motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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Evans v Betash [2021]

This case involved a claimant who was the front passenger in a car which left the road and hit a tree in 2009, leaving her with a traumatic brain injury.

Primary liability was admitted by the driver, and in November 2011 the claimant accepted a Part 36 offer of £100,000, against the advice of her solicitors who were the Betesh Partnership. As a result, the claimant cancelled an appointment to see a neuropsychologist and did not see him for over 6 years, when he found that she *"probably lacked capacity"* to instruct lawyers in 2011. In 2017, the claimant brought a new claim against the Betesh Partnership and her barrister alleging, among other things, that the defendants should have investigated whether she had lacked capacity to litigate and ensured that she had been seen by a neuropsychologist. Had these steps been taken, she would not have settled for £100,000.

The claimant, through her new legal team, had refused to sue the driver, and the Betesh Partnership solicitors applied to strike out the claimant's claims against them, or alternatively for her claim to be stayed until her claim against the driver was concluded. The Applications were originally dismissed, but on appeal allowed.

Overturning the decision of the High Court, the Master of the Rolls held that the claimant had a valid claim for loss on the basis her claim was under settled, aside from the issue of capacity to litigate. She was entitled to plead, in effect, that she did not know whether she lacked capacity to litigate at the time of the settlement. Accordingly, the claimant's claim was permitted to proceed. At the invitation of the Court of Appeal, the defendants also provided an indemnity to the claimant to fund her Application to re-open the underlying settlement.

Lavender v Liverpool Victoria Insurance Company [2021]

This case involved a claimant who had been on a motorbike when he was involved in a collision which resulted in the claimant suffering from serious knee, head, shoulder, and psychological injuries. Liability for the accident had been admitted and the proceedings were concerned with quantum only. Directions from the judge allowed for each side to rely on five expert witnesses and a trial date had been set. However, the claimant had instructed a new legal team and applied for permission to rely on evidence from three additional medical experts.

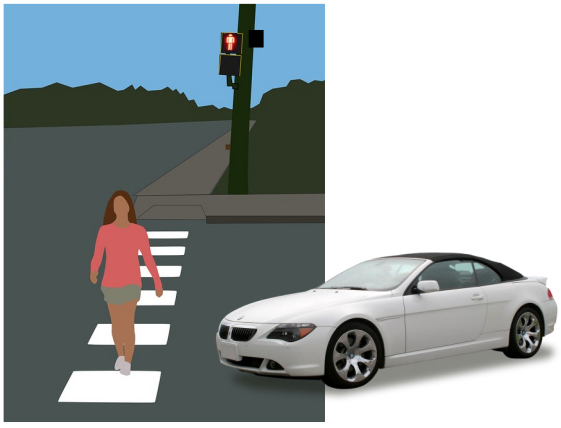
The claimant argued that he had been let down by his previous legal team and a pain specialist was required in respect of ongoing issues. The claimant also sought permission to present evidence from care and physiotherapy experts. The defendant opposed and argued that the pain issue had been known about since the beginning, and that if an expert was needed that should have been flagged at an earlier Case Management Conference by the previous solicitors. The judge agreed with the defendant and the claimant's Application was refused.

It was held that granting the claimant's Application would inevitably disrupt the trial date and the claimant's previous legal team had been aware of his pain issue and had not suggested that an expert would be required. The judge considered that it would be able to assess whether amounts claimed for care were excessive and deal with what sort of care would be required without the assistance of a specific care expert. The orthopaedic expert would be able to deal with the claimant's physiotherapy. To conclude, the judge considered that the experts sought were unnecessary, especially at such a late stage.

Alabady v Akram [2021]

This case involved a claimant who was 9 years old at the time of the accident. The claimant was crossing a major dual carriageway with 3 lanes of traffic in each direction. The claimant was with her mother, an adult cousin and 2 other cousins aged 11 and 9.

Although they used a light controlled crossing, they began to cross when the 'red man' indicated pedestrians should not cross. The defendant's car, travelling at 43mph in a 30mph limit, was approaching from their right, about 75m away. Whilst other members of the group slowed down when there was an oncoming car, the claimant carried on, and the point of impact was about 2m in front of the group.



