Legally Blonde

News & Case Law Update

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BACKHOUSE JONES

Extending Fixed Recoverable Costs

Fixed costs regime is a set of rules that limit the amount of costs that can be recovered by the winning party in a civil litigation case. From 01 October 2023, fixed recoverable costs (FRC) will be extended across the fast track, and in a new intermediate track for simpler cases valued up to £100,000 damages.

There will be a new additional track which is called 'intermediate track'. The intermediate track will be used for less complex multi-track cases under £100,000 damages. In the track, there will be four complexity bands (1 to 4 in ascending order of complexity) with associated grids of costs for the stages of a claim. There will be a new standard directions for the intermediate track. The Judges still retain the discretion to allocate more complex cases valued at under £100,000 to multi-track.

The new FRX will apply to claims where proceedings are issued on or after 01 October 2023, save for personal injury. The new FRC will apply to personal injury claims where the cause of action accrues on or after 01 October 2023; and it will only apply to disease claims where the letter of claim has not been sent to the Defendant before 01 October 2023.

Zanatta v Metroline Travel Ltd [2023] EWCA Civ 224

This was an appeal case arising from a road traffic accident where a claimant had been injured after stepping into the path of a bus. The accident occurred in a residential area where the speed limit was 30mph. The driver did brake and swerved however, had not managed to avoid her. At the trial, no witnesses of fact gave evidence, the claimant had no recollection of the collision and by the time of the trail, the driver had died however, reconstruction experts gave evidence.

The judge found that the driver had had no cause to sound his horn when he first saw the appellant at a distance. He determined that the driver had not been driving at an excessive speed in the circumstances and that the situation of the claimant moving towards the pavement edge and then crossing the road without looking had developed quickly. He found that the driver had reacted to the claimant's movement by breaking, but that had happened at fairly close proximity in time and space to the accident location. He also found that the appellant had not proved her allegations that the driver had failed to heed her presence or that he had failed to avoid driving into her despite having an opportunity to do so.

The appeal was dismissed despite the appellant submitting that the judge had made incorrect findings of fact about the distance between the driver and her and that if he had more correct findings he would have found that there was sufficient time and space for the driver t brake sufficiently to avoid the collision when he saw her step into the carriageway. It has been held that the judge's fact-finding. exercise was made more difficult without

forensic evidence, CCTV footage and live evidence from witnesses. He recognised the danger of being overly analytical and scientific when trying to reconstruct the facts of an accident and noted that the paucity of eye-witness evidence meant that many of the "facts" relied upon by the experts were not hard facts. He had been right to sound that note of caution. He had been careful not to make precise findings as to distance. It was of note that the experts' joint statement of points of agreement and disagreement expressed the caveat that any agreement between the experts was ultimately a matter for the court.

McGarrigle v UK Insurance Ltd [2023] SAC (Civ) 7

A self employed private hire driver appealed against the dismissal of his action against an insurer on the basis he has no title to sue. The appellant had sought to recover the hire charge for the replacement vehicle he required after his former leased vehicle was rendered unroadworthy by a collision caused by the respondent's insured. Parties were agreed the appellant had interest to sue.

It was held that he did have title to sue the insurer of an individual who had collided with his leased vehicle. He was a party to a legal relation which gave rise to a right which the insured had infringed by his negligence.

Hassam v Rabot [2023] EWCA Civ 19

The court determined the proper approach for assessing damages for pain, suffering and loss of amenity where the claimant suffered a whiplash injury which came within the scope of the Civil Liability Act 2018 s.3 attracting a tariff award stipulated by the Whiplash Injury Regulations 2021

reg.2, but also suffered additional injury which fell outside the scope of the Act and did not attract a tariff award. There was no violation of s.3 by a claimant asserting a claim for other injuries to be assessed by reference to common law principles.

Nicola Gray v Sean Holmes

This is a Personal Injury claim as a result of a road traffic accident which a claim was pursued within the OIC Portal. Liability was admitted in full but quantum remained in dispute. The claim was made for the tariff injury and a non-tariff injury to the thigh and leg.

The tariff injury was agreed but it was contended that the claimant had not proved that a non-tariff injury was suffered. The Defendant argued that the medical report described symptoms in the thigh and leg as having been caused by "a soft tissue injury" but without any further clarification as to the nature of that injury, or which 'soft tissue' had in fact been injured in the index accident. There was also no reference to any injury to the leg in the SCNF, nor did the doctor record any examination of the lower limbs and therefore, causation was challenged.

