Horwich Farrelly

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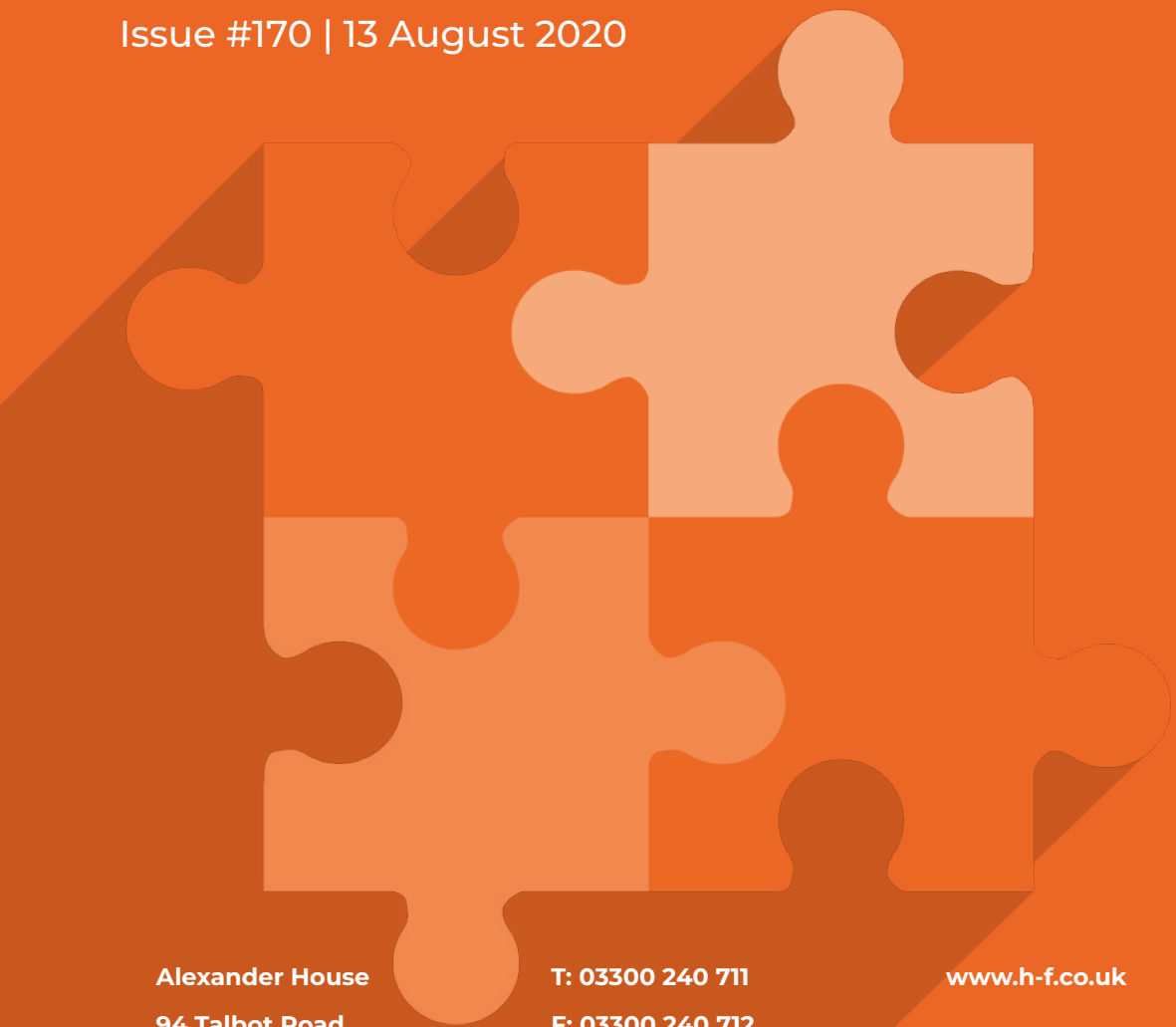
Insight

