motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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Lally v Butler [2022]

The claimant, 'C', suffered minor personal injury in a road traffic accident in November 2020. C submitted a Claims Notification Form through the RTA portal in accordance with the Pre-Action Protocol for Low Value PI Claims in RTAs. Liability was admitted. C obtained a medical report which anticipated a full recovery from soft tissue injuries after 6 to 7 months. 10 sessions of physiotherapy were recommended. No reference was made to the need for a further medical report. The report was served on the defendant, 'D', on 23 February 2021, with a request for a stay pursuant to paragraph 7.12 of the Protocol because C was uncertain as to whether she would recover in line with the prognosis in the medical report. C requested an interim payment of £1,615. D did not reply and did not make an interim payment. On 18 March 2021, C notified D that her claim would now exit the portal pursuant to paragraph 7.28 (failure to make an interim payment).

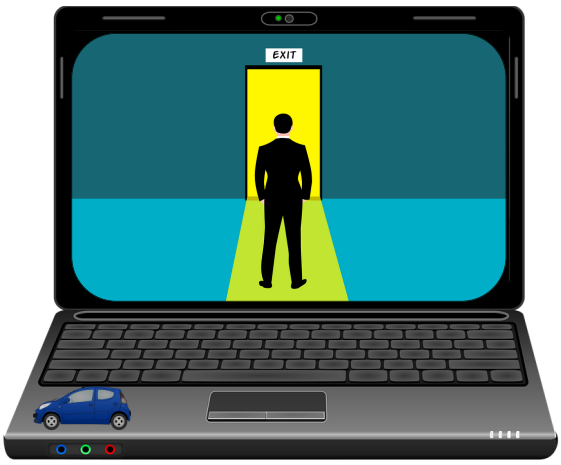
C issued Part 7 proceedings and the claim was settled. D refused to pay C's Part 7 costs. At first instance D was ordered to pay C's costs on the ground that C was entitled to exit the portal because D had failed to respond to the request for a stay or had failed to pay any interim payment.

D appealed submitting that C had no valid reason to leave the portal. No right to request an interim payment had arisen. A further medical report was not needed. Further, as no stay had been agreed, the request for an interim payment was premature. In any event, it was unreasonable for C to exit the portal.

Paragraph 7.12 provides "*Where a claimant needs to obtain a subsequent expert medical report … the parties should agree to stay the process in this Protocol for a suitable period. The claimant may then request an interim payment …*".

The judge held that *Greyson v Fuller [2022]* was clear authority that a claimant can be said to 'need' a subsequent medical report (as required by para 7.12) only where that report is 'justified'. Accordingly, an interim payment can only be requested under para 7.12 where a second medical report is justified. C's medical report had provided a clear prognosis. No right to request an interim payment arose in this case because there was no need for a subsequent medical report. In the circumstances, there was no obligation for D to make an interim payment and no right to exit the portal under paragraph 7.28.

Accordingly, D's appeal was allowed on the first ground of appeal and the judge did not go on to consider the further grounds of appeal.



Aviva Insurance Limited v Sakyi [2022]

This claim involved a respondent who had been involved in a road traffic accident with the applicant's insured driver. He claimed for personal injury and for time taken off work, but also claimed for £25,000 credit hire and £1,706 for the value of his motorcycle on the basis that it was no longer roadworthy.

The respondent had claimed to have been stationary at the time of the accident and hit from behind, but CCTV from a bus showed the respondent had actually clipped the offside of the applicant's insured driver's vehicle. Further documents, including insurance database searches and DVLA records of the motorcycle, purportedly showed that the respondent had continued to ride the motorcycle after the accident.

Immediately after the disclosure of the CCTV, the respondent made an application to have the footage disallowed due to delay. This application was dismissed by the district judge. The respondent filed a Notice of Discontinuance on the eve of the trial, on 8 October 2020.

On 26 October 2022, the applicant issued a permission application alleging that the respondent had interfered with the due administration of justice and had knowingly made false statements in his Particulars of Claim and Witness Statement.

