DOLMANS INSURANCE BULLETIN

Welcome to the June 2023 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor:

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REPORT ON

Wasted Costs Orders - Applying the Three-Stage Test

JC v Bridgend County Borough Council

Although there is a relatively high bar to cross before a Court will entertain making a Wasted Costs Order against a party's legal representatives, circumstances do arise where conduct has been unreasonable to the extent that such an Order is difficult to avoid. This is especially the case where a party's legal representatives have been ordered to provide a Witness Statement to show cause as to why they should not pay the Defendant's wasted costs, but even this fails to satisfy the Court.

This is illustrated by the recent decision in *JC v Bridgend County Borough Council*, in which Dolmans represented the Defendant Local Authority and successfully pursued such a Wasted Costs Order on their behalf against the Claimant's Solicitors.

Allegations and Dismissal of Claim

The Claimant alleged that during the course of her employment within the Defendant Local Authority's Care Services, she was attempting to manoeuvre a Service User in a home environment, when she took the Service User's full weight and sustained personal injuries.

The Claimant alleged that her accident was caused by the Defendant's negligence and/or breach of various Workplace Regulations, which were relied upon in support of the alleged negligence on the Defendant Local Authority's part.

Liability was denied and it was argued on behalf of the Defendant Local Authority that, pursuant to the Enterprise and Regulatory Reform Act 2013, the Claimant could not bring a claim for breach of the Regulations referred to above. In this regard, it was denied that any breach of the said Regulations was evidence of negligence and/or breach of the common law duty of care and that any alleged breaches of the various Regulations gave rise to an actionable claim in damages. The legal and evidential burden was on the Claimant to prove negligence.

After hearing oral evidence by the Claimant and the Defendant Local Authority's witnesses, the Trial Judge was not satisfied that the Claimant had done enough to prove her case on a balance of probabilities and dismissed the claim.

As this was a Qualified One-Way Costs Shifting (QOCS) matter, the Trial Judge made the usual Costs Order that the Claimant pays the Defendant's costs, but not to be assessed or enforced without the Court's permission.

However, the Trial Judge also needed to consider an Application for a Wasted Costs Order made on behalf of the Defendant Local Authority against the Claimant's Solicitors following adjournment of the previous trial date.

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REPORT ON

Order to Show Cause - Background

There had been several previous attempts to bring the matter to trial. The first attempt to proceed in person was adjourned, as there was insufficient Court time to deal with all the evidence in one day. The trial was, therefore, adjourned to a remote hearing at a later date. At this remote hearing however, it soon became apparent that the Claimant, who had joined online using her mobile phone from home, had not been provided with a copy of the Trial Bundle by her Solicitors.

As a result, the Trial Judge considered it impossible for the trial to proceed remotely at that time and ordered the Claimant's Solicitors, who were not present at the remote hearing, to show cause as to why they should not be ordered to pay the Defendant Local Authority's costs of the said hearing.

Although the Claimant's Solicitors did file and serve a Witness Statement, as ordered by the Court, it was argued that this failed to explain why no efforts had been made to ensure that the Claimant had received a hard copy of the Trial Bundle for the adjourned hearing.

Defendant's and Claimant's Arguments

Following the eventual trial, which was held in person and after dismissal of the Claimant's claim, it was argued on behalf of the Defendant Local Authority that the Claimant's Solicitors had acted unreasonably by failing to ensure that the Claimant could access a copy of the Trial Bundle at the previous remote hearing, leading to adjournment of the trial date. It was also argued that the making of a 'show cause' Order equates to a strong prima facie case for wasted costs having been accepted by the Judge. The Defendant Local Authority sought to rely upon the leading case of *Ridehalgh v Horsefield (1994) Ch.205 CA*, which will be considered below.

Unsurprisingly, the Claimant's representative at trial disagreed. It was submitted that the previous adjournment was a product of an unforeseen inability on the part of the Claimant to deal with her electronic devices and that the provision of paper bundles to clients in remote hearings is not mandated. As such, it was argued that the Claimant's Solicitor's conduct did not cross the high bar of unreasonableness; the Claimant's representative seeking to rely upon the decision in *Dammermann v Lanyon Bowdler (2017) EWCA Civ 269*. However, this involved different circumstances in a Small Claims matter.

Wasted Costs Orders – Three-Stage Test

The jurisdiction to make a Wasted Costs Order arises from section 51 of the Senior Courts Act 1981, as supplemented by rule 46.8 of the Civil Procedure Rules 1998.

Section 51(6) of the Senior Courts Act 1981 states that:

"In any proceedings mentioned in subsection (1), the Court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of Court."

Ridehalgh v Horsefield provides the relevant three-stage test. As such, an Applicant for a Wasted Costs Order must demonstrate:

(i) Improper, unreasonable or negligent conduct on the part of a Solicitor's firm, which constitutes a breach of that firm's duty to the Court: no duty is owed to the Applicant in this context.