from Horwich Farrelly's Large & Complex Injury Group

Issue #170 | 13 August 2020



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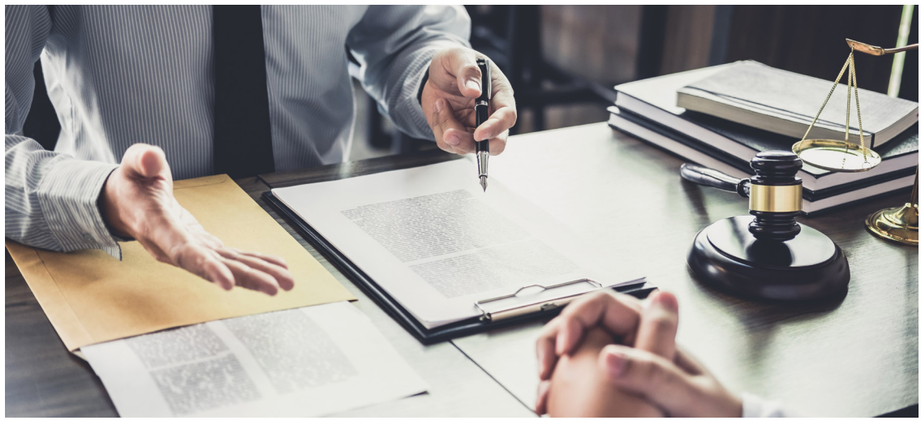
Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- A Part 36 offer that had been withdrawn
- The role of accident reconstruction experts
- Counsel's fees when a claim exists the Portal
- Mental capacity

Malcom Henké
Partner & Head of LACIG



Part 36

Blackpool Borough Council v Volkerfitzpatrick Limited and others (2020) 2128 (TCC)

There had been a trial of an action in which the claimant claimed damages of in excess of £6m but recovered slightly more than £1.1m. The defendant had ultimately brought additional proceedings against the third, fourth and fifth parties. The claim against the third party had been compromised before the trial and that against the fourth party on the first day of trial. The fifth party had brought contribution proceedings against the fourth party, which were taken over by the defendant as part of its settlement with that party.

The issues or be determined at this hearing included:

(1) As between the claimant and the defendant who was the successful party.

(2) The impact of Part 36 offers and an offer 'without prejudice as to costs' (WPSATC)

(3) The claimant's relative lack of success and its conduct.

(4) What costs orders ought to be made having regard to all of the circumstances.

The High Court Judge ruled as follows:

(1) As between the claimant and the defendant who was the successful party?

The claimant was properly to be regarded as the successful party. Whilst it was always a question of fact and degree, the claimant has been successful, both in substance and in reality. The real question was whether under the power conferred by 44.2(2)(b) the court should make a different order and, if so, what different order.

(2) The Part 36 and WPSATC offers

On 15 August 2019, some weeks before a mediation took place, the defendant made a Part 36 offer whereby it offered to pay the claimant £750,000 in settlement of part of the claim but not including some specified items. A comparison of the offer of £750,000 compared with the judgment on those items (inclusive of add-on) showed that the claimant only recovered £631,510.25, so that the defendant did better at trial than its Part 36 offer.

On 12 November 2019 the defendant made a WPSATC offer. It was an unorthodox offer in that it was an offer made to all of the parties and comprised both a global offer and a series of separate offers. There was a response from the claimant in the form of a Part 36 offer made on 21 November 2019. It did not formally reject the defendant's WPSATC offer, although it set out reasons why in its view it was ineffective. It adopted the same global and individual approach as the defendant's WPSATC offer, although it was made only to the defendant.

The defendant withdrew the Part 36 offer on 27 January 2020. The letter did not explain why.

(3) The claimant's relative lack of success and its conduct

When considering the claimant's costs, the judge held that he must take into account the claimant's failure to achieve anything like the amount it was inviting the court to award on its primary case, as well as its conduct, which was open to criticism in a number of respects.

(4) What costs orders ought to be made having regard to all of the circumstances.

The most significant issue was the impact of the defendant's Part 36 offer. Neither the claimant's Part 36 offer, or the WPSATC offer were relevant.

The question to be asked was whether, following Thakkar v Patel (2017) the claimant acted reasonably or unreasonably in failing to accept the offer while it was on the table.

It could now be seen from the principal judgment that with the benefit of hindsight the offer was extremely well judged because, in the context of a multi-million pound case, the offer was just under £120,000 more generous than the judgment for the relevant items.

The offer must have been made on the basis of a broad-brush gut instinct which proved to be an extremely impressive prediction of the eventual outcome. If the Part 36 offer had not been withdrawn the question of the reasonableness of the claimant's decision not to accept it would not normally be relevant because the defendant would automatically be entitled to its costs from the expiry of the relevant 21-day period for acceptance.

On the basis of the authorities, the approach the court adopted was: (a) to put itself into the position of the claimant at the time and not simply decide the case by reference to hindsight; but (b) the focus must be on the reasonableness of the refusal by reference to the facts and matters relevant to the merits of the claim as they ought reasonably to have appeared to the claimant at that time, not by reference to wider commercial factors.

'…the claimant acted unreasonably in the sense in which that term should be used for these purposes in rejecting the (Part 36) offer'

On that basis the claimant was in a position to undertake its own assessment and valuation of the case. It followed that the claimant acted unreasonably in the sense in which that term should be used for these purposes in rejecting the offer.

