DOLMANS INSURANCE BULLETIN

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REPORT ON

Claimant's Conduct Likely to Obstruct Just Disposal of the Proceedings Thwarted

X v A Local Authority

Dolmans acted for the Defendant Local Authority in relation to its defence of a claim for damages arising out of injuries suffered by the Claimant, who is now an adult, during an incident when he was a pupil at an Education Centre for children with social, emotional and behavioural difficulties. The Claimant had absconded from the Centre. Upon his return, whilst still outside the Centre, the Claimant became angry and kicked through a wired safety glass panel in a door. The Claimant sustained a severe laceration to his right lower leg resulting in permanent residual symptoms which, the Claimant alleged, disadvantaged him on the open labour market.

The claim for damages was robustly defended. The Claimant alleged that he should have had 1:1 supervision at the Centre at all times. The contemporaneous documentary evidence did not support this. The Defendant's evidence was that 1:1 supervision was neither agreed to be provided nor would it have been reasonably required for the Claimant. In any event, such supervision would not have stopped the Claimant from absconding from the Centre. The Claimant further alleged that he had been refused entry to the Centre upon his return. The Defendant's witness evidence strongly disputed this. The glass in the door had been risk assessed and considered suitable by external specialists and had been in situ for many years.

The claim was listed for Trial for a 3 day period. The parties complied with Court Directions and the case was ready to proceed to Trial. The parties began preparations for Trial, including liaising to seek to agree the content of a Trial Bundle. A Brief was delivered to Counsel. In accordance with the Court's Directions, the Trial Bundle, together with a Case Summary, was required to be filed by 5 working days before the Trial. The Trial Bundle was chased in order that Counsel could prepare a Skeleton Argument. A finalised Trial Bundle and Case Summary did not materialise.

The day after a Trial Bundle should have been filed, the Claimant's solicitors copied us into their email to the Court advising that the Claimant was in prison and they had decided they could no longer act for him under the terms of their Conditional Fee Agreement. The Claimant's solicitors indicated that as they were without instructions they could not make an Application to vacate the Trial and invited the Court to vacate the Trial under its inherent jurisdiction. No Application was made by the Claimant's solicitors to come off the Court record.

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REPORT ON

Whilst there was no indication from the Claimant's solicitors regarding when the Claimant had been imprisoned, internet enquiries suggested that the Claimant had possibly been in custody for many months. The Claimant's solicitor's position was that they had only become aware of this 2 days before they informed the Court. There was no indication of whether any attempt had been made to make arrangements for the Claimant to attend the Trial. The Claimant's solicitors indicated they would not carry out any further work on the case.

This left the case not properly prepared for Trial in the absence of a finalised Trial Bundle and with no clarity as to whether or not the Claimant would attend. Proceeding with the Trial risked public money and Court time being wasted if the Claimant did not appear. The Court vacating the Trial, as suggested by the Claimant's solicitors, would have allowed the claim to continue with further costs having to be incurred by the Defendant. It was considered imperative that this claim, which the Local Authority had already had to incur public money defending, was brought to an end.

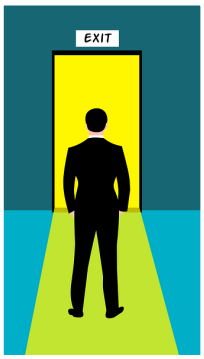
Accordingly, we asked the Court not to simply vacate the Hearing and filed an Application to strike out the Claimant's claim on the basis the Claimant's conduct was likely to obstruct just disposal of the proceedings. This was on the grounds that it was unlikely that the Claimant would attend the Trial, his solicitors were refusing to act for him, the Claimant had not apprised his solicitors of his imprisonment and had he done so the position could have been appropriately managed to enable the case to proceed to Trial and the situation the Defendant and the Court were now in, at the eleventh hour before Trial, would have been avoided. The Defendant was ready for Trial and the Defendant's witnesses were attending the Trial. The Claimant was wasting public money. The situation was entirely the Claimant's fault and was a clear instance of his conduct being likely to obstruct just disposal of the proceedings.