(ii) That the conduct caused the incurrence of costs, which would not otherwise have been incurred.

(iii) That all the circumstances of the case render it just to impose a costs liability on the Solicitor, by making a Wasted Costs Order in respect of all or part of the costs sought.

What Constitutes Improper, Unreasonable or Negligent Conduct?

Commentary as to what constitutes improper, unreasonable or negligent conduct was also provided in *Ridehalgh v Horsefield* as follows:

Improper conduct covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. In addition however, conduct that would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly defined as such, whether or not it violates the letter of a professional code.

Unreasonable conduct describes conduct which is vexatious and/or designed to harass the other side rather than advance the resolution of the case. It makes no difference that the conduct is the product of excessive zeal and not improper motive. However, conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.

Negligent conduct was the most controversial of the three definitions as considered in *Ridehalgh v Horsefield*. It had been argued that conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to the client, to whom alone a duty is owed. However, the Court rejected this approach, stating, firstly, that the predecessor of the current rule made reference to "reasonable competence", which does not invoke technical concepts of the law of negligence and, secondly, since the Applicant's right to a Wasted Costs Order depends on showing that a legal representative is in breach of duty to the Court, it made no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that the legal representative is also in breach of duty to the client.

Wasted Costs Order

The Trial Judge was content that he had the power to make a Wasted Costs Order and referred specifically to the three-stage test in *Ridehalgh v Horsefield*, as referred to above.

Although provision of a Trial Bundle is not mandated, the Trial Judge was concerned that nobody from the Claimant's Solicitor's office had checked that the appropriate link worked and attempts were only made on the day of the remote trial to access the link. This would have undoubtedly alerted the Claimant's Solicitors to the need for a copy of the Trial Bundle to be provided. There was no explanation provided as to why nobody had checked if the Claimant could access any copy of the Trial Bundle.

As such and after considering the parties' arguments regarding the same, the Trial Judge was satisfied that a Wasted Costs Order should be made against the Claimant's Solicitors in this particular matter and that unnecessary costs had been incurred.

The Trial Judge, therefore, proceeded to assess the wasted costs relating to the previous adjourned hearing and ordered the Claimant's Solicitors to pay the same to the Defendant accordingly.

Comment

Although remote hearings are becoming less frequent, with the re-introduction of more in-person hearings following relaxation of lockdown guidance, it is important not to lose sight of the practical issues surrounding such remote hearings as and when they do occur.

The Claimant's Solicitor's failure to ensure that their client had access to an appropriate Trial Bundle in the above matter resulted in the previous trial having to be adjourned, with subsequent costs consequences.

Not only were substantial damages and costs avoided by the dismissal of the Claimant's claim, the Defendant Local Authority was also able to recover some costs from the Claimant's Solicitors, notwithstanding that this was a QOCS matter.

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FOCUS ON

Handicap on the Open Labour Market

Barry v Ministry of Defence, 3 March 2023, Mr Justice Johnson [2023] EWHC 459 (KB)

Background

For a number of years there has been an ongoing debate as to the approach to be taken in relation to the calculation of future loss of earning capacity in circumstances of existing disability (arising from a defendant's negligence or breach of duty). Traditionally, such damages can be measured by reference to the seminal case of *Smith v Manchester* and are usually measured by reference to a certain number of years annual earnings.

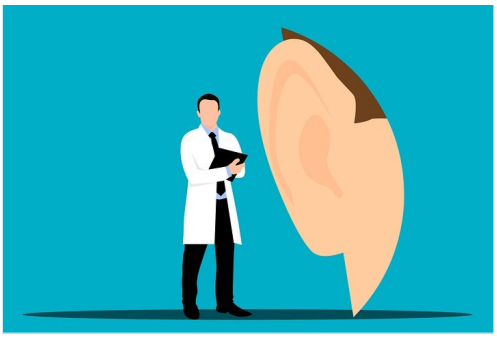
However, there has been an ongoing debate as to whether this approach fails to adequately compensate a claimant and is, in effect, a 'blunt instrument' regarding future loss of earnings.

More recently, the Ogden Tables have sought to evaluate such losses more scientifically by reference to statistical information derived from the study of those in employment without ongoing disability or injury, as compared to those in employment suffering with ongoing injury or disability. Thus, in essence, both methodologies attempt to measure and, therefore, compensate for the same kind of loss; however, different approaches are taken and different figures for losses are produced. In general, the Ogden Tables approach produces significantly higher awards of compensation as compared to the traditional *Smith v Manchester* approach.

The recent case of *Barry v Ministry of Defence* provides a useful illustration of the circumstances in which the 'Ogden' approach has been adopted by the Court, and, therefore, provides some insight into circumstances where it might hold sway in future cases. Inevitably, in general, one now finds claimants seek to advocate the Ogden approach; the more difficult question, for the defendant, is whether that approach will be adopted by the Court.

