motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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summer 2021

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West v Burton [2021]

This case involved a claimant who was involved in a road traffic accident and as a result suffered injury. The claimant's solicitors submitted a Claim Notification Form (CNF) using the portal, to which the defendant's insurers acknowledged the CNF. Liability was not admitted and the claim 'exited' the portal. The claimant died shortly afterwards for reasons wholly unconnected with the accident. The claimant's solicitors informed the defendant of the claimant's death and indicated an intention to instruct an expert doctor. Following receipt of the report, the insurers made a Part 36 offer which was accepted, however agreement could not be reached as to whether costs were to be paid pursuant to Part 45 CPR Section II or Section IIIA. Proceedings were issued under Part 8 and the court determined that fixed recoverable costs were payable under Section II.

The defendant appealed to the Court of Appeal and argued that the focus was on the 'claim started', not on 'the claimant', because r.45.29A and r.45.29B specifically applied to a claim started under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The Court of Appeal dismissed the appeal stating that as an executor cannot start a claim under the protocol given the provisions of paragraph 4.5 (3), later settlement on behalf of the original claimant's estate is not a claim within the ambit of CPR r.45.29A or r. 45.29B.

Accordingly, costs fell to be assessed by reference to the generally more favourable Section II. The outcome would be the same whether or not a claim exits the portal.

SGI Legal LLP v Karatysz [2021]

A client challenged their solicitor's bill of costs after bringing a successful claim for damages following a road traffic accident.

Section 74(3) of the Solicitors Act 1974 provides that the amount allowed in county court proceedings may not exceed the amount that would be allowed as between party and party. CPR 46.9(2) states that section 74(3) applies unless the solicitor and client have a written agreement expressly permitting payment to the solicitor of more costs than the client could recover from another party. CPR 46.9(3)(c) provides that, subject to paragraph (2), in a detailed assessment of solicitor and client costs, costs are presumed to have been unreasonably incurred if they are of an unusual nature or amount and the solicitor did not tell the client that as a result the costs might not be recovered from the other parties.

In deciding this case, the judge held that the issue under CPR 46.9(3)(c) is what the solicitor told the client, but not whether the client agreed or approved what the solicitor told them. The document which the solicitor provided to the client headed "CFA: What You Need to Know" said that the costs chargeable under the agreement would almost certainly exceed the fixed costs payable by the opponent, so the client would be required to pay the shortfall from her damages. It also stated that she would have to pay the success fee and the ATE insurance premium herself.

Accordingly, it was held that informed consent was not relevant or required for the purposes of CPR 46.9(3)(c) in considering whether solicitor/client costs have been unreasonably incurred.

Greenway v Parrish & Others [2021]

The claimants were aged 16 and passengers in a motor car being driven by a 16 year old friend who was driving his father's car. They were involved in a road traffic accident and seriously injured. The primary issue in relation to the insurer's liability related to whether or not the Road Traffic Act 1988 was compatible with Article 13 of Directive 2009/103/EC and specifically the meaning given to the word 'stolen'. The permitted exclusion from the scope of compulsory insurance set out in Article 13 is in respect of claims made by *"persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen"*.

Section 151(4) of the Road Traffic Act 1998, however, enacts the exclusion in slightly different language referring to claims by passengers who *"knew, or had reason to believe, that the vehicle had been stolen or unlawfully taken".* The accident occurred at a time when European law applied, but the UK's withdrawal from the European Union meant that the issue of construction could not be referred to the European Court. The defendant applied for permission to call expert evidence in relation to the construction of the Regulations. The Master refused permission, but the defendant appealed.

Spencer J reversed the Master's decision and allowed the insurer's application on appeal for four experts from other jurisdictions to give evidence on how Article 13 has been implemented. Spencer J stated, "*What is needed is an explanation to the court of how the word is used and interpreted in the particular member state in order to inform the court as to the potential correct interpretation of the word in the Directive … the court will use not just the language but also the wider purposive concepts which lie behind the Directive."* However, he said that fully analysing all 27 EU Member States' *approaches "would make litigation of this kind quite unmanageable"* and also referred to *"the nightmare"* of being faced with multiple translations of the Directive. He, therefore, allowed the appellant insurer's request for four experts, which was proportionate given the serious injuries suffered by the claimants.

Kasabaqi v Westway Community Transport Ltd [2021]

This case involved a claimant who had been seriously injured in a road traffic accident involving one of the defendant's drivers, which had led to the amputation of his left leg. Liability was admitted by the defendant and the trial on quantum was due to be heard in 2022. Expert reports were ordered in ten fields, but two of the defendant's experts had not yet examined the claimant because the claimant had failed to confirm and attend appointments, and had been abusive towards one of the experts. The defendant submitted that the claimant's conduct was so serious that they had been deprived of their right to defend themself and that his claim was an abuse of process. The defendant applied to strike out the claim and also ran an alternative argument that if the claim was not struck out, applying for an Order that unless the claimant attended the rescheduled appointments with their experts, he should not be allowed to rely on his own experts' reports in those fields.