It was taking a commercial risk in the knowledge that it could end up recovering less than the amount of the offer. It followed that the starting point was that the claimant ought to pay the defendant's costs of all the relevant issues from 21 days after service of the Part 36 offer, i.e. be from 6 September 2019 onwards.

The only obvious factor was the fact that the Part 36 offer was withdrawn for what were tactical reasons. It would be impermissible speculation for the judge to conclude that this claim would have settled had the Part 36 offer been accepted. It must be assumed that this claim would have fought to trial so that the claimant would have been entitled to its costs of the remainder of the claim.

Whilst it would be possible to make an issue-based costs order after 6 September 2019, this was a paradigm case for the court to make a percentage order if practicable under CPR Part 44.2(7).

There were two reasons why the case went to trial, the first being the claimant's failure to accept the defendant's Part 36 offer and the second being the defendant's unexplained decision to exclude a major part of the claim from its Part 36 offer. If that excluded issue had been the only matter tried it would have taken no more than four days. On a straight-line basis that would represent 20% of the costs of a 20-day trial. However, having considered issues of costs budgeting and all other the relevant considerations the appropriate orders were:

(1) The defendant should pay 80% of the claimant's costs of the action up to and including 5 September 2019.

(2) The claimant should pay 80% of the defendant's costs of the action, including the additional claims against the fourth (in relation to a specific issue) and fifth parties.

(3) The defendant should pay the fifth party's costs of the additional claim up to and including 5 September 2019 and the claimant should pay the fifth party's costs of the additional claim thereafter.

The claimant was represented by Squire Patton Boggs (UK) LLP

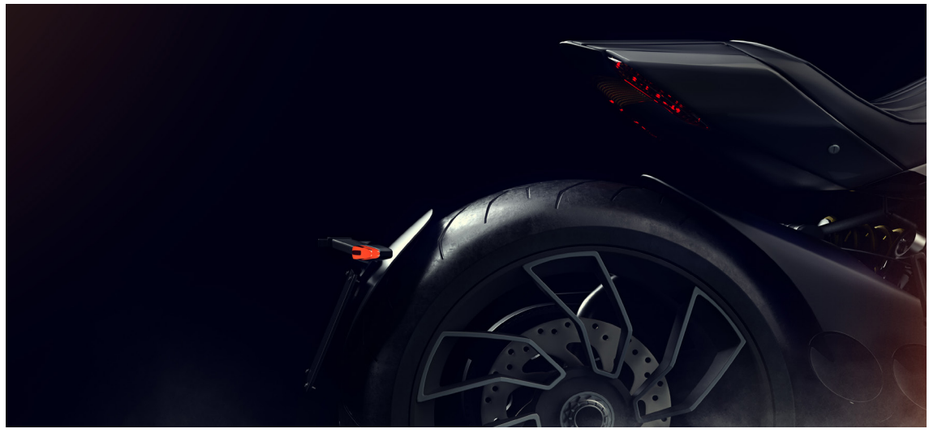
The defendant was represented by Fieldfisher LLP

The fifth party was represented by Clyde & Co LLP

Comment

In withdrawing its Part 36 offer, the defendant risked losing the costs protection that it afforded.

However, the judge retained discretion under CPR 44.2 (4)(c), which allowed a withdrawn offer 'properly be taken into account as a relevant circumstance', when considering the costs of the action.



RTA/ Expert Evidence

Domeney (Deceased) v Rees and another (2020) EWHC 2115 (QB)

This claim arose out of a fatal road traffic accident when the deceased, then 58 years old was riding a powerful motorbike along a main road. The road was a single carriageway with two lanes of opposing traffic. It was subject to a 60mph speed limit. The deceased was headed south. Ahead of him a minor road joined from the left.

The deceased would have gained a view of the junction from about 170 metres away – it being from that point a straight and slightly downhill section of road. Coming in the opposite direction was a car being driven by the first defendant. The first defendant turned right into the minor road directly across the path of the oncoming motorbike. The bike hit the car, the impact being to the front as the car was halfway through the turn and approximately in the middle of the deceased's lane.

The first defendant was subsequently convicted of causing death by careless driving whilst over the prescribed limit of a specified controlled drug (cannabis).

There were two passengers in the car, one in the front and one in the back.

The defendant was simply unaware of the presence of the motorbike until after the collision. His passengers saw it – but only in the instants before.

There were no independent witnesses to the actual collision. But three drivers saw the deceased's driving very shortly before. All criticised the deceased's speed and put it in a range of more than 60mph to 70 to 75mph.

