DOLMANS INSURANCE BULLETIN

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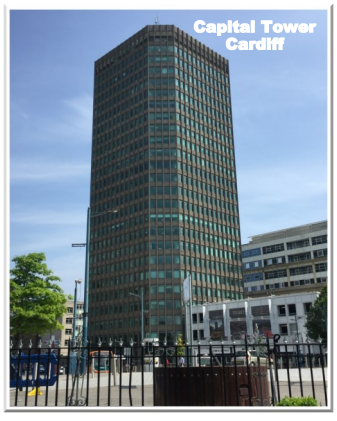

If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

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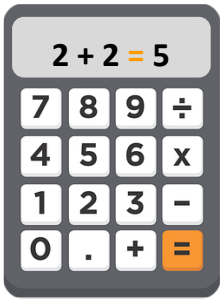
REPORT ON

"I didn't jump, Miss!"

CA (a Minor) v Caerphilly County Borough Council [2020]



Claims involving injuries suffered by children at school, particularly those in primary school, are notoriously difficult to defend. However, this case demonstrates that a system of good record keeping, together with comprehensive Witness Statements, can be sufficient to overcome a claim where the evidence from the Claimant does not quite add up.

Background

The Claimant was aged 6 and a pupil at a local Primary School. On 25 May 2017, he was playing in the school yard alongside other pupils. The Claimant's case was that he climbed up onto a climbing frame and fell, suffering fractures of the first and second metatarsals of his right foot.

The allegations made on the Claimant's behalf were extensive. The claim was brought under section 2 of the Occupiers' Liability Act 1957 and it was alleged the Local Authority knew the Claimant had mobility issues prior to his accident and should not have left him alone (having suffered several injuries during the prior 12 months), should have properly and constantly supervised the Claimant and should not have allowed him to climb upon apparatus from which it was likely he would fall. It was also alleged that there was no proper and safe system for playtime activities and the Local Authority should have conducted a pupil specific risk assessment for the Claimant.

Investigation

Due to the wide ranging allegations, it was necessary to attend the school to interview all relevant personnel and inspect the climbing frame in question. The headteacher confirmed that the Claimant transferred to the school from another Primary School in February 2016. The Application for School Transfer did not contain a Statement of Special Educational Needs and no medical needs or issues were disclosed on the transfer forms submitted to the Local Authority. The Claimant settled in well at the new Primary School and his Annual Progress Report (2016) noted he was a very polite and happy boy who had made some close friendships since joining the school.

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During the summer term of 2016, the Claimant's mother attended the school with various images of boxing and cycling helmets. She said her son had been falling over a lot and asked the school to select a helmet for him to wear during school hours. The school requested supporting medical documentation because they were not aware of any Special Educational Needs or mobility issues which necessitated a helmet to be worn. The school were not prepared to allow him to do so, which would set him apart from other pupils, without any supporting medical evidence. A referral was made for the School Nursing Team to meet with the Claimant's parents to discuss their concerns, but they did not engage with the school nurse.

In September 2016, the Claimant's parents notified the school that their son had been receiving specialist training support and requested this at the Primary School. The headteacher contacted the Special Teacher Advisor Support Team, who confirmed they had no record of any specialist support being provided. Towards the end of 2016, the Claimant's parents continued to express concerns about the Claimant falling over. The school had their own concerns about the Claimant's fine motor pencil grip and referred him to ISCAN – the Integrated Service for Children with Additional Needs (ISCAN) – to assess his fine and gross motor schools. The Claimant underwent a paediatric assessment on 16 March 2017, which found he had a normal heel / toe gait pattern. There was, however, evidence of reduced single leg balance and difficulty hopping. The Claimant also had reduced core control. Physiotherapy was arranged, but the Claimant did not attend a session and so was discharged from the service.

The school had carried out a risk assessment in relation to playtime activities, which was revised in January 2017. This considered the risks associated with break-time activities and specifically supervision. The assessment required an adequate level of supervision to be available and recommended a minimum staff:pupil ration of 1:30. The Claimant's school file contained 9 accident forms, completed between February 2016 and the accident date. The Claimant had 6 accidents during the summer term of 2016 and 3 other accidents between September 2016 and May 2017 (not including the index accident). The headteacher confirmed that infants tend to fall over more than juniors and she did not consider 9 accidents over 12 months to be unusual for a child of the Claimant's age. The headteacher also noted they all occurred while the Claimant was playing with friends and did not involve the climbing frame or other playground equipment.

