motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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Khuzran Irani v Oscar Duchon [2019]

The claimant had entered the UK from India in 2010 on a visa sponsored by his employer and his leave to remain expired in 2020. He was involved in a road traffic accident with the defendant in 2013 which caused injuries to his leg and elbow. He remained in hospital for a significant period and had extensive scarring and ongoing leg pain. The claimant returned to work 2 days per week and later 4 days a week. He was subsequently made redundant when the company shut down, though it restarted 3 months later. The claimant obtained alternative employment after 6 months. The claimant was awarded damages of £406,688, but submitted that the judge had been wrong to award damages by way of a lump sum award on the approach in *Blamire v South Cumbria* in respect of future loss of earnings and a *Smith v Manchester* award in respect of disadvantage on the open labour market. The claimant submitted that the judge should have quantified damages for loss of earnings by the adoption of a multiplier and multiplicand, leading to an award of £1,259,256. The defendant cross-appealed, contending that the judge had applied the wrong test of causation to the losses flowing from an apparent redundancy and that the amount of damages should have instead been £219,188.

It was held that the judge had been fully entitled to make a Blamire award. The only evidence of residual earnings was a letter from a friend, a snapshot of unsuitable jobs from an Indian website and various assertions made by the claimant, a number of which were specifically rejected.

The claimant was unable to establish, with sufficient evidence as to the type of work and remuneration over time, his residual earnings to calculate a multiplicand. As for the defendant's cross-appeal, the judge found that the claimant's injuries were an operative or effective cause of the redundancy. It would not have occurred but for the accident and, in turn, it had caused the claimant's predicament as he would not be able to renew his visa. It was held that the judge had made no error of law in reaching those conclusions and, as such, the appeal and the cross-appeal were both dismissed.

EUI Limited v Stephen Olayinka [2019]

The respondent was the driver of a car which was involved in a road traffic collision. He made a claim for personal injury and underwent a medico-legal examination, during which he stated that he did not have any pre-existing joint or spinal conditions and had experienced no past significant medical events. His Particulars of Claim alleged that he had had to terminate an employment contract as a result of his injuries and had lost £31,000 in earnings. His claim was made against an insurance company, the applicant, who discovered that shortly before the collision, the respondent had been given 14 days notice of early termination due to a significant reduction in work.

It was also apparent from his GP records that he had complained of neck, shoulder and back pain several times in the year before the accident. The applicant sought to amend its Defence to allege dishonesty and the respondent served a Notice of Discontinuance. The judge held that the claim was fundamentally dishonest and ordered the respondent to pay the applicant's costs on the indemnity basis. The applicant was permitted to bring contempt proceedings on grounds relating to conduct which was intended, or was likely, to interfere with the course of justice, including pursuing a fraudulent claim and making various false representations and statements.

The court held that it was not possible to reconcile the respondent's medical records with the account he gave during the medical examination. It was beyond reasonable doubt that he had misled the doctor and had intended to mislead the court by relying on the resultant report in his claim. Moreover, his claim for lost earnings was plainly dishonest and although he discontinued his claim before trial, he did so in the face of clear evidence of his dishonesty. Whilst the respondent had made admissions, he had not done so at the first opportunity and before seeking to blame others. It was noted that a custodial sentence would have an impact on the respondent's family, but he was not his children's sole carer and he had been aware of his responsibility to them when he behaved as he did. The court was satisfied that imprisonment was appropriate and the shortest possible term was 4 months. The respondent's admissions were analogous to a guilty plea to a criminal offence and attracted a 25% discount.

He was therefore sentenced to 3 months imprisonment, with immediate custody.

Philip Aldred v
Master Tyreese Sulay Alieu Cham [2019]

A child brought a claim against a motorist following a road traffic accident. The claim started under the RTA Pre-Action Protocol, but fell out of the Protocol when the defendant denied liability. Consequently, the rules as to costs in CPR 45 IIIA became applicable. The defendant subsequently admitted liability and offered £2,000 in settlement of the claimant's claim. Under CPR 21.10(1), an opinion on the merits of the settlement had to be obtained. Counsel recommended acceptance of the offer in a written Advice which cost £150 and a district judge approved the settlement. The defendant objected to paying counsel's fee on the basis that it was outside the fixed costs regime. The district judge and a judge sitting in the county court both allowed counsel's fee on the basis that the disbursement had been "reasonably incurred due to a particular feature of the dispute" within the meaning of CPR 45.29I(2)(h). The defendant appealed.

