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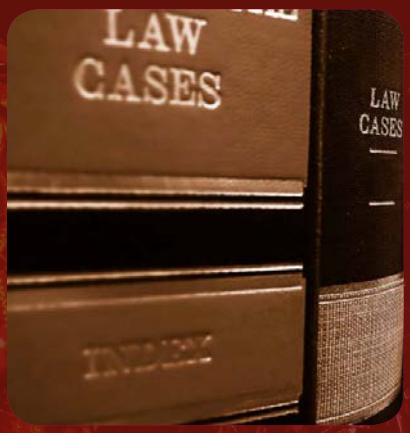

GASLIGHTING:

Mitigation of Loss Arguments in the Northern Ireland County Court

'We Embrace Innovation', soon to be shortened to just 'Innovation' when we relaunch them later this year, has been one of the core values of JMK Solicitors for almost a decade.

Technological advancement has been a feature of human development since the beginning of time, the speed of which continues to increase. To find an example of when an improvement took longer to adopt than you might expect; we can look to the early 19th Century and the introduction of Gas for commercial and domestic illumination.

Despite being available from the mid-1810s, it took the endorsement of it by the House of Commons, in 1859, before the public would really begin to trust it. Only then did rapid incorporation of gas within premises across the country take off.

It is interesting that **'gas-light' was feared, seen as a risk not worth taking, for its first fifty years.** That may well have foretold its now ubiquitous association with a nefarious human behavioural trait which has its roots in the stage-play and movies, of the same name, in the period 1938-1944.

For those not familiar with the plot, an unscrupulous husband tries to convince his spouse that she is losing her mind via a number of psychological tricks; including lowering the level of light from the gas-lamps in their house but pretending to his wife that there is no difference and that she is imagining things.

Brian Duignan at the Encyclopaedia Brittanica describes the technique in the following terms[1]:

'...attempting to convince the victim of the truth of something intuitively bizarre or outrageous by forcefully insisting on it or by marshalling superficial evidence;... dismissing the victim's contrary perceptions or feelings as invalid or pathological; questioning the knowledge and impugning the motives of persons who contradict the viewpoint of the gaslighter;...'

And whilst this does sound like the politicians have become expert at being key adopters once again, as a Plaintiff road traffic accident and personal injury law firm **we do on a regular basis see 'Gas-Lighting' techniques deployed to great effect by the insurance industry** in trying to convince our solicitors, our client's barristers, our clients and the Courts that the Insurer's version of reality is the correct one.

No more obvious example springs to my mind than the concept of Mitigation of Loss and the 'The Duty to Mitigate'.

I have seen that phrase used so many times in defence of our client's claims that for a period I thought that maybe insurance companies and their representatives had it pre-printed on their letterhead.

And here I am going to blow a few minds, but it may surprise you to know that there is in fact NO legal duty for a Plaintiff to mitigate their losses.

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[Insert baffled silence... whistling wind noises.... tumbleweeds across dusty plains...a loud scream.... or dramatic piano music as you see fit!]

In Sotiros Shipping Inc v Sameiet; The Solholt [1983] 1 Lloyd's Rep 605, then Master of the Rolls, Sir John Donaldson said:

"A plaintiff is under no duty to mitigate his loss, *despite the habitual use by lawyers of the phrase "duty to mitigate"...He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all losses suffered by the plaintiff in consequences of him so acting."*

So what does this mean in practice?

[1] https://www.britannica.com/topic/gaslighting

In Payzu Limited v Saunders: [1919] 2 KB 581, Bankes LJ held that:

"It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case."

Doing what the majority of others have done successfully, or doing what is recommended to you, should not be contentious as a reasonable step taken in mitigation of loss. A principle endorsed by judicial authority in Clippens Oil Co v Edinburgh and District Water Trustees: [1907] AC 291 where Lord Collins said:

*'In my opinion the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act….**I think the wrong-doer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after-events that another course might have saved loss.** The loss he has to pay for is that which has actually followed under such circumstances upon his wrong'*

I believe that proportionality in low value claims has been forgotten about in applying the principles of mitigation to the everyday so-called 'running down case'[2].

Lord Macmillan, in *Banco de Portugal v Waterlow and Sons Ltd:* [1932] AC 452, [1932] UKHL 1 (whilst referring to a contract matter the principles espoused also apply to Tort) said:

*'Where the sufferer from a breach of contract finds himself in consequence of that breach placed in position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. **It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency.** The law is satisfied if the party placed in a difficult position by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.'*

This, again, is mind-altering in the context of the gaslighting by insurers we'll all have suffered from over the years.

If every Plaintiff could be held to a 'Counsel of Perfection'[3] then many innocent victims of accidents would end up nursing losses that could not be recouped. And all because someone with a vested interest in coming up with hypothetical scenarios resulting in a lesser sum was able to do so.

