NIFA NEWS 25

Approved Expert Financial Witnesses

The Newsletter from The Network of Independent Forensic Accountants

I WOULD HAVE MADE A FORTUNE...HONEST

A recent judgment sheds light on the court's attitude to the assessment of loss of earnings in circumstances in which the claimant was on the verge of setting up a business before the incident occurred that gave rise to the claim.

One periodically comes across claimants who, at the time of an accident that ended their working lives, had been about to embark on or had just started a new business venture.

In those circumstances the writer has typically expressed caution as to the extent to which credible claims can be made for loss of earnings based on the future profit potential of the fledgling enterprise. Often these cases are simply pleaded on the basis of a "Loss of Chance", especially if there are no contemporaneous financial records or business plans.

Very substantial damages

The recent case of XYZ and Portsmouth Hospitals NHS Trust ([2011] EWHC 243 (QB)) demonstrates that it is possible to win very substantial damages in relation to a business which, at the time the claim arose, had not even begun to trade. However the case highlights the importance of having robust and reliable evidence not only from expert accountancy witnesses but also from lay witnesses who are able to testify to the claimant's personal business acumen and the trading dynamics of businesses similar to that which the claimant claims he would have run had it not been for the accident.

The case concerned a claim by a claimant who had donated a kidney to his father. The defendant admitted that the operation was performed negligently, and to a degree recklessly.

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NIFA WELCOMES A NEW MEMBER

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NO TIME TO STOP AND STARE....

Family Procedure Rules introduce new tight deadlines in relation to expert reports.

The new Family Procedure Rules 2010 ("FPR") came into effect on 6 April 2011. They apply to family proceedings in the High Court, County Courts and Magistrates' Courts and mirror, in many ways, the Civil Procedure Rules ("CPR") 1998.

Part 25 of the Family Procedure Rules deals with the expert evidence and largely follows the provisions of Part 35 of Civil Procedure Rules. However there are important differences.

Of particular note is the provision, at Part 25.6 that requires that any written questions arising from an expert's report must be produced within 10 days from the date on which the expert's report was received. This is far shorter than the 28 days deadline that applies under the CPR Part 35.6.

Part 25 of the FPR is accompanied by Practice Direction 25A, which imposes very tight timetables and strict rules on procedure. In particular, a duty is imposed on instructing solicitors to ensure that the disruption to the expert's professional schedule and the consequent costs are kept to a minimum by means of "proper co-ordination between the court and the expert when drawing up the case management timetable".

Named in any public judgment

Before any application can be made to court to rely on expert evidence, the parties are required to have made preliminary enquires of the expert to establish his expertise, availability and likely fees. In addition the expert should be asked if he wishes to make any representations about being named in any public judgment.

A written proposal then has to be submitted to the court dealing with the foregoing matters, incorporating the expert's CV and explaining how it is proposed that a single joint expert's fee is to be apportioned between the parties.

Accompanying the written proposal, the party proposing to instruct the expert is required to submit to the court a draft order specifying,

- Who is to be responsible for drafting the letter of instruction
- Dealing with the issues to be addressed and the timetable
- Requiring that a copy of the expert's report shall be made available to the court in electronic form
- Instructing solicitors have only 5 business days from the day of the hearing in which to issue a letter of instruction to the expert.

If questions are to be put to experts, the court will nominate one of the solicitors "or other professional" to be responsible for the management of the expert evidence. This person becomes "the Nominated Professional" and, upon receipt of the expert's report, he has only 15 business days to make arrangements for a meeting of experts, in person, by telephone conference or video link.

Unlike the procedure under the CPR, the FPR provides that the meeting of experts shall be chaired by the Nominated Professional who shall ensure that the matters discussed are strictly limited to those on the agenda, which must have been issued no later than 5 business days before the meeting.

Potentially prejudicial

The provisions seem to be intended to minimise costs by keeping experts focused in their discussions on the issues in dispute. However exactly how this will work in practice is rather unclear and the idea of a solicitor for one party being present at a without prejudice discussion between experts, in the absence of the solicitor from the other party, seems somewhat bizarre. The writer cannot believe that that was what was intended nor what will become common practice.

"Solicitors have only 5 business days from the day of the hearing in which to issue a letter of instruction to the expert."

Finally, if experts are to be called to give oral evidence, they are to be notified of dates and cancellations of hearings as soon as possible and consulted regarding their availability. They should be given an indication as to the likely time for which they are to be required and consideration should be given to their participation by telephone conference or video link.

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The consequences of the defendant's negligence were described in the judgment as "catastrophic for the claimant and his family: physically, psychologically, emotionally and financially."

