uncertain. Such an application will need to recognise that it is an exception and to be adequately supported by evidence.

A push towards early settlement

The problem with waiting for a child's condition to stabilise or develop is that an offer that a defendant may have made at an early stage, which on a 'worst case' basis looked too low, may begin to look more attractive if the child's condition improves. If the offer was made pursuant to Part 36, there may be difficulties in accepting it out of time without costs consequences.

Unsurprisingly, this has given rise to a number of conflicting decisions. The cases are very fact specific however, and can rarely (if ever) be treated as precedents.

As is well known, the civil justice system places a great emphasis on early settlement. This makes a lot of sense, both because of the pressure on court resources, and also the financial and emotional benefits of early settlement for litigants. Thus CPR rule 1.1 – the overriding objective - emphasises *(inter alia)* saving expense, dealing with the case in proportionate ways, and allotting appropriate resources; while rule 1.4(2)(e) and (f) encourage the use of alternative dispute resolution (ADR) and helping the parties to settle all or part of the case (and see also rule 3.1(2)(m) – the taking of any step for furthering the overriding objective, including hearing an Early Neutral Evaluation (ENE) to help the parties settle the case).

Directions orders from the court will often require parties to consider the possibility of ADR at all times, while any party refusing to engage with ADR must give reasons for that refusal.

Continued on P48

Part 36

Part 36 is itself designed to encourage parties to make, and promptly to accept, realistic offers of settlement. It may fairly be described as lying at the interface between litigation and ADR (see the ADR Handbook). However, it is also designed to give parties a measure of protection against costs risks.

Part 36 offers are often made at a level below what the defendant fears having to pay at trial, in the hope that the claimant's appetite for, or ability to undertake, costs risks will encourage the claimant to settle for less than the claim is worth.

This can be a powerful tool in the hands of insurers – and especially in personal injury cases. In a case with an evolving medical condition – as is often the case in a claim involving a child - you may not know what the claimant's ultimate condition will be. An offer can be made at any stage, even before proceedings have been issued, so a realistic and possibly generous offer by a defendant at an early stage of the claim may put significant pressure on the claimant. Can they afford to further explore the medical condition, instruct experts and prepare a detailed costed claim, if all those costs may be disallowed or not recovered, and *(a fortiori)* if there were a danger of paying the defendant's costs - which is likely to be the case in other civil claims, where QOCS does not apply; and more so in PI cases since recent amendments to Part 36 and 44.14 (see below)?

So there may be some merit in keeping your cards close to your chest as a claimant, rather than giving the defendant too much information about the way your claim may be formulated; and thus giving them the opportunity to frame a well-judged offer that might undervalue the potential of the claim, but where you cannot take the risk of refusing it. In such circumstances, it may be advisable to write a reasoned and detailed letter explaining why it is premature to consider the offer, so as to be able to resist a later argument that you have unreasonably rejected (or failed to accept) an early offer (which turned out to be realistic).

Note, however, that a failure to keep the defendant's solicitors and insurers informed as to steps being taken, inquiries being made and the progress of the case may result in criticism that may sound in costs, especially in respect of late acceptance of offers (see for instance the recent case of *IEH v Powell* [2023] EWHC 1037 (KB)).

Part 36 consequences

The consequences flowing from a Part 36 offer that is not accepted in time or is beaten will be mandatory unless the court considers it 'unjust'. Whether it is unjust to make such an order is decided after considering all the circumstances of the case, but in particular the factors listed at r.36.17(5):

- the terms of any Part 36 offer;
- the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
- the information available to the parties at the time when the Part 36 offer was made *(plainly this is relevant to whether it is appropriate to consider settlement)*;
- the conduct of the parties with regard to the giving of, or refusal to, give information for the purposes of enabling the offer to be made or evaluated *(may be relevant where a hospital trust is the defendant and there are difficulties securing all the records)*; and
- whether the offer was a genuine attempt to settle the proceedings (for instance, offers are sometimes made at 95% or even 99% of the full value of the claim to try to get the benefit of these interest and penalty provisions, but that is unlikely to be seen as a genuine attempt to settle. In this context, see *Chapman v Mid and South Essex NHS Foundation Trust (Re Costs)* [2023] EWHC 1871 (KB): the claimant's offer to accept 90% of damages bit; *Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1512 (Comm): the claimant's offer to accept 96% of full value did not bite; *Omya UK Ltd v Andrews Excavations Ltd & Anor* [2022] EWHC 1882 (TCC): the claimant's offer to accept 98.85% of full value bit; *Sleaford Building Services Ltd v Isoplus Piping Systems Ltd* [2023] EWHC 1643 (TCC): the claimant's offer to accept 99.9% of claim value did not bite).

If the court decides it would be unjust to make the usual order under Part 36, it has wide powers when exercising its discretion as to costs under CPR 44.2.

Recent changes to Part 36

In cases commenced after 6 April 2023, a significant change to Part 44.14 has resulted in the effect of the decisions in *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654 and *Ho v Adlelekun* [2021] UKSC 43 being reversed (those decisions having been to the effect that defendants could not enforce costs orders against damages unless there had been an *order* awarding them (and not a *Tomlin* order, because an agreement contained in a schedule to a *Tomlin* order as it is not 'an order for damages and interest'), and could not set off costs orders made in their favour against costs orders made in favour of the claimant).

The new wording of the rule is (emphasis added):

'(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders *for damages or agreements to pay or settle a claim for, damages, costs and interest* made in favour of the claimant.

'(2) *For the purposes of this Section, orders for costs include orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.*

'(3) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.

'(4) *Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.*

'(5) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.'

It follows that a defendant can now enforce a costs order (in cases commenced after 6 April) where the claimant has accepted a Part 36 offer late *and* where the claim is concluded by a *Tomlin* order; as well as setting off costs orders against adverse costs orders (see Part 44.12). Part 44.14(2) refers to 'deemed' costs orders, and that will cover orders made when a claimant accepts a Part 36 offer.

This is liable to have an important impact on a claimant's approach to interim applications where there is a risk of an adverse costs order. The need for ATE insurance cover also becomes of increasing importance.

It is also not difficult to envisage situations where a conflict may arise between the claimant and their solicitors as to the application of the net recovered damages - for instance, if the CFA is interpreted as having achieved a 'success', but the damages have been exhausted in satisfying the defendant's costs, and the claimant still has an obligation to pay their own solicitors.

Christopher Sharp KC and Ben Handy are barristers at St John's Chambers in Bristol