DOLMANS INSURANCE BULLETIN

Welcome to the September 2023 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor:

Justin Harris, Partner, at **justinh@dolmans.co.uk**

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REPORT ON

Successful Defence of a Significant Personal Injury Claim with Fundamental Dishonesty Findings and Displacement of Qualified One Way Costs Shifting (QOCS) Following a 5 Day Trial

GP v MSV (1) and VI Limited (2)

Facts and Claimant's Allegations

The Claimant was the tenant of a flat in Dudley, West Midlands, of which the First Defendant was the leasehold landlord and the Second Defendant was the owner of the block in which the flat was located.

Dolmans represented the Second Defendant.

The Claimant's claim was that, on 1 May 2016, he slipped on a puddle of water in the hallway of his flat, sustaining a back injury. He asserted that the water emanated from a leaking communal stack pipe which was part of the shared/communal pipes for the building and which ran inside the airing cupboard in his flat.

The Claimant further asserted that this had been an historical issue and, rather incredibly, gave evidence at Trial that from the commencement of his tenancy foul water had poured into his flat (with him saying that sometimes he was wading through it) with 9 asserted significant floods during the term of his occupancy. Given that his tenancy had commenced on 30 June 2006, this was, from the outset, challenged and difficult to conceive.

The Claimant alleged that the provisions of Section 11 of the Landlord and Tenant Act 1985 and Section 4 of the Defective Premises Act 1972 applied to the tenancy insofar as duties were owed to him by his landlord.

As against the Second Defendant, the Claimant asserted that it was responsible for maintaining the structure and common parts of the block of flats, and that as the leak came from the communal stack pipe, the Second Defendant was a correct Defendant to the claim.

The Second Defendant did not dispute the duties owed, but both medical and factual causation were immediately put in issue. From the outset, both we and our Loss Adjuster clients had grave concerns as to whether the accident had, in fact, occurred, how it had occurred, and the conduct and accounts being provided by the Claimant.

Aligning with the claim, it had been noted that when the alleged incident occurred the First Defendant had already commenced possession proceedings against the Claimant alleging that rent had not been paid, and it was the opinion of both Defendants that this was a significant motivating factor for the Claimant's claim.

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The Injury and Claimed Losses

At the date of the accident the Claimant was employed as a nurse in a residential care home. He asserted that he had sustained a soft tissue injury to his lower back which resulted in him suffering an adjustment disorder, with mixed anxiety and depression, which adversely impacted on his social and occupational functioning. He also asserted chronic pain, saying it was likely linked to his mental disorder.

The Claimant went further, however, and claimed that he was unable to continue to work as a nurse due to the accident and had resigned from his post as a direct consequence of the fall. He claimed that the accident had affected his health to such a degree that he had low mood, poor concentration, a poorer memory, low motivation, overeating, negative thoughts and loss of confidence. He said he spent most of his time at home. He painted a bleak picture. By the time of the Trial his medical condition appeared worsened. He was suffering from unrelated urinary issues which required very frequent breaks in him giving evidence.

The medical evidence served by the Claimant indicated that he had been unable to return to work for a period of 12 to 18 months and so his losses were capped to that period.

Value of the Claim

The claim was issued with a value of up to £75,000. The Claimant asserted past losses of £70,000, including a claim for lost earnings amounting to £53,000. This was very much a contested point which we shall return to below.

The Claimant served a Costs Budget in the sum of £126,000.00, which was reduced to £72,504 at the Case and Costs Management Conference. There was more at stake to this claim than costs. It had the hallmarks of an exaggerated and/or fraudulent claim from the outset.

Defence

The accident circumstances were not admitted and the Claimant was put to proof. The Defence expressly stated "*the precise circumstances date and mechanism of the Claimant's alleged accident are very much an issue in this case*". It was denied that any "*flood*" complained of by the Claimant emanated or could have emanated from the stack pipe. It was denied there had been, as alleged, 9 earlier significant floods. The complaints records of the Second Defendant simply did not support or evidence this. In our view, it was inconceivable that there would have been regular flood of foul water without repeated complaints having been made (of which there were none).

As to the allegation of the index flood it was the position of the Second Defendant that any issues of disrepair reported to it had been repaired.

As to the cause of the flood when the Second Defendant's representatives were permitted access following the index flood they found the flat was already largely empty of furniture (giving rise to a belief that the Claimant was no longer living there anyway). A very serious leak could be seen with continuous running water. The floor was flooded. However, both representatives came to the view that this flood had been caused by a leak from the toilet and, further, that this damage had been deliberately caused by or on behalf of the Claimant by vandalising the toilet. If the leak had flowed from the toilet the Second Defendant would not have been liable to the Claimant in any event as it was not a communal feature giving rise to an obligation to repair per the lease covenants.

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Evidence Gathering

Detailed enquiries were undertaken by the Second Defendant and a number of matters were discovered which gave rise to significant concerns that this was a fraudulent claim. We summarise some of those here:

(1) It was discovered that prior to the Claimant being employed in the residential care home he was a nurse in A&E and had been investigated and suspended by the Nursing and Midwifery Council (NMC). Unsurprisingly, we sought disclosure of these records.