The Claimant's solicitors maintained that they would not be undertaking any further work on this matter and suggested we should correspond direct with the Claimant in prison. It was made clear to the Claimant's solicitors that as they remained on the court record we would continue to correspond with them and they should take steps to notify the Claimant of the Application. It was also highlighted that the Court rules were clear that it remained their responsibility to prepare and produce the Trial Bundle.

To assist the Court, a Hearing Bundle was filed which highlighted to the Court that a properly prepared Trial Bundle was not available due to the Claimant's actions and the Claimant's solicitors not being prepared to carry out further work as a consequence. This was served on the Claimant's solicitors, with it again being made clear that it was their responsibility to get this to the Claimant.

The day after the Application was filed and served, the Claimant's solicitors obtained the Claimant's instructions and served and filed a Notice of Discontinuance.

REPORT ON



Consideration was given to whether the Local Authority should apply to set aside the Notice of Discontinuance in order to proceed with the strike out Application which, if successful, would have enabled the Local Authority to seek an enforceable costs order against the Claimant as an exception to QOCS, but this would have simply resulted in further public money having to be expended with no reasonable prospect of recovering any money from the Claimant given his circumstances.

The Claimant's Notice of Discontinuance pleasingly brought this claim to an end, before further public money was wasted by the Claimant, which fulfilled the purpose of the Local Authority's Application.

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FOCUS ON

Client Update: Changes to the Personal Injury Damages Claim Portal (154th Update to CPR51 Practice Direction 51ZB, March 2023)

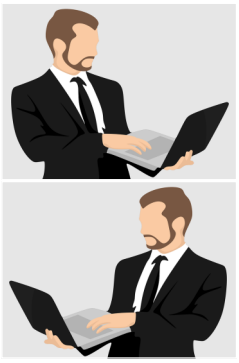
Background

Clients should by now be familiar with the Damages Claims Portal ("DCP") which became compulsory for Defendants to use from 15 September 2022. Personal injury claims, where a Defendant solicitor is instructed to receive proceedings, must now proceed via an electronic platform – the DCP – managed via the "myHMCTS" platform which deals with the initial stages of the litigation, hitherto, up to the point of submission of Directions Questionnaires, at which point claims would be transferred out to recipient Courts for local case management and listing.

The latest changes arise from an update to Practice Direction 51ZB dated 1 and 8 March 2023. They were notified to practitioners via the HMCTS weekly operational summary dated 13 March 2023. There are a number of changes, but perhaps the most important one – for solicitors and clients alike – is the ability of the DCP to issue what amount to case management directions and listing orders in Small Claims Track and Fast Track Cases (see below).

We will spend some time considering this aspect below, along with highlighting other aspects.

Latest Changes



From 1 March 2023, legal representatives can use MyHMCTS to request and issue a Default Judgment in the online civil money claims or damages service against another legally represented party. They can review and progress their case at any time using the online portal. Previously, requests for Default Judgment were subject to CPR12 and, therefore, not available on line – this is of interest, if only because the clear impression of the situation when the DCP was first made compulsory for Defendants – in September 2022 – was that Default Judgment would be entered automatically at the expiry of relevant timescales.

Monitoring of this change will be required, but it may actually be better news for Defendants than the original understanding of the position. Like a lot of aspects of the DCP, until one sees it work in practice it is difficult to fully understand all implications.

From 8 March 2023, Judges, or legal advisors in appropriate cases, can provide a Small Claims or Fast Track Standard Directions Order on a case after reviewing the digital case file. Notification of the digital Order will then be sent electronically to legal representatives and will be available on the portal. According to the myHMCTS update, *"the introduction of digital orders should significantly reduce the current wait by parties for their case to be reviewed and allocated."*

A new provision has been added in respect of extensions of time agreed between the parties: if the parties have agreed an extension of time of less than 28 days but then wish to increase the extension up to 28 days in total, the Defendant must file an Application at the CCMCC. On receipt of such an Application, the Court must send the claim out of the DCS.

Comments

The most significant change here is, undoubtedly, the partial "in-housing" of case management and listing orders within the DCP.

Traditionally, since the inception of the Jackson Reforms in 2013, and thereafter the advent of the County Court Money Claims Centre in Salford (CCMCC), there has been a noticeable "pause" between submission of Directions Questionnaires and the issuance of Case Management Directions within the local Court. In essence, this timescale was variable, but reflected the need to get the file out from the CCMCC and to the local Court where it would be case managed/tried – and thence for the Judge in that local Court to consider the papers and in Fast Track cases issue directions or in the case of Multi-Track cases issue a date for an initial Costs and Case Management Hearing (CCMH) to deal with directions (and budgeting).