Facts in Barry

The Claimant in *Barry* claimed damages for Noise Induced Hearing Loss ("NIHL") sustained during his career in the Royal Marines. In 2016, when he was 29, the Claimant was medically discharged from the Marines because of NIHL; he had served for 4 years, having signed on for up to 20 years' service. However, unable to continue with his military career, he found work as a lorry driver.



His hearing loss, at the time of trial, was categorised as 'mild to moderate', but it required the Claimant to use hearing aids and, moreover, would deteriorate further with ageing due to natural processes.

The Ministry of Defence admitted primary liability but contended that the Claimant had (firstly) been guilty of contributory negligence by means of not using the ear plugs provided and (secondly) argued that future loss of earnings should be awarded on a straightforward handicap on the open labour market (*Smith v Manchester*) basis, rather than any (more sophisticated) identification of the deficit between pre and post injury earning capacity and applying a multiplier. Thus, in simple terms, it was a choice – for the Learned Judge – between the traditional approach (exemplified by *Smith v Manchester* damages) and the more modern approach advocated by the Ogden Tables (as set out in the now 8th Edition, albeit this method of calculation has been present for some time).

Findings in Barry

On the contributory negligence point, the Court found in favour of the Claimant. In summary, this was based on an acceptance of the Claimant's arguments that use of the hearing protection was not reasonably possible in the context of other tasks which needed to be undertaken, in particular the need to remove at least one ear plug to use a radio headset. Moreover, insufficient instructions as to the use of hearing protection were issued by the MOD and insufficient enforcement took place as to the appropriate use of the same. In short, the Claimant had done his best, but was unable to fulfil the requirement for the use of hearing protection in real world circumstances. Thus, there was no contributory negligence (and no deduction from his ultimate award of damages – see below).

On the future loss of earnings point, which is, rather obviously, the central focus of this article, the Court found that had the Claimant not been medically discharged it was likely that he would have remained in the Royal Marines for his full 20 years of service. His promotion prospects, on the evidence, were akin to those of an average Marine.

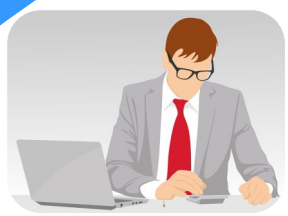
Given the significant diminution in his future earning capacity, the conventional multiplier/ multiplicand approach had to be used to properly compensate the Claimant. His hearing loss had a substantial impact on his day-to-day activities and, therefore, importantly for calculation purposes, he was to be considered disabled within the meaning of the Disability Discrimination Act 1995; this is the definition contained within paragraph 68 of Section B of the Ogden Tables (8th Edition).

Importantly, the previous case of *Billett v Ministry of Defence* [2015] EWCA Civ 773 (wherein the Appeal Court refused to approach matters according to the Ogden Tables and, instead, took the approach envisaged by *Smith v Manchester*) was distinguished. This decision to distinguish *Billett* will be discussed in more detail below.

In consequence of the Court's findings, a multiplicand v multiplier approach to future loss of earnings was considered to be the correct approach. Thus, the Court awarded the Claimant **£452,247.00** by way of future loss of earnings, and **£152,424.00** for future loss of pension; as part of an overall Judgment sum of **£713,716.00**.

FOCUS ON

Discussion



The essence of any calculation of future loss of earnings via the 'Ogden method' is to postulate future earnings on an 'uninjured' (or non-disabled) basis and then deduct from that figure the earnings that the Claimant is likely to receive on a disabled basis. This involves treating the non-disabled earnings via a conventional multiplier and then the disabled earnings via an adjusted multiplier – adjusted for disability – derived by reference to the Ogden Tables.

There then needs to be a further adjustment of the disabled multiplier for "contingencies other than mortality" – which, in essence, is a judgement call for the Judge and seeks to give thought to a claimant's underlying educational attainment (or absence of the same, as the case may be) to further adjust the multiplier to seek to do further justice to the situation. In simplistic terms, and by way of example, a poorly educated claimant who is left disabled by a defendant's negligence is likely to require further compensation than a well-educated claimant who may (and I emphasise 'may') find it easier to 'bounce back' (at least to an extent) from such an injury.