The Claimant argued that if the defendant wanted to challenge causation of component of the injury, then they were

obliged to drop the claim out of the OIC Portal to do so. However, DJ Hennessy rejected this, concluding that the rules which require claims to drop out of the OIC Portal process were limited to cases where causation of any and all injury was being disputed which are the 'low velocity impact' (LVI) claims. It was held that not only can Defendants raise non-LVI causation arguments without the need to drop the matter out of the OIC Portal, but they could do so at a final hearing even if they had not raised such arguments expressly at the pre-litigation stage. DJ Hennessy concluded, "the reality in a case such as this is that "an" injury is accepted albeit the extent of it is for the claimant to prove. The fact that the defendant argues, at the hearing, the claimant has not done so is entirely permissible, with or without notice in my view. The claim must be taken to know m at the outset, he or she must prepare their case, in so far as is possible, to meet the evidential burden upon them".

Aviva Insurance Ltd v McCoist [2003] CSOH 62

The Road Traffic Act 1988 Pt VI s.151(8)(b) provides inter alia that where an insurer becomes liable to pay an amount in respect of a liability of a person who is not insured by a policy, he is entitled to recover the amount from any person who permitted the use of the vehicle gave rise to the liability.

An insurer raised an action against an insured (m) and his son (X), jointly and severally in terms of the Road Traffic Act, as explained above, to seek to recover £244.00 paid to pedestrian who had sustained serious injury when he was struck by a vehicle insured by the pursuer.

At the time of the accident, the vehicle was being driven by X although he was uninsured to drive it. M owned the vehicle and had insured it, along with several other vehicles, however, was unable to insure X. M's position was that he had told X that he was not to drive the vehicle, and on several other occasions, that he was forbidden to do so.

The insurer's claim had failed as there was nothing in the evidence to suggest that prohibition has been withdrawn, and nothing which came up to the statutory test of permitting the use of the vehicle.

Part 36 and Liability

University Hospitals of Derby & Burton NHS Foundation Trust v Harrison [2022] EWCA Civ 1660

Clinical negligence proceedings were brought against an NHS trust. The trust made a Part 36 offer which stipulated that that if the offer was not accepted by its expiry date, and further deductibles were paid, the Claimant would require the Court's permission to accept the offer. The Claimant accepted the Part 36 offer almost 2 years after its expiry date, in which time the trust had incurred costs and the Claimant had received benefits.

An order which provided that that the Claimant should pay the Defendant's costs from the expiry date of the offer and that the benefits paid to the Claimant since the offer

was made should be deducted from the settlement sum, was not "an order for damages and interest made in favour of the Claimant". This meant that the Defendant could not enforce or offset the costs order in its favour against the settlement amount due to the Claimant.

Mundy v TUI UK Ltd [2023] EWHC 385 (Ch)

The Claimant brought a claim against the Defendant, a holiday company, after suffering food poisoning whilst on a holiday arranged by the Defendant. The Claimant made two Part 36 offers: 1) £20,000 inclusive of interest and special damages 2) liability on a 90% / 10% basis in his favour. The Defendant made a Part 36 offer of £4,000. Neither offers were accepted, and the matter progressed to a trial.

At trial the Claimant won on a 100% basis, but only recovered £3,805.60 in damages. In the circumstances, the Claimant had beaten its Part 36 offer on liability but failed to beat or equal its quantum offer and failed to beat the Defendant's quantum offer.

The Claimant argued that the 100% success on liability established that the Defendant's rejection of the 90%/10% offer should attract the Part 36 adverse consequences.

The Court held that a 90/10% liability offer was not an offer to settle the claim, nor a quantifiable part of or issue of the claim. The Court treated the offer as an offer for 90% of the quantum claim. The Claimant had failed to recover 90% of the £20,000 offered for quantum and therefore, the Claimant did not benefit from the Part 36 enhancements.

The Court stated that the Claimant's liability offer was not a genuine offer to settle, but "plainly tactical". This reasoning has been heavily criticized, as the Defendant had argued contributory negligence which the Claimant accepted in some degree, therefore, reflecting its 90%/10% offer of liability.

