# motoring news

# Headlight

## welcome

**to 'Headlight', Dolmans Solicitors' motoring news bulletin.**
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**autumn 2020**

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**David Craig Pegg v (1) David Webb (2) Allianz Insurance [2020]**

Somewhat unusually, the second defendant in this case appealed against an Order dismissing the claimant's claim at trial, but on the ground that, despite dismissing the claim, the judge ordered the defendants to pay 60% of the claimant's costs. The reason for the unusual Costs Order was that the second defendant (who had conduct of the defence) had run a case of fundamental dishonesty against the claimant, and this had meant that what would otherwise have been a 1 day fast track trial became a 2 day multi-track claim.

As regards the court's discretion to award any other disbursement reasonably incurred due to a particular feature of the dispute under CPR 45.29I(2)(h), the defendant submitted neither fee was reasonable or proportionate in the circumstances. The claimant submitted that both disbursements were recoverable under CPR 45.29I(2)(h) as they had been reasonably incurred. Skeleton Arguments had been served in accordance with a direction of the court and counsel had, inevitably, already been briefed when the case settled the day before trial.

The claimant was the front seat passenger in a vehicle which was involved in a collision with the first defendant. The collision was wholly the fault of the first defendant. The claim was for the injury and losses alleged by the claimant to have been suffered as a result of the accident.

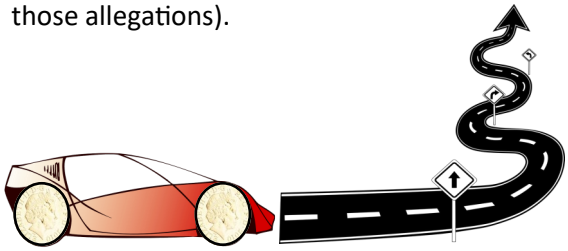
At trial, the claimant relied upon a medical report from a Dr Shakir, in which Dr Shakir gave a longevity to the injuries of 6 months post-accident. This evidence was adopted by the claimant in his Claim Form and Witness Statement. The principle line of the defence was that this was a bogus claim based upon a collision which never happened or, if it did occur, was contrived between the parties. Having heard the evidence, the trial judge concluded that the claimant had proved his case and that there was a genuine collision. He found it was not a dishonest claim. However, the judge acceded the defendants' submissions that there had been a failure on the part of the claimant to give Dr Shakir relevant information and what he had told Dr Shakir about the longevity of the injuries was inconsistent with his own evidence at trial, such that no reliance could be placed upon Dr Shakir's report and, without medical evidence in support, the claimant's claim had to fail. Despite this, the trial judge did not make a finding of fundamental dishonesty.

On appeal, it was found that there were factors which pointed strongly, if not inextricably, to the conclusion that the claimant had been dishonest in his presentation of his injuries to Dr Shakir and also to the court.

The trial judge had failed to deal with these factors either adequately, or in some cases, at all:

- The claimant sought no medical assistance at all after the index accident.
- A month after the index accident, the claimant injured his back after having a fall when he "rolled his quad bike"; the claimant failed to inform Dr Shakir of this.
- The position was aggravated by two positive lies told by the claimant to Dr Shakir; that he was still feeling the effects of his injuries and his treatment was ongoing.
- The claimant compounded his dishonesty towards Dr Shakir by lying in his Claim Form and Witness Statement.

The appeal judge, therefore, concluded that no judge could reasonably have failed to come to the conclusion that the claim for damages as presented by the claimant was fundamentally dishonest. Accordingly, he agreed that the claimant's claim should be dismissed. The original Costs Order was set aside and the claimant was ordered to pay 70% of the defendant's costs on the indemnity basis. The claim was reduced from 100% because a significant part of the evidence and court time had been spent determining whether the accident was bogus (and the defendants had not succeeded in those allegations).



**Coleman v Townsend SSCO [2020]**

The claimant commenced a claim in the portal pursuant to the Pre-Action Protocol for Low Value Personal Injury Claims in RTAs. The defendant did not admit liability and the claim exited the portal. Proceedings were issued and directions were given, which included a direction for Skeleton Arguments to be served 2 days prior to trial. The claim was listed for trial on 26 April 2018. The claim settled when the claimant accepted the defendant's Part 36 offer (within the 21 day relevant period) on 25 April 2018, the afternoon prior to the trial date. The claimant sought to recover counsel's abated Brief fee for trial at £852.50 and counsel's fee for the Skeleton Argument at £370. The costs officer allowed the fees and the defendant appealed. Table 6B under CPR Part 45 deals with the fixed costs payable where a claim no longer continues under the RTA Protocol and Rule 45.29I(2) deals with disbursements. The defendant submitted that Table 6B only permits recovery of the trial advocacy fee where the claim is disposed of at trial. The master allowed the defendant's appeal and disallowed both fees. Table 6B sets out the recoverable costs for each stage of a claim which no longer continues under the RTA protocol and includes all work which could reasonably be expected to be carried out at each stage. Stage C - "if the claim is disposed of at trial" - specifically includes the trial advocacy fee and, implicitly, the costs of preparing for the trial, including a Skeleton Argument, but that stage had not been reached in this case as the day of the trial was not yet at hand.