Now, we see the power for Judges or legal advisors (seemingly senior court staff) to immediately issue Case Management Directions *from the DCP platform*. The intention of this change (see comments above) is to reduce the overall process time between "close of pleadings" (at submission of Directions Questionnaires) and the case moving forwards into directions which, in turn, will (obviously) compress the overall timescale for processing cases to trial.

Depending on the resources available to the DCP and how matters are processed in terms of liaison with local Courts, who will be the recipients of these cases for trial listing (see below), this is likely to mean Small Claims Track and Fast Track claims are underway – towards trial – more quickly than was hitherto the case. Thus, the lead time available for parties in a "pre-directions timetable" environment is likely to be reduced; by how much is obviously difficult to comment upon until this process is in train. Nevertheless, this is an important change and needs to be considered. In simple terms, parties may well have less preparation time outside the deadline driven environment of Case Management Directions than is currently the case.

Moreover, until we start to see DCP Case Management Orders, it is difficult to foresee what shape they will adopt. One assumes the "standard directions" periods of 4 weeks for disclosure and 10 weeks for witness statements will be provided/replicated in these Orders, but, until they appear, it is difficult to be clear and we shall have to await developments.

Additionally, one assumes that the DCP, in issuing listing orders, will need to have (and will have) access to local Courts' listing resources to be able to slot claims appropriately into the relevant list(s). This also underlines the need to have accurate availability information for witnesses and any preferred Counsel at the point of submission of Directions Questionnaires – because this is the information which will govern listing (in part).

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Damages Claim Portal

Without being too cynical, it seems highly likely that there will be teething problems here which will need to be ironed out. Not the least of which will be the process through which initial DCP orders can be revisited or amended where the possible "one size fits all" approach inherent in the same does not work in a particular case. Given that this initiative is currently confined to Fast Track and Small Claims Track claims, one can say with some confidence that standard directions – within reason – should work appropriately in most instances.

However, as with any new process, parties will need to maintain flexibility and be ready to react to changing circumstances. It is difficult to see these changes as anything other than an expansion of the role of the DCP in case management and possibly a step towards the centralised electronic case management of cases (outside the trial environment itself) "cradle to grave".

The changes to Default Judgment Applications are interesting. As above, hitherto, the understanding was that Default Judgment would be entered automatically, and given that no one wishes to find out how a new approach will work in the context of an Application to set aside, one would wish to sound a note of caution as to this change and assume, for the moment, that the previous understanding – at least as far as Defences are concerned – holds true. As with all updates of this nature, the risk of misunderstanding is present and much better to assume the specified date on the DCP system for a Defence will lead to automatic Judgment in default rather than assume (akin to the old system) that the Claimant needs to apply for the same. No doubt this aspect will become clearer over time.

The position as to extensions of time, is, with respect, rather cumbersome and one assumes that in the face of this new approach, parties might be better advised to simply agree 28 days and then proceed sooner, if they can, rather than agree a shorter timescale only to find that is insufficient and then have to go before the CCMCC via formal Application.

Rest assured we will continue to keep clients advised of developments in this area.

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CASE UPDATES

Abuse - Contribution from Carers

SS v Essex County Council and (1) FF (2) FM
[2023] EWHC 417 (KB)

The Defendant Council ('D') settled a claim for damages brought by the Claimant (SS) arising out of alleged abuse by her carers. Via a Part 20 claim, D sought an indemnity or contribution from the carers, FF and FM, for the compensation D had paid to SS in the principal claim.

SS has severe learning difficulties and autism. She was removed from her parents' care by D and placed with foster carers, FF and FM, in 1981. FF and FM were de-registered as foster carers in 1998, but SS remained in their care as an adult. D's responsibility for SS continued throughout SS's adult life as she was a vulnerable adult incapable of caring for herself. SS was removed from FF and FM's home in 2009 as a result of a police visit which raised concerns about abuse and false imprisonment. FF and FM were arrested, but no further action was taken in relation to the criminal allegations.