Two accident reconstruction reports were available for the criminal proceedings, one from the police accident investigator and one by an expert instructed by the first defendant's defence solicitors. Neither felt able to give any reliable estimate of the speed of the motorbike. There were no marks on the road prior to the collision site (i.e. no skid marks from which deductions as to speed could be drawn).

The damage to the vehicles (which was very extensive) would not allow a calculation because of the disparity in mass and because the motorbike had not travelled through the centre of mass of the car. Because the trajectory of the deceased, who was thrown from the bike, had been arrested by a metal fence within a hedgerow, no calculation could be made from the 'throw' distance.

The defendants' application was to adduce the evidence of another, freshly instructed accident reconstruction expert plus an A&E consultant to be used at a proposed trial of a preliminary issue of contributory negligence (primary liability having been conceded). The claimant had agreed to the defendant having permission for a freshly instructed accident reconstruction expert but only for 'pragmatic' reasons.

Refusing the application, the Master held that the test in Part 35 of the CPR namely that the expert evidence "is reasonably required to resolve the proceedings" was nowhere near made out.

The court was not bound to give permission for expert evidence just because the parties had agreed to it. It was therefore incumbent on the parties (and particularly the defendants) to do two preliminary things. First, to provide the court with enough material to form a judgment as to the need for the evidence.

In a case like this, that meant furnishing the court with copies of the police report, the report of the police accident reconstruction expert, and the report of the first defendant's expert in the criminal proceedings.

Second, neither side (but the criticism again applied mainly to the defendants) complied with CPR 35.4(2) which required them to provide costs estimates for the proposed expert evidence in advance of the hearing. When raised at the second of two hearings relating to the application, the claimant estimated that the overall costs of both sides for the accident reconstruction experts would be around £24,000.

That figure seemed realistic to the Master. If A & E evidence were added then the overall 'worst case' costs for the experts would be around £40,000 to £50,000 – a significant sum. The involvement of these experts would also impact on the time required for the trial.

As two experts had already stated in unequivocal terms that they could offer no reliable opinion as to the motorbike's speed, there was no realistic prospect of a third expert doing any better. The court would have to make findings as to speed based upon the evidence of lay witnesses. There was nothing unusual or untoward about that.

'If there was no or no sufficient forensic material from which conclusions could be drawn, then experts were redundant'

It would, however, be very unusual to have expert evidence from accident reconstruction experts in circumstances where those experts could not in fact reconstruct its single most important feature. If there was no or no sufficient forensic material from which conclusions could be drawn, then experts were redundant.

The Master accepted that an accident reconstruction expert would be able to put forward alternative scenarios as, to some extent, the previous defence expert had already done. But there were difficulties with admitting evidence of that type:

1) The alternative scenarios were extraordinarily elaborate. It was proposed that the accident reconstruction experts formulate the speeds and dynamics of each hypothetical collision and then that A&E consultants should pronounce on the type of injuries that might have been expected to have been suffered in consequence.

Whilst it was true that in 'seatbelt' and 'helmet' cases, A&E consultants did often give evidence on the issue of how much more serious the claimant's injuries probably were for want of a seatbelt or helmet, such evidence related to an actual accident the dynamics of which were known. In the context of entirely counterfactual 'alternative scenarios' the evidence would be highly speculative, indeed absurdly so.

2) It was also difficult to see how the judge would be assisted. The assessment of contribution required an evaluation of the culpability and causative potency of the negligence found against each motorist. That was an essentially impressionistic decision, involving the weighing and balancing of a range of different factors. For this reason, there was authority discouraging the type of exercise that the defendants proposed (see Stanton v Collinson (2010) (a seatbelt case))

3) The proposed evidence would itself be a series of questionable constructs and it would be based upon an assessment of the deceased's speed that could only ever, on the evidence available, be the trial judge's rough estimate.

This part of the judgment could be tested by posing the following question. If the Master were the trial judge, would he want or require expert evidence of the type proposed? The answer was emphatically that he would not.

The Master did, however, permit the defendants to rely upon the written evidence of the expert instructed by the criminal defence solicitors. (There was no issue about the reports of the police accident investigator). The expert's report was not to be regarded as having no probative value whatsoever. The report was in existence, all parties had seen and considered it, it contained various data and observations not in the police officer's report and the cost had been incurred.

