A Judgment for What? The Effect of Default Judgments by Paul Stagg

Where a defendant admits breach of duty but wishes to contest causation, injury and quantum, it has in the past been common practice for it to allow judgment to be entered in default of Acknowledgment of Service or of Defence and to proceed to contest the remaining issues at an assessment of damages hearing. An alternative course of action, which in the short term is more expensive, is to file a Defence making appropriate admissions and then for the claimant to seek entry of a judgment for damages to be assessed.

In Symes v St George’s Healthcare NHS Trust [2014] EWHC 2505 (QB), the claimant was referred to hospital in October 2008 by his GP with a lump on his face which turned out to be a malignant tumour. In January 2009, a consultant decided that he should have an urgent superficial parotidectomy, but that was not carried out prior to May 2009, when it was found that the tumour had invaded the facial nerve and there had been metastasis to the lungs, leading to the need for a total parotidectomy and the loss of the left facial nerve and inoperable lung cancer. In 2011, an open admission was made that there had been a breach of duty in failing to identify that the lump was suspicious of malignancy and in the delay in operating, but the defendant’s solicitors made it clear that its view was that the invasion of the facial nerve and the metastasis to the lungs were not attributable to either breach of duty.

Proceedings were initially struck out for non-service, but on re-issue, the claimant pleaded his causation case in detail in the Particulars of Claim. The defendant did not enter an Acknowledgment of Service or a Defence. Master Roberts entered judgment in default of Acknowledgment of Service and set a date for a directions hearing. The parties agreed the terms of an order before the hearing and the Master ordered that the parties would have permission to rely on expert evidence on “quantum, condition and prognosis” from experts in oncology and care. The defendant continued to reiterate in discussions between solicitors that the claimant’s case on quantum was in dispute, save that it was accepted that there was a liability to pay damages for pain and suffering during the delay in treatment. However, it was not until the claimant sought an interim payment of £50,000 that his advisers expressly asserted that the default judgment precluded the defendant from contesting the pleaded allegations of causation. Whether or not the claimant was entitled to that interim payment depended largely on whether the claimant was correct as to the effect of the default judgment.

At first instance, in a judgment given on March 21st 2014, the Master upheld the claimant’s contention. He ruled that the Particulars of Claim stood as a template for the default judgment and that the defendant accordingly could not contest causation. He castigated the defendant for having acted in a manner contrary to the overriding objective and having failed to comply with the obligation in CPR 16.5 to respond properly to the Particulars of Claim by serving a Defence.

On appeal, Simon Picken QC, sitting as a Deputy High Court Judge, allowed the appeal. In his judgment, the deputy judge reviewed the case law in some detail. In particular, he closely examined the leading case on the subject, Lunun v Singh [1999] CPR 587, which had followed an earlier decision of the Court of Appeal refusing permission to appeal in Turner v Toleman [1999] unreported, January 15th. The judge held at [62]-[63] that he was bound by the decision of the Court of Appeal in Lunun to conclude that the default judgment established no more than that the defendant was in breach of duty and that the breach had caused some damage. There was no special rule applicable to clinical negligence cases: at [64]. Lunun remained good law following the introduction of the CPR: at [65]. He also said that as a matter of principle that since the defendant admitted part of the claimant’s pleaded case on causation (that the delay in treatment led to pain and suffering) there was no basis to construe the default judgment as extending to the other consequences which were said to follow from the breaches of duty: at [66]-[68].

The deputy judge then went on to consider whether the defendant had acted contrary to the CPR. The rules did not state that the effect of a default judgment for damages to be assessed precluded a claimant from contesting a pleaded case as to causation: at [83]. It followed from the decision as to the effect of the default judgment that the defendant had been entitled not to serve a Defence and so there was no breach of CPR 16.5: at [84]-[85]. Accordingly, while it “would have been more sensible” for the defendant to serve a Defence, it was not in breach of the rules for failing to do so: at [86]-[87]. Nor was the defendant in breach of the overriding objective, since it had made its position clear in correspondence to the claimant’s advisers, if not to the court: at [88]-[91]. The claimant’s advisers accepted that they had known that the defendant’s solicitors were under what they regarded as a misapprehension.

The extent to which, in clinical negligence cases, the practice of allowing default judgment to be entered in this way is followed is not clear. Anecdotally, it appears that both courses of action are utilised by defendant’s solicitors. Even though the practice has been legitimised (subject to any further appeal to the Court of Appeal) it would be far more sensible for both parties to enter into a Defence: at [92]. In Parkhouse v North Devon Healthcare NHS Foundation Trust, at a hearing on May 6th 2014, this course had been taken where default judgment had been entered but at a directions hearing, the defendant had made it clear that causation was in dispute. Master Roberts himself denied that there was any need for the directions order to make clear that it was open to the defendant to contest causation, although in the event a recital was inserted to that effect.

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Court of Appeal) by the decision in Symes, nevertheless the modest cost savings in not serving a Defence in a case where there is a clearly pleaded case in causation are surely outweighed by the need to ensure that both parties are absolutely clear about the extent to which the critical issue of causation is being contested.

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