SS brought a claim for damages against D alleging that she had been physically and sexually abused, starved, neglected and falsely imprisoned by FF and FM. SS sought damages in excess of £7 million. D admitted negligence and vicarious liability. D's Counter Schedule accepted SS was entitled to PSLA damages suffered as a result of the tortious conduct of FF and FM and that a Court was likely to find SS sustained at least emotional abuse and neglect whilst placed with FF and FM. A settlement of the claim was approved in the sum of £325,000. D also made an interim payment on account of SS's costs in the sum of £200,000. D made a Part 20 claim against FF and FM for an indemnity or contribution claiming that FF and FM were responsible for the damage for which D had admitted liability. D asserted that FF and FM were responsible for 'the same damage' and, thus, liable under the Civil Liability (Contribution) Act 1978 and sought £525,000 from them. FF and FM denied any abuse or neglect of SS.

D accepted that it needed to prove FF and FM's liability for the same damage.

D did not seek to prove that SS was sexually abused. The Judge found there was insufficient evidence of physical assault or emotional abuse. The Judge found SS was severely malnourished when removed by the police in 2009. FF and FM owed SS a duty of care and this was breached by failing to provide her with sufficiently nutritious food over a period of time, which the Judge found to be at least 18 months. FM and FF neglected SS's basic needs for the same period of time as the malnutrition.

Accordingly, the Judge found that FF and FM were liable in respect of the same damage as D. FF and FM were responsible for neglect and malnutrition for an 18 month period and they were liable to D for this damage.

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D accepted that if it was found that FF and FM caused some damage but not all of the damage that SS received compensation for from D, that could be taken into account in determining the amount of contribution under section 2(1) of the 1978 Act. The Judge took the view that he, therefore, needed to know what damage D had compensated SS for. There was no evidence before the Court as to the precise basis of the settlement, but D invited the Judge to infer it took into account various risks to both sides in relation to the extent of the abuse that would be found, causation and quantum issues. The Judge found that a proportion of the £325,000 was paid because of the risks.

The Judge decided that it would not be just and equitable to require FF and FM to compensate D for the risk of findings which were not proved in this trial. SS had alleged abuse between 1981 and 2009. The Judge had found FF and FM were responsible for a period of 18 months only. The damage for which FF and FM were responsible was, therefore, the pain and suffering SS had endured as a result of their negligence over the course of 18 months in respect of malnutrition and neglect.

D asserted that it would be wrong in principle for the Judge to attempt to value the part of the claim he found proved against FF and FM as this was a statutory claim and not a tort claim. However, the Judge did not consider there was any sensible way in which he could calculate by means of a percentage of the settlement figure what a just and equitable contribution would be to reflect what had found to be proved. The Judge considered whether this led him to a conclusion that he should, therefore, exempt FF and FM from making a contribution, but decided that would be unfair to D.

The Judge, therefore, decided to take the course of valuing the damage for which FF and FM were liable. The Judge valued damages for pain and suffering caused by the 18 months malnutrition and neglect at £14,000.

The Judge accepted that a contribution should also be made towards the costs paid to SS and decided that it would be just and equitable for a broadly commensurate proportion of the costs to be paid as for the damage contribution, which he assessed at £10,000.

Accordingly, the Judge concluded that FF and FM were liable for a contribution in the sum of £24,000.

In relation to costs, the Judge accepted D was the successful party, but found that D had not won on many important issues. The level of damages found was significantly lower than sought. It was, therefore, appropriate to vary the normal order for costs. The Judge ordered that D was entitled to 33% of its costs to be assessed on the standard basis.

CASE UPDATES

Abuse of Process - *Henderson v Henderson* - Part 36 Settlement

Warburton v The Chief Constable of Avon and Somerset Constabulary [2023] EWCA Civ 209

The Claimant ('C') brought claims for damages and injunctive relief against the Defendant police force ('D') for alleged breaches of the Data Protection Acts 1998 and 2018 (DPA) in respect of personal data relating to C held or formerly held by D. The Court of Appeal was required to consider C's second appeal against the strike out of parts of his claim.