The court heard there was no communication between the parties until the Part 8 Claim Form and evidence were served on the respondent.

Sarah Crowther KC said she was 'very troubled' by the 17 month delay in bringing the application, but, notwithstanding the excessive and unexplained 17 month delay in issuing, she held it was in the public interest to proceed. The respondent could still have a fair hearing because the proposed grounds for committal, that he had knowingly advanced a false account of the accident and a false claim for credit hire replacement vehicle charges, were discrete points unrelated to memory or other evidence.

Holdgate v Bishop [2022]

The claimant asserted he was entitled to damages in respect of alleged pecuniary losses caused, as a result of his index injuries, due to him having to sell land which otherwise he would have developed himself at a profit. The defendant made an application for summary judgment on a narrow issue: whether the claimant had instructed a firm of solicitors in respect of a proposed property sale transaction prior to the index accident.

The defendant filed a counterclaim alleging fundamental dishonesty, and the claimant, in his Reply and Defence to Counterclaim, and by way of response to the defendant's CPR 18 Request for Further Information, admitted that his case was that he had no pre-accident intention to sell the land and that there were documents evidencing an offer to purchase the site prior to the accident.

The claimant, however, qualified those admissions and also said that he had significant memory problems such that any inaccuracies that he had put forward were inadvertent. The defendant's application, pursuant to CPR 24, invited the court to proceed on the basis that the claimant had taken steps to progress the pre-accident offer.

The court granted the defendant a declaration, by way of CPR r.24.2, providing that the personal injury claim against him should proceed on the basis that the claimant had, in fact, instructed solicitors to sell the undeveloped land prior to his road traffic accident. The claimant's case on that issue lacked clarity and he had maintained a contradictory position. It was consistent with the overriding objective not to put the defendant to the expense and time of proving something that, but for the claimant's stance, ought not to need proving.

Barrow v Merrett [2022]

The claimant, a minor, who was 11 years old, sustained catastrophic injuries when hit by a car in 2015.

A claim for compensation worth in excess of £10m was made, but disputed by the defendant's insurer on the basis that the claimant had run into the road making the collision unavoidable. It was argued on behalf of the claimant that he was walking at the time of the accident, fell and was in the process of standing up when he was struck by the defendant's car. Expert evidence could not determine factors central to the issues, but contemporaneous accounts supported the defendant's case.

The case was originally dismissed (no liability on the defendant) by Richard Hermer KC in March 2021, but was appealed to the Court of Appeal in June 2022. There were three grounds of appeal.

Firstly, that the judge erred in law by failing to have "proper or any regard to objective or undisputed evidence and failed to test the evidence of the witnesses against that evidence, but, instead, made findings of fact which conflicted with the objective evidence, without acknowledging that conflict".

Secondly, the judge "did not assess the evidence in a fair way", relying on a theory which was not pleaded nor put to medical experts nor agreed by accident reconstruction experts.

Thirdly, the judge was 'irrational' to reject the evidence of a schoolfriend of the 11 year old who was with him at the time, and accept, instead, the evidence of a neighbour who was driving past. The appeal was dismissed with the Court of Appeal ruling that the evidence of eyewitnesses and other contemporaneous accounts should take precedence when expert testimony cannot 'unlock' a case.

Lady Justice Elisabeth Laing said, "The first point is that the judge recognised that the 'hard' expert evidence might unlock the case. He analysed the evidence with that point in mind and decided that the 'hard' expert evidence was not the key". This was not a wrong approach, Laing LJ said. She said the judge "weighed the evidence conscientiously and the claimant's submissions were designed to show that the judge could have made different findings on the evidence, rather than to show that the findings which he did make were wrong".

Islington London Borough Council v Bourous / Davies v Yousaf [2022]

In joined appeals, two insurers appealed against decisions concerning claims for the cost of hiring replacement vehicles under the Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

The claimants were both taxi drivers who had been injured in road traffic accidents and had made personal injury claims under the Protocol. Their claims also included the cost of hiring replacement taxis whilst their own vehicles were damaged.