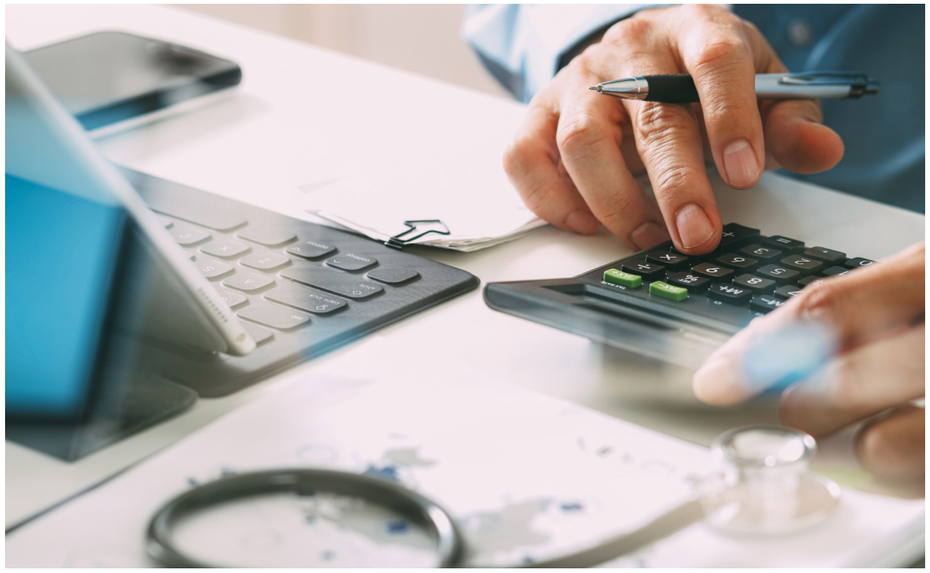
Together with the reports of the police accident investigator and the police report, the criminal defence expert's report should be placed into the court bundle and that it should be admissible as to its contents, including where those contents were or consist of opinion evidence.

The claimant was represented by White Dalton Motorcycle Solicitors

The defendant was represented by BLM

Comment

As well as acting as a reminder that the court ultimately decides what expert evidence may be adduced at a trial, this case also reconfirms that accident reconstruction experts require sufficient physical or scientific evidence from the accident scene to support any opinions they express.



Counsel's fees when a claim exits a portal

Finsbury Food Group Plc v Dover (2020) EWHC 2176 (QB)

This appeal from the order of a Master of the Senior Courts Costs Office raised a single and narrow issue: whether CPR 45.29I (2)(c) fixed the quantum of counsel's (or a specialist solicitor's) fee for an advice on valuation of the claim at £150 plus VAT in accordance with CPR 45.23B (read with Table 6A) or whether the fee for such an advice fell outside the fees fixed in CPR 45 and was subject to assessment.

The claim arose from an injury which the claimant sustained during the course of his employment by the defendant. Initially, the claim was valued at less than £25,000. As such, it fell to be dealt with by the parties under the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the Protocol").

In accordance with the Protocol, the claims notification form (CNF) was uploaded to the online system. However, the defendant failed to provide a response within the requisite 30 days and the claim therefore exited the Protocol.

Although the defendant's insurers requested (on two occasions) that the claim should be resubmitted and continue in accordance with the terms of the Protocol, both requests were rejected by the claimant. Liability was admitted on 29 February 2016 subject to causation. Medical evidence was assembled by the claimant and a detailed Schedule of Loss prepared. Counsel advised on the value of the claim in conference. The claim ultimately settled for £70,000 on 19 December 2017.

Following settlement, the claimant submitted a Bill of Costs in which counsel's fee for the advice in conference was claimed in the sum of £650 plus VAT. The defendant disputed any entitlement to payment of counsel's fee on the basis that no such fee was payable under the relevant provisions in a claim which had exited the Protocol and it was incurred after the claim had left the Protocol, as those costs were subsumed within the fixed fees.

Alternatively, it was submitted that, if counsel's advice was a recoverable item of cost, then the costs of such advice were limited to £150 plus VAT. The costs officer rejected these arguments holding that the relevant provisions permitted recovery of counsel's fee for advising in conference as a disbursement. However, he assessed the costs of counsel's fee down from £650 plus VAT to £500 plus VAT.

Dismissing the defendant's appeal, the High Court Judge started with some general and uncontroversial observations concerning his approach to the statutory interpretation exercise. The objective of any exercise of statutory interpretation was to determine the intention of the legislature and the starting point for that exercise was the natural and ordinary meaning of the words used. It followed that where the meaning was clear on the face of the provision in issue, there was no need to resort to other canons of statutory construction unless the construction produced a result which was so startling that it could not have been intended.

Against this short and uncontentious introduction, the first question therefore was the grammatical meaning of CPR 45.29I(2)(c), taking the provision in context. Viewed linguistically the meaning was clear and unambiguous: the phrase in subsection 2(c): "as provided for in the relevant Protocol" was not referring to the cost as provided for in the relevant protocol, but was referring to the type of disbursement there provided.

