motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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summer 2023

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Brown & Another v Sestras & Others [2023]

This claim involved a child claimant who was a rear seat passenger in his mother's vehicle when a black Mercedes cut in front of it at speed. The claimant's mother lost control of her vehicle and crashed. Sadly, the claimant was very seriously injured. The black Mercedes did not stop after the accident, but shortly after the accident an anonymous caller told the police that he had managed to follow the Mercedes after it drove off.

The anonymous caller gave the police a registration number which did, indeed, belong to a black Mercedes, owned by Mr Sestras. He was subsequently visited by the police and arrested, but denied any involvement, claiming mistaken identity and stating that his Mercedes was not involved. Fortunately, the other passengers in the claimant's car gave a description of both the Mercedes and its passengers that matched Mr Sestras' car, Mr Sestras himself and his wife.

The case was unusual in that it depended for its central allegation on the hearsay evidence of the anonymous caller to the police who identified the Mercedes of Mr Sestras. The judge rejected the evidence of Mr and Mrs Sestras and their rear seat passengers in favour of that of the occupants of the Peugeot, other independent witnesses and the anonymous caller. Having denied he was there at all, Mr Sestras was left with no opportunity to defend or explain the actual manner of his driving and was found entirely to blame for the accident. The claimant's mother was absolved of any responsibility.

Tabbitt v Clark [2023]

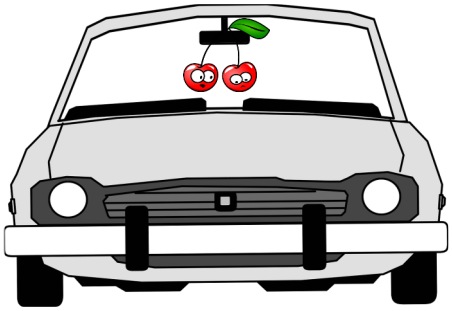
The claimant sued for damages in respect of personal injuries sustained in a road traffic accident. The claimant accepted the defendant's Part 36 offer out of time and the parties agreed that the usual costs order should apply, i.e. that the claimant should have his costs up to 21 days after service of the defendant's Part 36 offer and the defendant should have his costs thereafter. The action was subject to QOCS and the parties also agreed that the defendant was entitled to costs, but the provisions of QOCS that then applied meant that these could not be enforced. The claimant sought a declaration to protect his potential liability for costs following late acceptance of the Part 36 offer because he had been concerned that the existing QOCS regime might be amended to permit enforcement of costs on a retrospective basis.

At first instance, it was held that since the claim had been disposed of by agreement it would have been open to the parties to have achieved the claimant's objective by agreement, perhaps by making it a condition of acceptance of the Part 36 offer that no costs order would be enforced against the claimant or by offering to accept a lower sum in exchange for that agreement. That was not done and HHJ Walden-Smith refused to make the order that the claimant sought. The claimant appealed, but the Court of Appeal upheld HHJ Walden-Smith's refusal to make a declaration on the basis that the responsibility for making any changes lay with the Civil Procedure Rules Committee and HHJ Walden-Smith was, therefore, entitled to leave the matter to the Committee. In any event, the claim was unaffected by the changes made as the Civil Procedure (Amendment) Rules 2023 r.24 only applied to claims where proceedings had been issued on or after 6 April 2023.

Rowbottom v The Estate of Peter Howard (deceased) & Another [2023]

This case involved a claimant pillion passenger on a motorcycle who sustained serious injuries when she was involved in a head on collision between the motorcycle and a vehicle. The rider of the motorcycle was tragically killed in the accident. The claimant brought a claim against both the driver of the vehicle and the estate of the motorcyclist.

The judge heard evidence from several witnesses of fact and from three accident reconstruction experts. The witnesses of fact were unable to provide evidence to state exactly where the vehicles were situated at the moment of impact, therefore the judge turned to the expert evidence. The expert witness of the driver of the vehicle gave evidence stating that the crash was caused by the motorcyclist as he was riding on the wrong side of the road. However, the judge expressed criticism towards this expert witness, firstly, because of the nature of his evidence which the judge stated was "*obviously incorrect*" and "*palpably false*", and, secondly, due to his conduct as an expert witness. When addressing the second point, the judge stated that the expert was ignorant of his obligation to '*fairly deal with all the evidence*' and had sought to cherry pick only parts of the evidence that supported his theory.



Whereas, the judge was impressed by the other two experts. The claimant's expert he felt "*carefully weighed all the evidence and had presented a persuasive account*". The motorcyclist's expert "*carefully analysed the evidence and presented a fair and convincing account of the collision in his written and oral evidence*".

It was held that the motorcyclist was on the correct side of the road when the collision occurred and that whilst he was slightly in excess of the speed limit, this did not indicate either breach of duty or causation. Therefore, the claimant's claim against the motorcyclist was dismissed, but succeeded against the driver of the vehicle.

Mehmood v AIG Europe Limited & Another [2023]

The claimant brought a claim for substantial hire costs, recovery and storage, together with vehicle damage. The claimant was a taxi driver involved in an accident in Wakefield in 2016. His replacement car hire claim totalled £107,000 based on hiring a replacement plated taxi for 456 days at a daily rate of £195 plus VAT. It was held that the total amount claimed was an "*extraordinary sum*" in the context of a vehicle itself worth only £2,190.

The judge held that the starting point was that the vehicle was a profit-earning chattel and that the true loss was, therefore, the loss of profit suffered whilst the claimant's damaged vehicle was reasonably off the road pending repair/replacement.

As the cost of hire significantly exceeded the claimant's hypothetical loss of profit during this period, the claimant was limited to a claim for loss of profit, unless the claimant could still succeed in establishing that he had acted reasonably.