The Accident

On 25 May 2017, it was the Claimant's class who were using the large playground equipment. One member of the lunchtime staff would stand adjacent to the climbing frame while children used it. The supervisor confirmed the climbing frame as the Claimant's chosen piece of equipment (when permitted) and he had used it on numerous occasions prior to 25 May 2017. That day, over a third of pupils were away on the school's annual residential trip. There were 68 pupils in the playground with 4 supervisors, with a staff:pupil ration of 1:17. That ratio was considerably better than the recommended minimum and the headteacher confirmed it was probably the best ratio possible given the number of pupils offsite.

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The lunchtime supervisor saw the Claimant jump from the climbing frame and told him it was dangerous and he might hurt himself. He said *"Okay Miss, I won't do it again"*. Within seconds of getting back on the climbing frame, he jumped again. In accordance with the school's policy of *'three strikes and you're out'* (which applies to all activities), the supervisor told the Claimant it was his last chance and if he jumped again he would no longer be able to use the climbing frame. The Claimant replied *"Okay Miss"*.

The supervisor watched the Claimant get back on and continue to play. Another pupil called the supervisor over. She was only a couple of yards away and had her back to the climbing frame. The supervisor turned around and saw the Claimant crying on the floor. She asked what he had done and he replied *"I didn't jump, Miss"*. The Claimant said he had hurt his foot and was taken to the first aid room. His parents collected him and he attended hospital the next day.

The supervisor's evidence was that although she was sorry the Claimant had suffered an injury, she would not have done anything differently. The Claimant had been warned twice about jumping from the climbing frame and had never disobeyed two warnings. She thought he would not want to be taken off the climbing frame, which was his favourite playtime activity. The supervisor also knew the climbing frame was low to the ground, so it was a very small distance to jump. The base beneath it was padded, providing a softer landing. The Claimant had used the climbing frame regularly and the supervisor considered him a much better climber than many of his classmates.

Post-Accident Events

In July 2017, the Claimant's father provided the school with some correspondence from medical professionals. He requested a safety plan, asking the school to cater for the Claimant's needs and provide constant supervision during physical activities. The Claimant's parents were asked to attend a meeting with the Local Authority's Health & Safety Manager (for schools), where a Health and Safety Pupil Risk Assessment was completed. This documented their comments over the Claimant's alleged mobility issues, notably hypermobility in all joints and dyspraxia, together with the engagement of a private consultant in 2014 who diagnosed hyperflexibility. A GP letter made reference to possible dyspraxia and it was agreed that the Claimant's parents would provide the risk assessment to their GP and seek an updated diagnosis and advice regarding any specific support. The GP stated that the Claimant should not be prevented from climbing activities, but should be monitored. Physiotherapy identified no physical limitations to the Claimant participating in all gym based activities and ISCAN confirmed he had undergone a comprehensive assessment and did not meet the criteria for a diagnosis.

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Witness Evidence

Witness Statements were exchanged. The Local Authority adduced evidence from the headteacher, the lunchtime supervisors and a first aider. The Witness Statement from the headteacher confirmed that the school does not have the capacity to increase the level of supervision unless there is a medical statement of need which is supported by additional hours. She confirmed the Claimant had been referred for assessments and each time he was within the normal boundaries.

The Claimant's witness evidence consisted of Witness Statements from the Claimant's mother and father. Notably, the Witness Statement of the Claimant's father said that he had supplied documentation/letters from medical professionals to the school in advance of the Claimant's accident alleging *"The Primary School were clearly aware of [the Claimant's] problems before his accident".* The headteacher disputed the contents of this Witness Statement and we prepared a Supplemental Witness Statement to respond and correct the factual inaccuracies.

Application and Discontinuance

The Claimant's solicitors objected to the Defendant being permitted to rely on the headteacher's Supplemental Witness Statement. We made an Application to the Court and outlined how the Claimant's father's Witness Statement contained evidence which was based on allegations that had not been pleaded in the Particulars of Claim or previously expressed in correspondence on the Claimant's behalf. Specifically, he sought to advance a case that medical documentation had been provided to the school prior to the Claimant's accident and the Defendant should be given the opportunity to respond to such an allegation. Although the Claimant had alleged the Local Authority were aware of the Claimant's mobility issues, that allegation referred to previous accidents and not the provision of any medical documentation.

Shortly after making the Application, the Claimant served a Notice of Discontinuance, approximately one month before the Trial listed for 14 May 2020.

Comment

Although this was a Fast Track claim, there were a number of issues to consider from a liability perspective and evidence to adduce in Witness Statements. The headteacher felt strongly about the claim and her Supplemental Witness Statement cast doubt upon large sections of the Claimant's father's evidence. We did not want the headteacher's evidence to be confined to her original Witness Statement and although we do not know the reasons behind the discontinuance, we anticipate the Application forced the Claimant's hand, resulting in an excellent outcome for the headteacher, the school and the Local Authority.