Not only did this construction make grammatical sense, it was also the only logical construction of CPR 45.29I. Neither the Protocol nor the rules fixed the cost of obtaining medical records or of obtaining an expert medical report, nor fixed the cost of other disbursements referred to in (2), save for subparagraph (g) where the upper limit of the claim was expressly set out.

Part 45 expressly fixed the cost of the disbursement when counsel's advice was obtained in a claim which remained within the Protocol and settled at Stage 3. Section III of rule 45 included 45.23B which fixed the cost at an amount equivalent to Stage 3, Type C fixed costs, that was, £150 plus VAT.

No such similar provision existed in Section IIIA for claims outside the Protocol. Likewise, CPR 45.29I(2A), which related to whiplash claims, started under a different protocol (the road traffic accident protocol) fixed the costs of various medical reports. Had the drafter intended to fix the costs of legal advice for a claim outside the Protocol, then the drafter could easily have included a similar provision.

Having therefore dealt with the grammatical (plain wording) meaning of the provision, the judge considered whether the meaning led to an absurd outcome or an outcome which the drafter could not reasonably have intended. He did not accept that leaving the legal costs of valuing a claim which had fallen outside the Protocol unfixed and subject to assessment in the usual way, was an absurd outcome.

Claims which had fallen out of the Protocol were a mixed bag. Some small straightforward claims might fall out of the Protocol as a result of the failure by the defendant to respond to the CNF. But there were other reasons for a claim falling out of the Protocol including notification by the claimant that the claim had been revalued at more than the upper limit; where liability remained in dispute and where contributory negligence was alleged.

Those factors were likely to be associated with a much greater level of complexity, so making quantification of the claim all the more difficult. There was nothing absurd in the costs of such an advice on valuation not being fixed in those circumstances. It would be odd if the same fixed fee were to be recovered for valuing a straightforward claim worth £15,000 as for a claim which, as it turned out, included a high claim for loss of earnings or handicap on the labour market the quantification of which might involve considerable skill and expertise.

Further, the costs allowed would not be unchecked. Just as in this case, they were subject to assessment and might be reduced on assessment.

The fact that 45.23B fixed the level of fees for claims which settled at Stage 3, did not mean automatically that the fee would be recovered. That provision made plain that the fee would only be recovered where the advice was reasonably required to value the claim and so, even within the fixed costs regime of Section III, there was a basis for challenge which might require resolution by the costs judge.

'Although the bar to recovery under 45.29J was set high, the fact that the provision existed in relation to claims which had fallen out of the Protocol... suggested a different and more flexible policy generally…'

The drafting of Part IIIA suggested a greater degree of flexibility generally to costs in claims which had fallen out of the Protocol: Rule 45.29J permitted claims for an amount of costs exceeding fixed recoverable costs where there were "exceptional circumstances."

Although the bar to recovery under 45.29J was set high, the fact that the provision existed in relation to claims which had fallen out of the Protocol, but no similar provision existed in relation to those which were resolved under the Protocol or at Stage 3, suggested a different and more flexible policy generally to claims which had fallen out of the Protocol.

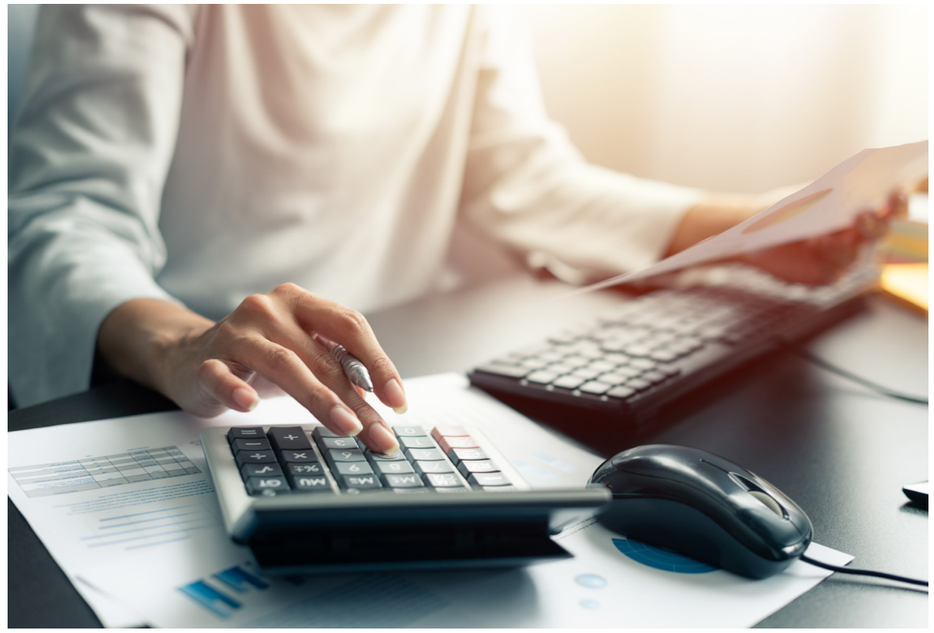
Although the argument deployed before the costs officer was different, he reached a similar conclusion for similar reasons. He concluded that CPR 45.23B and Table 6A applied to claims which settled at Stage 3 under PD 8B, and as such had no application to claims which had exited the Protocol. He concluded that the Protocol did not expressly incorporate CPR 45.23B nor was it implicitly incorporated by CPR 45.29I. He found that paragraph 7.41 and 7.44 of the Protocol were referring to claims which settled at Stage 2 and had no application to claims which were outside the Protocol. None of these findings were wrong.