While the court sympathised with the defendant's irritation at the slow progress in obtaining the expert evidence, the claimant's conduct was not an abuse of process. The court refused to strike out the claim as there was no evidence that the claimant was hostile towards the experts as many experts had already examined him.

In addition, there was no evidence that the defendant would not be able to have a fair trial. In any event, the judge confirmed he would have declined to exercise his discretion to strike out the claim as it would be unfair to shut the claimant out from his claim where liability had already been agreed.

Covey v Harris [2021]

The claimant claimed damages of £8.8 million for personal injuries alleged to have been sustained in a road traffic accident. The defendant admitted primary liability in February 2015, but alleged contributory negligence due to the claimant's failure to wear a seat belt. Liability was agreed 80:20 in the claimant's favour. The defendant applied to amend his Defence to plead a positive case of fundamental dishonesty against the claimant and invited the court to dismiss the claimant's claim in its entirety under the Criminal Justice and Courts Act 2015, s. 57. The defendant's alternative case was that the claimant's account of the accident and the nature and severity of her symptoms had varied over time, were unreliable and had been exaggerated.

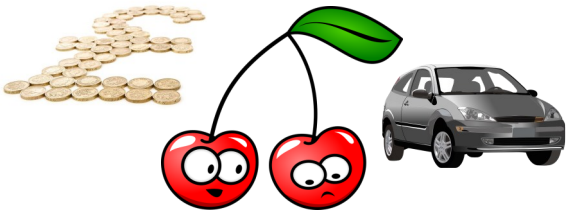
The defendant's application was granted. It was held that although there was no obligation to plead fundamental dishonesty, following *Howlett v Davies [2017]*, it was sensible to do so and in keeping with the overriding objective that the parties knew all elements of a case before the hearing. The claimant had known for some time that the defendant's case was that she was fundamentally dishonest, so there was no real prejudice to the claimant and no risk to the trial date. Although it was held in *Mustard v Flower [2021]* that permission to amend a Defence would be refused if the case put forward amendment which had no real prospect of success, the defendant was seeking to plead a positive case of fundamental dishonesty and the facts of this case were different.

AXA Insurance Ltd v Lakhani [2021]

This case involved a claimant who had been in a road traffic accident with the appellant's insured, for which the insured was 95% liable. Following the accident, the claimant hired a replacement vehicle whilst his car was undergoing repairs. The claimant's hire period amounted to 109 days at a daily rate of £151.45, totalling £19,847.52, albeit it was estimated that the repairs would only take 12 working days. At the hearing, the appellant's counsel produced a statement setting out comparable credit hire rates for each of the vehicles the claimant hired. However, the statement produced at the hearing differed from the rates in the underlying documents, and during the hearing the appellant conceded that the figures were inaccurate.

The judge stated that the main point to determine was that the challenge to the hire rates was an argument based on the legal concepts of failure to mitigate, which was a high hurdle for the appellant to cross and that it had failed to do so. The appellant's insurer appealed stating the judge had failed to apply the law set out in *Stevens v Equity Syndicate Management Ltd [2015]* to determine evidence of car hire rates and had wrongly failed to rely on the basic hire rate figures in the appellant's schedule.

At appeal, it was held that the judge had been wrong to suggest that the burden of proof was too a high standard and had applied the wrong standard of proof. Although, the figures in the appellant's statement differed slightly, that did not undermine the underlying evidence which clearly showed that the basic hire rate was less than what the claimant had paid. The claimant argued that the appellant was cherry picking the available rates, however it was found that cherry picking was a legitimate part of the exercise.



The aim of the exercise was to identify comparable figures which were less than the rate charged to the claimant. It was held that the appropriate period of hire was 7 days, with a rate of £405.38 for each 7 day period. The claimant was entitled to recover that amount per week, as well as £21.55 per week for excess insurance. The total figure, including delivery and collection, minus the 5% contribution, was £6,320.26.

Lavender v Liverpool [2021]

This case involved a claimant who, while riding his motorcycle, collided with a car being driven by the defendant's insured. Liability had been admitted by the defendant and the matter came before a judge who gave directions and a timetable for the matter to proceed to trial in November 2021. Directions also included for the provision of multiple medical expert reports.

The claimant applied for a stay of the November 2021 trial date, contending that he was not in a position to undertake the structured rehabilitation that had been set for April 2021. The application to vacate the trial date was refused as there was no compelling evidence to support a stay. The overriding objective applied throughout and provided that all cases needed to be dealt with fairly, but fairness applied to both sides and it was necessary to deal with a case proportionately. The judge stated that vacating a trial was a direction that would rarely be given by a court and only as a last resort.

The judge noted that the claimant had had the opportunity for rehabilitation at an early stage that did not progress and the defendant's solicitors were clearly keen to support his rehabilitation as case workers had been instructed. The judge conceded it was unfortunate there had been a breakdown in the relationship between the case worker and the claimant which brought that to an end. However, there was no other evidence which supported a stay.

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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