In the first claimant's case, the insurer had made an offer in respect of car hire at Stage 2 of the Protocol. The first claimant did not accept the offer and the claim proceeded to Stage 3. However, the insurer asked the court to transfer the case to Part 7 so it could file and serve a Defence and evidence in order to argue that the first claimant had not made a claim for loss of profit and, therefore, was not entitled to claim hire charges. The insurer was allowed to rely on the argument by the deputy district judge at the Stage 3 hearing, which ultimately resulted in the claim being dismissed. On appeal, this finding was overturned due to the issue of loss of profit point not having been raised by the insurer at Stage 2, reiterating that a defendant could not object at Stage 3 to a claim under a particular head of damage except on those grounds expressly raised at Stage 2.

The second claimant had provided a Witness Statement indicating he could not afford to repair or replace his vehicle and as a self-employed taxi driver needed a replacement vehicle in order to pay his bills and living costs. At Stage 2, the insurer put him to proof over the claim for hire and requested evidence of his impecuniosity. The matter proceeded to Stage 3, where the district judge awarded the second claimant damages for vehicle hire. A circuit judge upheld that decision, finding the material in his Witness Statement had entitled the district judge to find the second claimant was impecunious and needed a replacement vehicle.

Upon the insurers challenging these findings, the Court of Appeal dismissed both appeals, emphasising that the Protocol for Low Value Personal Injury Claims in Road Traffic Accidents was designed to enable the parties to narrow and limit the issues in dispute, so that if a decision by the court was necessary at Stage 3, that decision would only concern the narrow issue which the parties' exchanges under the Protocol had already defined.

The Costs Year Ahead

As we enter the New Year, it is perhaps worth reminding ourselves what should be happening in terms of dispute resolution within the next 12 months and with particular emphasis on costs.

Fixed Recoverable Costs Extension

Extension to fixed recoverable costs is expected to be introduced in October 2023, although we still await the draft rules. There is no timetable yet for those draft rules, although the MOJ has confirmed it will give stakeholders early notice. From experience, that may not necessarily be the case.

By way of reminder, the main expected reforms include:

- Fixed costs to apply to all fast track cases.
- The introduction of an intermediate track to encompass cases valued between £25,000 and £100,000 in damages where:
  a) the trial is less than 3 days.
  b) there are no more than 2 experts giving oral evidence for each party.
  c) it is just and proportionate to manage the case under an expedited procedure.
- A provision that no case will be allowed to exit fixed recoverable costs in the absence of exceptional circumstances.
- An uplift of 35% on the failure to beat an opponent's Part 36 offer, which can be increased to 50% where the party has behaved unreasonably.

Wider Cost Reform

The Civil Justice Council has a working group undertaking a wider review of costs generally which, in turn, follows on from a public consultation that concluded in October 2022. This includes a number of core areas, including the vexed subject of cost budgeting as follows:

- The impact and effectiveness of cost budgeting.
- Guideline hourly rates for summary assessment in terms of their purpose and effect.

- The wider impact of the proposed extension to fixed recoverable costs.

- The role of pre-action protocol's and portal's impact on costs and whether the same should be reformed.

Exactly when the results of this review will become known is unclear, although Birss LJ, who leads the review group, has previously indicated that the group was on target to report to the Civil Justice Council in January 2023.

Revision of QUOCS Rules

Readers will be aware that since *Cartwright v Venduct Engineering Ltd [2018]*, sums payable under the Schedule of a Tomlin Order or following a Part 36 acceptance meant that no damages had been 'ordered' and, as such, a defendant cannot setoff its Costs Orders against anything it has to pay. As a result of this, CPR 44.14 (1) is being redrafted. The proposed draft should have been finalised in December 2022 by the Civil Procedure Rule Committee, although the minutes are currently awaited.

It is anticipated the new wording will be introduced in April 2023.

If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

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