The Claimant had revealed to the medical expert in this claim that he had suffered a prior heart attack, but we were suspicious. The Claimant strongly resisted disclosure of the NMC file and a successful Application for specific disclosure was threatened to bring this about. The NMC file was interesting to say the least. It revealed that the Claimant had been admitted to hospital (unfortunately for him the very hospital he had worked in as an A&E nurse) on an emergency basis suffering from a ketamine overdose. The Claimant's partner even produced a bag of white powder to the treating attendants.

A&E records of that admittance were also secured which fully corroborated this.

The NMC conducted an investigation and suspended the Claimant. The "heart attack" was, in fact, a ketamine overdose. Despite the clear A&E records and despite the findings of the NMC, the Claimant still sought to assert in these proceedings that he had not taken drugs and that he had suffered a heart attack. That was also what he had told his own medical expert in this claim. His medical expert was, understandably, concerned when the true position was revealed to him.

We considered the Claimant's position to be unsustainable, but despite putting this to the Claimant's Solicitors they maintained the Claimant's version of events and the Claimant signed his Witness Statement repeating his version of events.

(2) The Claimant stated in his pleadings, witness evidence and in giving evidence at Trial that he had resigned from his employment after his fall. This is what led to his claim for loss of earnings.

By now some years had gone by and the Claimant's NMC accreditation had been reinstated. He had returned to work and was employed as a manager in a care home. We sought disclosure of his personnel records to support his resignation as manager. Again, the Claimant strongly resisted disclosure of the personnel file from his previous employers, only authorising disclosure on threat of an Application to Court.

Liaison with the care home revealed, once again, an account which did not correlate with what the Claimant was asserting. Contrary to his claim, his previous employers revealed that on 30 April 2016 the Claimant had been demoted from manager to nurse. This was the day before the accident date. Naturally, we were very curious to establish why he had been demoted, especially as he had never revealed this to us and, in fact, in his Schedule of Loss was putting forward a claim for asserted lost wages on the basis of him being a manager as at the accident date (obviously at a higher wage).

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Further disclosure was sought. We discovered an Investigation and Adverse Report into the Care Home written just prior to the Claimant's demotion and relating to a period when the Claimant was the manager.

More significantly, we discovered that the Claimant had resigned from his job. The resignation letter itself was illuminating. It was disclosed by the Claimant and was dated, on its face, 24 May 2016. However, interrogation of the file properties of the letter showed that it had been created on 31 May 2017 – i.e. significantly after the accident date. The file properties also confirmed the author of the letter to be the Claimant. Our belief was that it had been created for the purposes of the claim. It had been produced by the Claimant and not his former employers. We, therefore, reverted to the former employers who confirmed that they were not able to locate the resignation letter amongst their files.

The Claimant was wholly unable to explain this, simply stating that he no longer had the laptop he had used to create that letter and declining any further explanation. He, unsurprisingly, denied any wrongdoing in relation to the investigation. As to his demotion, he stated that he had not known that he had in fact been demoted at all.

(3) The Claimant claimed that he was unable to work following the accident. However, Facebook posts revealed that he had applied (on 3 occasions) for nursing posts on cruise ships following the accident date. Unsurprisingly, we relied on this to support our position that the Claimant was well enough to have sought other jobs on not one but three occasions and was, therefore, far from being unable to work as a result of the alleged accident. Again, this was put to the Claimant. It will not surprise readers to learn that the Claimant's response was to state that these posts were made "*tongue in cheek*" and meant as an "*attempt to humour*". Unsurprisingly, that was not the way in which these were interpreted by the Second Defendant.

(4) The cause of the flood: As set out above, the Second Defendant's case was that the flood was caused by the Claimant himself, deliberately vandalising the toilet. This was supported by witness evidence later served by the Second Defendant, including from a plumber and gas engineer which supported this claim of vandalism.

(5) At the date of the asserted accident, the Claimant was the Defendant in possession proceedings being brought against him by the First Defendant who alleged that rent had not been paid and that there were significant arrears. A Notice to Quit had been served by the First Defendant in February 2016 and possession proceedings had been issued. At the date of the alleged accident, the Claimant knew he was facing eviction (and, in fact, an Eviction Notice was issued in August 2016). Relations between the Claimant and the First Defendant were poor. The Defendants both believed this to be a motivating factor in the claim.

The Claimant was put on notice of our intention to seek fundamental dishonesty findings at Trial. In our view, completely inexplicably, neither the Claimant nor his Solicitors appeared to take on board the seriousness of the Claimant's position. They proceeded with the claim.

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The Trial

The claim was listed for a 5 day Trial in Coventry County Court.

The Claimant was represented by Counsel and his Solicitors were also present. Both resolutely disputed the assertions of fundamental dishonestly. Both gave a clear view that they strongly believed in their client and that this claim was a matter of principle for them. As such, they said they would see the claim out.