In *Barry*, the adjustment factor of 0.56 was applied against a 'raw' future loss of earnings multiplier of 33.59. This produced a disabled multiplier of 18.81. The range of adjustment figures open to the Judge covered the bracket 0.45 (the disabled figure) to 0.89 (the non-disabled figure). The midpoint was (therefore) 0.67. The Judge discussed the approach to this adjustment at paragraph 160 of the Judgment and his comments are likely to be taken up, in my view, in future cases (by claimants' representatives):

"There is a natural temptation to adjust the factor within the range 0.45 (the disabled figure) and 0.89 (the non-disabled figure) according to an assessment of the degree of Mr Barry's disability. There are dangers in such an approach. First, the disabled figure is of all people who have a disability and who are in employment. That means that the cohort is skewed in favour of those with disabilities that are not at the most severe end of the impairment and activity-limitation. The explanatory notes to the Ogden Tables say (at paragraph 89) that the 'norm' for severity is not severe and is at the mild end of the mild to moderate category. So, the fact that a claimant's impairment or activity-limitation is mild or moderate does not, in itself, justify a departure from the published mean. Second, the explanatory notes to the Ogden Tables say (at paragraph 84(ii)) that although the figures given represent a central estimate (there being a distribution of observations on either side), the observations cluster closely around the central estimate, so that most departures from the mean are modest. Third, where a departure is appropriate it will usually be modest (explanatory notes at paragraph 91). Fourth, an adjustment to the mid-point between the disabled and non-disabled figures is likely to be too great a departure (explanatory notes paragraph 91)."

In this latter context (judging departure from the disabled multiplier adjustment factor), the Learned Judge also referred to guidance given by Prof Victoria Wass (Journal of Personal Injury Law (2013) 1 35-44 and (2018) 4 279-283), which, it was said, reinforced the point that distribution of disability within the population that underlies the figures is concentrated towards the mild end of the spectrum; *"within the disabled population, most people suffer from a relatively mild degree of impairment."* (paragraph 160 of the Judgment).

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Moving on to discuss the present case, the Judge found that an adjustment factor consistent with educational level 3 was appropriate. Interestingly, this was based on the effect of hearing aids and the Claimant's maintenance of employment, as a result of his high drive and/or exemplified by his completion of the Royal Marines' basic training. *"In other words, the ameliorating effect of a hearing aid and Mr Barry's very high drive and determination can be modelled as being broadly equivalent to the advantage gained from a higher education qualification beyond A level."* It was on this basis that the 0.56 adjustment factor was ultimately adopted.

The Claimant's pre-injury future earnings were projected at £1,057,047.00 (paragraph 171). His assumed future net annual earning capacity was found to be £32,156.00, and, on the basis of the adjusted multiplier – 18.81, this produced a net residual earnings figure of £604,800.00. Thus, the net loss (£1,057,047.00 less £604,800.00) was £452,247.00.

An immediate interesting feature of this Judgment is the extent to which the Judge has engaged and grappled with the need to arrive upon a suitable disabled multiplier, not just in terms of examining the figures produced by the Ogden Tables approach but also seeking to engage with the definition of disability (see below) and the distribution of disability as found by the studies underlying Ogden. On that basis, even though the Claimant had a mild to moderate level of disability, on the basis that this correlated with many of those disabled workers within the said studies, the actual adjustment involved was not great and, therefore, the disabled multiplier was sufficient to produce a significant future loss of earnings figure (see above).

Inevitably, there is also an immediate comparison to be made with the previous *Billett* case, where a multiplier v multiplicand approach to future loss of earnings was not the result (on appeal, at first instance, this approach was adopted). Accordingly, one needs to consider what it was in the *Barry* case which persuaded the Judge to conclude that the Ogden Tables approach was correct and/or the approach taken on appeal in *Billett* was to be distinguished.

Billett was a case about cold injuries sustained by the claimant having been given inappropriate footwear. The Judge in *Barry* put it thus:

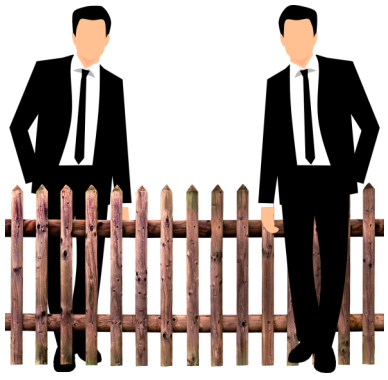
"The factors that led the Court of Appeal in Billett not to apply the Ogden Tables are not applicable here. Mr Barry's case is not at the outer fringe of the spectrum covered by disability – he falls squarely within one of the examples given in the guidance. He is not pursuing his chosen career. His disability affects the career choices that are open to him and even with the ameliorating effects of a hearing aid it is likely to have an impact on his career. Further, his hearing will deteriorate further in the future. All of his career options since leaving the military have involved, to a greater or lesser extent, the need to communicate by voice with others, and thus rely on his hearing."

These comments illustrate one of the perennial problems in these cases – the threshold for a finding of disability – by reference to the Ogden Tables (in effect, the definition of disability within the Disability Discrimination Act 1995) is relatively low. Thus, the spectrum of disabilities initially 'captured' by the Ogden Tables approach is very wide. Accordingly, some form of 'jury analysis' needs to be engaged by the Judge, as it was in *Billett*, to determine if, realistically, the raw definition of disability is actually sufficient to trigger an Ogden Tables assessment, or whether, in reality, a *Smith v Manchester* approach is sufficient.