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FOCUS ON

Where Fundamental Dishonesty is not established, is there still room for costs consequences to penalise a Claimant for exaggeration?

Brian John Morrow v Shrewsbury Rugby Union Football Club Limited

Fundamental Dishonesty is a powerful weapon for Defendants, but in cases where exaggeration is suspected, it is also a weapon which cannot always be deployed with any guarantee of success. Moreover, there are cases where exaggeration, on any view, falls short of the ingredients required for Fundamental Dishonesty. In such circumstances, what other options are available to a Defendant?

One potential answer is issue based Costs Orders pursuant to CPR 44.

The decision of Mrs Justice Fabey on 30 April 2020, in the above case in Manchester District Registry, does provide some potential avenues for a Defendant to pursue in an appropriate case. The *Morrow* case was concerned with a date of accident of 28 February 2016. On that occasion, the Claimant was struck on the head and injured by a rugby post whilst watching a game of rugby at the Defendant's ground. Liability was conceded, causation and quantum were the only issues for determination.

The Trial took place on causation and quantum, and a Judgment was handed down on 21 February 2020. Quantum figures were agreed, but there remained a dispute as to costs, and a further hearing took place on 13 March 2020. The Claimant submitted that he should receive costs in full. The Defendant asserted, pursuant to CPR 44, that costs should be subject to a one third reduction (or such amount as the Court determined) because the claim was exaggerated and conducted in an unrealistic way.

Prior to the incident, the Claimant was working as an Independent Financial Advisor (IFA). The main plank of his case was that the accident had caused him to become unfit for work, particularly on psychological/psychiatric grounds. It was asserted that he would never resume work as an IFA, in future he would only be capable of a minimum wage role and that situation would endure up to the normal date of retirement otherwise (at age 65). However, had he been capable of continuing work as an IFA, he would have been subject to promotions and his earnings would have increased.

The Defendant asserted that the Claimant was capable of work as an IFA, but his previous documented psychological and psychiatric problems prior to the accident would have prevented him from continuing to work as an IFA irrespective of the accident.

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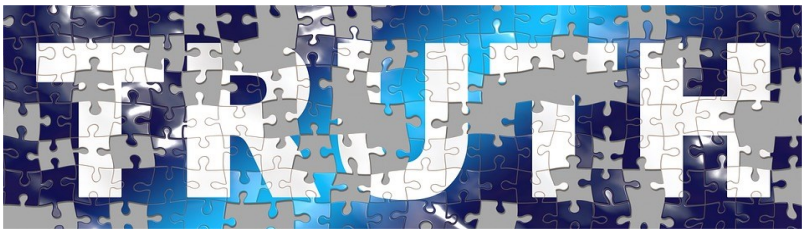

Importantly, the Defendant (presumably following a conscious decision to proceed on this basis) did not maintain that the Claimant was dishonest, and such finding was not made by the Judge. However, the Defendant did assert that the Claimant's case, and the evidence on which it was based, was misleading. It was said that he had given a misleading picture (as to pre-accident history), on multiple occasions, to experts and also in his witness evidence on the same basis. He had, according to the Defendant, described his post-accident symptoms in extravagant terms, whereas, in fact, there was little difference between the pre and post accident situations (see below).

Strikingly, only 9 days before the accident on 19 February 2016, the Claimant's wife had sent an email to his GP practice describing a range of symptoms and (it was said) implicitly questioning his capacity to continue working as an IFA at that time. A specialist medical referral was sought.

As the Judge put it, "the parties were poles apart at Trial." The Court was, in fairness, presented with two extreme positions and was, inevitably, required to navigate a just course through those positions.

It was accepted by the Judge that analysis of the future loss of earnings claim in the case was the "most complex and time consuming" element of the case.

Following a concession by the Defendant's expert psychiatrist (Dr Ahmed Al-Assra) in cross-examination, the Court found, at Trial, that the Claimant would, but for the accident, have been capable of working as an IFA until age 55 (he was 46 at the time of the incident and 50 at the date of Trial), but no longer. The Judge did not accept the Claimant's case as to promotion and/or upward trajectory of earnings thereby generated.

As a result of the Judgment following the Quantum Trial, the Claimant was awarded damages in the sum of £285,658.08, including PSLA of £58,000. The pleaded claim was in excess of £1 million and included a claim for future loss of earnings of £946,097.28 (PSLA was claimed at £60,000).

Interestingly, on 8 October 2019, the Claimant made a Part 36 Offer of £800,000. Prior to that, on 8 June 2018, the Defendant had offered the sum of £110,000.00.