The defendant's evidence was that he had seen the group crossing and assumed that they would stop before reaching his lane. Primary liability was admitted, but a trial on contributory negligence was heard, where the judge was determining a preliminary issue as to whether there was any contributory negligence and the extent of such negligence. No live evidence was called, the incident having been captured on CCTV, footage from which was analysed and formed the subject of an agreed report from accident reconstruction experts. Amongst other things, the experts concluded that if the claimant had looked to her right as she started to cross, she would have had a clear and uninterrupted view of the defendant's car.

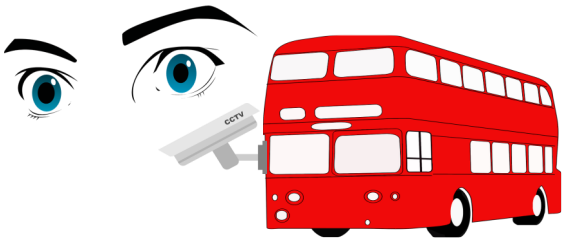
However, they also agreed that had the defendant been travelling at 30mph when the claimant began to cross the claimant would have completed her crossing without a collision, and had the defendant performed an emergency stop when he saw the group he would have been able to avoid the collision if travelling at 30mph and may have been able to do so at 43mph.

The judge found that the standard of care to be expected of a child was to be judged by what was reasonably expected of a child of her age, intelligence and experience. The judge concluded that the defendant's evidence was that he was prepared to take a gamble based on his own assessment of their speed that he would have passed them before they crossed his path. The judge decided that the claimant was not at fault by crossing the road when the 'red man' signal was against her. She was with a group under the general supervision of her mother and with her adult cousin. It would not be reasonable to expect a child of her age to keep such a close eye on the group around her that she could stop within a second or so of them stopping while crossing the road.

Chan v (1) Peters (2) Advantage Insurance Company Limited [2021]

On 29 November 2017, the claimant, aged 17, was seriously injured in a road traffic collision involving the 1st defendant's ("the defendant") vehicle. The claimant was crossing the road outside his school in which he was in the lower sixth form.

As a result of the collision, the claimant sustained a traumatic brain injury, a fractured skull, left traumatic optic neuropathy, muscle damage to his left knee and lacerations to his face, elbow and knees. Cavanagh J, sitting in the High Court, was required to determine liability. Due to his significant injuries and inability to recall the collision, the claimant was unable to give evidence, but other eyewitnesses were called. CCTV from a nearby bus was obtained and analysed, collision reconstruction experts were called to give evidence and vehicle examiners and the police took part in the proceedings.



The court had to consider: a) whether the collision was caused by the defendant's negligence; b) whether damages should be reduced due to the claimant's contributory negligence and; c) if so, by how much?

Cavanagh J outlined the legal principles to be applied in such cases. He said that the defendant would be liable in negligence if they failed to attain the standard of a reasonable careful driver and if the accident was caused as a result. The burden of proof rests with the claimant, on the balance of probabilities. He said that the standard of care is that of the reasonably careful driver, with experience of how pedestrians, and particularly children, are likely to behave. If a real risk of danger emerging would have been reasonably apparent to the driver, then reasonable precautions must be taken.

The judge made it clear that the Defendant should not be judged by the standards of an ideal driver, nor with the benefit of hindsight, but it should be assumed that drivers are familiar with the Highway Code and must recognise, when getting behind a wheel, that a motor vehicle is a potentially dangerous weapon.

In relation to contributory negligence, Cavanagh J reiterated that *"the apportionment of responsibility is inevitably a somewhat rough and ready exercise"* and the age of the claimant is irrelevant for the determination of the extent of contributory negligence.

It was established that the defendant was travelling at 25mph, which was below the recommended 30mph speed limit. A witness, who was travelling behind the defendant, confirmed that before stepping out into the road the claimant did not look to his right at any time. The witness stated that he believed the claimant was responsible for the collision. After examining the expert evidence, Cavanagh J concluded that the defendant had not been negligent. He found that the defendant had *"acted in the manner of a reasonably competent driver in the way that she reacted once she perceived that the claimant was jogging into the road"*. As there was no finding of negligence by the defendant, the question of contributory negligence did not arise and the claim was dismissed.