By the end of day 2 of the Trial it was apparent that the Claimant was, in our view, in serious difficulties. He was on any basis not a credible witness. He was unable to give any cogent account or explanation for contested matters put before him. Matters worsened for the Claimant; a witness he had called in support of his claim to recover losses relating to damage to the inside of his flat (new flooring, etc) appeared to give an account which gave rise to further concerns that the documents produced were fraudulent.

On day 3 of the Trial the Claimant did not attend Court at all. Earlier that morning, but before Court commenced, Notices of Discontinuance had been emailed by his Solicitors to the Court. Whilst both his Solicitors and Counsel were present, they indicated that they no longer acted for the Claimant and they could not explain the Claimant's absence. On any view, this was a bizarre situation.

The Second Defendant indicated that despite the Notices of Discontinuance being filed, it wished to proceed to seek findings of fundamental dishonesty (in accordance with the Practice Direction relating to service of Notice of Discontinuance in such matters). Our position was that the Claimant had heard the most serious of allegations being made against him when being cross-examined and, as a result, he had, in effect, sought to sabotage the Trial by absenting himself. This was strongly resisted by Claimant's Counsel. The Judge allowed our Application.

The Claimant's Counsel was excused from further attendance. The Claimant's Solicitors were ordered to make an Application to come off record and to return to Court on day 5 of the Trial. They were also ordered to advise the Claimant to attend Court on day 5 of the Trial.

The Claimant attended on day 5 of the Trial, as did his Solicitors who were permitted to come off record. The Claimant was, therefore, unrepresented from this point. He waived the right to adjourn the Trial to seek further legal advice. He was advised of the seriousness of his position and that findings of fundamental dishonest could, ultimately, result in a term of imprisonment. He, nevertheless, elected to continue with the case.

The witnesses of both the First and Second Defendants were called. The Claimant did not challenge any of the evidence. Instead, he submitted he was a "broken man" and going to prison would give him a heart attack. Detailed representations were made to the Court as to fundamental dishonesty in the multiple aspects referred to earlier in this article. All submissions of fundamental dishonesty were made out.

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Comment

This was an interesting and very engaging claim which required considerable input from both ourselves and the Loss Adjusters from day one. It was clear from the outset that there was a significant potential for fundamental dishonesty findings, but, unusually, the more our investigations advanced the more it became clear that this was a case where further issues were arising during the course of the claim.

There were clear red flags present, but despite this neither the Claimant, his Solicitors or his Counsel appeared to pay any heed to the same, even when put on explicit notice. The result was that the 5 day Trial took place somewhat against our expectations given the weight of evidence assembled on the fundamental dishonesty issues. The result of that Trial was failure of the Claimant's claim, a finding of fundamental dishonesty against the Claimant, displacement of Qualified One Way Costs Shifting and an Order for costs against the Claimant, relating to both the First and the Second Defendants' costs on an indemnity basis.

It was an unusual case in that there were significant and numerous findings of fundamental dishonesty. Normally the battleground in fundamental dishonesty cases is confined to a narrow ambit of matters. This case contained an embarrassment of riches, so to speak, for the Defendants. As above, in some senses, it was odd that the case actually proceeded to Trial, but the Claimant had the benefit of legal advice and representation almost to the very end of the case.

Claire Thomas
Associate
Dolmans Solicitors

For further information regarding this article, please contact:

Claire Thomas at **clairet@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

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FOCUS ON

The New Fixed Recoverable Costs Regime in Litigation from 1 October 2023

Historical Background

The implementation of the fixed recoverable costs regime in cases valued up to £100,000 has been seen as 'unfinished business' arising from the original reforms considered and implemented following the Jackson Civil Justice Reforms Report of 2013. In fact, the current reforms and/or extension to fixed recoverable costs arise from a later report of Lord Justice Rupert Jackson dated 2017. The recommendations in that report were then subject to a consultation process in 2019 and the Government eventually responded to that indicating implementation of fixed recoverable costs in cases valued up to £100,000 in 2021. Inevitably, the COVID-19 pandemic has played a role in the overall timescale, but one might say that these reforms have been a considerable period in gestation.

At present there is still no guarantee that the reforms will be enacted as planned from 1 October 2023. There is an ongoing Judicial Review of the decision by the Government instituted by the Association of Personal Injury Lawyers (APIL). At the date of preparation of this article the new costs regime, applicable to cases valued up to £100,000 and based upon fixed (and 'predictable') recoverable costs, will be implemented as planned by the Ministry of Justice on 1 October 2023.

In this article we shall consider the main changes to recoverable costs which will be implemented on that date. A detailed and forensic examination of figures in place in all relevant circumstances is beyond the scope of an article like this, however we will seek to give some sense of where the likely areas of ongoing controversy will be.

The focus of this article will be personal injury claims, but the reforms to the case management and costs recovery systems which are to be implemented will apply to all civil litigation (valued up to £100,000).

Introduction to the New Regime

The rule changes arise from the Civil Procedure (Amendment No.2) Rules 2023 (SI 2023 No 572 L.6).

In the context of personal injury litigation, it is important to consider that the changes apply to all *non-disease* personal injury claims where the *cause of action* accrues on or after 1 October 2023. The changes, therefore, will not apply to accidents occurring up to 30 September 2023. Claims referable back to that period will continue to emerge up to 2026 (possibly longer regarding claims by minors). In contrast personal injury *disease* claims will be dealt with under the new regime where the *Letter of Claim* is sent after 1 October 2023.