At the risk of stating the obvious, that is a matter for the Trial Judge and, therefore, both fact sensitive and judge sensitive. That makes it one of the most difficult elements of any case, for the parties, in this context.

Comments

The *Barry* Judgment is of considerable interest to those practicing in the field of employers' liability claims, or indeed any claim where there is asserted to be an impact on a claimant's future earning capacity by reason of a defendant's negligence or breach of duty. It is, at the risk of stating the obvious, important immediately in the sense that it is the first (reported) application of Ogden in the shadow of the previous *Billett* case. Moreover, in that context, it is a further MOD case and a case involving 'mild to moderate' disability. In that sense, there is some degree of immediate equivalency between the two cases.



However, in *Barry*, the Judge has taken a detailed and, it may be said, extremely thoughtful approach to the Ogden Tables and the previous *Billett* case. He has, for logical reasons, distinguished Mr Barry from the ambit of the *Billett* case and, thereby, awarded him with significant future loss of earnings, based on an assessment of his disability and, of specific interest to practitioners on both sides of the fence, an analysis of the distribution of disability within the studies underlying the Ogden Tables. It is likely that the approach seen in *Barry* is going to be argued for, on behalf of claimants, in future cases – that is to say, once the disability threshold has been crossed, any adjustment to contingencies, apart from mortality to arrive upon the disabled multiplier, should, in effect, more likely be modest (i.e. have a lesser impact on the ultimate reduction of damages) due to the clustering of mild to moderate disability within the disabled working population.

It is conceivable that further study of the disabled population may be required to better understand the impact of their disability on earning capacity and provide yet further context in this area.

A further possible impact of this Judgment – in an appropriate case – is that where there is significant disability (but ongoing employment), adjustment to the contingency factor should, arguably, be even less still – or even to have the effect of reducing the residual earnings multiplier yet further again (favouring a claimant still further).

Inevitably, any discussion of cases in this area would have to say that each case depends on its own particular facts, but it is clear from a reading of *Barry v MOD* that parties would do well to familiarise themselves with the approach taken in this detailed Judgment because it is likely to be seen as a template for the application of Ogden Tables multipliers to future loss of earning capacity. There remains, per *Billett*, an opportunity for argument as to the continued use of *Smith v Manchester* damages – albeit the success (or failure) of that approach is going to depend on a careful analysis of the injury and its (exact) impact on the activities of daily living on a given claimant. Medical evidence, in this context, and at the risk of stating the obvious, will be significant; particularly what any medical expert says regarding the realistic impact of any residual disability. Additionally, factual evidence from a claimant (and analysis thereof) will be of considerable importance in terms of arriving upon an objective assessment of impact on activities of daily living.

Continued debate and legal developments in this area are inevitable. We will, of course, continue to keep our readers advised of material developments.

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CASE UPDATES

Acknowledgment of Service - Challenges to Jurisdiction - Late Service

Pitalis v NHS England
[2023] EWCA Civ 657

The Appellant appealed against a decision upholding the striking out of their claim for failure to comply with the time limit under CPR 7.5, after they failed to serve their claim within 4 months of issue.

After the sealed Claim Form was finally served, the Appellant applied for an Order, a couple of weeks later, that valid service had been effected, whether by rectification of the Claim Form under CPR r.3.10 or otherwise. Alternatively, they applied for an extension of time for service. The Respondent filed an Acknowledgment of Service which indicated their intention to defend the claim, but did not tick the box indicating an intention to challenge jurisdiction. The Respondent did, in addition, promptly apply to strike out the claim for breach of CPR 7.5.

The Appellant's Application was refused and the claim was struck out.

The Appellant argued to the Court of Appeal that the District Judge had erred by not determining that the Respondent had accepted jurisdiction and/or lost its right to challenge the validity of the Claim Form by failing to use the procedure under Part 11 CPR and/or that the Respondent's Solicitors had filed an Acknowledgment of Service without indicating an intention to challenge jurisdiction. They argued that the Respondent's Application could not succeed because it was not an Application under CPR Part 11, as mandated by the Court of Appeal decision in *Hoddinott v Persimmon Homes (Wessex) Limited [2008] 1 WLR 806*. They further argued that the Respondent was, in effect, applying for relief from sanctions, and so *Denton v TH White Ltd [2014] EWCA Civ 906* applied and the Respondent's failure to comply with Part 11 was serious and significant.

The appeal was dismissed.

The Court of Appeal held:

Failure to comply with CPR 7.5(1) was to be treated with greater strictness than other procedural errors. If the Respondent had made its Application expressly seeking a declaration under CPR 11(1) that the Court lacked jurisdiction to try the claim there would have been little the Appellant could have said in response. Whilst the Application should have been brought under CPR Part 11, the failure to have made an Application under Part 11 was an error which could be cured under CPR r.3.10.

