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Personal Injury Newsletter

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Personal Injury Newsletter – April 2018

By Sharan Sanghera

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In this edition of the Newsletter, 3PB brings you the following articles.

Henrietta Hughes, who recently joined the PI Team on successful completion of her 3rd six pupillage, summarises a recent Appeal in which the Claimant slipped on ice in an unmanned car park. No doubt litigators will see a rise in claims after the disruption caused by the Beast From The East and so the article should hopefully remind practitioners of some of the pitfalls that come with dealing with claims of that nature.

Luke Ashby then follows with a summary of an appeal in which he successfully persuaded HHJ Simpkiss that a Claimant had acted reasonably when exiting the Portal. The issue was one of costs and thankfully Luke was able to prevent his client from being limited to (meagre) Portal Costs.

Gabriel Adedeji brings us up to speed on recent cases including the decision in London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield [2018] EWHC 51 (QB) in which the Court gave guidance on the correct approach in relation to ap-plications under s.57 Criminal Justice and Courts Act 2015 and Joanne Dunhill (By her Litigation Friend Paul Tasker) v W. Brook & Co. (A Firm) and Justin Crossley [2018] EWCA Civ 505, which was a professional negligence claim brought by a Claimant after her claim was settled on the advice of her solicitor and barrister.

Our Newsletter Editor, Sharan Sanghera rounds up the edition with a quick reminder of some important Part 36 Rules. Be sure to use her checklist when you are making Part 36 offers to avoid some of the more commonly made mistakes, which could lead to an offer being found invalid.

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The Risk of Ice

By Henrietta Hughes

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Summary:

In recent weeks snow and ice have swept across the UK. The appeal case of *Mr Ivor Cook v Swansea City Council* [2017] EWCA Civ 2142 concerns a claim arising from slipping on the latter.

The facts

On 8 December 2012 the Claimant, aged 78 at the time of the accident, had parked his car shortly after 10:30 in a small unmanned 24 hour pay and display car park ('the car park') in Swansea owned and operated by the Defendant. When walking to the ticket machine, there being a slight downward incline towards it, he slipped on black ice. The Claimant pleaded negligence and/or breach of duty under section 2(2) of the Occupiers' Liability Act 1957 ('OLA 1957') and sought £10,000 in damages for his injuries.

The Defendant operated 46 car parks in total and they are unmanned bar 3 multi-storey car parks, and 3 park and ride car parks. In bad weather the manned car parks will be gritted, but there is a reactive system of gritting in relation to the unmanned car parks - they are only gritted when a report from a member of the public about a dangerous area is received.

Two wardens, who ensure that drivers have paid and displayed, attended the car park at 10:51 on 7 December 2012. In addition, cashiers had collected money from the machines on both 7 December 2012 and 8 December 2012. All were employees of the Defendant.

The Decision below

HHJ Vosper QC found that a reactive system was the only proportionate and reasonable way of dealing with the problem of ice in car parks, save for those rare occasions of heavy snow fall, which are exceptional and call for different decisions. In turn he concluded that by adopting a reactive system the Defendant did discharge the common law duty to take such

care as in all the circumstances of the case was reasonable. He accepted that they could have issued instructions to cashiers and wardens, prima facie there would be no difficulty in implementing such a system, but they would have been part of a reactive system and there was no evidence that such instructions would have prevented the Claimant's accident.

The Appeal

The Claimant appealed.

Ground 1 - Breach of Duty:

'18 … (1) Having found as a fact that the Defendant did not put in place a system whereby cashiers and wardens would report ice, and having found that prima facie there could be no difficulty with such a system, the judge erred in failing to make a clear and explicit finding of breach of duty under section 2(2) of the 1957 Act.'