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The New Tracking System

The main feature of the new fixed recoverable costs regime is an amendment to the Courts' tracking system. Currently there are 3 tracks into which cases are placed by reference to their value or complexity. These tracks are Small Claims Track, Fast Track and Multi-Track.

Under the new regime the Small Claims Track remains unchanged. Equally, the Multi-Track also remains, but it explicitly only now applies to claims with a value in excess of £100,000. The previous Fast Track which deals with claims of a value up to £25,000 also remains (with certain important modifications – see below) and *an entirely new Intermediate Track* covering claims valued at £25,001 to £100,000 has been created.

Assignment to track is, however, no longer a process referring only to value. There is now a specific process of assigning *complexity* to the case, by reference to a number of *complexity bands* in both the Fast Track and the Intermediate Track – this has consequences in terms of the extent of costs which are recoverable. The allowable costs are now set out in tables 12 (Fast Track) and 14 (Intermediate Track) of the new Practice Direction 45 ("PD45").

Parties will be required to give their indication of both track and complexity banding in Directions Questionnaires (CPR26.9). The parties can agree to a particular track and complexity banding, *but* even in the context of agreement the final arbiter is the Court. It is anticipated that disputes as to complexity banding will arise and will have to be resolved at allocation/case management hearings.

Pursuant to CPR 26.18(3) the Court has power to re-visit and re-assign a case. The Court must be satisfied in these circumstances that (a) there has been a change in circumstances from when the case was originally assigned a particular complexity banding and (b) must accept that this change justifies re-assignment to a different complexity band.

The New Fast Track – Detail

Subject to certain limited exceptions (see below), the Fast Track is the normal track for any claim:

(A) For which the Small Claims Track is not the normal track, and

(B) The claim is for monetary relief not exceeding £25,000, or

(C) Includes a claim for monetary relief not exceeding £25,000, the trial in the case is unlikely to last more than 1 day and oral expert evidence is likely to be limited to 1 expert per party in relation to any expert field and expert evidence is in no more than 2 expert fields. Moreover, the Court must be satisfied that it is in the interests of justice for it to be allocated to the Fast Track.

It should be noted that the Fast Track explicitly *excludes* Noise Induced Hearing Loss litigation. This is a type of litigation which has long presented the Courts with problems as to tracking. It is interesting to see this explicit exclusion being enacted.

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Moving to deal with complexity banding, in the Fast Track there are 4 complexity bands as follows:

Complexity Band 1 – Involves RTA non-personal injury claims and defended debt claims.

Complexity Band 2 – Involves RTA personal injury claims which are (or should be) commenced pursuant to the RTA protocol and also personal injury claims arising from the Package Travel Claims Protocol (holiday sickness claims).

Complexity Band 3 – Involves RTA personal injury claims to which the RTA protocol does not apply, employers' liability claims and public liability claims, possession claims and housing disrepair claims, together with "any other money claims."

Complexity Band 4 – Involves employers' liability disease claims (other than Noise Induced Hearing Loss claims), complex possession or housing disrepair claims, property and building disputes, professional negligence claims and "any claim which would normally be allocated to the Fast Track but is nonetheless complex …".

It is not immediately clear what the distinction is, or needs to be, between employers' liability and public liability claims in Band 3 and the same types of claims in Band 4 – other than a "complexity" criterion which is not defined.

Fast Track Fixed Costs – Table 12

Table 12 defines sections marked A to D which refer to the particular stage that the case reaches and then allocates costs, according to that stage, rather like the fixed costs regime which currently applies within the Fast Track. There are then subdivisions within each stage which further refine the recoverable costs in a given situation.

How this system operates is best understood by reference to the stages set out and the complexity banding defined in each case.

At **Stage A** (Pre-Issue), for a Complexity Band 1 claim with damages of less than £5,000, no costs are allowed (since this is effectively a Small Claims Track matter), yet for a Complexity Band 3 Fast Track claim, up to £3,000 in costs is allowed (plus a sum equivalent to 10% of damages over £10,000). All Complexity Band 4 Fast Track claims (concluded within Section A of the Table by reference to the stage reached within the case) attract £2,600 in costs plus a sum equivalent to 15% of Damages recovered (together with an additional sum of £510 per additional Defendant).

At **Stage B** (Issue to Trial Listing), there are further subdivisions – "issue to allocation", "allocation to listing" and "listing for trial". Here the range of recoverable costs covers a Complexity Band 1 case concluded post-issue but pre-allocation £2,100 in costs up to a Complexity Band 4 case concluded post-listing which would attract fixed costs of £7,900 plus a sum equivalent to 40% of damages recovered (plus £760 per extra Defendant).

Stage C of Table 12 then covers non-advocacy to trial costs which range from £3,800 in costs for a Complexity Band 1 case to £7,900 in costs plus a sum equivalent to 40% of Damages for a Complexity Band 4 case.

