Legally Blonde

News & Case Law Update

Winter 2022

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BACKHOUSE JONES

Harford v Music Store Professional UK/DV247 Ltd [2021] 8 WLUK 132

The court ordered that only fixed portal costs were recoverable in a claim which was initially valued at £25,000 but settled for £11,200.

The claim was brought against an employer following an accident in 2015 when lifting heavy items that led to injury. The Claimant's solicitor initially valued the claim as in excess of £25,000, but once all the evidence was finalised it was apparent that the claim was not worth in excess of the limit. The Claimant accepted a Part 36 offer made by the Defendant in the sum of £11,200. The Claimant had acted unreasonably by valuing the claim at more than £25,000, so that the Claimant did not need to comply with the relevant Protocol, and this was deemed to be unreasonable.

Michael v IE & D Hurdford Ltd (t/a Rainbow)
[2021] EWHC 2318 (QB)

This was an appeal against a refusal to dismiss a personal injury claim on the grounds that the Claimant had been dishonest. The Claimant was barred from relying on impecuniosity after failing to provide certain bank and credit card statements. His claim to recover the cost of eight sessions of physiotherapy was challenged as in cross-examination, he claimed not to understand the claim, saying that he had only attended one session. He also revealed that he had a second part-time job. The judge found that the Claimant was not dishonest, and he was not "basically fraudulent".

The appellant claimed that certain matters were sufficient to establish fundamental dishonesty.

The judge stated that the respondent was clearly unfamiliar with the contents of his own statement, but he was entirely honest when questioned, even volunteering information that was detrimental to his claim. He did not understand the documents that he had signed or that his solicitors had signed on his behalf. The judge was entitled to find that the respondent was not dishonest irrespective of his suspicions as to whether parts of the claim were dishonest. The case was a classic illustration of when the appeal court should not go behind the careful findings of the trial judge who had had the benefit of hearing and seeing the witnesses and reaching his own conclusions. The question of dishonesty should be determined by the judge as factfinder whether drawn from specific findings of fact or by inference, the judge was best placed to decide if the appellants had proved to the civil standard that the respondent had been dishonest.

Seabrook v Adam
[2021] EWCA Civ 382

This case sought to explore the correct interpretation and the validity of a Claimant's Part 36 offer for the purposes of determining

whether the costs consequences set out in CPR 36.17 should apply.

It was agreed that the Claimant had not beaten two 90:10 split liability offers in a situation where primary liability/breach of duty had been admitted but where the Defendant's insurers sought to dispute the causation of the Claimant's alleged injuries, successfully establishing at trial that the most serious of the two injuries that he had allegedly sustained could not be causally linked to the index accident.

Gul v McDonagh
[2021] EWCA Civ 1503

This case resulted in a judgment that illustrated how courts may approach findings of contributory negligence in cases involving injury to children.

After finding contributory negligence on the part of a 13-year-old child who was hit by a car while crossing a road, the judge decided it was just and equitable to reduce the child's damages by 10%. Although an unusually low reduction, it took account of the egregious conduct of the car driver and was not outside the range of reasonable determinations.

This decision was then appealed.

The issue before the trial judge had been limited to the question of contributory negligence. The judge found that a reasonable 13-year-old would have realised that the car was being driven much faster and would have waited for it to pass. Even if a reasonable 13-year-old would have set off across the road, he found that they would have kept the car under observation.

The Appeal was dismissed on the basis that the appellant's culpable misjudgement could not be wholly ignored. Although 10% was an unusually low reduction, it was not outside the range of reasonable determinations.

Ho v Adelekun
[2021] UKSC 43

The appellant had accepted a Part 36 offer to settle her personal injury claim but had appealed against a decision that the respondent was entitled to set off a costs award in her own favour against her costs liability. The initial claim exited the protocol and was allocated to the fast track. Following the Part 36 offer, the parties signed a consent order which included an agreement that reasonable costs on the standard basis were to be assessed if not agreed. The Court of Appeal concluded that set-off of opposing costs orders was not affected by QOCS. On Appeal, it was held that the two costs orders could not be netted off against each other.

Parry v Johnson
[2021] 11 WLUK 129

It was appropriate to order a split trial of liability and quantum in a personal injury claim where the Defendant denied liability. If the Claimant succeeded on the liability issue, it would avoid delay in him receiving an interim payment, and if the Defendant succeeded, he would make
significant costs savings.

The Claimant had suffered serious injury and sought an interim payment. If the matter proceeded to a liability trial it could do so in a matter of months. The parties would then know where they stood, and if the Claimant succeeded, he would receive a significant interim payment. If the Defendant succeeded and liability was not established, he would make huge savings in costs.

The case required a speedy determination of the liability issue. The Defendant would potentially lose bargaining ability, but the Claimant was entitled to determination of that issue.

Campbell v Advantage Insurance Co Ltd
[2021] EWCA Civ 1698

A judge had not erred in holding that an intoxicated passenger in a vehicle driven by an intoxicated driver had been contributorily negligent when that vehicle was involved in a collision. The relevant test to be applied was that of the reasonable, prudent and competent adult, and the judge had
rightly concluded that such a person in the passenger's position would have appreciated that the driver had drunk too much to drive safely.

In a claim for damages for personal injuries, the appellant challenged findings that he was contributorily negligent and that damage should be reduced by 20%.

It was concluded that the appellant's previous consumption of alcohol was not sufficient to displace the presumption of capacity, and that, accordingly, if he had capacity to consent to a change of position in the car, he also had capacity to consent to being driven in the car. Adopting the objective test, the judge considered that a reasonable man would have concluded that the driver's ability to drive safely had been impaired through alcohol. There was nothing to demonstrate that the judge's apportionment of responsibility was wrong.