The first ground was dismissed. The Defendant considered the following matters as being especially relevant, and Lord Justice Hamblen found them compelling reasons for upholding HHJ Vosper QC's decision that there was no breach of duty:

'(1) The likelihood that someone may be injured;

The risk of ice in cold weather is an obvious danger. People out and about in cold weather can be reasonably expected to watch out for ice and to take care. The Car Park did not pose a particular risk compared to any other of the Defendant's car parks. There had been no previous reports of dangerous ice conditions at the Car Park, nor any previous accidents due to ice.

(2) The seriousness of the injury which may occur;

Injury due to slipping on ice may be trivial or serious.

(3) The social value of the activity which gives rise to the risk;

The Defendant's car parks provide the useful facility of 24 hour parking. If gritting of unmanned car parks, such as the Car Park, is required whenever there is a report of icy

conditions the Defendant is likely to have to prohibit their use in all its unmanned car parks in periods of adverse weather, to the considerable inconvenience of local residents and visitors.

(4) The cost of preventative measures.

The alternative to closing the car parks would be manning them or arranging regular gritting. Such gritting would have to be by hand and would involve significant use of staff and material resources. This would be a disproportionate and costly reaction to the risk and would have diverted such resources from situations where attention was more urgently required.'

Grounds 2-4 - Causation:

'18 … (2) The judge was wrong in law in his approach to the issue of causation in finding there was no burden on the Defendant to establish that the accident would have occurred in any event;

(3) If the judge's approach regarding the question of causation was correct the threshold he adopted in respect of proof of causation was too high and presented an insurmountable hurdle for the Claimant.

(4) The judge failed to accord sufficient weight or to consider adequately evidence before him establishing causation. There was ample evidence that any reactive system would or should have sought to address the condition of the car park before the time of the accident on 8 December.'

It was not necessary for Lord Justice Hamblen to determine the Claimant's challenge to the conclusion on causation, but he did observe that in order for the accident to be prevented, given the judge's finding that gritting could not begin until midnight on 7 December 2012, an employee would have had to attend the car park early on 8 December 2012 and considered conditions sufficiently hazardous for a report to be made, and the Defendant would then have to decide to act on the report and arrange for manual gritting. Such gritting would have to be undertaken before the time of the accident/10:30. Lord Justice Hamblen found that inherently implausible [38]. With regards to an evidential burden on the Defendant to establish the accident would have occurred in any event, Lord Justice Hamblen reiterated

what was observed by HHJ Vosper QC in that this is not a case *'where proof of the circumstances leads to the conclusion that something has gone wrong … it cannot seriously be said that something must have gone wrong to explain the presence of ice on the ground in December.'*

Lord Justice Henderson and Lord Justice Longmore agreed that the appeal ought to be dismissed.

Comment

As the wintry conditions continue, this case is highly topical. In certain circumstances a breach of duty could be difficult to prove where occupiers are operating a reactive system, as long as that system is working. Equally, one should look out for any faults within the reactive system as that could point to something having gone wrong.

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When is it reasonable to leave the EL/PL Portal

By Luke Ashby

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Summary

In *Nicholls v The Ambassador Theatre Group*, Luke Ashby successfully defended an appeal and secured a finding that the Claimant reasonably exited the EL/PL Portal and should escape the associated costs regime.

The Facts

Mr Nicholls brought a claim for personal injury after being injured on the Defendant's premises. His claim started life under The Protocol for Low Value Personal Injury (EL/PL) Claims (the EL/PL Protocol). Whilst following that Protocol the Defendant's insurer challenged causation of the main injury to the finger (but not other more minor injuries). At stage two of the process the insurer argued there was no evidence the finger was injured in the accident and stated the finger could easily have been injured elsewhere.

In light of the allegations the Claimant commenced proceedings under Part 7 rather than Part 8. In its defence the Defendant objected to the use of the Part 7 procedure and alleged use of Part 7 was unreasonable.

The claim for injuries settled shortly after the defence was filed. But the issue of costs proved impossible to resolve as the parties remained at odds over whether the Claimant had reasonably exited the EL/PL Protocol or not.

The Claimant commenced proceedings for recovery of his costs. At a Provisional Assessment the Judge found the Claimant had acted reasonably in exiting the EL/PL Protocol given the dispute over causation of the main injury.