The claimant was represented by Thompsons Solicitors

The defendant was represented by Taylor Rose TTKW

Comment

It remains of concern that two regimes introduced to bring simplicity and certainty to lower value personal injury claims can still provoke so much satellite litigation, to clarify what the relevant rules really mean.



Mental capacity

King (Protected Party) v The Wright Roofing Company Limited (2020) EWHC 2129 (QB)

The preliminary issue in this case was whether the defendant's tort had deprived the claimant of capacity to litigate and manage his own finances. The claimant was a roofer by trade. He suffered a severe head injury, and other serious injuries, falling from a roof. The defendant admitted liability, subject to contributory negligence.

The claimant issued the claim as a protected party, with a litigation friend. In its defence, the defendant denied that he lacked capacity to litigate and manage his financial affairs.

The High Court Judge noted that under the Mental Capacity Act 2005 (the Act) capacity was presumed unless its absence was proved on the balance of probabilities (Ss1(2) and 2(4)). A person was not to be treated as unable to make a decision unless all practicable steps to help him do so had been taken without success (S1(3)). A person must not be treated as unable to make a decision merely because he made an unwise decision (S1(4)).

A person had or did not have capacity "in relation to a matter". The test was whether "at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain" (S2(1)). The impairment or disturbance might be permanent or temporary (S2(2)).

There were four aspects to inability to make a decision (S3(1)(a)-(d)). A person was unable to make a decision for himself if unable "to understand the information relevant to the decision" ((a)); "to retain that information" ((b)); "to use or weigh that information as part of the process of making the decision ((c)); or "to communicate his decision …" ((d)).

This was a worrying case, for several reasons. First, relations between the claimant and his representatives were poor and, at or near the point of breaking down.

The judge also had concerns about the costs that had been incurred in this satellite issue. Could not a joint expert on capacity have been appointed? Were four experts and six reports really needed?

The directions hearings were attended by two counsel, again at considerable expense. Who was going to pay the costs of all these reports, the deputies, the Court of Protection application and the fees of solicitors and counsel?

Viewed in that light, the claimant's suspicions that the professionals might gain financially at his expense were not as fanciful as they might seem.

Against that background, there were two issues: whether the claimant was "a protected party", who "lacks the capacity to conduct the proceedings" (CPR 21.1(2)(d)) and whether he was a "protected beneficiary", i.e. a protected party who also "lacks capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings" (CPR 21.1(2)(e)).

It was accepted that the claimant had an impairment of, or a disturbance in the functioning of his mind or brain within S2(1) of the Act and that his post-accident state of mind, behaviour, outlook and attitudes were at least in part "because of" that impairment or disturbance. The other four elements of inability to make decisions were inability to understand, to retain, and to use or weigh, information relevant to the decision, and inability to communicate the decision. Of these, there was something approaching consensus that the first, second and fourth were not, or not sufficiently, present in the claimant.

The issue was his inability to "use or weigh" the relevant information "as part of the process of making the decision" (S3(1)(c)). The information relevant to a decision included information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision (S3(4)).