Inevitably, the Judgment sets out the legal framework by which the decision on costs would need to be decided; specifically Part 44 of the CPR, and, in particular, the conduct of the parties pursuant to CPR 44.2(5).

There was, to my reading, a clear reluctance on the part of the Trial Judge to depart from the normal 'costs follow the event' position and, moreover, concern expressed as to:

"A [potential] culture of satellite litigation [which] would carry the risk of generating significant additional costs to the parties (in the form of hearings and appeals at which the only issue is costs) and significant costs to other litigants because of the uncertainty which such an approach generates …".

Additionally, the Judge was concerned to preserve and/or emphasise the primacy of Part 36 as the protective mechanism for the Defendant:

"The primary protection for Defendants against paying the costs of exaggerated claims is CPR Part 36. Faced with an exaggerated claim, a Defendant is able to make a Part 36 offer ***that takes account of the exaggeration*** *and reflects the value of the claim likely to be accepted by the Court …".*

[emphasis added]

The Judge referred to the decision of Yip J in *Welsh v Walsall Healthcare NHS Trust [2018] EWHC 2491 (QB)*, where a deduction of a Claimant's costs (to the extent of 15%) was made where it was found that the Claimant's conduct, in the context of CPR 44, had gone beyond the *"ordinary situation where one part of a party's case is stronger than another and depends on consideration of the evidence at Trial …".*

The Judge also appears to have been heavily reliant on the following passage of the Judgment of Ward LJ from *Widlake v BAA Limited [2009] EWCA Civ 1256* (**NB**: a pre-Jackson decision and, therefore, pre Fundamental Dishonesty decision):

"… the Court is entitled in an appropriate case to say that the misconduct is so egregious that a penalty should be imposed upon the offending party. One can, therefore, deprive a party of costs by way of punitive sanction. Given the Judge's findings of dishonesty in this case, that may be appropriate here. I sound a word of caution: lies are told in litigation every day up and down the country, and quite rightly do not lead to a penalty being imposed in respect of them. There is a considerable difference between a concocted claim and an exaggerated claim and Judges must be astute to measure how reprehensible the conduct is …".

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The Defendant's central argument in the present case was that the Claimant had not succeeded on the central issue as to future loss of earnings. This argument was advanced at the hearing to determine costs, despite the concession by the Defendant's psychiatric expert which, it was said, did not impact the force of this position in the context of the 'lie of the land' following analysis of the position by the Judge and the findings made as to quantum. Significant time at Trial had been taken up in dealing with these issues and, therefore, there was, bluntly, a causal nexus between the Claimant's misconceived and/or exaggerated approach to future losses and the one third deduction from overall costs sought by the Defendant.

The Claimant's Leading Counsel, in his submissions, highlighted that in its Counter-Schedule of Loss, the Defendant only accepted £829.54 of past losses and an unassessed amount for PSLA. All other heads of loss were, seemingly, put explicitly in issue; including loss of earnings.

Thus, it was contended that the Claimant had to go to Court to achieve an award of more than the £110,000 offered in June 2018, which was the Defendant's only offer and easily beaten (see above, mathematically, the force of this argument is easily demonstrated).

Moreover, the Claimant's Counsel highlighted that, consistent with its approach to Special Damages overall, the Defendant, at Trial, had mounted a defence on causation of damage which, if successful, would have meant that the claim would have attained a much lower valuation. This approach, the Claimant had argued, was wrong in law, and, importantly, the Claimant had wholly succeeded on that point at Trial.

Thus, in some senses, it was entirely reasonable for the Claimant to assert that on an issue based analysis of the result, the Claimant had, in fact, succeeded on the important issue. According to the Claimant's Counsel, the Defendant had shaped its entire case around the Claimant's wife's email to the GP dated 19 February 2016 and the apprehension that this email connoted such a crisis in the Claimant's mental health, before the accident, that he was clearly not going to be employed for a significant period of time at all. This approach was rejected at Trial, in part, because of the concession by the Defendant's psychiatric expert.

In essence, the situation at Trial arose because of a failure on the part of the Defendant to appropriately 'stress test' the evidence of the psychiatrist before Trial. Had that happened, the medical basis upon which the Defendant's case was founded would have been found to have been flawed (or at least significantly weaker than it appeared to be) and, shortly thereafter, the Defendant would have appreciated that its Part 36 Offer of June 2018 was non-protective.