Stage D covers fixed trial advocacy costs (usually Counsel's fees) in a manner which is recognisable to those familiar with the existing fixed trial costs regime in the current Fast Track. There are 4 subdivisions referable to value (only) ranging from a brief fee of £580 for a claim worth less than £3,000 to £2,900 for a claim worth more than £15,000.

To complicate matters yet further within the Fast Track regime there is also provision for the recovery of specialist legal advice costs *for Complexity Band 4 Claims only*, and these costs cover matters such as post-issue conference or advice (£1,000) and/or drafting the Statement of Case (£500). These costs must be "justified", but there is no guidance as to what justification will be looked for from the Courts at this stage of matters. Equally, the Court can award costs for more than one advice "where this is justified" (CPR 45.46(3)), but, again, there is no current guidance as to what is considered adequate justification in this context.

The scope for disagreement, argument and satellite litigation is apparent.

The New Intermediate Track – Detail

As above, this entirely new track covers claims valued at £25,001 to £100,000 and, in effect, is the basis for extension of the fixed costs regime up to a value of £100,000. Hitherto, these strata of cases were Multi-Track claims and subject to costs budgeting and assessment.

The Intermediate Track, according to the new CPR relevant to the new fixed recoverable costs regime, is the normal track where:

- The trial will not exceed 3 days.
- Oral expert evidence is limited to 2 experts per party.
- The claim may be appropriately managed under the procedure within CPR Part 28 (the general case management rules for Fast Track cases).
- There are "no other features which would make the claim inappropriate for the Intermediate Track."

There are then several explicit exclusions from the Intermediate Track (pursuant to CPR 29.6(10)) being:

- Mesothelioma or Asbestos Related Disease claims.
- Clinical Negligence claims are said to be normally excluded unless by reference to value they would normally fall within the Intermediate Track (i.e. worth less than £100,000) *and* both breach of duty and causation are admitted.
- Abuse claims – that is claims arising from "abuse, harm or neglect of or by children or vulnerable adults".
- Claims in which the Court could order a trial by jury if satisfied of applicability of the relevant criteria under the County Courts Act or the Supreme Court Act.
- Claims against the Police involving an intentional or reckless tort, or where a relief or remedy in relation to the Human Rights Act 1998 is sought.

In all the above instances the excluded type of claim is, by default, allocated to the *Multi-Track*, thereby escaping the fixed recoverable costs regime entirely. Such cases will be dealt with via budgeting and/or detailed assessment following the presentation of an hourly rate bill.

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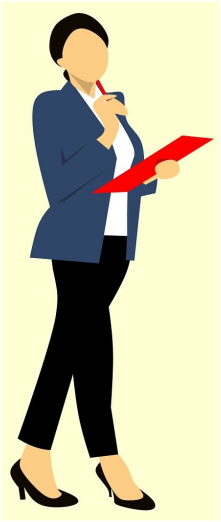
The procedure within the Intermediate Track, like the Fast Track, involves the Court resolving allocation to the Intermediate Track and then assignment to the relevant complexity band. There are 4 complexity bands once again, but these are dealt with differently to those on the Fast Track.

Within the Intermediate Track, the complexity bands are as follows:



Complexity Band 1 – Involves any claim where (a) there is only one issue in dispute and (b) the trial is expected to last no longer than 1 day and includes personal injury claims where liability or quantum is in dispute.

Complexity Band 2 – Involves any less complex claim where there is (nevertheless) more than one issue in dispute, including personal injury accident claims where liability and quantum are disputed.

Complexity Band 3 – Involves any more complex claim where one issue is in dispute, but which is unsuitable for assignment to Band 2 – including Noise Induced Hearing Loss claims and employers' liability claims.

Complexity Band 4 – Involves any claim which would normally be allocated to Band 1 to Band 3, but which is unsuitable for such allocation because there are serious issues of fact and/or law.

Then, much like the Fast Track process, by reference to the complexity banding and the stage reached in the case at conclusion, amounts of fixed costs are assigned – as defined in detail by Table 14.

Intermediate Track Fixed Costs – Table 14

Table 14 is, in comparison to Table 12, a more stratified analysis and there are, explicitly, no less than 15 potential stages given for the lifetime of a claim – however, some of these 15 stages are additional or alternatives.

Some examples may assist in gaining an overall understanding.

A Stage 1, Complexity Band 1 case would attract fixed costs of £1,600 plus a sum equivalent to 3% of damages.

A Stage 1, Complexity Band 4 case would attract fixed costs of £9,300 plus a sum equivalent to 8% of damages.

A Stage 8 (listing to trial, but excluding trial costs), Complexity Band 1 case would attract fixed costs of £6,600 plus a sum equivalent to 15% of damages.

In contrast a Stage 8, Complexity Band 4 case would attract fixed costs of £29,000 plus a sum equivalent to 22% of damages awarded/agreed.

There appears a risk of a significant variation of approach to the issue of both tracking and assignment from Court to Court and even from Judge to Judge within a given Court. One assumes that some level of guidance – to achieve consistency within Courts if nothing else – may be anticipated from Designated Civil Judges. There is also a role for Court Users Committees to seek to informally discuss issues between practitioners and the judiciary in each Court or within a locality served by a number of Courts to seek to achieve some level of understanding and consistency of approach.