"The claimant has simply misunderstood the rules"

Jimenez v Esure Services Limited [2021]

This case, before Deputy Master Friston in the Senior Courts Costs Office, considered whether any conditions could be attached to Part 36 offers and if a claim had been unreasonably removed from the portal following a request for an interim payment.

The Facts

The claimant was injured in a road traffic accident and a claim was submitted in the MOJ Portal. Liability was admitted and the claim for damages for vehicle damage settled reasonably quickly. The only outstanding matter was the damages claim for injury. A medical report recommended that a psychological report be obtained and the claimant requested an interim payment of £1,000 to fund that report. That request was made at the end of Stage 1. There was no request for a stay, pursuant to paragraph 7.12 of the Pre-Action Protocol. The defendant did not respond to the request for an interim payment and the claimant gave notice that the matter had exited the portal. The claimant obtained a psychological report and then issued proceedings under Part 7.

Following the issue of proceedings, the defendant made a Part 36 Offer to settle the matter in the sum of £5,350. In response to that offer the claimant wrote: *"We assume, from the terms of your letter, that our client's costs will be dealt with on post-portal fixed costs basis and reasonable disbursements. If this is not correct, then please return to us in the next 3 days"*.

The claimant subsequently sought to characterise this as being a counteroffer (namely, an offer to accept £5,350 plus costs calculated in accordance with CPR 45.29C). The defendant did not respond. Accordingly, the claimant then wrote to the defendant accepting the offer to pay damages of £5,350, *"on the basis that (the claimant's) post-issue fixed costs and reasonable disbursements were paid in addition"*. The defendant subsequently sent a cheque in settlement for the damages of £5,350, but disputed the costs recoverability sought by the claimant.

The question at assessment was whether there was a concluded agreement that fixed the costs to those allowable under CPR 45.29C (claimed at £8,246.40). The defendant argued that the claimant was entitled to recover only fixed costs and disbursements in accordance with CPR 45.15 and 45.19 (£1,776). The court was also required to determine whether the claimant had acted unreasonably in exiting the claim from the portal and whether the amount of the claimant's profit costs should be determined by reference to the damages, either inclusive or exclusive of vehicle-related damages.

The Decision

The court held that there is no provision within Part 36 for unilateral conditions or qualifications to be attached to offers. The claimant was estopped from arguing that there was a contractual non-Part 36 agreement regarding costs. The notion that a counteroffer was accepted by the defendant sending a cheque did not find favour with the judge.

In relation to interim payments, the Pre-Action Protocol is set out in a chronological way. Paragraph 7.12 ought to be read in conjunction with 7.13 onwards. If a claimant wishes to benefit from the provisions of paragraphs 7.12 to 7.22 and be paid an interim payment, they must first obtain a stay under paragraph 7.12. The claimant did not do this and unreasonably exited the process. It was also held that it was unreasonable to seek an interim payment to fund a single medical report and that interim payments are meant for damages and not costs.

As the court decided that the matter had settled via a Part 36 Offer, the value of the fixed costs was to be calculated by reference to the amount of the offer which had been accepted. The vehicle related damages, which were settled previously, were, therefore, excluded from the calculation. Accordingly, the claimant's costs were reduced from £8,246.41 to £1,776.00 and the claimant was ordered to pay the defendant's costs of the assessment proceedings.

Comment

The outcome should come as no surprise to readers, but it is important to remember that where a party wishes to make a counteroffer they should make it clear that the Part 36 offer is not accepted and put forward a separate, non-Part 36, offer, perhaps a *Calderbank* offer, setting out the terms which they are willing to accept.

That will not only clarify the position, but also allow the court to assess the costs consequences arising from the offer under CPR 44.2(4)(c): *"In deciding what order (of any) to make about costs, the court will have regard to all the circumstances, including … any admissible offer to settle made by a party which is drawn to the court's attention and which is not an offer to which costs consequences under Part 36 apply"*.

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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