Background

C had been a probationary constable with West Midlands Police in 1998 when he was investigated in relation to 2 allegations against him. He left the force before any action was taken. In 2004 C began working for D and, in 2005, applied to become a Special Constable with D. Vetting checks revealed the aforementioned allegations, together with another allegation whilst working for D and the information was recorded in D's Counter Corruption Unit (CCU) files. C's application was refused. C left the force. In 2008 C made a public complaint on Facebook about a police sergeant who worked for D and this was recorded in a CCU file. In 2008 C was arrested on suspicion of criminal damage and a record of this was retained on the Police National Computer and the Police National Database. In 2017 C applied to be a constable with Hertfordshire Constabulary. He passed initial vetting and was due to start work, but the offer was withdrawn when D disclosed the CCU files to Hertfordshire Police. Hertfordshire Police provided C with copies of the material received from D. C commenced defamation proceedings against D alleging the information supplied to Hertfordshire Police was defamatory and untrue, and this had caused him to lose a police career.

The Particulars of Claim stated that it was a claim for defamation. Reference was made to breach of DPA 1998 principles, but C confirmed, in response to D's defence, that it was not a claim under the DPA 1998. D applied to strike out the defamation proceedings. C applied to amend the Particulars of Claim to include DPA claims. However, a District Judge struck out the defamation proceedings as being out of time and failing to comply with rules relating to pleading defamation claims. Permission to appeal against the strike out was granted and an Order made for the proceedings, including the Application for permission to amend the Particulars of Claim, to be transferred to the High Court. A Judge allowed C's appeal and the defamation proceedings were restored.

CASE UPDATES

Shortly after the defamation proceedings were restored, C made an offer to settle. In relation to the outstanding Application to amend the Particulars of Claim, C then filed and served revised draft Amended Particulars of Claim which included a defamation claim and a DPA claim under the DPA 1998. D then made a counteroffer to C which was stated to reflect the distress C felt in respect of breaches of the DPA 1998. D refuted the defamation claim, but accepted that there were some data protection breaches. Negotiations continued. C wanted all of the data erased. D considered it had lawful grounds for retaining data relating to a racial abuse allegation. Ultimately, on 2 July 2019, D made a Part 36 offer of £20,000 to settle the whole of the claim. C accepted the offer on 11 July 2019. This brought the existing defamation proceedings to an end.

In September and October 2019 D deleted the records, with the exception of the racial abuse allegation. In August 2020 C issued proceedings. The Particulars of Claim advanced the same DPA claims as had been set out in the draft Amended Particulars of Claim in the defamation proceedings. D applied to strike out the proceedings pursuant to the principle in *Henderson* that parties to litigation should bring forward their whole case and were not permitted to open the same subject of litigation in respect of matters which could and should have been brought forward as part of that case.

The parties accepted that in accordance with case law, where a party makes a Part 36 offer to settle the whole of the claim such offer relates only to the pleaded claims and, therefore, excludes any other claims, even those in a draft amended pleading which had been served but where permission to amend had not yet been obtained (which was the position with the DPA claims herein).

At first instance, the District Judge took the view that as the settlement related only to the defamation claim C was not estopped from pursuing the pre-July 2019 DPA claim and dismissed the Application. D appealed.

On appeal, C raised a new argument that the *Henderson* principle did not apply because he had 'raised' the DPA claim in the defamation proceedings by mentioning it. The Judge rejected this contention, finding that the *Henderson* principle applied as the cause of action in relation to the DPA could have been brought forward (in the sense of pleaded) within the defamation claim and was not. The Judge noted C was a lawyer by training and knew D's offer had been intended to compensate him for the DPA breach rather than defamation. C was abusing the process of the Court as he had been compensated for the pre-July 2019 data breaches which were integral to the defamation proceedings. C could pursue a claim for the retention of the data that was not erased after the settlement, but it would be an abuse of process to allow C to continue with the claim for pre-settlement breaches. The Judge, therefore, struck out the pre-July 2019 DPA claim. C appealed.

Court of Appeal

The grounds of appeal were that:

(1) The Judge was wrong to hold that the pre-July 2019 DPA claim had not been 'raised' or 'brought forward' in the defamation proceedings as it was in the draft amended pleading.