The Defendant requested an Oral Review of the decision made on Provisional Assessment. At the oral review the Judge found the comments made by the Defendant at stage two to be really quite significant and amounting to a suggestion of dishonesty. She found the credibility of the Claimant had been called into question. As a consequence, she also found the Claimant had reasonably exited the EL/PL Protocol and started Part 7 proceedings.

The Appeal

The Defendant appealed to the Designated Civil Judge, His Honour Judge Simpkiss. The Defendant argued the Claimant had acted unreasonably in starting proceedings under Part 7. As such the Defendant submitted that, in accordance with CPR 45.24, costs should be limited to the very modest costs provided for in cases which proceed to the stage three procedure under the EL/PL Protocol.

His Honour Judge Simpkiss dismissed the Defendant's appeal. The Judge found whether the finger was injured or not was a significant issue of fact which meant the matter was not suitable for resolution under Part 8. The Judge agreed the Defendant had put the Claimant's honesty and credibility in issue; the potential finding of fundamental dishonesty was disproportionately significant. The Judge found it was quite right for insurers to be sceptical but having raised this issue they could not complain if the Claimant elected not to proceed under Part 8. He found the District Judge had identified the correct issue and made the correct decision. The Claimant escaped the usual limited costs regime. The appeal was dismissed with costs.

Comment

This decision serves as a useful reminder that great care must be taken with allegations made at stage two of the EL/PL Protocol, especially where they could amount to an allegation of dishonesty. Whilst insurers are clearly entitled to put causation and credibility in issue they must be mindful that doing so may expose them to increased costs should the Claimant reasonably wish the matter to be resolved under Part 7. It is important to ensure such allegations are only made having fully considered the consequences. A Court is unlikely to require a Claimant to defend itself from serious allegations under a very modest cost regime.

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Fundamental Dishonesty: London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Sinfield [2018] EWHC 51 (QB)

By Gabriel Adedeji

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Summary

In this case the High Court set out the correct approach in relation to applications under s.57 Criminal Justice and Courts Act 2015 ('the 2015 Act').

Facts

The Respondent had broken his left arm and wrist while acting as an assistant to spectators at the 2012 Olympic and Paralympic Games. Liability was admitted.

The Respondent's claim for special damages included a claim of around £14,000 for future gardening expenses. He asserted that the accident had caused him to employ a gardener to look after his two-acre garden, a task which had previously fallen to himself and his wife. This aspect of the claim represented around 42% of the special damages sought, and 28% of the entire claim, general damages having been agreed at £16,000.

However, when he was contacted by the Appellant, the Respondent's gardener (identified from the Respondent's list of documents which had referred to numerous invoices from the gardener) indicated that he had been working for the Respondent and his wife since 2005 and that his work had not changed following the Respondent's accident. He further indicated that the invoices referred to had not come from him and that the Respondent had not been telling the truth in relation to his allegation that he had had to employ a gardener as a result of the accident.

The Appellant therefore sought to have the claim dismissed under s.57 of the 2015 Act, asserting that the Respondent had been fundamentally dishonest.

The judge at first instance refused the application, finding that the Respondent had not been dishonest but, instead, *'muddled, confused and careless'* in relation to the preliminary Schedule of Damages. The judge found further that the Respondent had been dishonest in creating false invoices and as to his statement that the accident had caused him to hire a gardener for the first time. However, the judge found the dishonesty did not contaminate the entire claim as there was a genuine claim for personal injury which *'went wrong'.* The judge found that the Respondent had not been fundamentally dishonest but, if he had, it would have been substantially unjust for the entire claim to be dismissed, given that the dishonesty related to only a *'peripheral'* part of the claim and the remainder of it was genuine.