The Claimant's own Part 36 Offer was approximately 60% of the pleaded valuation of the claim. This reduction from the pleaded valuation, it was said on behalf of the Claimant, amounted to a substantial signal as to a desire to negotiate. Moreover (and perhaps more importantly, at least as far as the writer is concerned), the Claimant made significant attempts at engaging ADR during 2019; specifically, the Claimant made a request for a Joint Settlement Meeting on 16 April 2019 (which the Defendant asserted it was considering, at least in principle), followed by *seven further requests for a settlement meeting*, but the Defendant refused to engage.

The Judge made a number of findings as to the situation:

- Whilst not dishonest, the Claimant, undoubtedly, exaggerated his claim for future loss of earnings - *"His psychiatric and psychological condition … may have made him prone to exaggeration and prone to pursue his claim beyond what common sense and realism would dictate … He chose to put an exaggerated claim to the Court."*.

- The Judge did not accept the Claimant's submission that if the Defendant had been willing to engage in settlement meetings or negotiations, it would have been possible for the Claimant's lawyers to reveal his (unrealistic) approach to the litigation which could, in turn, have led to compromise. The decision to make a £800,000 Part 36 Offer only weeks before Trial, the Judge found, was entirely inconsistent with such a position. Such offer *was "Unrealistic and nearly 3 times in excess of what (the Claimant) recovered at Trial. The timing of the offer and its lack of realism are sufficient to defeat the inference that he had an intention to settle which was thwarted by the Defendant …"*.

- In contrast, the Claimant preferred to put forward an exaggerated case in Court, as exemplified by the gulf between damages claimed and the damages awarded - *"The Defendant's Part 36 offer proved too low, but the Defendant's offer was significantly closer to the damages awarded than the Claimant's offer."*.

- All of that having been said, in the absence of dishonesty, the Claimant's exaggeration was not the sort of egregious misconduct that in itself deserves a punitive Costs Order per *Widlake* (see above). Albeit the Defendant's Part 36 Offer was closer to the valuation of damages at Trial, it was, nevertheless, an assessment of value which the Court rejected. The Defendant lost on its important causation argument (see above). The Defendant also sought to contest almost every allegation and almost every issue relating to quantum. Thus, this meant that the Claimant would have needed to come to Court to recover damages which flowed from the original Judgment.

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- Albeit Fundamental Dishonesty was excluded, the Judge had the following to say about the Claimant's exaggeration in general - *"Exaggeration and an inflated claim for damages was built into the structure of the Claimant's presentation of his claim, both before and at Trial … the Claimant's exaggeration operated across multiple and cumulative witnesses (the Claimant, his wife, his line manager … the exaggerated instructions that he gave to experts) and across multiple days in Court. I give considerable weight to exaggeration in a case where it is engrained. I give some weight to the fact that the Claimant's Part 36 Offer was multiple times higher than the award of damages. These factors lead me to the conclusion that the Claimant's conduct was a cause of unnecessary expense."*.

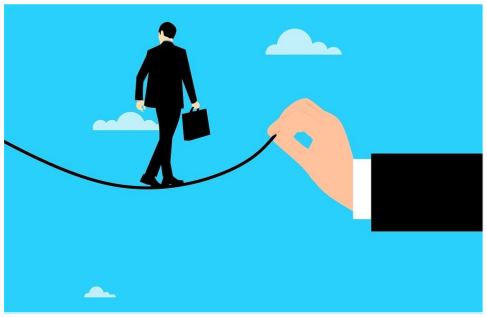
Accordingly, taking an overall view of matters, the Judge, ultimately, concluded that a reduction in costs should take place. However, balanced against that principal was the view of the Judge that the Defendant also bore some responsibility for the length of the Trial (see above). Ultimately, the Judge made a deduction of 15%; the same figure as Yip J in *Welsh v Walsall* (see above).

The Judge indicated that, in her view, a figure higher than 15% risked making inroads into areas in which both the Claimant and the Defendant overstated their respective cases and, therefore, would, in effect, over penalise the Claimant for costs causatively connected to the Defendant's conduct, not his own.

Moreover, the Judge also considered whether a deduction of 15% could be regarded as appropriately meaningful (the concern being that 15% was too little to be so). However, having reflected on this point, the Judge concluded that 15% of costs being "lost" by the Claimant would be meaningful, given that the overall Trial time was 7 days with very numerous witnesses, both lay and expert. In simple terms, a deduction of 15%, in these circumstances, was sufficient to mark the misconduct by the Claimant.

Comments

As touched upon in the introduction to this article, exaggerated personal injury claims are, to some extent, part of the legal landscape (as noted in the *Widlake v BAA case* – see above). Defendants now have the weapon of Fundamental Dishonesty which, when successfully deployed, removes the need for arguments of this nature. However, what of cases where the issues are such that Fundamental Dishonesty is not going to be made out (or is not likely to be accepted as an argument)?