(2) The Judge failed to recognise that the effect of accepting a Part 36 offer is the settlement of the pleaded claim only. The Judge was wrong to consider the pre-settlement correspondence. It was not an abuse for C to take advantage of D's litigation mistake.

In relation to ground 1, C argued that this case fell into a gap between the concepts of res judicata (claims or issues which have been determined) and the *Henderson* abuse principle (claims which should have been brought forward but were not). C submitted that it was not abusive to pursue a claim which had been fairly 'flagged' to D but formally pleaded.

The Court of Appeal rejected C's arguments. Excluding a 'raised but not brought' claim from the scope of the *Henderson* principle altogether would create an unnecessary and unprincipled exception which would enable parties to bring second claims with impunity, no matter how obviously abusive and contrary to the clear public interest they might be. There was no doubt that C did not bring forward the pre-July 2019 DPA claim for adjudication in the defamation proceedings. C's expressly pleaded position in those proceedings was it was not a DPA claim and C continued to emphasise the pre-July 2019 DPA claim was not included in the settlement precisely because it was not pleaded. There was no merit in ground 1 of the appeal.

There was also no merit to ground 2 of the appeal. The Judge had fully understood and accepted the position that the effect of the Part 36 offer was only to settle the pleaded claims. It was clear that the fact that the defamation proceedings ended in a settlement did not prevent the application of the *Henderson* abuse principle to any further proceedings in which one of the parties mounted a claim or defence which could have been raised in the settled claim. Once the *Henderson* principle is engaged there is a further broad merits-based question as to whether the second claim is in fact an abuse. It was in this context that the Judge considered the pre-settlement correspondence. The Judge was fully entitled and obliged to do so. In doing so the Judge discovered that both parties had been negotiating on the basis that they would settle all claims, including the pre-July 2019 DPA claim. C accepted D's offer without notifying D of the possibility of a second claim and did so for partisan tactical reasons. C admitted he was taking advantage of D's litigation mistake. Such conduct fully justified the Judge, finding that bringing the pre-July 2019 DPA claim in the current proceedings was within the scope of the *Henderson* principle and an abuse of the process of the Court.

Accordingly, C's appeal was dismissed.

CASE UPDATES

Breach of Confidence - Misuse of Private Information - PTSD - Measure of Damages

FGX v Gaunt
[2023] EWHC 419 (KB)

In the first case of its kind, Mrs Justice Thornton was required to assess damages in a case relating to 'revenge porn" or "image-based abuse" as it was renamed in this case. Such conduct cannot only lead to criminal prosecution but a claim in damages in the civil courts too.

The parties had been in a co-habiting relationship. The Claimant found a camera concealed in the bathroom and discovered that the Defendant had been filming her naked and had uploaded images to a website alongside a photograph of her face. The Defendant was prosecuted and was convicted of voyeurism. He received a suspended sentence of imprisonment and was ordered to sign the sexual offenders register for 10 years.

The Claimant brought civil proceedings, claiming that the Defendant had intentionally exposed her to a foreseeable risk of injury or severe distress which resulted in injury, infringement of her privacy and beach of confidence. The Claimant suffered from chronic post-traumatic stress disorder.

The Defendant did not actively defend the proceedings and Judgment was awarded in the Claimant's favour by default. The Defendant failed to turn up to the assessment of damages hearing which proceeded in his absence.

The Court was required to assess quantum on the basis of separate and distinctive torts: the intentional infliction of injury and the misuse of private information. The facts underlying the cause of action overlapped considerably and double counting had to be avoided. In assessing damages, the Court took guidance from cases involving sexual abuse and/or misuse of private information.

There was limited information as to the extent of publication. However, the Court proceeded on the basis that the images remained online and available to an unknown number of recipients. Once downloaded the image would remain available for viewing. The effect of the repeated intrusions by publication had contributed to the development of the Claimant's chronic PTSD and enduring personality change; *Gulati v MGN Ltd [2015] EWCA Civ 1291, [2017] QB 149, [2015] 12 WLUK 608* applied.

CASE UPDATES

The impact upon the Claimant had been profound. It was not suggested that the awards in *MGN* were comparable, but it could be said that the misuse of information in this case was at least as serious as accessing voicemails to obtain private information for publication in newspapers; *MGN* considered. The consequent degradation and humiliation considerably heightened the violation of the Claimant's personal dignity and autonomy resulting from the misuse of her information.