The claimant's case was that when he suffered his injuries he was on the threshold of a new stage in his career in the highly specialised area of market research in the pharmaceutical industry. For some 13 years he had worked in the industry and had reached the top of his profession in the employed sector. For at least two years he had been actively planning to set up his own agency.

His case was that, but for the defendant's negligence, after 2 years, the turnover would have been £2 million, after 5 years the turnover would have been £5 million and after 10 years the turnover would have been £10 million. He contended that he would have continued running the agency until retirement, at which point he would have sold the business for a very substantial sum.

The claimant relied not only on expert accountancy evidence but also from evidence from former colleagues who had, themselves, successfully established pharmaceutical market research practices comparable with that which the claimant claimed he would have created.

But for the defendant's negligence, after 2 years, the turnover would have been £2 million, after 5 years the turnover would have been £5 million and after 10 years the turnover would have been £10 million.

Such evidence was clearly very influential, notwithstanding the judge's comment that the he did not "regard the exercise of analysing the turnover of the comparator businesses as anything more than the roughest guide to the level of success the claimant could have expected to achieve" because "none of the comparator businesses was a direct match for the business the claimant proposed."

Unimpressive

Prior to the kidney donation operation the claimant had prepared a business plan on which he was extensively cross-examined. The defendant argued that it was "so unimpressive…as to call into question the ability of the claimant to set up and maintain an agency at the financial level contended for." It was submitted on behalf of the defendant that it was "all the more significant because it is the only contemporaneous document in which the claimant's financial aims and objectives were set out."

The claimant acknowledged the shortcomings of the document but said it was a work-in-progress. He said he had "no previous experience of drafting a business plan, and used two books called 'Business Plans for Dummies' and 'Starting a Business for Dummies'."

The court noted that there was a "stark difference" between the financial forecast in the Business Plan and the figures underpinning the claim for damages. Nevertheless the judge concluded that the projections in the business plan were not intended to be a properly researched and considered set of figures and that the creation of a detailed financial forecast was one of the tasks the claimant had set himself to complete but had been prevented from doing by virtue of the circumstances underlying the claim.

Accordingly, the court concluded that "it was a virtual certainty that the claimant would have achieved a turnover of £2 million within 2 years" and that there was therefore "no need to apply a percentage discount to reflect the chance that he would not have done so." It further concluded that "there was a 50% chance that the claimant would achieve an annual turnover of £5 million within 5 years" and "a 20% chance that the claimant would have achieved a turnover of £10 million" within 10 years.

The judge applied an overall net profit percentage of 22% to the turnover figures and a discount of 15% to reflect the further contingencies and uncertainties that the proposed business venture would have faced. He also assessed that the claimant would have sold the business upon his retirement for a sum based on six times its net profit at that time. Overall the claimant was awarded £4.5 million in relation to his claim for future loss of earnings and a further £1.2 million for his capital loss on the eventual sale of the claimant's business.

The case gives valuable guidance as to the approach taken by the court in relation to prospective businesses and the importance of good quality accountancy evidence.

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BUT I'M ONLY A SECRETARY...

Many professionals believe that appointment as a company secretary carries little risk and few responsibilities. Are they right or could it result in an unwitting criminal offence?

It is generally thought that responsibility for ensuring that a company prepares accurate accounts lies exclusively with the directors. Indeed Section 393 of the Companies Act 2006 ("CA 2006") requires that directors must be satisfied that the accounts give a true and fair view of the assets, liabilities, financial position and profit or loss of their company.

However that provision has to be seen in the context of Section 386 CA 86, which imposes a duty on the company to maintain adequate accounting records that disclose with reasonable accuracy, at any time, the financial position of the company.

In the event that a company fails to comply with the requirement in relation to accounting records, "an offence is committed by every officer of the company who is in default."

It is noteworthy that the reference is to every "officer" rather than to every "director". Clearly a company secretary is an officer of the company and will therefore be caught within the ambit of this provision.

This raises an interesting question, namely in what circumstances might a company secretary act so as to be "in default" of the requirement to maintain adequate accounting records.

What is more, if a company secretary were to have concerns as to the adequacy of the accounting records, it is difficult to see what authority he would have to affect change without the support of the directors, which could put him in an invidious position.

In any event, it seems to the writer that professional advisers should be very wary of accepting appointments as company secretary and, when they do so, they should ensure that they have taken steps to manage any risks that might arise in this regard.

That is certainly what one professional company secretary, currently facing allegations of negligence and on whose insurers behalf the writer is acting, wishes he had done had he had the benefit of hindsight.