motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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Winter 2020 - 2021

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Rachel Troke & Finley Allen (A Child) v Amgen Seguros Generales Compania De Seguros Y Reaseguros Sau [2020]

The appellants were injured in a road traffic accident in Spain. The respondent accepted that they were entitled to damages and the appellants issued proceedings in England. An issue arose as to whether the amount of interest awarded under the damages claim was governed by Spanish law or English law. A joint expert report on Spanish law stated that where the insurer had not made an interim payment within 3 months of the accident, Spanish law contemplated a penalty interest. The respondent did not make that interim payment. The penalty interest payable under Spanish law was substantially higher than the rates payable under English law. It was accepted that if regulation 864/2007 applied to the appellants' interest claim, then Spanish Law would apply. However, the judge decided that a claim for interest was a procedural matter which was excluded by virtue of art.1(3) of the regulation and awarded interest at the lower English rates. The appellants appealed.

The question as to which law should apply turned to the proper application of art.1(3) and if the regulation was not excluded, then the judge should have applied Spanish Law. Art.1(3) provided that the regulation did not apply to evidence and procedure. It had to be decided whether the award of interest was procedural. It was held that the court's power to award interest was a discretionary remedy rather than a substantive right claimed from the tortfeasor and it was, therefore, a procedural matter. The judge was entitled to exclude the claim for interest under Spanish law. However, that did not entirely resolve the question in the case because the appellants argued that the right to interest proved in the joint expert report was a substantive right which fell to be applied to their tort claim under the regulation. The report used the word "contemplated", which suggested that the entitlement was not mandatory but discretionary and it was, therefore, a procedural right which was excluded by art.1(3). Accordingly, it was held that the judge had been entitled to award interest at English and not Spanish rates and the appeal was dismissed.

Charlotte Swift (Appellant) v Malcolm Carpenter (Respondent) & Personal Injuries Bar Association (Intervener) [2020]

The claimant, 'C', suffered serious injuries in a road traffic collision for which the defendant, 'D', was responsible. C had to undergo an amputation of her left lower leg and had significant disruption of the right foot.

The judge at first instance found that the additional capital costs of the required special accommodation of which C required would be £900,000 more than the value of C's existing home. The judge held that she was bound by the approach in *Roberts v Johnstone [1989]* which, combined with the negative discount rate, produced a negative sum and, accordingly, the judge made no award in respect of this head of loss. C appealed. The first issue for consideration on the appeal was whether the court was bound by the decision in *Roberts v Johnstone*. If the answer to that issue permitted the court to re-examine the approach in *Roberts v Johnstone*, then the issues were: should the court award the full capital value of the incremental sum required or, alternatively, should the court award that sum but reduced to reflect the value of the notional reversionary interest? If the latter approach was correct, how should the court value the reversionary interest?

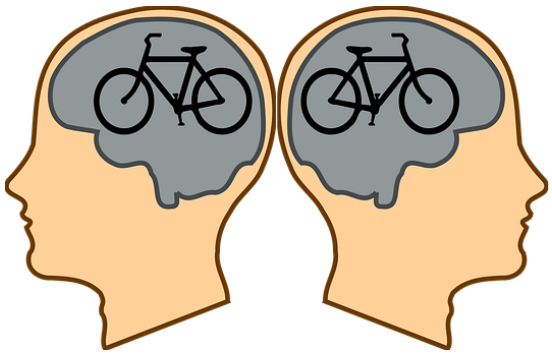
The court of appeal held that whilst *Roberts v Johnstone* did apply to this case, it did so in the form of authoritative guidance given the specific conditions prevailing at the time of the decision. In the context of modern property prices and a negative discount rate, the approach in *Roberts v Johnstone* no longer achieved fair and reasonable compensation; accordingly, the court could revisit and alter such guidance. It was not appropriate to award the full capital value of the incremental sum required, which would produce a potential capital windfall (most likely to C's estate after her death), as it was possible, adopting a pragmatic approach, to make a fair and reasonable award whilst at the same time taking reasonable steps to avoid over-compensation.