The impacts on the Claimant were akin to the impacts of sexual assault listed in the JC Guidelines 2022 Section C Ch.4 Psychiatric and Psychological Damage. Although the Claimant had suffered permanent effects, she was able to work and there was evidence of some improvement. Category b was, therefore, the appropriate category, with her case being towards the top end given the enduring personality change; *C v WH [2015] EWHC 2687 (QB), [2016] E.L.R., [2015] 9 WLUK 449* considered.

It was appropriate, in principle, to make an award of damages to compensate the Claimant for additional distress arising from aggravating features of the Defendant's conduct. A further aggravating feature was his failure to participate in the proceedings. However, the Court held that bearing in mind the need to avoid double counting, no separate award for aggravated damages would be made and the uplift in that regard was modest.

General Damages of £60,000 were awarded, together with Special Damages of £37,041.

Part 36 Offers

Mundy v TUI UK Limited
[2023] EWHC 385

The Claimant's claim arose out of a claim for damages for 'holiday sickness'. He claimed he had suffered food poisoning and succeeded in his claim, with the Court awarding him £3,805.60.

Two Part 36 Offers had been made within the proceedings, which were of relevance to the issue of costs:

(1) The Claimant had made a Part 36 Offer in 2018 to settle the issue of liability at 90/10 in his favour.

(2) The Defendant had made a Part 36 Offer in 2019 to settle the whole of the claim in the sum of £4,000.

Neither offer was accepted.

CASE UPDATES

Following Judgment, each party claimed to have beaten their offers. The Claimant asserted that as the Defendant was found to be 100% liable for his illness, the Judgment was 'at least as advantageous' as his Part 36 Offer. The Judge, however, considered CPR 36.17(1)(a) and concluded that the Claimant had failed to obtain a Judgment more advantageous than the Defendant's Offer. The Claimant appealed.

The appeal was dismissed.

It was held:

- On the face of it, the Claimant had been awarded less than the Defendant's offer of £4,000.
- Liability was not obviously a distinct or severable issue capable of being given monetary value and it was artificial to attempt to fit the 90/10 liability offer into the Part 36 Scheme.
- Having regard to the circumstances of the case, as per CPR 36.17(5), the Claimant's offer was not a 'genuine attempt to settle the claim', nor a quantifiable part of or issue in the claim, and so it did not fall within CPR 36.17(b). Therefore, the costs consequences in CPR 36.17(4) did not apply.
- The Part 36 Scheme did not contemplate approaching rejected offers by doing anything other than starting with the question at CPR 36.17(1)(a) and making a straightforward comparison between what a defendant offered and what a claimant received in money terms. On a plain reading, CPR 36.17(1)(a) and 36.17(10(b) were both directed to a like-for-like comparison of the terms on which either party offered to settle the proceedings.
- The effect proposed by the Claimant made such an offer into a means for a claimant who had failed to beat a settlement offer to recoup a substantial premium for "winning" the case nevertheless (by having beaten or equalled his own liability offer) and to reverse the losses otherwise provided for by CPR 36.17. That was against both the letter and the spirit of CPR 36.17.

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- Apportionment in HAVS cases
- Bullying, harassment, intimidation and victimisation in the workplace – personal injury claims
- Conditional Fee Agreements and costs issues
- Corporate manslaughter
- Data Protection
- Defending claims – the approach to risk management
- Display Screen Regulations – duties on employers
- Employers' liability update
- Employers' liability claims – investigation for managers and supervisors
- Flooding and drainage – duties and powers of landowners and Local Authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage
- Flooding and drainage – duties and powers of Highway Authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the Highway Authority in respect of highway waters
- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
- The Jackson Reforms (to include : costs budgeting; disclosure of funding arrangements; disclosure of medical records; non party costs orders; part 36/Calderbank offers; qualified one way costs shifting (QWOCS); strikeout/fundamental dishonesty/fraud; 10% increase in General Damages)
- Liability of Local Education Authority for accidents involving children
- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

If you would like any further information in relation to any of our training seminars, or wish to have an informal chat regarding any of the above, please contact our Training Partner:

Melanie Standley at **melanies@dolmans.co.uk**