Appeal to the High Court

Allowing the appeal, the High Court set out the proper approach to s.57 of the 2015 Act, stating that a claimant should be found to be fundamentally dishonest (within the meaning of s.57(1)(b)) if the defendant proved on the balance of probabilities that the Claimant had acted dishonestly in relation to the primary claim and/or a related claim, as defined in s.57(8). Moreover, that he had substantially affected the presentation of his case in respect of either liability or quantum in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation.

Dishonesty was to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos*. If the court was satisfied as to the Claimant's dishonesty, it had to dismiss the claim, including any element of the primary claim in respect of which the Claimant had not been dishonest, unless he was satisfied that the Claimant would suffer substantial injustice, per s.57(2).

As to what would constitute substantial injustice, Knowles J, giving judgment, stated:

'Given the infinite variety of circumstances which might arise, I prefer not to try and be prescriptive as to what sort of facts might satisfy the test of substantial injustice. However, it seems to me plain that substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty…because of s 57(3). Parliament plainly intended that sub-section to be punitive and to operate as a deterrent. It was enacted so that claimants who are tempted to dishonestly exaggerate their claims know that if they do, and they are discovered, the default position is that they will lose their entire damages. It seems to me that it would effectively neuter the effect of s 57(3) if dishonest claimants were able to retain their "honest" damages by pleading substantial injustice on the basis of the loss of those damages per se. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages'.

The Court therefore found that the judge had been wrong in his finding that the Respondent had been *'merely muddled and careless'.* Applying the *Ivey* test in relation to whether the Respondent had been dishonest in respect of the Preliminary Schedule, the *'only reasonable conclusion'* was that he had been dishonest and that, *'the judge was plainly wrong not to have reached the conclusion that paras 5 and 8 of the Preliminary Schedule were dishonest misstatements'.* The judge should therefore have concluded the Respondent had been fundamentally dishonest as he had presented his case on quantum in a dishonest way, which could have resulted in the Appellant paying out far more than it would have on honest evidence. Further, the judge had not made any findings capable of supporting a conclusion that that dismissal of the whole claim would result in substantial injustice to the Respondent. He had also been wrong to characterise the gardening claim as peripheral given that it was a substantial part of the claim.

Comment

Where a Claimant has, on the balance of probabilities, been fundamentally dishonest within the meaning of *Ivey* (i.e. with reference to the actual state of the Claimant's knowledge or belief as to the facts, they were dishonest by the standards of ordinary people) and it substantially affected the presentation of their case in a way which adversely affected the Defendant, the Court will have to dismiss the whole part of the claim, including those parts which are 'untainted' by the dishonesty unless a substantial injustice arising out of the loss of the Claimant's damages can be made out. The judgment confirms the strict approach courts will take to claims involving fundamental dishonesty, and underscores the need for solicitors and counsel to properly brief their clients as to the potential impact on the claim for damages and costs, including QOCS.

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Settlement: Joanne Dunhill (by her litigation friend Paul Tasker) v W. Brook & Co. (a firm) and Justin Crossley [2018] EWCA Civ 505

By Gabriel Adedeji

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Summary

The Appellant appealed against the dismissal of her claims for damages for professional negligence brought against the First Respondent (the solicitors' firm) and the Second Respondent (the barrister). The Court of Appeal confirmed that a judge had been entitled to conclude that a Claimant's solicitor and barrister had not been negligent in recommending settlement of her claim for personal injury in the sum of £12,500.

Facts

The Respondents had represented the Appellant in her claim in the county court in respect of a head injury sustained in a road traffic accident in 1999. Proceedings had been issued in May 2002. The total claim was limited to £50,000. Since quantum was uncertain, the District Judge ordered a split trial of liability and quantum. The Second Respondent, accompanied by a junior trainee from the First Respondent's firm, represented the Appellant. After half a day of discussions between the parties, the claim was settled, ostensibly with the Appellant's consent, in the sum of £12,500 and costs.