'(The claimant's) unwillingness to accept advice and inability to think through the consequences of decisions in the litigation went beyond merely disagreeing with the manner in which the claim was being conducted'

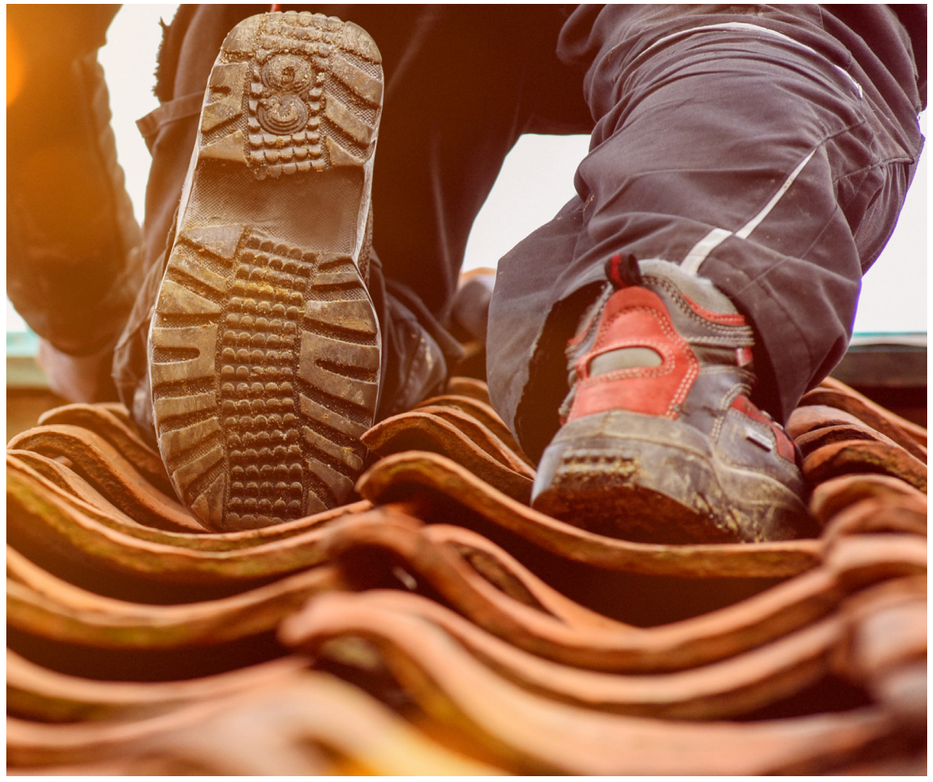
On the evidence, the judge was persuaded by a fairly narrow margin that the claimant was unable to use and weigh information relevant to decisions that had to be made about his claim. His unwillingness to accept advice and inability to think through the consequences of decisions in the litigation went beyond merely disagreeing with the manner in which the claim was being conducted. The claimant could not use and weigh information relevant to the value of the claim informing a decision such as whether to accept a Part 36 offer; and, specifically, that he could not use or weigh the consequences of recovering less than the amount of such an offer.

As for the claimant's capacity to manage and control money recovered, the question came down to whether he was unable to use or weigh information relevant to making decisions about how to manage and control the financial fruits of the claim, including information about the reasonably foreseeable consequences of financial decisions such as how to balance income and expenditure, whether to buy or rent a property and if so where, and so forth.

This was an even more difficult issue. There was no evidence of any inability to manage his own money before the accident, despite a longstanding constitutional depressive illness. In early 2018 nearly two years after the accident it was said that the claimant "appeared able to manage his own financial affairs" and that though he was generous with money, loans he made to friends were repaid.

The claimant was at present so keen to travel in search of good cheer that he was unable to use or weigh financial information about the need for future care and the foreseeable adverse consequences of being unable to afford it. He was also so absent minded that he was likely to lose money through forgetfulness or not troubling to recover debts due to him or to pay debts due to others, thereby incurring interest charges. That conclusion was reached on the balance of probabilities and also by a very narrow margin.

To conclude, the present circumstances including the claimant's absence from court made it difficult to judge his capacity. The breakdown of relations between him and his advisers and the strained relations with his litigation friend were inhibiting the court from deciding the issues on the basis of the best available evidence. The judge was just persuaded that absence of capacity on both counts was at present proved on the balance of probabilities.



The judge then went on to deal with the future management of the case, including whether the existing litigation friend should continue in that role. A litigation friend might stand down and be replaced by a different one, preferably with the consent of all concerned including the claimant. While agreement was preferable, the court had power under CPR 21.7 (and, by rule 3, on its own initiative as well as on the application of a party) to terminate the appointment of a litigation friend. In the absence of a suitable substitute, the court might appoint the Official Solicitor who was usually willing to act, subject to costs considerations, without charging fees.

The claimant was represented by Anthony Gold Solicitors

Comment

The judge's finely balanced decision in this case was set against a background that the claimant did not suffer from any identifiable psychiatric illness such as psychotic behaviour or anything worse than a mild degree of personality change, coupled with signs of frustration, alcohol abuse and erratic behaviour also connected to constitutional depressive illness predating the accident.

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