That approach (to valuing the notional reversionary interest) comprised a market valuation of the current value of the reversionary interest based on a discount rate of 5%. Applying that approach in this case gave the value of the reversionary interest to be £98,087. Deducting that from the identified sum of £900,000 required to purchase the required accommodation resulted in an award of £801,913. The court did indicate that there may be cases where this guidance is inappropriate. This would include, for example, cases with short life expectancies. D sought permission to appeal to the supreme court, however, in an unsurprising decision, the court of appeal has refused the defendant permission to appeal.

Knapman v Carbines [2020]

The claimant suffered a severe traumatic brain injury in 2013 when he was cycling and had been struck by the defendant's vehicle. A claim form was issued in 2016 and liability was admitted in full. A ten day quantum trial was listed for April 2021. An initial schedule of loss had been prepared in 2019 which estimated the future cost of care to be around £157,000 per year. The total claim value was £12.5 million. A counter schedule valued the claim at around £130,000 in total.

The claimant's case was that he had learning difficulties before the accident, but had been able to cope without 24 hour care. The defendant's case, however, was that because of his learning difficulties, the claimant would have needed to live in a group care situation in any event after his father's death. At a case management conference, the parties were given permission to rely on various experts and reports were exchanged, but no agreement was reached at a roundtable meeting in March 2020. Subsequently, the defendant sought a report from a further expert, a paediatric neuropsychologist, without informing the claimant or the court. This was despite two neuropsychologists having already been engaged, one for each side.



The defendant received the report in August 2020, sent it to the other instructed experts for their comments and made an application in October 2020 to rely upon the report. The defendant submitted in their application that the new expert report was significant, important and would assist with the difficult issue of the claimant's likely care regime if there had not been an accident. The claimant submitted that the report was largely inadmissible and of little assistance.

The court refused the defendant's application. It would be extremely difficult to rearrange a ten day trial with several experts in attendance. Moreover, it would not realistically be possible for the claimant to seek an equivalent paediatric neuropsychologist's report before trial and it would not be fair to require the claimant to suffer prejudice which he had not brought on himself. There had been a delay in making the application for permission to rely on the new report and the report should have been made available to the claimant and the court earlier. The defendant had been able to fully assess the claimant's case before the case management conference and there was no explanation for their inaction until the defendant took steps to bolster its case following the roundtable meeting. The court concluded that the overriding objective, the potential prejudice to the claimant and the delay in making the application outweighed the significance of the report.

West v Olakanpo [2020]

The claimant was involved in an accident and alleged that the other vehicle was driven by and belonged to the defendant. However, the defendant said that neither he nor his vehicle were involved and he was two hours away when the accident occurred. The defendant supported his alibi with evidence from a third party and his mother, together with timesheets from his workplace. The claimant produced a photograph allegedly of the defendant's vehicle and a business card attributed to the defendant.

The claimant made a Part 36 offer in May 2018, but the offer was not accepted. The case was allocated to the fast track. The defendant accepted the offer in November 2018. In August 2020, a judge accepted the claimant's application that the defendant should pay his costs on the indemnity basis under CPR 45.29J on the basis that the defendant's dishonesty amounted to exceptional circumstances. The judge found that the alleged dishonesty went to the heart of the defendant's case; the defendant had had an opportunity to adduce evidence, but had failed to do so and there was no need for an oral hearing to decide the issue. The defendant appealed.

It was held that it was not accurate to say that the defendant had not filed any witness evidence. He had done so throughout the case and it was not a case where the defendant had no evidence or did not attend trial. The judge had failed to address the evidence that the defendant had adduced earlier in the proceedings and had erred in concluding, without testing that evidence in a mini-trial, that the defendant had been dishonest. It was acknowledged that the defendant had not actively applied for a mini-trial, but he had made it clear that it would be necessary if a conclusion was to be reached on the allegation of fundamental dishonesty. The appeal was allowed.

X (A Protected Party By His Litigation Friend M) v (1) Y (2) C [2020]

This case involved a claimant who was born in Romania in 1994, but who moved to the UK in 2018.