Green v Generali France Assurances
Senior Courts C[2021] 11 WLUK 393

Following a road traffic accident in February 2010, an insurance company's successful Part 20 claim was to be treated as a counterclaim to the claim that had been brought by the Part 20 Defendant. It was held that the insurance company was only entitled to the additional costs of bringing the Part 20
claim.

There were two tranches of costs: one related to the Part 20 claim itself, and the other related to the insurer's investigation of liability and included a claim for its costs of defending the proceedings. The Defendant submitted that there had been no order for costs, and there was no order for costs in the insurer's favour in respect of the Defendants' proceedings because the costs award had been in the Defendant's favour. The Defendant maintained that the insurer was only entitled to its costs of bringing the Part 20 claim against the Defendant and did not allow the insurer to claim for the costs of defending the Claimant passengers' proceedings. The insurer could not claim any liability costs against either proceeding brought by them. The only sensible construction of the order was that its scope was only sufficient to provide for the additional costs of the Part 20 claim to be recovered from the Defendant.

Collins v Gotz
[2021] EWHC 3282 (QB)

A driver had been negligent in pulling out from a side road and onto a main road without looking left in time, causing a collision with a vehicle on the main road. The driver of that vehicle had also been negligent as he had failed to see the first vehicle pulling out and had failed to take evasive action. The apportionment of blame between the two drivers was 70/30 respectively.

Martini v Royal and Sun Alliance Insurance Plc
[2022] EWHC 33 (QB)

A van driver who had fallen asleep at the wheel while driving and crashed into the back of an HGV, which then caused a series of other collisions, was the sole relevant cause of damage and injuries suffered as a result. No liability could be apportioned to two other drivers who had subsequently collided with the van.

The Claimant was proceeding in lane 3 behind a HGV and driving at 65-70 mph. When the HGV entered his lane, the Claimant braked and swerved left to try to avoid hitting it. However, as a result he collided with the stranded van in lane 2, which he had not seen, and his car ricocheted across to hit the rear of the HGV in lane 3. Finally, a Vauxhall Vivaro crashed into the van in lane 2 and then spun across the highway, striking the Claimant who then brought the instant proceedings against RSA and AXA as the insurers of the van driver and the driver of the Vauxhall Vivaro respectively. RSA entered a defence contending that the Claimant's negligent driving had been a cause of the damage and injuries.

Judgment for Claimants was entered on the basis that the van driver was the sole relevant cause of the damage and injuries sustained. Neither of the other parties involved had acted negligently, so no questions of apportionment of liability arose.

O'Grady v B15 Group Ltd (formerly Brighthouse Group Ltd)
[2022] EWHC 67 (QB)

The doctrine of common law mistake could apply to a Part 36 offer where a clear and obvious mistake was made, and that mistake was appreciated by the offeree at the point of acceptance. In those circumstances, the offeror could be permitted to withdraw the offer.

Butt v Nizami [2006] EWHC 159 (QB)

The Claimant suffered injury and entered into a CFA in relation to the claim. The claim was settled though the Claimant's solicitors sought fixed recoverable costs, disbursements and a success fee. Costs could not be agreed with the other side and costs only proceedings were commenced. The Defendant challenged payment on the grounds that it was not satisfied there was compliance with the Conditional Fee Agreements Regulations 2000 so as to render the CFA enforceable.

The Judge held that although the disbursements were subject to assessment, the indemnity principle did not apply to the entitlement to fixed recoverable costs under CPR 45.9 and CPR 45.11 so it did not matter whether the CFA was valid and enforceable. The Defendant submitted that not only was the indemnity principle fundamental to the costs regime, the CFA had to be lawful to be enforceable.

The Court of Appeal held that the intention underlying CPR 45(II) was to provide an agreed scheme of costs recovery which was certain and easily calculated by providing fixed levels of remuneration. It was clear that the indemnity principle did not apply to the figures that were recoverable and so there was little reason why the indemnity principle should have any application to CPR 45.9 or CPR 45.11 and good reason why it should not. The whole idea underlying CPR Part 45 (II) was that it should be possible to ascertain appropriate costs without having to have further recourse to the Courts.

Shah v London Borough of Barnet [2021] EWHC 2631 (QB)

Permission was refused to allow the Defendant to resile from a pre-action admission in a personal injury case where the Claimant had fallen over an uneven pavement, and where the Defendant was the relevant highway authority.

The Defendant had initially denied liability but later wrote to the Claimant's solicitors stating that *"liability will no longer be in issue".* This was the Defendant's application to resile from that admission, which had been made almost one year earlier.

The Council claimed that there was new evidence which showed a change in the Claimant's direction of travel and the Judge felt that this was a hopeless argument to justify resiling. The Judge felt it would "reflect poorly on the justice system to allow the Defendant another last 'bite at the cherry' in respect of liability arguments when so many experienced claims handlers have reviewed the matter already, and over a considerable period of time".

She concluded: "For all the reasons above my determination is that the Defendant should not be granted permission to resile from their admission. Judgement is to be entered for the Claimant."

Lock v Ravi-Shankar [2021] EWHC 3247 (QB)

The duty of solicitors in relation to disclosure was recently discussed in this case. It was said by the High Court that "…solicitors should ensure that their clients appreciate at an early stage of the litigation not only the duties of disclosure and inspection which will arise if disclosure is agreed or ordered by the court but also the importance of not destroying documents which might possibly have to be disclosed. Moreover, it is not enough simply to give instructions that documents be preserved. Steps should be taken to ensure that documents are preserved."

The High Court also stated that if documents come to a party's notice at any time during the proceedings, the solicitor must immediately notify every other party.

If you would like any advise on any matters raised please contact Claire McKie on 01254 828300 or claire.mckie@backhouses.co.uk.

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