The Second Respondent took the view that the failure of a key witness to attend the trial constituted a significant setback and that there was a real risk that the entire claim could fail. The First Respondent had not given the Second Respondent all of the available medical evidence, as the trial was to be in respect of liability only. The medical evidence seen by the Second Respondent was to the effect that the Appellant had lost her sense of smell and taste, had experienced some personality changes, and, that she had a slight risk of developing epilepsy. A report from a neuropsychologist which painted a far more serious picture of the extent of the Appellant's recovery had been received by the First Respondent the day before the trial, but this was not passed on to the Second Respondent.

On appeal, the Appellant succeeded in having the settlement set aside on the basis that she did not have capacity at the time of the settlement. She pursued her original claim against the Defendant. The claim was negotiated as to liability in her favour to the extent of 55% of its full value. The parties agreed a figure for quantum far above the upper limit of £50,000 originally placed on the claim. The Appellant's case was that the Respondents had been negligent in recommending a full and final settlement in the sum of £12,500.

The appeal judge found that the view reached by the Second Respondent was not negligent on the basis of the material known to him at the time. She rejected the allegation that he had been negligent in relation to the assessment of quantum, finding that it was inevitable that the evidence prepared on quantum in a legally aided claim would be provisional where a split trial had been ordered. It was therefore unrealistic to suggest that the he could have obtained an adjournment to obtain more evidence on quantum given that he had clearly been unaware of the relevance of the further medical evidence. The judge accepted that the Appellant felt aggrieved, but accepted that neither Respondent had pressured her to accept the settlement.

Appeal to the Court of Appeal

Giving judgment, Sir Brian Leveson found, although it was likely that the case could have been run successfully based solely on the evidence of the Defendant's witnesses, that was far from saying that the judge, having heard the Second Respondent, and, who was in the best position to assess his doubts and his assessment of the position at the relevant time, was not entitled to take a different view. To interfere with her conclusion that the barrister had been entitled to fear that the case could fail in its entirety ran contrary to what was the clear approach to the assessment of a trial judge, as set out by the Court of Appeal in *Fage UK Ltd v Chobani UK Ltd.*

As at the first day of trial, the First Respondent had not read the neuropsychologist's report. He was not aware that a key witness had not attended the trial or that quantum and potential full and final settlement figures were being considered. Furthermore, as found by the judge, although the Second Respondent had been alerted to the existence of the neuropsychologist's report, he had formed the impression that it would merely explain the Appellant's reluctance to attend trial.

The judge on appeal had dealt with all of the arguments advanced by the Appellant, recognising that, in a legally aided case, quantum would not fully be investigated until the liability had been established. The upshot was that the Second Respondent had to do the best he could if seeking to obtain some form of compensation for his client in a case which he considered that he faced fighting and losing. He had been entitled to rely on the medical

evidence which he had seen and was not negligent in arriving at the quantum figure which he arrived at.

The judge had the responsibility of assessing the overall evidence, including the approach that had been taken by counsel. The Court stated:

'Again, the judge had the responsibility of assessing the overall evidence including the approach of Mr Crossley (with the benefit of the way he responded to lengthy cross examination only in part conveyed by the transcript). Again, the perils of "island hopping" as identified in Fage UK Ltd v Chobani UK Ltd…and imposing this court's (different) view for her judgment, reached with a far broader appreciation of the circumstances itself of the judgement of Mr Crossley requires us to conclude that his advice was "blatantly wrong"…Only with the benefit of hindsight can that be said to have been so. As with my conclusion in relation to liability, faced with the position as it was on 7 January 2003 and his concern that the case could fail in its entirety, I am not prepared to say that it was'.

On the basis that the Second Respondent was not negligent, it could not sensibly be suggested that the case could succeed against the solicitors if it failed against the barrister. The appeal was dismissed accordingly. Obiter, the Court stated that there was merit in the proposition that it fulfilled the solicitors' duty of care to permit a trainee to accompany properly instructed counsel to a split trial, provided that he or she had instructions that a solicitor (preferably having the conduct of the case) was available if the need arose.