**Linda Domeney v (1) Alexander Rees (2) Advantage Insurance Co Ltd [2020]**

The claimant's husband had been riding a motorcycle on a single carriageway with a speed limit of 60mph. He was approaching a junction with a minor road on his left. The first defendant, who was driving his car in the opposite direction, turned across the motorcycle's lane towards the minor road, causing the motorcycle to hit the car and the claimant's husband was killed instantly. The first defendant was convicted of causing death by careless driving whilst under the influence of cannabis. He said he was unaware of the motorcycle until after the collision and there was an issue in relation to contributory negligence. There were no independent witnesses, but three witnesses had seen the motorcycle shortly before the collision and all estimated that it was travelling over the speed limit. Although two accident reconstruction reports were prepared, neither expert could reliably estimate the speed of the motorcycle. There were no skid marks on the road and the trajectory of the deceased motorcyclist could not be calculated as he struck a fence when he was thrown from his motorcycle. The defendants wished to adduce two further expert reports; one from another accident reconstruction expert and one from an A&E consultant, submitting that the accident reconstruction expert could provide alternative scenarios of events if the deceased had been travelling at various speeds and the A&E consultant could assess whether the injuries matched those scenarios.

The court held that the test under CPR 35 was whether the expert evidence was reasonably required to resolve the proceedings. That was not made out. Two experts had already stated that they could offer no reliable opinion as to the motorcycle's speed and had provided cogent reasoning. There was no realistic prospect of a third expert doing any better and the court would have to make findings as to the speed based on lay witness evidence, which was not unusual. Conversely, it would be very unusual to have expert evidence from accident reconstruction experts where they could not reconstruct the most important feature (speed). Their evidence would be highly speculative and it was undesirable to inquire into fine degrees of contributory negligence based on speculative alternatives. Accordingly, the defendant's application was refused.

**Barry Cable v Liverpool Victoria Insurance Co Ltd [2020]**

The Court of Appeal overturned a decision to strike out a £2.2 million personal injury claim which remained in the RTA portal for almost 4 years before the claimant's solicitors sought to transfer it to the multi-track.

The appellant was injured in a road traffic accident in September 2014. He instructed solicitors, but, at that stage, it was not appreciated that the claim was worth more than £25,000.

The respondent admitted liability. Due to the conduct of his solicitors, however, the claim did not progress. The claimant did not return to work. A neurology report in January 2017 indicated that the claimant's condition had become chronic. In July 2017, a Claim Form was issued under Part 8, without the Stage 2 procedure under the RTA portal having begun. The Claim Form asked for a stay of the proceedings to enable compliance with the RTA Protocol. A stay was granted until August 2018, with the Claim Form to be sent to the respondent by August 2017. The Claim Form was not sent until February 2018. 4 days prior to the expiry of the stay, the appellant's solicitors said that the case was no longer suitable for the portal. The appellant applied to lift the stay and to proceed as a Part 7 claim. An amended Claim Form was served in the sum of £2.2 million.

At first instance, it was held that there had been an abuse of process and the claim was struck out. On appeal, it was held that the district judge had wrongly applied the test for striking out the claim and so the court had to consider the matter afresh.

The judge had wrongly assumed that strike-out was the primary solution. It was primarily the delay, from July 2017, when the appellant's solicitors had sufficient knowledge that the claim should have been issued under Part 7, which constituted the abuse of process. There was no evidence, however, that matters would have proceeded differently if the Personal Injury Protocol had been followed a year earlier. There was no evidence of any actual prejudice to the respondent from the failure to switch to the Personal Injury Protocol in August 2017, nor did the abuse of process affect the limitation period. Striking out the claim was not, therefore, an appropriate proportionate sanction, especially given the prejudice to the claimant. The appropriate sanction was that the appellant should pay the respondent's costs, on the indemnity basis, up to 17 October 2018 (the date of the original hearing) and was barred from recovering interest on his Special Damages for the period up to that date.

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**Changes to the Fatal Accidents Act 1976**

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Section 1 (1) of the Fatal Accidents Act 1976 provides a right of action under statute that enables dependents of the deceased, who has died due to the wrongdoing of another, to recover damages.

The Heads of Loss recoverable under the Act are as follows:

- Funeral expenses
- Bereavement damages
- Loss of income and services dependency (such as gratuitous care)

Earlier this year the government enacted a change to increase the sum awarded under the Act for bereavement in England and Wales from £12,980 to £15,120. The change took effect from 1 May 2020, but there was pressure to provide for further reform.

At the time, the Act only made bereavement damages available to a wife, husband or civil partner of the deceased, but failed to recognise cohabitees. However, from 6 October 2020, a remedial order is being passed to extend the statutory bereavement award to include cohabitees.

The reactive change came about due to the case of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others [2017] EWCA Civ 1916*, following the death of Ms Smith's partner. Ms Smith had cohabited with her partner between March 2000 and his death in October 2011. They were never married, but it was accepted that the relationship was equal in every respect to a marriage in terms of love, loyalty and commitment.

Ms Smith argued that the existing wording of the Act was in breach and contrary to Article 8 and Article 14 of the European Convention of Human Rights, respect for your private and family life and protection from discrimination respectively.

The Court of Appeal agreed, ruling that cohabiting couples should be eligible for bereavement damages and, as such, issued a declaration of incompatibility.

However, to qualify as a cohabitee, the Ministry of Justice has confirmed that the claimant must have been living with the deceased in the same household immediately before the date of death and must have been living with the deceased for a period of at least 2 years immediately prior to the date of death.

This is welcoming news for a cohabiting partner who may now, subject to the above qualifications, be eligible to recover bereavement damages, but how far any further reforms go remains to be seen.

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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