This Judgment is a useful reminder that the mechanisms within CPR 44 and the question of issue based Costs Orders still provide a Defendant with a means to penalise the Claimant for unreasonable and inappropriate conduct in the furtherance of an exaggerated claim.

The balancing exercise painstakingly undertaken by the Judge in this case is, ultimately, almost as interesting as the issue and the result. In that sense, the Judgment is likely to be held up as a potential template for future considerations of such situations by the Court.

The primacy of Part 36 remains. That is the clear thread running throughout the Judgment. Thus, careful and regular evaluation of offers in all quantum only cases will be required because, clearly, changing circumstances will erode the potential protection of such offers which are the primary bulwark against paying extensive costs in such cases. Moreover, a potentially more 'reasonable' approach by the Claimant as to his Part 36 offer might well have, in conjunction with the ADR position, caused the Defendant significant difficulty in the present argument. Invitations to ADR (in difficult cases) continue to present conundrums for all parties in litigation both at the time of the proposal and potentially later as well.

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RECENT CASE UPDATES

Consent Orders - Interpretation - Service

Oran Environmental Solutions Limited & Another v
OBE Insurance (Europe) Limited & Another
QBD 11.05.20

The Defendant applied for a declaration that the Claimant had not served its Claim From within the time specified in a Consent Order.

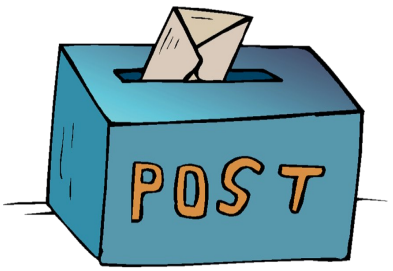
The terms of the Consent Order indicated that the Claimant would 'serve' its Claim Form by 4pm on 6 January 2020.

The Claimant's solicitors posted the Claim Form on 6 January 2020. The Defendant argued that the service was not valid.

The Court held the meaning of 'service' was as provided for under CPR r.7.5(1):

"Where the Claim Form is served within the jurisdiction, the Claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the Claim Form …".

The table in CPR 7.5(1) identified that one step for service was to post the documents and it was then possible for documents to be received after the expiry of the Claim Form's validity, but still to have been properly served.



The Court held that the Claim Form was validly served. Proceedings were "served" when placed in the post to the Defendant and not when received.

Costs Budgets - Filing - Application for Relief from Sanction

Heathfield International LLC v Axiom Stone (London) Limited
[2020] 1075 (Ch)

The Court ruled on an Application for relief from sanction by the Second Defendant, following the late filing of its Costs Budget.

Initially, Costs Budgets were to be filed by 18 November 2019, ahead of the Case and Costs Management Conference (CCMC). The Second Defendant failed to do so.

The CCMC was vacated in early December 2019 and re-listed for 30 April 2020. The Second Defendant asserted that it did not file its Costs Budget because the parties had agreed to vacate the hearing.

The Second Defendant's Costs Budget was filed in advance of the April CCMC, but it was 6 days late. To compound matters, relief from sanction was only sought 2 days before the CCMC.

The Second Defendant argued that the beach was not serious or significant because it did not have an impact on the litigation or cause the Claimant inconvenience. The Judge disagreed.

The Costs Budget which had been filed was not in the required form; it failed to take into account the requirement introduced last October that all costs up and including the CCMC should be treated as incurred costs. The Witness Statements filed by the Second Defendant's solicitor were also non-compliant as they contained an out of date Statement of Truth.

The late filing of the Costs Budget was considered to have placed an unreasonable burden on the Claimant in preparing for the CCMC and also on the Court.

The Court held that the Second Defendant's conduct showed a persistent failure to engage with the obligation to provide a Costs Budget and a total failure to engage in discussion of or commentary on opposing parties' budgets. By the date of the hearing, there was still no Precedent R prepared by the Second Defendant.

Even with regards to the lateness prior to the April CCMC, the Second Defendant had failed, or refused, to recognise the seriousness of the failure. There was a catalogue of other procedural and deadline failures, which resulted in the Court finding that the Second Defendant had only filed a Costs Budget comprising the applicable Court fees and dismissing the Application for relief from sanctions.

Costs - Reasonableness of Switching Funding Regime

XDE v North Middlesex University Hospital NHS Trust
[2020] EWCA Civ 543

In a claim arising from the delayed diagnosis of tuberculosis meningitis, the Claimant, 'C', was granted a Legal Aid Certificate in 2009, limiting costs up to Stage 2 to £55,480. In December 2011, C's solicitors sought a £10,000 increase to the costs limit. The Legal Services Commission (LSC) advised that a formal request for funding should be made using form CLSAPP8. In May 2012, C's solicitors responded stating that their current costs were £57,000, costs at the point of issue would be £67,000, they would not be able to progress the case within the current costs limit and requested that the Certificate be discharged. The LSC discharged the Certificate and C entered into a CFA-lite with 100% success fee and ATE insurance.