The court of appeal had to consider whether counsel's Advice was "due to a particular feature of the dispute". The fact that the claimant was a child had nothing to do with the dispute itself. Age, linguistic ability or mental well-being were characteristics of the claimant and were not generated by, or linked to, the dispute. Particular features would commonly be matters such as how the accident happened, whether the defendant was to blame or the nature, scope and extent of the injuries. It was held that being a child was a characteristic of the claimant and so did not fall within the costs exception in CPR 45.29I(2)(h). However, if counsel's Advice had been "due to a particular feature of the case", would the Advice have been "reasonably incurred" and recoverable in addition to fixed costs?

The court held that it was not. Practice Direction 21, paragraph 5.2, provided for the Advice to be given by either counsel or a solicitor and, if provided by a solicitor, the cost would not be a disbursement. It would be undesirable for solicitors to routinely instruct counsel and recover the fee instead of doing the work themselves. Therefore, if the decision to allow the defendant's appeal on the first issue was wrong, the court would allow the appeal on the second issue.

Andrea Brown (appellant) v (1) Commissioner of Police of the Metropolis (2) Chief Constable of Greater Manchester (respondents) and Equality & Human Rights Commission (intervener) [2019]

The appellant made various claims arising out of the respondents' wrongful obtaining and use of private information about her. Claims in relation to data protection and human rights were admitted; she also succeeded at trial on a claim for misuse of private information, but claims for damages for misfeasance and personal injury were rejected. Nevertheless, at trial, the damages awarded to her were significantly lower than a Part 36 offer that she had rejected and she was, therefore, awarded 70% of her costs up to the date of the offer and ordered to pay the respondents' costs on the expiry of the offer to trial. However, the judge held that the costs order could only be enforced to the limit of the damages awarded to her because the QOCS regime in CPR r.44.13 applied as she had made a personal injury claim. The respondents' won on appeal, arguing that it was a mixed claim and the exception in r.44.16(2)(b) was met which provided that costs orders could be enforced in full where a claim was made for the benefit of the claimant "other than a claim to which this Section applies", ie - personal injury.

The appellant appealed against the decision that she was not entitled to Qualified One-way Costs Shifting, but this was dismissed. It was held that Rule 44.13(1) acknowledged the three types of claim which were covered by that regime being claims for damages for personal injury.

Therefore, if the proceedings also involved claims which were not claims for damages for personal injury, then the exception in r.44.16 (2)(b) would apply. However, it was suggested that if the whole of the proceedings could be fairly described as a personal injury case, then, unless there were exceptional features of the non-personal injury elements of the claim, the judge deciding costs would be expected to attempt to achieve a cost neutral result. The exception in r.44.16(2)(b) was designed to deal with the situation where a claim for damages for personal injury was only one of the claims being made in the proceedings. In those circumstances, the automatic nature of the QOCS protection fell away and it became a matter of the judge's discretion.

Siu Lai Ho v Seyi Adelekun [2019]

A claim was issued in 2014 under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. Liability was not admitted. The claim exited the Protocol and was allocated to the fast track. The claimant made an application to reallocate the claim to the multi-track. Shortly before the application was heard, the defendant made a Part 36 offer of £30,000 and agreed to the matter being reallocated. The offer letter stated that if the offer was accepted, the defendant would pay the claimant's costs in accordance with CPR 36.13, "such costs to be subject to detailed assessment if not agreed". The offer was accepted and the parties signed a Consent Order which included an agreement that the defendant would pay the claimant's "reasonable costs on the standard basis, to be subject to detailed assessment if not agreed".

The parties did not agree on costs. The defendant considered that the fixed costs regime under CPR 45 applied. The judge held that that regime did not apply and the defendant appealed.

The court of appeal held that the offer letter, properly construed, did not offer to pay conventional rather than fixed costs. The fact that the offer letter referred to CPR 36.13 instead of CPR 36.20 was of no great significance and a simple reference to the former was not sufficient to take the case out of the fixed costs regime. While the letter's reference to "detailed assessment" was not ideal, if the appellant had intended the fixed costs regime to apply, it was not wholly inapposite; the fixed costs regime did involve an assessment of some kind. The court also rejected the Claimant's submission that, notwithstanding the stay imposed following acceptance of the offer, the claim should be reallocated to the multi-track with a direction under CPR 46.13 to disapply the fixed costs regime with retrospective effect. The court advised that, in future cases, any defendant wishing to make a Part 36 offer on the basis that the fixed costs regime would apply would be well advised to refer the offer to CPR 36.20 and not CPR 36.13, and to omit any reference to the costs being "assessed" or assessment "on the standard basis" in any offer letter or Consent Order drawn up.