Enhancements to Fixed Costs Figures

There are two circumstances in which, theoretically, enhancements to the normal fixed costs figures can be pursued and potentially allowed.

The first of these is in the context of "vulnerability" – the Court will consider an amount of costs which is greater than the fixed recoverable costs amount, where the party or witness is vulnerable, that vulnerability has required additional work to be done and by reason of that additional work the claim is for an amount that is at least 20% or greater than the fixed recoverable costs figure.

There is no guidance as to what constitutes vulnerability. Moreover, it is difficult to see how the 20% threshold can easily be measured. The implication seems to be that if a witness or party is vulnerable then the legal representative is likely to incur significant additional costs because costs within a 20% margin (presumably) will not be sufficient to generate additional provision. However, the legal representative incurring those costs will not know whether they might be recovered at the time they are incurred.

The second means of escape of the quantum of fixed recoverable costs is in the context of so-called unreasonable behaviour. A party, under the fixed recoverable costs regime, can apply for fixed recoverable costs to be increased (or reduced) *by 50%* based on the other party's "unreasonable behaviour".

Unreasonable behaviour is defined somewhat unhelpfully as *"conduct for which there is no reasonable explanation."*

This appears to invoke something like the wasted costs jurisdiction. However, it is poorly defined, and this is an aspect which might be subject to further satellite litigation. Commentators have speculated that this may include a refusal to engage in Alternative Dispute Resolution, mediation or settlement discussions, without reasonable explanation – and there is some reason to support that interpretation given the emphasis which is placed upon all forms of ADR in the Civil Courts' system today.

Part 36 – New Costs Implications for Claimant Offers

Part 36 of the CPR has been re-written in the context of the new regime. Indeed, one might suggest that the effect of Part 36 is now more favourable to Defendants than it was (or will be) in cases to which the fixed recoverable costs regime does not apply. Where a Claimant beats their own Part 36 offer, instead of costs being assessed on the indemnity basis (which, in a fixed recoverable costs scenario means escaping the fixed costs regime entirely, into a conventional hourly rate assessment of costs), the Claimant will be entitled to claim additional (*fixed*) costs via CPR 36.24(4) which is a new provision.

This provides that additional costs, in this situation, are 35% of the difference between the fixed costs for the stage applicable when the relevant period within the Part 36 offer expired and the stage applicable at the date of Judgment. As the name implies, these are additional costs paid in addition to the fixed costs received by the Claimant regarding successfully prosecuting the claim and defined by the concluding stage of the case (pursuant to Table 12 or Table 14). The general view is that this change in approach to costs will lead to less recovery for the Claimant.

Comments

The new costs regime injects some complexity and significant uncertainty in terms of how cases are classified initially and then assessed regarding costs. There is room for Defendants to make savings in terms of costs if it is possible to challenge the complexity banding.

The implementation date of the new regime is 1 October 2023, but the lead times in regard to personal injury claims will mean – rather like the changes which were implemented in 2013 – that there will be a significant period where, in effect, two regimes are being administered alongside each other.

As in previous reform situations, certain types of claims are excluded from the system of fixed recoverable costs, regardless of value; notably, asbestos related disease claims and abuse/neglect claims. It remains to be seen how Claimant lawyers will seek to limit the impact of the fixed recoverable costs regime to their business model. It also remains to be seen how certain types of litigation are treated by the Courts in complexity terms – data protection claims and Japanese knotweed claims are examples of claims which have some in-built complexity, as do motor cases where there are complex indemnity issues.

We shall monitor developments as the new regime takes effect and provide further updates in due course.

Peter Bennett
Partner
Dolmans Solicitors

For further information regarding this article, please contact:

Peter Bennett at **peterb@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

CASE UPDATES

Clinical Negligence - Date of Knowledge - Limitation

Shaw v Maguire
[2023] EWHC 2155 (KB)

In October 2007, the Defendant, a Consultant Pathologist, had reviewed cell samples taken from the Claimant's husband's back. She reported the samples as being benign. The Claimant's husband was discharged and no follow-up treatment was arranged.

In November 2009, further samples were tested which confirmed the presence of malignant melanoma. The 2007 samples were sent for re-testing and found to contain malignancy.

In April 2013, the Claimant's husband was diagnosed with stage 4 metastatic melanoma. He died in January 2014.

In November 2014, the Claimant instructed solicitors. The Defendant was first notified of a potential claim in March 2017, but no claim was served.

In June 2020, the Claimant instructed new solicitors to pursue a professional negligence claim against her former solicitors.

In August 2022, the Claimant issued proceedings against the Defendant.

The preliminary issue for the Court to determine was whether the claim was statute barred.

The Claimant's claim was brought under the Fatal Accidents Act 1976. The Court held that the effect of S.12(1) of that Act, taken together with S.33(2), was that where an injured person with capacity died 3 years or more after the accident or date of knowledge without commencing proceedings, the only avenue open to the personal representative on behalf of the dependants was to commence proceedings and apply to the Court to exercise its discretion under S.33 to disapply the limitation period. There was no absolute bar to the application of S.33.