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The failure of the Respondent's Solicitors to tick the relevant box when completing the Acknowledgment of Service Form, to indicate an intention to contest jurisdiction, was not fatal to their Application for relief. Rule 11(1) did not say that a box on a form had to be ticked, it said that an Application had to be made. A tick in a box was neither a necessary nor sufficient basis for challenging jurisdiction.

The failure to make express reference to CPR r.11(1) in the covering letter or Application was an error capable of rectification under r.3.10. The Respondent's intentions were made clear by the Acknowledgment of Service, the covering letter and the strike out Application supported by Witness Statements. The failure of the documents served to expressly refer to r.11(1) was not a serious and significant transgression, but was the sort of technical error for which r.3.10 was designed.

Human Rights / Negligence - Social Services / Police - Costs

ABC & Others v (1) Derbyshire County Council (2) The Chief Constable of the Derbyshire Constabulary

Liability Judgment

[2023] EWHC 986 (KB)

The 1st and 2nd Claimants (C) are the parents of the 3rd and 4th Claimants (the children). In 2017, safeguarding concerns were raised by a consultant paediatrician regarding the possibility of Fabricated or Induced Illness in both children, a rare form of child abuse. The children's school had also raised concerns. The 1st Defendant was the Local Authority (D1) and the 2nd Defendant the Chief Constable (D2) of the area in which they resided. D1 and D2 decided it was not appropriate to discuss the concerns with C before removing the children. Accordingly, the children were removed into police protection pursuant to s.46 Children Act 1989 and C were arrested on suspicion of child cruelty offences. All proceedings against C were subsequently withdrawn.

All four Claimants brought claims against D1 and D2 under the Human Rights Act 1998 for breach of their ECHR Article 8 rights. C also brought claims against D2 for false imprisonment and breach of their ECHR Article 5 rights and the children also brought claims in negligence against D1 and D2.

In a Judgment dealing with liability handed down on 28.04.23, the Judge dismissed all of the Claimants' claims.

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D1 accepted it owed a common law duty of care. The Judge accepted D1's submission that in relation to the standard of care the *Bolam* test was applicable. The Judge found the professionals had reasonably concluded that the children would be at immediate risk of significant harm if C became aware of their concerns and all professionals agreed the plan for removal. Whilst it had been a distressing experience for the Claimants, the professionals had been seeking to safeguard the children. Therefore, the decision not to alert the parents prior to removal was not outside the range of reasonable responses open to a reasonably competent and careful social worker judged by the *Bolam* test. There was also no breach of any duty of care owed by D2.

The removal of the children engaged Article 8. However, on the facts, the decisions not to inform C of the concerns prior to removal and the removal were necessary, and the least intrusive measures that could have been adopted. Even if a process for removal other than s.46 should have been used, the children would have been removed in any event by the Family Court making an ex parte interim care order with removal at around the same time.

The claims for false imprisonment were also dismissed. The arresting officers subjectively believed the arrests were necessary for at least one of the reasons given in PACE S. 24(5) and their beliefs were reasonably held; the custody officer subjectively believed that detention without charge was necessary under s.37(3) and he had reasonable grounds for that belief. The Art. 5 claims were dismissed for the same reason.

Costs Judgment

[2023] EWHC 1337 (KB)

In a subsequent Judgment handed down on 06.06.23, the Judge dealt with the issue of costs following the dismissal of the claims.

D1's costs were estimated at £447,742.95 and D2's at £317,628.20. The Claimants accepted they should be ordered to pay the Defendants' costs. However, they contended this was a 'mixed claim' for the purposes of the QOCS regime which was 'in the round' a personal injury case and, therefore, the Court should not grant permission under CPR 44.16(2)(b) for any of the Costs Order to be enforced against them. The Defendants sought to enforce the Costs Order against the Claimants to the level of 85%.

It was agreed this was a 'mixed claim'. Thus, in accordance with the decision in *Brown v Commission of the Police of the Metropolis [2020]*, the first issue to determine was whether these proceedings could 'fairly be described in the round as a personal injury case'. The Judge held they could. By the time of trial, the Claimants were no longer pursuing their claims for just satisfaction damages under the HRA (other than those that reflected personal injury damages), exemplary damages or any claim for a declaration and damages under the Equality Act 2010. The negligence, HRA and false imprisonment claims were pursued at trial almost exclusively for the purposes of obtaining personal injury damages.

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The majority of the heads of claim in the Schedules of Loss fell within the broad definition of claims in respect of personal injuries. Even before trial the parties appeared to understand the claims were focussed on personal injury damage claims. The personal injury element was a necessary element of the children's claims in negligence. All of the disclosure, Witness Statements and expert evidence was necessary for the determination of the personal injury claims.