Humayum Hussain v EUI Limited [2019]

The claimant was a self-employed taxi driver. He had been involved in an accident through no fault of his own and, therefore, brought a claim against the defendant insurer. His vehicle was damaged as a result of the accident, and, whilst it was being repaired, the claimant hired a replacement vehicle on credit terms at a cost of £6,596.50. The judge limited the claimant's hire charges to £423, being the loss of profit that he had avoided by hiring a replacement car, and considered that the claimant had not acted reasonably by hiring a car at a cost which equated to almost a full year's profit over an 18 day period. The claimant appealed against the decision, which was dismissed.

The court outlined the principles which applied to claims for financial losses suffered by self-employed drivers who hired replacement vehicles when their vehicles were off the road pending repair or replacement. The starting point is that a professional driver's vehicle is a profit earning chattel and that the true loss to the driver is the loss of profit suffered whilst the vehicle is reasonably off the road and undergoing repairs.

A claimant may decide to hire a replacement vehicle in order to continue with business and, like any other expense incurred, in a reasonable attempt to mitigate a loss, such hire costs being prima facie recoverable. If a claimant is successful in mitigating their loss by hiring a lower cost replacement vehicle than the loss of profit, the court will more than likely award the lower hire charges. The court also held that where a claimant acted reasonably in hiring a replacement vehicle at about the same cost as the avoided loss of profit, a claimant would not be held to the hypothetical loss of profit if it turned out to be a little lower. However, where the cost of hire significantly exceeded the avoided loss of profit, the court would ordinarily limit damages to the lost profit, but where the cost of hire significantly exceeded the avoided loss of profit, a claimant may still succeed in establishing that they acted reasonably if, for example, there was a need to retain important customers or contracts, there was a proven need for use of the vehicle for social and domestic purposes, or because the claimant simply could not afford not to work (in which case impecuniosity becomes relevant).

AIG Europe Limited v Mohammad Bilal [2019]

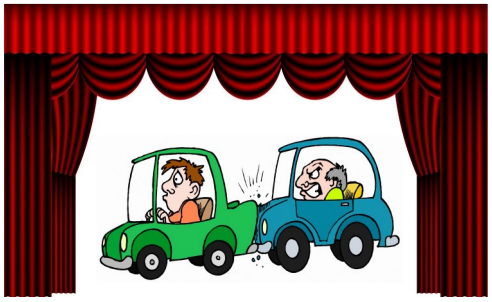
Mr Bilal had brought a personal injury claim in 2014 against the driver of a BMW car insured by AIG Europe Limited. Mr Bilal alleged that the driver of the BMW had negligently driven into his Mercedes car. AIG Europe Limited put forward a defence, and, amongst other things, asserted that Mr Bilal had made false statements in his Claim Form and falsely stated that he did not know the driver of the BMW car.

The claim was struck out in 2017, due to a failure to pay a hearing fee, but, before the claim was struck out, expert witness evidence had already been exchanged. The experts' concluded that Mr Bilal's car was stationary when it had been hit and not moving as he alleged. Interestingly, there was evidence to suggest that Mr Bilal, who was a lawyer, had actually handled the BMW driver's claim against AIG Europe Limited and had regular contact with him. In addition, there was evidence to show that Mr Bilal knew the person who had sold the BMW to the person driving it at the time of the accident and Mr Bilal also had a number of aliases and had used different names at different times.

AIG Europe Limited applied to commit Mr Bilal to prison for contempt of court arising out of a personal injury claim. It was held that the evidence provided by Mr Bilal about the speed of collision was inconsistent with the damage sustained, and the court was satisfied that the collision did not occur as had been alleged. Turning to the relationship between Mr Bilal and the driver of the BMW, the court confirmed there was a possible connection between them before the accident and a clear connection between them afterwards, which was not coincidental. Mr Bilal had lied when he denied using another name and there had been no genuine account of events. The court held that the BMW had deliberately driven into Mr Bilal for the purpose of making a fraudulent personal injury claim. Mr Bilal's statements had been false when he made them and he had no honest belief in them. The contempt of court was made out, as were the particulars of deceit, and Mr Bilal was sentenced to 8 months imprisonment.