At first instance, on the basis of the guidance in *Surrey v Barnet and Chase Farm Hospitals NHS Trust [2018]* that Legal Aid and CFA-lite funding were broadly equivalent, the Master concluded that the C's solicitor's decision to change funding was unnecessary and unreasonable. That decision was upheld on appeal.

C appealed to the Court of Appeal submitting that the decisive factor in *Surrey* was the failure to advise the Claimants that changing from Legal Aid to a CFA before 1 April 2013 would dis-entitle them to the 10% *Simmons v Castle* uplift, whereas the switch in this case was effected before the *Simmons v Castle* uplift was announced and was not, therefore, a factor and *Surrey* did not apply. Further, the CFA-lite was so obviously superior to Legal Aid the actual reasons for the change in funding were irrelevant.

The Court of Appeal held that the approach and guidance in *Surrey* was of general application in assessing the reasonableness of a change from Legal Aid to a CFA-lite and was not confined to cases in which the *Simmons v Castle* uplift arose. The Court had to determine whether a party's reasons for changing funding were reasonable and that involved examining the advice given by the solicitors. The Court had to look at what the client was told and why, the background circumstances and whether any of the solicitor's advice was erroneous or self-serving.

In this case, the reasons for the change lay in the solicitor's unreasonable failure to limit their spending to the parameters imposed by the LSC. They had gone over budget, knew the LSC would not grant an increase because they could not show a good reason for needing one and, therefore, decided to move to a CFA-lite without obtaining instructions from C's Litigation Friend. The Master had been right to find that the change in funding was unreasonable.

The argument that CFA-lite was so obviously superior to Legal Aid lacked merit. This had played no part in C's solicitor's decision to change funding. In any event, CFA-lite was not obviously superior to Legal Aid.

Limitation - Delay - Prejudice

Gregory v HJ Haynes Limited
[2020] EWHC 911 (Ch)

The Claimant, 'C', suffered from pleural thickening as a result of alleged exposure to asbestos during his employment with the Defendant, 'D', between 1959 and 1972. D was dissolved in 1992. It was agreed that C first acquired knowledge of his disease in November 2008 and the limitation period expired in November 2011. C instructed solicitors in March 2009, who made enquiries with the Employers' Liability Tracing Office (ELTO) to identify an insurer, but none was identified. The solicitors made other unsuccessful attempts to identify insurers.

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In November 2013, unbeknown to C's solicitors, details of D's insurers were uploaded to the ELTO database. C's solicitors discovered this by chance in September 2014 during an ELTO search for another client. A Letter of Claim was sent to the insurers in March 2015 and a Claim Form was issued in July 2017. C applied under s.33 of the Limitation Act 1980 to disapply the limitation period. The Application was refused at first instance, with the District Judge finding, inter alia, that C's solicitors could have done much more between March 2009 and September 2014 to identify the insurers. C appealed.

On Appeal, the Judge found that the District Judge had been wrong to characterise the delay between March 2009 and September 2014 as culpable; it was not possible to see what more could realistically and sensibly have been done, and the decision, therefore, could not stand and was retaken.

The Judge was satisfied that if proceedings had been issued in September 2014, a s.33 Application would have succeeded. It was necessary to consider the effect of the additional delay thereafter. The Judge found that D's position was not prejudiced by this further period. Whilst C's solicitors delayed during this further period for no good reason, that delay was attributable to the solicitors and not dilatoriness on the part of C, and the delay was not quite enough to deprive C of the disapplication of the limitation period.

Limitation Periods - Historical Sex Offences - Prejudice - Vicarious Liability

FXF v Ambleforth Abbey Trustees
[2020] EWHC 79 (QB)

The Claimant, now aged 56, was 4 or 5 when she was sexually abused by a Priest, Father Webb, who was a member of the Benedictine Community within the Defendant Trustees Monastery. The primary limitation period had expired in January 1985 and Father Webb had died in 1990. It was alleged that the abuse had ended when the Claimant's mother and grandmother witnessed it. It was also alleged that, following this, Father Webb was banned from the family home by the Claimant's father. Further, that the Claimant's mother had reported the abuse to the church and, consequently, Father Webb had been removed from the Parish.

The Claimant first contacted solicitors in March 2013, but did not pursue the litigation at that time.