Laws L J said in Samuels v Benning [2002] EWCA Civ 858,

"…it is settled law that the onus of proving that a claimant failed to mitigate his damage lies on the Defendant to show that the claimant ought, on the facts, reasonably to have pursued some course of action which he did not in order to mitigate his loss."

When we now turn to the practicalities of pursuing a claim where principles of mitigation will arise we do find more 'gaslighting' that we have to resist.

Insurers will raise the blanket, and entirely vague, defence that there has been a failure to mitigate loss.

The hoodwinking tactics come into play immediately with the implication that the Plaintiff must litigate their case in correspondence so as to comply with the 'overriding objective' of saving expense and court time.

However, the recent Civil Justice Review did opine that the Northern Ireland County Court resolved cases "at a very modest cost to the 'at fault' party"[4] and The Northern Ireland Courts and Tribunal Service is now committed to fully recouping its costs via the levying of its fees.

There is arguably no reason to suggest that the overriding objective is a barrier to the Court listing all the cases that it can.

Simply alleging a failure to mitigate loss should not be all that is required to open up the Plaintiff to searching pre-hearing questioning and discovery aimed at finding the 'Achilles Heel' that will diminish the claim being made.

As they will have been provided with details of the Plaintiff's losses, the insurer should be sufficiently able to leverage their own experience, or access enough expertise, to work out whether what the Plaintiff has done is something that is prima facie reasonable.

Where this is the case they should simply settle the claim and move on, but that is not the course of action they take because, in my opinion, they know that their opponents, and the Judiciary, have been sufficiently softened-up through decades of bamboozling to think that even the reasonable man could always have done better.

The burden of showing a failure to mitigate is exceedingly high as indicated in 'McGregor on Damages' where it is stated:

"The illustrative decisions practically all go to show what the Plaintiff need not do in order to come up to the required standard: this in itself suggests that the standard is not a demanding one."

Compensators have successfully convinced us that

[2] https://lawlegal.eu/running-down-case/
[3] https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095642836
[4] Civil Justice Review 2017

> A plaintiff is under no duty to mitigate his loss,

they only need attack. In actual fact they need to present by evidence, to the satisfaction of the Court, that an alternative course of action should, not could, have been followed.

Whilst the insurer may try to cajole us into believing that it is unfair on it to have to wait until examination-in-chief and cross-examination to get the full story from the Plaintiff- that is how the low cost regime is maintained. If they want more done in advance of hearing then they should meet the expense of that, to do otherwise places a higher burden on Plaintiffs than is envisaged under the current scale-fees.

And of course it is for the insurer to be prepared with the evidential proof of their alternative counter factual. If the opponent does not provide that scenario, and quantify what the losses would have been, in advance; then the Plaintiff is on the back foot and unprepared for it at the hearing should the Court find there was a failure to mitigate.

In order for the Plaintiff to properly deal with it, an adjournment will be required to allow that to happen.

However, we've been duped into thinking that this is something that is inappropriate in County Court cases.

The dichotomy that exists in the low level light we've become used to that a Plaintiff is expected to 'sing like a canary' to the insurer prior to the hearing date. They are expected to take away the responsible party's practical problem of not having access to the Plaintiff's oral evidence pre-hearing.

The insurers have effectively convinced everyone that they need do nothing other than act like a hypercritical 'Twitter Troll' to find 'fault' without having to do the additional work of showing that, on the balance of probabilities, no other Plaintiff in the same situation would have done so without also facing the same alleged inadequacies – the vagaries of human life. The ups and downs that we all go through in the face of adversity.

It should be a given that in our County Court a Plaintiff will have a fair hearing. With a finding that they have done something so clearly wrong as to require the ultimate sanction of the Court- leaving them out of pocket for special damages or under compensated for general damages – a rarity.

Whilst I accept that when the quantum of the head of loss is in the High Court jurisdiction, appropriate detailed evidence is a necessity, I do not accept that this is something that should apply by default in the County Court.

This issue of proportionality with regard to interlocutory applications in the County Court was dealt within the case of Foot v Quinn (2010) NIQB 89, where McCloskey J rejected all of the Defendants' applications for specific discovery and interrogatories, even though some of the matters sought did involve "permissible areas of enquiry" and fell "within the ambit of relevant issues". In dismissing all of the Defendants' applications, McCloskey J referred at paragraph 20 to "factors such as oppression, undesirable delay, inappropriate cost and want of proportionality."

In a low-cost regime to expect Plaintiffs to produce the kind of detailed documentary evidence that is seemingly required is impractical and unrealistic, especially when there is no such demand expected of the at-fault party.

The role of Plaintiff lawyers must be to ensure that modern day LEDs illuminate the litigation landscape by:

L- Looking Out for Gaslighting

E- Educating yourself and others that it is happening

D- Developing a confidence in your own version of reality

Starting with re-calibrating how mitigation principles are applied in the County Court will ensure better results for all parties seeking access to justice thus reducing expense and time.

Jonathan McKeown
Chairman

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