Mansur Haider v DSM Demolition Limited [2019]

The defendant was driving directly behind the claimant in a line of traffic. The claimant's case was that he slowed down to accommodate a manoeuvre by a vehicle ahead, when the defendant, who was driving too fast, drove into the rear of his car. Over £30,000 was accrued in credit hire charges when the claimant claimed that impecuniosity prevented him from paying for a replacement vehicle whilst his was being repaired. The defendant alleged that the accident was not genuine and had been deliberately staged.



The defendant also alleged that the claimant had been fundamentally dishonest in failing to disclose that he had two credit cards and two bank accounts and, therefore, might have been able to organise replacement car hire without resorting to a credit hire arrangement. At trial, the judge found that the defendant's driving had not been negligent. He found that the claimant had overreacted to a manoeuvre ahead by over-braking, which left the defendant with no time to avoid the collision. No finding on the issue of fundamental dishonesty was made.

He ordered that the claimant should pay the defendant's costs, but did not disapply Qualified One-way Costs Shifting. The claimant appealed on the basis that the judge's conclusions were not adequately reasoned and the defendant sought permission to cross-appeal on the basis that the judge should have found fundamental dishonesty.

It was held that the trial judge's reasons, albeit brief, made it clear why he decided as he did, and they were, therefore, adequate. The trial had taken less than a day and the issues were ones that commonly arose in road traffic cases. The judge's reasons showed he was satisfied that the defendant was not driving too close or too fast at the point of collision. The judge's conclusion was supported by evidence and he was entitled to find that the claimant had failed to discharge the burden of proving that the defendant had been negligent. As for the defendant's cross-application, although they had failed to serve their notice of cross-appeal on time, which was a serious and substantial breach of the rule, permission to cross-appeal was granted on the basis that it was in the interests of justice to extend time. It was held that the claimant had concealed the existence of highly material information that went to the heart of the claim and doing so was plainly dishonest. The only real inference was that the claimant had intentionally failed to make full disclosure, and that failure could only be labelled as fundamentally dishonest. As such, the claimant's appeal was dismissed and the defendant's cross-appeal was allowed.

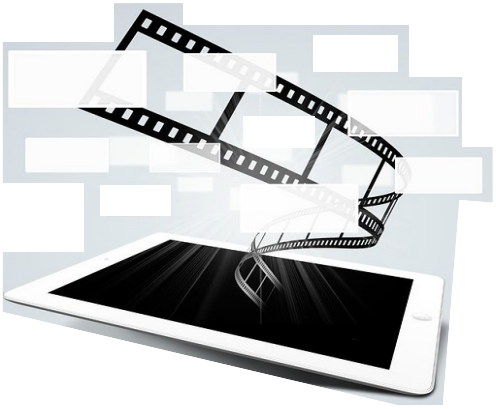
Samantha Mustard v (1) Jamie Flower (2) Stephen Flower (3) Direct Line Insurance [2019]

It was claimed that the claimant had sustained a sub-arachnoid brain haemorrhage and a diffuse axonal brain injury which left her with cognitive and other deficits. However, there was a considerable difference of opinion between the parties' medical experts, with the defendants' experts opining that the claimant had suffered no, or only minor, brain injury. Whereas, the claimant's expert opined that she had suffered a serious brain injury with subtle manifestations.

The claimant recorded the examinations by the defendants' experts on a digital device. At times the recordings were covert, and, on other occasions, the agreement of the expert was sought. During the neuropsychological examination, the defendants' expert agreed to a recording of the clinical examination, but not of the tests. The defendants adduced evidence from the British Psychological Society (BPS) to show that the broadcasting of test materials was regulated for reasons relating to the continuing validity and effectiveness of the tests.

It was argued that if the recordings were released into the public domain, the tests would be impaired. The defendants also submitted that the covert recordings were unlawful under the Data Protection Act 2018 and gave rise to an unequal playing field because the claimant did not record examinations by her own experts.

The claimant resisted the application to exclude the defendants' expert's medical examination and suggested that there were serious errors in the application of the testing, and also resisted the defendants' objection to the Part 35 questions which were extensive. The court had to consider the means employed to obtain the evidence, together with its relevance and probative value, and the effect that admitting or excluding it would have on the fairness of the litigation process and the trial. It was held that the data related to the patient, not the doctor. Therefore, while the covert recordings lacked courtesy and transparency, given their relevance and probative value, they were admitted and deemed not unlawful.



If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

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