Gohil v Advantage Insurance Company

A Claimant who beat her part 36 offer by 7p did not receive the additional Part 36 benefits.

The Claimant prepared a schedule of her fixed costs amounting to £4,937.07, and the Defendant was ordered to pay costs and disbursements in that sum. The Claimant had previously offered to settle for £4,937.00 which the Defendant rejected. It was accepted that the Claimant had obtained judgment 'at least as advantageous' as her offer but the Defendant argued that this was not a genuine attempt to settle proceedings.

The Judge held that 'the discount presented no real opportunity for settlement but appears to be merely a tactical step designed to secure the benefit of the Part 36 incentives.'

Credit Hire

Mehmood v AIG Europe Ltd & Anor [2023] EW Misc 1 (CC)

The Claimant was a taxi driver who was involved in a road traffic accident and was claiming damages in the sum of £1,800.00 for damages. The Claimant also sought to recover £107,340.00 for the costs of hiring a replacement vehicle and £13,860.00 for credit recovery and storage.

As the costs of hire significantly exceeded the loss of profit, the court established that the Claimant's damages would be limited to lost profit. However, even where the cost of hire significantly exceeds the loss of profit, the claimant may still succeed in establishing that he or she acted reasonably, subject to two exceptions which neither applied. (1) The Claimant was not a risk of being dropped from the by the taxi company and (2) The Claimant could not demonstrate that the vehicle was used for both business and private purposes.

The Judge said "I need spend only a moment or two on whether, overall, the Claimant acted reasonably in incurring £107,340 in hire charges where the cost of repair (at the highest) was some £1,800. It is clear to me, for the reasons given, that the Claimant has not so acted."

The Claimant recovered £346.00 for loss of profit, £250.00 for recovery, and £350.00 for storage.

Islington LBC v Bourous [2022] EWCA Civ 1242

Two insurers appealed against decisions concerning claims for the cost of hiring replacement vehicles under the Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The Claimants were two taxi drivers who had been injured in road traffic accidents under the Protocol. Both claims included the costs of hiring replacement taxis.

The court dismissed the appellants on the basis that they failed to take appropriate steps within the procedure of the RTA Protocols. The court found that claimants are not required to provide financial disclosure in order to evidence impecuniosity. Future insurers on a certain sized credit claim will be discouraged from challenging a claim in case of a risk of increased costs in Part 7.

Ziaullah & Rapid Vehicle Management Ltd v Zurich Insurance

An application was made on behalf of the Defendant following the successful Defence of a Taxi Credit Hire claim brough by the claimant.

The claimant did not attend the trial, no witness statements had been filed and the List of Documents had been signed by the claimant's Solicitor who confirmed that they had instructions to sign the same from the CHO.

The claimant's claim was struck out for failing to file a witness statement and pay the hearing fee. Also at the time, the claimant's Solicitor made an application to come of the record as acting for the claimant which was successful however, given that the CHO had instructed the Solicitor to sign the List of Documents it was asked that the CHO be added to proceedings to allow to seek a costs order from them instead of the claimant which was granted.

The Judge found that the CHO was providing instructions for the claim instead of the actual claimant and that (a) the costs

win at the Trial, and (b) the costs of the application(s) should be paid by them.

Shahzad v Roual and Sun Alliance [2023] 4 WLUK 92

A credit hire company had no costs liability following a finding of fundamental dishonesty on the part of the insured claimant in a road traffic accident and personal injury case. In most modest traffic accident claims, where the credit hire claim was usually the biggest head of loss, for the credit hire company to be liable for costs there had to be evidence that it had controlled the litigation to such an extent that an objective analysis would suggest that it was the real party and the actual claimant merely a nominal claimant whose interest were distinctly secondary. Therefore, appeal was allowed in this case.

Holt v Allianz Insurance Plc [2023] EWHC 790 (KB)

This is an appeal against an order for pre-action disclosure obtained by the respondent insurance company in his threatened claim for recovery of credit-hire charges. The appellant had been invo0lved in a road traffic accident which has been caused by a driver insured by the respondent. The appellant had been provided with a replacement car for 25 days on credit hire terms and therefore, a reimbursement of over £10,000 in credit hire charges was requested from the respondent. The respondent replied with evidence that ordinary car rental terms would be £1,550 for 25 days, and asked the appellant to confirm if he was claiming impecuniosity and, if so, to provide some basic financial documentation to support that claim. The appellant declined to provide any information and the respondent applied for pre-action disclosure under CPR r.31.16.