Comment

This case serves to highlight that post-settlement remorse will not be enough to establish failings on the part of solicitors and/or counsel. Furthermore, it is essential that those acting in personal injury litigation always be alert to capacity issues, particularly when serious head injuries have been sustained.

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Getting Part 36 offers right

By Sharan Sanghera

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Summary

There are clear advantages to Claimants and Defendants in making Part 36 offers. Put very simply, if a Claimant's Part 36 offer is accepted then the Claimant will be entitled to his costs up to acceptance and, if it isn't accepted and later the Claimant beats his own offer at court, then the Claimant will be entitled to his costs up to expiry of the offer with indemnity costs thereafter and penalty interest as well as a 10% damages bonus (CPR Rules 36.17(1)(b) & 36.17(4)).

If a Defendant beats her own offer then she will pay the Claimant's costs up to the expiry of the offer and will recover her costs (on the standard basis) thereafter as well as interest on those costs. Those costs can be enforced up to the amount of damages that a Claimant recovers (CPR Part 44.14(1)).

With those benefits in mind it's important to ensure that Part 36 offers are made properly and in accordance with the rules so that they take effect and the above consequences are applied. A few recent decisions serve to remind litigators of some of the rules within the regime and this article sets those out here.

The importance of getting everything in writing

Part 36 offers must be made in writing and they must be accepted in writing. Any withdrawal of an offer must also be in writing.

When drafting a Part 36 offer, if not using the pro forma (Form N242a), remember to be clear in your wording and consistent with Part 36. In *James v James & Ors* [2018] EWHC 242 the Court found a purported Part 36 offer could not be classed as an offer which fell within the scope of Part 36 as there was an inconsistent term by which the offeror would pay the Offeree's costs up to the end of the relevant period whereas CPR 36.13 provides that the Offeror is only responsible for costs up to the date of acceptance within the relevant period.

It followed that the Court did not award the Offeror part 36 consequences even though the offer otherwise made sense and purported to be more generous than Part 36.

Withdrawn offers don't have automatic consequences

In *Ballard v Sussex Partnership NHS Foundation Trust* [2018] EWHC 370 (QB) an appeal was allowed where the lower court had erroneously taken into account a withdrawn Part 36 offer. The Offeror had in fact made two Part 36 offers, the first of which had been withdrawn. At trial the Offeree failed to beat both offers and the Judge held that the second (non-withdrawn) offer was irrelevant to the question of costs and ordered the Offeree to pay the Offeror's costs from the expiry of the first offer. The decision was plainly wrong as CPR 36.17(7)(a) provides that Part 36 consequences do not apply to an offer which has been withdrawn and so the Offeree's appeal was allowed.

Offers must be genuine

The Court has previously held that a 100% offer is not a genuine attempt to settle as offers must contain some genuine element of concession (*AB v CD & Ors* [2011] EWHC 602 (Ch)). Recently, in *JMX v Norfolk & Norwich Hospitals* [2018] EWHC 185 (QB), the Court has reaffirmed that a 90% offer can be a genuine offer such that it would not be unjust to apply part 36 consequences. In this case the Defendant had attempted to argue that the Claimant's assessment of the litigation risk at 10% was a significant under-evaluation however, the Court said that was an argument which could hardly ever succeed and that a discount of 10% was not a token amount particularly in a claim where damages were very high. Part 36 consequences applied.

Payments on account

If, after making a Part 36 offer, an Offeror makes a payment on account, the effect of that payment results in a corresponding reduction in the amount the Part 36 offer unless the paying party clearly stated that it was not to be treated as having that effect (*El Gamal v Synergy Lifestyle Limited* [2018] EWCA Civ 210).

Checklist

- Everything from making to accepting the offer must be done in writing.
- A withdrawn offer does not have any automatic consequences.
- Offer must be a genuine attempt to settle.
- Payments on account made after a Part 36 offer is made reduce the amount of that Part 36 offer unless otherwise stated.
- Beating, or “more advantageous” means in money terms… however small – 36.17(2).
- Don’t forget to claim your Part 36 consequences under CPR 36.17!

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