Once residing in the UK, the claimant and his brother were, unfortunately, passengers in a car driven by the first defendant which was involved in a highspeed collision with a heavy goods vehicle. As a result of the collision, the claimant's brother suffered fatal injuries, with the claimant himself suffering from catastrophic and lifechanging injuries, which included widespread neurological damage with cognitive and behavioural problems.

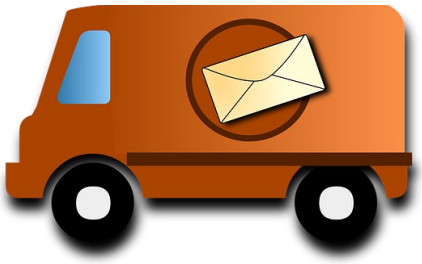
The insurer of the second defendant agreed to meet the full value of the claim in damages and the claimant's mother instructed a firm of solicitors to act on the claimant's behalf. However, in her individual capacity, she became the claimant's litigation friend by filing a certificate of suitability in September 2018. During the litigation, the relationship between the solicitors appointed by the mother and the claimant's mother had been extremely difficult. As a result, the claimant's solicitors applied pursuant to CPR r.21.7(1) to remove the claimant's mother as litigation friend and to replace her with a professional litigation friend. A partner from the firm provided a witness statement to support the application, which provided various examples of the claimant's mother's repeated irrational allegations and decision making. Among other things, they included ill-considered attempts to move the claimant from one medical facility to another and refusal to cooperate with medical authorities.

However, the main reason for the application was because almost two years after the collision, the second defendant made a settlement offer and the claimant's legal team organised a conference with counsel to discuss the offer, at which the claimant's mother was present. Counsel advised not to accept the offer as further evidence was required before any proper assessment of damages could be made. However, just before the offer was about to expire, the claimant's mother sent correspondence directly to the solicitors acting on behalf of the defendant insurer intending to accept the settlement offer. The solicitors acting for the second defendant disclosed this to the claimant's solicitors who were not aware of the mother's approach. The next day, the claimant's solicitors also received a request for transfer of the papers by a third firm of solicitors, who had been approached by the claimant's mother, agreeing to assume conduct of the case on her behalf as there had been a breakdown of relations. The claimant's solicitor made the application on the grounds that the claimant's mother was not able to satisfy the conditions in CPR r.21.4 (3), most notably not being able to fairly and competently conduct the proceedings on the claimant's behalf.

The court granted the application to remove the mother as the court had serious reservations about her ability to make rational decisions in light of her attempt to accept the settlement against clear and unequivocal legal advice not to, however, it was for the new litigation friend to consider whether there had been an irretrievable breakdown of relations between the claimant's solicitors and the claimant's family. If this was the case, then the court considered that the litigation friend would no doubt act accordingly.

Abdirahim Ali Diriye v (1) Kaltrina Bojaj (2) Quick-Sure Insurance Limited [2020]

The district judge decided that relief should be refused, finding that CPR 6.26 did not apply because service effected by 'signed for 1st class' post was not the equivalent of first-class post because of the requirement that the document be signed for. Applying the three stage 'Denton' test, it was found that the application had not been made promptly, the reply provided no details of the claimant's income and there was no reason why information relating to impecuniosity could not have been provided. On first appeal, HHJ Latham upheld the decision to dismiss the application for relief and the claimant appealed to the court of appeal.



The court of appeal unanimously dismissed the appeal, finding that although Royal Mail's 'signed for 1st class' service did fall within deemed service under CPR 6.26, as any attempt to distinction between two first class services based on actual delivery was wrong in principle and that it would make no sense to suggest that by using the 'signed for 1st class' service a solicitor was in a worse position than if they had used ordinary first class post, this, ultimately, did not alter that it was correct to refuse relief from sanctions because the claimant's breach was serious and significant.

Among other things, the court stated that even if the reply had been served on time, the document itself failed to comply with the substance of the unless order, the application for relief had not been made promptly, being made two months after the breach had occurred, and there was no good reason for the breach.

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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Dolmans would like to extend to our readers of Headlight best wishes for 2021