The application was granted however, it was later appealed where it has been held that the application should have been dismissed on the basis that the at fault insurer was unlikely to be a party to underlying proceedings as per CPR r. 31.16(3)(b).

Ali v HSF Logistics Polska sp zoo [2023] EWHC 2159 (KB)

This is a case where a lorry has hit X's parked car rendering it undriveable. Liability was not disputed and a claim for credit hire charges of £21.558 incurred for a replacement vehicle while his car was being repaired was issued. The Judge had found that hiring a replacement vehicle was reasonable however, X's car's MOT had lapsed four months before the accident and therefore, X had been careless as to whether his car was covered by a valid MOT certificate and that there was no evidence that had any intention to obtain one which resulted in the claim being dismissed.

The decision was appealed where it has been held that the Judge was correct in his reasoning. Where the Claimant's pre-accident use of his own car was illegal, the accident could not be said to have caused the loss of use which he claimed to have mitigated by incurring car hire charges.

QOCS and Mixed Claims

ABC v Derbyshire County Council [2023] EWHC 1337 (KB)

The Courts were required to consider the costs liability of Claimants that lost at trial in a mixed claim which was predominantly a personal injury claim.

The four Claimant's brought claims under the Human Rights Act and for negligence and false imprisonment. The Claimant's lost at trial and the Courts had to determine costs. It was accepted that there should be an order that the losing Claimants should pay the winning Defendant's costs, but the issue was in respect of enforcement and the degree of Qualified One-Way Cost Shifting (QOCS) protection.

The total costs of the Defendant's costs were £765,371.15 and they sought the Courts permission to enforce an order against the Claimant for 85% of those costs. The Claimant's argued that the Defendant's should not be allowed to enforce their costs as the claim was "in the round – a personal injury case *(Brown v Commissioner of Police of the Metrolpolis & Anor [2019] EWCA Civ).*

The Court concluded that it was a mixed claim as the Claimants brought claims for personal injuries and claims unrelated to personal injury. Although the non-personal injury claims did lead to the defendants incurring some additional costs, they were very modest in the context of the overall claim and did not justify enforcement of 85% costs against the claimants.

The Court ordered that the appropriate level of enforcement was only 5%.

Excalibur & Keswick Groundworks Ltd v McDonald [2023] EWCA Civ 18

It was held that it was not appropriate to remove qualified one-way costs shifting (QOCS) protection from a claimant who had discontinued his personal injury claim at the last minute in the light of inconsistencies in his case or to set aside his notices of discontinuance where there was no evidence of abuse or process, dishonesty, or egregious conduct. Powerful reasons were required to set aside such notices or to remove a personal injury claimant's substantive right to the protection of the QOCS scheme.

Pathan v Commissioner of Police of the Metropolis [2022] EWHC 3244

It was held that protection under the qualified one-way costs shifting regime applied to the period before a claim was amended to include an action for personal injury. The meaning of Civil Procedure Rules r44.12(1) is stated to have been clear and it states, the QOCS regime, which included certain layers of judicial discretion, applied if proceedings included a personal injury claim and did not apply if proceedings did not include a person injury claim.

Medical Agency Must Provide a Breakdown of its Bill

Northampton General Hospital NHS Trust v Hoskin

The Judge ordered that bills for expert reports rendered by an agency should be broken down to enable to the paying party to see the amounts being charged by the experts.

Premex, a medical reporting organisation, produced two expert reports on behalf of the claimant. Premex then rendered two invoices respectively in the sum of £5,400 and £8,755.

The Defendant requested a breakdown of the costs of the two expert reports, to which Premex declined on the basis that the invoices amount was both reasonable and proportional. The Defendant made a specific application to the Court for a breakdown of the invoices, but the Judge refused in the first instance.

The Defendant then appealed the refusal and was successful. The Court held that the if the receiving party is asking the paying party for the costs of an expert, then the receiving party is required to provide a copy of the expert's fee notes. Obtaining a breakdown of this information, allows the paying party to make a rational, evidenced based decision about whether to accept, reject or make a counteroffer for each aspect of the bill.

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

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