CASE UPDATES

Neither the deceased nor the Claimant had possessed sufficient knowledge that the injury was significant in 2009. Their date of knowledge for the purposes of S.14(2) was June 2013 when they became aware that the husband's condition was serious and terminal, so they would have had until June 2016 to bring proceedings. The cause of action remained vested in the husband at the time of his death in January 2014. The primary limitation period expired in January 2017.

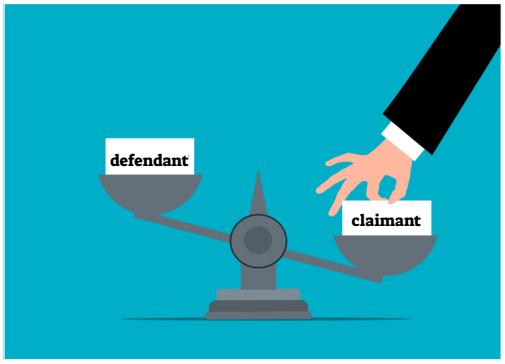
There was a delay of just over 5½ years in the proceedings being issued. The Court held that the delay was in no way the Claimant's responsibility. She could not be criticised for acting as she did after June 2013. It was entirely reasonable that between June 2013 and instructing solicitors in November 2014 that she concentrated on her husband's condition and treatment.

As to the effect of the delay, since both the histology sample and the Defendant's report were available, the issue would be the subject of independent expert evidence. The interpretation of the sample was relevant. The Defendant's recollection of the events that had occurred would not be relevant. The issue of causation would also be a matter for independent expert evidence. The Claimant's evidence was only likely to go to quantum.

In carrying out the balancing exercise, the Claimant had not contributed to the delay in any way and there was clear evidence of prejudice to the Claimant. The Court could not be satisfied that her claim against her former solicitors would succeed. The refusal to exercise the Court's discretion in her favour would cause her prejudice which any alternative remedy would not cure.

The Defendant had not provided any evidence to the effect that she was prejudiced in her ability to defend the claim. She was able to give direct evidence regarding her usual practice when it came to reviewing cell samples; the 2007 samples were still available and could be viewed by her and her instructed independent expert, and even if a claim had been brought within the relevant limitation period it was doubtful that the Defendant would have, in fact, had a clear recollection of this cell sample review over that or the many hundreds that she had carried out in the intervening years.

The Court held that any prejudice to the Defendant was more than outweighed by the prejudice to the Claimant and a fair trial could still take place with substantially the same evidence available. The preliminary issues were, therefore, determined in favour of the Claimant.



CASE UPDATES

Part 36 Offers - More Advantageous - Indemnity Costs CPR 36.17(4)

CCC v Sheffield Teaching Hospitals NHS Foundation Trust [2023] EWHC 1905 (KB)

The Claimant was an 8 year old girl who sued the Defendant NHS Trust for damages for negligence, which resulted in her suffering cerebral palsy. The Defendant NHS Trust admitted that it was responsible for failing to prevent the Claimant suffering severe chronic partial hypoxic ischaemia before and during her birth, and that this caused her cerebral palsy.

In July 2023, Judgment was handed down on quantum as follows:

a) A gross lump sum award of £6,866,615.

b) A Periodical Payments Order (PPO) for life in the sum of £394,940 per annum.

In May 2023, the Claimant had made a Part 36 Offer to settle her claim consisting of:

a) A gross lump sum of £7,000,000; and

b) A Periodical Payment Order (PPO) of £360,000 per annum for life.

The Court was required to determine whether the Claimant had beaten her Part 36 Offer, whether the award was more advantageous to her than the offer she had made, and, if so, whether the benefits under CPR 36.17(4) should be awarded (including indemnity costs).

There was no prior authority on this point or within the White Book.

The Claimant submitted that on the proper interpretation of Part 36 she had beaten her own Part 36 Offer at Trial. This was on the basis that if the PPO was capitalised into a lump sum by using the agreed lifetime multiplier used to calculate the lump sum value of the other heads of future loss, the capital value of the PPO would be £7,935,600, which, when added to the lump sum offered, came to a total of £14,635,600. This total was less than the total value of the award ordered by the Court which, if calculated in the same way, made a total of £15,246,292.

The Court did not agree with the Claimant's approach.

Under CPR 36.17(4) "more advantageous" meant better in money terms by any amount, however small. It followed that the issue for decision was what was meant by "better in money terms" when dealing with a combined offer which included a lump sum and a PPO.

A combined offer could be made under Part 36. However, the offeree could only give notice of acceptance of the offer as a whole and not accept just the lump sum or just the PPO. No protection would be gained unless both the lump sum and the PPO offers were beaten. The quantification of each depended upon the multiplicands in each head and on which heads of loss were included in each part of the combined offer. At Trial the Claimant beat the PPO part of the combined offer but failed to beat her lump sum offer, so that the combined Part 36 Offer was not beaten. Therefore, the CPR 36.17(4) rewards and incentives were not appropriate.