The sexual abuse was first reported to the Defendant in July 2014.

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A Letter of Claim was sent in July 2016. Proceedings were issued in September 2017, 32 years and 9 months after the expiry of the primary limitation period.

The Defendant admitted vicarious liability for tortious acts committed by Father Webb as the Claimant might prove. In view of the death of Father Webb, however, the Defendant could not advance a positive case in relation to the same. To pursue the claim, the Claimant required a direction from the Court under the Limitation Act 1980, section 33, setting aside the prescribed time limits.

The Trial took place in the High Court in London in January 2020.

The Claimant submitted that the evidence on which she relied provided the Court with cogent and compelling evidence that she was sexually abused. She argued that her oral evidence, in conjunction with the corroborative evidence of her sister (who also alleged she was abused by Father Webb during his visits to the family home) and her father (who confirmed that he had been asked by the Claimant's mother to ask Father Webb to leave the family home after they witnessed him 'fondle' the Claimant), together with evidence from another alleged victim that Father Webb was an abuser, was so convincing that it was "vanishing unlikely" that his evidence would have prevailed over the Claimant's evidence. It was argued that the Defendant had not been prejudiced by Father Webb's death.

The Judge agreed that, based on the evidence, the Claimant's account of the alleged abuse did appear to be genuine. However, the Claimant's claim was largely dependant on the Claimant's memory of events which occurred 50 years ago as a child. The Claimant's recall was deficient. She was only able to give a partial account about what happened. The Claimant's mother had died by the date that the Claimant instructed solicitors and, therefore, there was no evidence as to what she had witnessed and the complaint which was alleged to have been made. As such, had Father Webb been alive he would have had a case to answer, but it would not have been an unanswerable one.

There had been a significant delay in the proceedings being issued. This was not a case where the Claimant had not appreciated for many years that the abuse was wrong. There were reasons for the delay, however, these were not found to temper the prejudice to the Defendant caused by the death of Father Webb. It was held that the prejudice to the Defendant was substantial. The Defendant could not advance a positive case in respect of the allegations. The delay had seriously prejudiced the prospect of a fair trial.

Therefore, even though it was possible that the Claimant was sexually abused by Father Webb, for whom the Defendant's were vicariously liable, a fair trial was not possible. The Court, therefore refused to disapply the primary limitation period and the Claimant's claim was dismissed.

RECENT CASE UPDATES

Negligence - Employment - Duty of Care

Rihan v (1) Ernst & Young Global Limited (2) Ernst & Young Europe LLP (3) Ernst & Young (EMEIA) Services Limited (4) EYGS LLP [2020] EWHC 901 (QB)

The Defendants were four UK based entities that were part of a network of companies, ('EY'), providing accountancy and related services for businesses worldwide. The First Defendant imposed obligations on member firms and the other Defendants assisted in ensuring compliance. The Claimant, 'R', was a partner in EY's Middle East and North Africa entity, working mainly in Dubai. During an audit of a Dubai based client, 'K', R discovered irregularities suggestive of money laundering which he reported to the local regulator. R alleged that the regulator and K pressurised him to cover up his findings and that EY colluded in this, which led to R resigning, publicly disclosing the wrongdoing and fleeing Dubai out of fear for his safety. As he ordinarily worked outside Great Britain, R could not rely on statutory whistleblowing protections. R brought a claim in negligence alleging he was unable to secure alternative employment and seeking damages for economic loss. R alleged that the Defendants had breached two duties of care; a duty to take reasonable steps to keep him safe by relocating him outside of Dubai ('the safety duty') and a duty to take reasonable steps to prevent him suffering financial loss by reason of their failure to conduct the audit ethically and without professional misconduct (the audit duty).

The Judge held that the Defendants did not owe the safety duty. The duty to provide a safe place and system of work did not extend to protecting purely economic interests.

As regards the audit duty, whilst the Judge recognised it was a novel duty, applying the threefold test in *Caparo Industries Plc v Dickman [1990]*, the Judge found that R's losses were foreseeable, there was sufficient proximity between R and the Defendants and it was fair, just and reasonable to recognise the existence of the duty. The Judge did, however, make clear that such a duty was unlikely to be found where someone was able to rely upon the statutory whistleblowing protections.

The Judge found that the Defendant had breached the audit duty. Measured against the code of ethics published by the International Federation of Accountants, their conduct was unethical, improper and unprofessional.

With regards to quantum, R had not failed to mitigate his loss. He had applied for jobs within his area of expertise and experience. R had not been bound to diminish the impact of his disclosures by making them anonymously. Had he been supported by the Defendants, he would have continued his career with EY up to retirement. R was awarded $10.8 million.

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

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