Whilst the Defendants submitted the Claimants' primary motive for bringing the claims was to hold the Defendants to account, this did not change the fact the Claimants had, in fact, sought personal injury damages in their HRA claims. The agreed expert evidence was that all of the Claimants had suffered psychiatric/psychological injuries and the Claimants could not, therefore, be accused of 'tacking on' weak personal injury claims. The main non personal injuries element of the claim, for aggravated damages, generated no need for additional evidence.

The Judge rejected the Defendants' submission that once the automatic application of QOCS was lost the Court had a wide discretion and should adopt a starting point that 100% of costs should be enforced and look to see if there were particular features justifying a reduction below 100%. Having found that this was 'in the round' a personal injury case, the Judge considered that, following *Brown*, the starting point for the exercise of discretion was that QOCS protection would have been available for the personal injury claim and it was expected that a costs neutral result would be achieved through the exercise of discretion unless there were exceptional features of the non personal injury claims.

The only exceptional feature the Judge found related to the evidence of the Claimants' social work expert, Mr Barratt. His report had been critical of the actions of both Defendants. However, under cross-examination he accepted that D1's social workers had acted correctly. It also came to light that Mr Barratt was not aware of the requirements of CPR 35 and that in the letter of instruction Mr Barratt had been provided with a detailed briefing drafted by the Claimants' Counsel setting out potential failings by D1 and Counsel's chronology. In closing submissions at the liability trial, the Claimants' Counsel had indicated they no longer relied on Mr Barratt's evidence.

The Judge accepted Mr Barratt's evidence that he had not been unduly influenced by the documents prepared by Counsel, but this issue had generated concerns during the trial and contributed to the need for a split trial. The manner in which Mr Barrett's evidence developed also strongly suggested it had not been sufficiently tested before the decision was taken to rely upon it. Mr Barratt's evidence had been relied upon to support the non personal injury claims and the Defendants had incurred some additional costs in relation to those claims, albeit at a very modest level in the context of the claim overall.

The Judge concluded the appropriate level of enforcement was 5% which properly respected the spirit of the QOCS regime and the starting point of the need for a costs neutral result in relation to the personal injury claims, but made an appropriate allowance for the exceptional nature of the 'Mr Barratt' issues insofar as they impacted on the non personal injury claims.

CASE UPDATES

Medical Agency Fees - Recoverability and Breakdown

Northampton General Hospital NHS Trust v Luke Hoskin (Administrator of the Estate of Pippa Hoskin Deceased) County Court at Manchester, on Appeal, 22.05.23

In the first of two recent appeal cases regarding the recoverability of medical agency fees, the substantive action was settled in November 2020 when the Claimant accepted the Defendant's Part 36 Offer. The Claimant's Solicitor drew up a Bill of Costs and served it on the Defendant. All but two items on that Bill were agreed. The outstanding items were:

(1) The sum of £5,400 plus VAT in respect of a medical report from a Consultant in Obstetrics and Gynaecology.

(2) The sum of £8,775 plus VAT in respect of a medical report from a Consultant Cardiologist.

An invoice for each sum, issued by Premex Services Limited, was served with the Bill. Premex is a medical reporting organisation ("MRO"). The Court heard that Premex maintains a panel of medical experts and provides reports at a lower cost than those experts would charge if directly instructed by solicitors.

The Defendant asked for a breakdown of the sums claimed to understand how much of the fee related to the individual medical report and how much related to the services provided by Premex. The request for a breakdown was rejected by Premex/the Claimant's Solicitors, whose position was that the invoice amount was both reasonable and proportionate so that there was no need for a breakdown.

Following the commencement of Detailed Assessment proceedings, the Defendant issued an Application seeking an Order that the Claimant provide the breakdown followed by Points of Dispute which also requested details of the sums charged by the expert and those charged by Premex. The Defendant's Application was refused. The Defendant appealed.

The success of the appeal rested on a single issue: is a receiving party required to provide a breakdown in its Bill between the cost of an expert report and the costs of a MRO?

> The Court considered the Judgment in *Stringer v Copley (2002)* and cited the following passage from HHJ Cook: "[*HHJ Cook] is satisfied that there is no principle which precludes the fees of a medical agency being recoverable between the parties, provided it is demonstrated that their charges do not exceed the reasonable and proportionate costs of the work if it had been done by the Solicitors*."
>
> And further: "*It does, therefore, seem to me important that, whilst there is much to commend the use of medical agencies, it is important that their invoices (or 'fee notes') should distinguish between the medical fee and their own charges, the latter being sufficiently particularised to enable the cost officer to be satisfied they do not exceed the reasonable and proportionate cost of the Solicitors doing the work."*

His Honour Judge Bird held that the language of CPR PD 47 is "very clear and admits no doubt". Paragraph 5.2 applies and provides that if the receiving party is asking the paying party to pay for the cost of an expert, then the receiving party is required to provide a copy of the expert's fee note, with the effect that the precise cost charged by the expert is known. Without the fee note, the paying party cannot make a rational evidence-based decision about whether to accept that aspect of the Bill, reject it or make a counteroffer. He found that the Court was in the same position.