The Claimant was awarded her costs on the standard basis.

CASE UPDATES

Vicarious Liability - Sexual Assault of School Pupil by Work Experience Placement

MXX v A Secondary School
[2023] EWCA Civ 996

The Claimant, MXX, unsuccessfully appealed against the decision that the Defendant School was not vicariously liable for torts committed by an individual who carried out a work experience placement at the School comprising assault and battery (sexual assaults) and intentional infliction of harm (grooming). The first instance decision was reported upon in the August 2022 edition of Dolmans' Insurance Bulletin.

Between 24 and 28 February 2014, PXM, a former pupil of the School, undertook a Work Experience Placement (WEP) at the School. PXM was then age 18 and attending college hoping to qualify as a PE teacher. Attending a WEP was a compulsory part of his course. At that time the Claimant, MXX, was a Year 8 pupil (age 13) at the School. PXM had approached the School enquiring about the possibility of undertaking the WEP. Before starting the WEP, the Claimant attended an induction meeting with the Head of PE and was told he would have to be with a member of the PE staff at all times. PXM was made aware of the School's policies and guidance, including on safeguarding, and signed a declaration confirming he understood his responsibilities for child protection whilst at the School. By early March 2014, PXM and MXX were communicating on Facebook. On 4 July 2014, PXM first sent MXX indecent images over Facebook. They first met up in person on 2 August 2014 at a park, when PXM committed a serious sexual assault against MXX. In September 2014, PXM was arrested and subsequently convicted.

The Trial Judge found that during the WEP there were two occasions on which PXM had more than passing interaction with MXX; when he spoke briefly to MXX at the School and suggested that she attend the afterschool badminton club and the club session itself on 28 February 2014. PXM was supervised at all times by an experienced teacher at the club, during which PXM taught MXX to play badminton. The Trial Judge found that PXM did not carry out any grooming behaviour during the WEP.

The Trial Judge further found that there was no significant social media contact between PXM and MXX until late April 2014. The torts of assault and battery were committed by PXM on 2 and 5 August 2014. The tort of intentional infliction of injury was committed by PXM and that tort was first complete at the time of the sexual activity on 2 August 2014. As regards vicarious liability, the Trial Judge found that neither stage of the 2 stage test for the imposition of vicarious liability was satisfied: there was not a relationship akin to employment and there was not a sufficiently close connection between the relationship between the Defendant and PXM and the wrongdoing perpetrated by PXM such that the wrongful conduct could fairly and properly be regarded as done by PXM whilst acting in the ordinary course of the Defendant's employment.

MXX appealed on the grounds that the Trial Judge was wrong to:

(1) Conclude that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the Defendant ceased;

(2) Find that the conduct and mental elements of the tort of intentional infliction of injury were not made out until after the end of PXM's placement at the School;

(3) Find that the relationship between the Defendant and PXM was not akin to employment; and

(4) Find that PXM's torts were not sufficiently closely connected with his relationship with the Defendant so as to give rise to vicarious liability.

The Claimant succeeded on grounds 1 to 3, but failed on ground 4.

The Court of Appeal found that the Trial Judge had overlooked evidence that was at the core of MXX's case as to what took place during the WEP and, as a result, the findings of the Judge that the grooming behaviour by PXM did not take place during the WEP and that there was no significant communication between MXX and PXM until late April 2014 were not supported. On the balance of probabilities, the grooming by PXM began during the WEP. Given this finding, the elements of the tort of intentional infliction of injury were made out during the WEP. Accordingly, grounds 1 and 2 were allowed.

Whilst the Trial Judge had correctly set out the law as to the 2 stages of vicarious liability, in relation to stage 1 the Judge was wrong to find that the relationship between the Defendant and PXM was not akin to employment. The Court of Appeal accepted MXX's contention that PXM was at the School to experience the work of a teacher, which he did. The reality of the relationship between the School and PXM was that the School identified the terms upon which PXM would be there; it required him to read and accept the School's policies which applied to members of staff; it regulated PXM's time; supervised him and directed and controlled what he did; pupils were told to treat PXM as a member of staff; in undertaking the tasks assigned to him PXM assisted with the business of providing PE classes and after school sports clubs; and he was not carrying on business on his own account. Accordingly, the stage 1 test for vicarious liability was made out.

As regards stage 2, notwithstanding its findings on grounds 1 to 3, the Court of Appeal agreed with the Trial Judge's assessment of the limited nature of PXM's role at the School. PXM had no caring or pastoral responsibility for pupils; his access to the Claimant was limited as he was, or should have been, kept under close supervision at all times; PXM held no position of authority over pupils; it was not until after PXM left the school that any Facebook communications took place and such communication was specifically prohibited by the School. Given the limited nature of PXM's role during the course of one week, the facts did not begin to satisfy the close connection test.

Accordingly, the Court of Appeal found for the Defendant on ground 4. The Defendant was not vicariously liable for the torts of PXM and the appeal was dismissed.

For further information on any of the above cases, please contact:

Amanda Evans at **amandae@dolmans.co.uk** or
Judith Blades at **judithb@dolmans.co.uk**

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