The judge ruled that the claimant had not acted reasonably and found that the claimant had "*failed to demonstrate that any private use of the vehicle was no more than minimal*" and considered that his vehicle was used "*exclusively or almost exclusively*" for business use. The judge was also satisfied that the claimant was not impecunious and, accordingly, found that the claimant had not acted reasonably when incurring £107,340 of hire charges. The claimant was limited to recovering his loss of profit of £346, which was reduced by 50% on account of his contributory negligence.

Danielewicz v Cannon [2023]

This claim involved a claimant who was a protected party proceeding by his litigation friend. The claimant was injured in a road traffic accident and a first claim was issued against the driver, Miss Cannon. However, procedural errors made by the claimant's solicitors resulted in the discontinuance of proceedings. A second claim was then issued against three defendants, Miss Cannon, Miss Cannon's purported insurer and the MIB. Permission was not sought under CPR 38.7 for the second claim and the incorrect address for service was again used for Miss Cannon. Miss Cannon applied to strike out the second claim, but neither application proceeded to be heard and the claim was discontinued against all three defendants.

Subsequently, a third claim was issued against Miss Cannon and the MIB. This time, the claimant's solicitors applied for permission under CPR 38.7 after having issued, but before serving the claim.

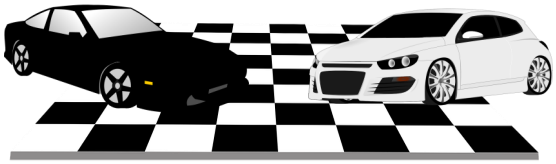
When a claim is discontinued, a claimant needs the court's permission to bring another claim against the same defendant, firstly, where the claimant discontinued the claim after the defendant filed a defence and, secondly, where the claim arises out of the same or substantially the same facts as the discontinued claim. Rule 38.7 is silent as to how or when a claimant should seek permission.

The claimant's solicitors openly conceded that the breaches were serious and offered no explanation for the catalogue of errors, other than ignorance of procedural rules and a failure to establish evidence in a way that other defendants had proved could relatively easily be obtained. Having regard to the resources already taken up in dealing with the litigation, the overriding objective and the court's 'natural disinclination to permit repeated litigation without convincing explanation and justification', the court dismissed the application for permission, concluding that permission should not be granted for a third claim and the claimant should consider looking to his solicitors via their indemnity insurance.

Gohil v Advantage Insurance Company Limited [2023]

This traffic accident claim was settled and the claimant sought fixed costs rather than portal costs.

The claimant's fixed costs totalled £4,937.07. The claimant made a Part 36 offer to settle their costs in the sum of £4,937.00, being seven pence lower than the fixed costs that they were claiming. The Part 36 offer was not accepted by the defendant and the claimant went on to be awarded their fixed costs, totalling £4,937.07. The claimant claimed an additional sum pursuant to CPR 36.17 on the basis that they had obtained an award for their costs which was at 'least as advantageous' to them as their Part 36 offer. Although, the claimant beat her own Part 36 offer by just seven pence, the defendant argued that the claimant's initial offer was not a genuine attempt to settle and was merely a tactical ploy and effectively demanded the defendant to completely surrender its position.



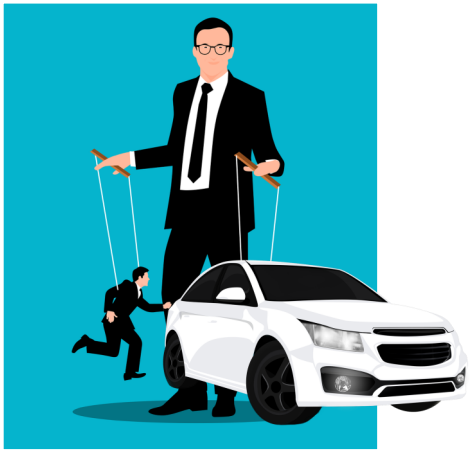
It was held that the discount presented *"no real opportunity for settlement"* and appeared to be a *"tactical step designed to secure the benefit of the incentives in the absence of any explanation as to why that discount was chosen"*. The judge noted that this was a *"lightly disguised request for capitulation and not a genuine offer to settle"*. As a result, the additional awards in CPR 36.17 were not applied and, as such, the claimant did not receive the additional benefits typically associated with beating a Part 36 offer. The court's decision was influenced by the Court of Appeal judgment in *Huck v Robson* which stated that a Part 36 offer should represent a genuine and realistic attempt by the claimant to resolve the dispute through agreement.

Shahzad v Royal and Sun Alliance & Fastrack Solutions Limited [2023]

This claim began as a personal injury claim arising from a road traffic accident on 20 November 2015. The claimant claimed a variety of damages, including credit hire charges of £27,780 and storage and recovery charges of £9,200. The respondent defended the claim on the basis that it was a staged accident and the claimant was fundamentally dishonest. The trial took place before District Judge James on 9 September 2020, with the claim being dismissed after a finding of fundamental dishonesty on the claimant's part. The protection which the claimant should have had under QOCS was removed and he was ordered to pay the respondent's costs, assessed in the sum of £10,000. Thereafter, an application for a non-party costs order by the insurer was issued against the credit hire organisation.

In this instance, the credit hire organisation had not retained solicitors for the claimant, was not in direct contact with the at fault insurer, did not have the power to deduct its hire charges from any personal injury damages and nor did it operate as the claims manager for the claimant. The application was, therefore, refused, meaning the credit hire organisation had no costs liability following the finding of fundamental dishonesty on the part of the claimant.

For the credit hire company to be liable for costs there had to be evidence that it had controlled the litigation.



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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