Court considers failure to serve medical report in personal injury case (Mark v Universal Coatings & Services Ltd and another company)

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Personal Injury analysis: Following the judgment in Mark v Universal Coatings, Robert O'Leary, barrister at Crown Office Chambers, advises that what appeared to be mandatory requirements in all personal injury claims will not necessarily be applied as rigorously in complex cases.

Mark v Universal Coatings & Services Ltd and another company [2018] EWHC 3206 (QB)

What are the practical implications of this case?

CPR PD 16, para 4.2 says that in a personal injury claim, the claimant 'must attach to his particulars of claim a schedule of details of any past and future expenses and losses which he claims'. CPR PD 16, para 4.3 states that where such a claimant is relying on the evidence of a medical practitioner, he 'must attach to or serve with his particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim'. The practical implication of *Mark v Universal Coatings* is that what appeared to be mandatory requirements in all personal injury claims will not necessarily be applied rigorously in complex cases. In such complex cases, the claimant will not be required to serve a medical report or schedule of loss where, in the circumstances, they would be relatively uninformative and not take the matter further.

What was the background?

Mr Mark, the claimant, was alleged to have sustained silicosis and massive pulmonary fibrosis as a result of inhaling silica dust during his employment with Universal Coatings & Services Limited (the first defendant) and Barrier Limited (the second defendant) and one other defendant.

In February 2013, the claimant instructed solicitors. His date of knowledge for limitation purposes was taken as the date on which he first received treatment for his conditions on 27 June 2012.

A claim form was issued shortly before expiry of the limitation period in June 2015.

Mr Mark obtained an ex parte order extending time for service of the claim form, particulars of claim and supporting medical evidence. In breach of CPR 23.9, the claimant's solicitors failed to serve the order on the first defendant, but the first defendant did receive a copy of the same from its insurance broker. The claimant's solicitors went into administration and new ones were appointed. On 26 February 2016, the claim form and particulars of claim were served, but no medical report or schedule of loss accompanied them. A medical report and draft schedule of loss followed a few weeks later.

The first and second defendants applied to strike out the claim form.

The judge at first instance held that the obligation in CPR PD 16 paras 4.2 and 4.3, that the claimant 'must' serve the schedule of loss and medical report with the particulars of claim, contained an implied sanction and that the principles of relief from sanctions therefore applied. The judge decided that there was no good explanation for the breach of paras 4.2 and 4.3 and that the extension of time had been obtained by misrepresenting the attempts made to obtain medical evidence. It was therefore held that relief from sanctions should not be granted. Further, the judge decided that the claimant's various breaches of the rules amounted to an abuse of process and struck out the claim.

What did the court decide?

Martin Spencer J heard the appeal. He thought that the defendants' contention that where, in breach of the provisions of PD 16, para 4, a claimant fails to serve a medical report and schedule of loss with the particulars of claim, the claimant is thereby in breach and requires relief from sanction under the *Mitchell/Denton* principles was a 'surprising'

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one (see *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795, [2014] 2 All ER 430 and *Denton v TH White Ltd* [2014] 1 WLR 3296, [2015] 1 All ER 880). He said:

'Frequently, particularly in complicated personal injury or clinical negligence litigation, the focus is on difficult questions of causation which may or may not resolve the matter. Often, at a relatively early stage, a medical report and schedule of loss served with the particulars of claim are simply uninformative.'

The defendants submitted that the word 'must' used in PD 16 paras 4.2 and 4.3 indicated that the provisions were mandatory. Martin Spencer J noted that some rules and practice directions contain express sanctions for non-compliance and some, without themselves expressly laying down a sanction for non-compliance, carry with them an implied sanction. Examples of the latter are the failure of a respondent who wishes to resist an appeal on grounds other than those relied on below to serve a respondent's notice, and a litigant who wishes to appeal from a court order or judgment but fails to serve and file a notice of appeal in time. The judge said:

'…the principle behind the reason why those rules carry with them an implied need to apply for relief from sanction when breached can be discerned by reference to the default position if the application is refused. In the case of a litigant who fails to serve and file a notice of appeal in time, without an extension of time the litigant is unable to appeal as any notice of appeal would be invalid as having been served out of time and the judgment in the court below will stand. This is so significant for the purposes of the litigation that the need to apply for relief from sanction is implied. Similarly...the failure to serve a respondent's notice means that, without permission to do so, the respondent is fixed with relying on the grounds relied on below and may not argue that the judgment below should be upheld for different reasons. This may so significantly confine the scope of the appeal as to be highly significant for the purposes of the litigation and has therefore also been held to require relief from sanction although, as it seems to me, this is much closer to the line than the failure to serve a notice of appeal in time…'

Martin Spencer J held that the failure to serve a medical report or schedule of loss with the particulars of claim is not in the same category. In complex cases, at an early stage they can be uninformative and not take the matter further. By contrast, in a simple personal injury claim, there will be no difficulty at all in serving such documents. PD 16 para 4, he said, 'sets a benchmark' because it applies to all personal injury claims, from the simplest to the most complex, and that in cases of the latter type, it is honoured more in the breach than in observance. The judge concluded:

'The "one size fits all" approach of the CPR leads to documents being served with the particulars of claim in complex cases which, in reality, are unhelpful and uninformative. In my judgment, 16 PD.4 is not in the category of the kind of rule or practice direction to which the implied relief from sanction doctrine should be applied.'

The judge, reviewing the evidence, held that the claimant's solicitor had not deliberately or recklessly misled the court into granting the initial extension of time for service of the claim form. The other complaints and breaches of the rules, whether individually or collectively, did not amount to the kind of abuse of process which justifies a claim being struck out. There were other, more proportionate steps, which could have been taken, including the making of unless orders or penalisation in costs. The appeal was therefore allowed.

Robert O'Leary practises in the fields of personal injury and occupational disease. He has acted on behalf of individuals, unions, insurers and institutions, including the UK and Welsh governments. O'Leary has particular experience in group and multi-party litigation, occupational illness and disease work, as well as employer's liability cases.

Interviewed by Kate Beaumont.

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