He further held that if the receiving party seeks to recover the fees of a MRO, then the same point applies.

His Honour Judge Bird held that if the paying party (and potentially the Court) is to make a decision about MRO fees it needs to understand what they are. A Judge faced with the task of assessing the items in issue was faced with an 'impossible task' absent a breakdown. He determined that the points made in *Stringer s*till apply, namely that without a breakdown a Judge risked permitting a disproportionate and unreasonable sum. It was, therefore, held that PD 47 imposes a duty on the receiving party to provide the fee note of any expert instructed and, where such costs are claimed, details of the costs of any MRO.

In contrast to this ruling, in April 2023 the case of *Anthony Sephton v Anchor Hanover Group* was heard by a District Judge in the Liverpool County Court, who ruled that it is "irrelevant" how medical reporting costs are broken down. In this case, it was held that the Court should assess whether the extent of recoverable disbursements is reasonable and proportionate, rather than how they are broken down.

The underlying claim was a public liability claim which was settled by way of a Part 36 Offer. It was common ground between the parties that the Claimant was entitled to recover fixed costs and disbursements. An issue arose between the parties, however, as to fees submitted by a medical agency. It was the Defendant's case that the Claimant was only entitled to recover the actual costs paid to the medical practitioners and not any additional charge paid to the agency.

Within the Application made by the Defendant for non-party disclosure (under CPR 31.17), the Defendant originally sought disclosure of documents relating to five invoices submitted by the agency. By the date of the hearing however, disclosure of only one particular invoice was sought relating to an MRI scan which the Claimant had undergone.

The Court held that the costs of obtaining the MRI scan fell to be considered as part of the cost of obtaining the medical reports and the cost was recoverable to the extent that it was reasonable and proportionate. It was held that the Court *"simply does not need to know any apportionment between the provider and the agency"*. The cost had to be assessed on a standard basis with the benefit of the doubt being given to the paying party on the basis of what is reasonable and proportionate. How the cost of the MRI scan was apportioned between the provider and the agency was held to be of limited, if any, relevance and, in those circumstances, referring back to the provisions of CPR 31.17, the Judge did not take the view that the invoice for the MRI scan was likely to support or adversely affect the respective parties' cases on this particular issue or that disclosure was necessary in order to fairly dispose of the claim. The Defendant had other means (such as to produce evidence of the 'going rate' for an MRI scan in the area or by producing the cost of MRI scans that they had paid for in other cases) of challenging the disbursement claimed.

It is understood that this decision is being appealed and so there may be further developments in this area as it is likely that the higher courts will soon be required to resolve the extent to which insurers are entitled to be shown the figures behind invoices from personal injury claimants.

Service of Claim Form - Date of Seal

Walton v (1) Pickerings Solicitors (2) F Brophy
[2023] EWCA Civ 602

The first appeal decision in this case was reported in the August 2022 edition of Dolmans' Insurance Bulletin and readers are referred thereto for further details.

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Briefly, the Claimant (W) attended the Court Office on 20.07.20 to issue his claim and paid the issue fee. The Court did not provide a sealed Claim Form whilst W was present at Court, but was to send it to him after sealing so W could effect service. W did not receive the sealed Claim Form. He served an unsealed Claim Form on 17.11.20. Following a request for the sealed Claim Form from the Defendant, W made enquiries with the Court, whereupon it transpired that the Court had lost the Claim Form. W was asked to provide a new version of the Claim Form which the Court then sealed, backdating it to 20.07.20. This was then served, but was outside the 4 month period for service. W applied for a retrospective extension of time for service, which was refused.

On the first appeal, the Judge had found that discretion should not be exercised because, inter alia, W had left it to the last minute before expiry of limitation to issue a Claim Form. W chose to take responsibility for service. W took no action to find out where the sealed Claim Form was until prompted to do by so by the Defendants. W could have applied for a prospective extension of time. If the extension were granted the Defendants would potentially be deprived of their limitation defences. Whilst the Court was at fault for losing the original Claim Form, the other factors outweighed the Court's mistake.

W appealed to the Court of Appeal submitting that the Court had had no power to backdate the issue of the Claim Form. The appeal was successful. The Court held that, pursuant to CPR 7.2, proceedings were not started until the Court issued the Claim Form. On issue, the Court had to seal the Claim Form and the purpose of the seal was to indicate that the Claim Form had been issued by the Court. The Court had to enter the date of actual issue. There was no power in the Court to seal a claim with a date other than the date on which the Claim Form was in fact sealed. A declaration was, therefore, given that the Claim Form had been duly served.

For further information on any of the above cases, please contact:

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