3PB Personal Injury Update – Second Quarter of 2019

By Henrietta Hughes and Gabriel Adedeji
3PB

New Key Publications

Facts & Figures Tables for the Calculation of Damages 2019/20 publication date is 30.09.19.

The Judicial College Guidelines 15th edition is under the new chair of Mrs Justice Lambert and is expected to be published in late summer/early autumn 2019.

The New Discount Rate

On 15 July 2019 the Lord Chancellor announced the new Personal Injury Discount Rate, which has been increased from -0.75 to -0.25%, It comes into force on 5 August 2019.

Under the Civil Liability Act 2018, the new personal injury discount rate will be reviewed within a five-year period, with future reviews advised by an expert panel and required within five years of the last.

FD: Daniel O'Brien v Royal Mail Group LTD (May 2019) QBD (Manchester)

Background:

This case concerns an appeal against the judgment of HHJ Beech dated 19.09.18 where she did not make a finding of fundamental dishonesty in dismissing the claim. The claim followed an RTA on 18.09.15, and the parties' accounts were wholly different.

The Claimant's statement described how the Defendant's driver crashed into the back of his car, which threw him violently and caused his seat belt to lock and his head to hit the headrest. He maintained the Defendant's driver then drove off at speed having caused a crack to his rear bumper. The Claimant also said he sustained immediate and severe personal injuries, went to A&E and then his GP as they were still severe. He had physiotherapy, and was examined by Dr Ahmed and told him he could not shower or play with his children and had sleeping problems all due to his injuries. In addition, his case was that he had 6 weeks off work due to the index accident and was then restricted at work and in other activities such as the gym for 8 months. The Claimant had a witness in support, Mr Hirst, who said he saw the accident and it was quite violent.

The Defendant driver noted that the Claimant had been holding a mobile phone and he told him to put it down when the cars were side by side. The Claimant then grew quite aggressive stating – 'I'll f**king show you'. Mr Hook-Dale said that the Claimant then cut him up leaving him with insufficient braking distance and so he made very light contact with the rear of the Claimant's vehicle. The Claimant then attempted to get him, but Mr Hook-Dale locked his doors and drove off. He said he felt threatened. He later reported the matter to the Police. When he got back to the Royal Mail depot the Claimant was there marching around. No damage was seen to the Defendant's van. On behalf of the Defendant was Mr Clitheroe who described the Claimant as well built, aggressive and that he could not see any damage to the Claimant's vehicle, and also Mr Longaran who took photographs of the Defendant's van showing no damage.

The first issue Judge Beech had to decide concerned velocity and she found the impact speed was no more than 5 mph, that it was at a low velocity and was insufficient to cause damage to the vehicles and insufficient to cause personal injuries, finding that the Claimant was not injured.

Judge Beech noted that the Claimant had told the Police he was not injured and, by her findings, she effectively found that what the Claimant told the Police was true ie the Claimant was not injured and believed he was not injured. She found the Claimant's contention that he had immediate and severe personal injuries was untrue.

In addition, Judge Beech found that the A&E attendance was untrue – it was unsupported in the medical records; and further, that the Claimant's evidence that he attended his GP regarding the index accident was also untrue – it was also unsupported in the medical records.

Judge Beech further rejected the Claimant's evidence that he took 6 weeks off work due to his injuries and rejected his case that he did not go to the gym for 8 months – this was untrue and inconsistent with the physiotherapy records. She also found the Claimant was untruthful about not being able to do any DIY.

Judge Beech was not impressed with the evidence of Mr Hirst – he said in evidence that he did not see the impact and also gave further contrary evidence which questioned whether he had been there at all.

She concluded that the Claimant had failed to satisfy her that the Defendant was at fault and he had failed to satisfy her that the velocity of the impact was capable of causing personal injuries. A finding of fundamentally dishonest pursuant to CPR 44.16 was sought, but Judge Beech was not prepared to find any dishonesty, let alone fundamental dishonesty. She said either that the Claimant had been careless or he was not worthy of belief. The Judge said she felt uneasy about finding any dishonesty, but accepted another judge may well have found so. Her 'gut reaction' was that there was no dishonesty. The matter was appealed.

Appeal:

Mr Justice Martin Spencer was of the view that hat the Judge's rejection of Mr Hirst should have led her to question whether Mr Hirst was there at all – the point being that if he was not there, then it would follow that he had come to give false evidence on behalf of the Claimant and that the Claimant had colluded with this.

He also noted the Judge's finding was that this was a wholly bogus claim: no personal injuries and no damage or loss ie all made up, hence the Claimant's inability to show he went to A&E or his GP. The Judge found there had been no such attendances.

In those circumstances, Mr Justice Martin Spencer concluded no reasonable Judge could have failed to find this was a case of fundamental dishonesty, allowed the appeal and there was to be a finding that the Claim was fundamentally dishonest pursuant to CPR 44.16.

Hire & Contractual Liability: Andrew Phillips v Aviva Insurance UK LTD (Jan 2019) CC (Bournemouth & Poole)

Background:

On 30.05.17 the Claimant was driving a hire vehicle which was damaged in a collision with the Defendant's insured's vehicle and liability in respect of that accident was conceded by the Defendant.

The Claimant had hired this hire vehicle from Auxilis Services Limited. The pleaded claim was for the resulting period of time for which that vehicle was off the road. When Auxilis took the car off the road they triggered a clause in the Claimant's hire contract requiring him to pay Auxilis a sum equivalent to the daily rental rate for each day the vehicle was off the road; and it was that sum which the Claimant sought to recover, £2,252 to be exact, representing £139.50p for each of the 16 days that the vehicle was unavailable.

This was not a Claim for losses that Auxilis suffered as bailor which the bailee, Mr. Phillips, was bringing on their behalf. It was a Claim for a contractual liability that was said to flow from the hire agreement entered into as pleaded.

With regards to the question of the actual loss to the Claimant, it was common ground that a bailee hirer can recover a bailor's losses. What the Defendant said was that the Claimant in this case was not seeking to recover losses sustained by Auxilis as bailor. The Claimant was instead seeking to recover personal losses arising as a result of the operation of his contract with Auxilis. That, it seemed to DJ Walsh was plainly right as a matter of fact.

Claim dismissed:

Judge Walsh concluded that:

'It is not open to two parties who are privy to a contract to essentially dictate the loss that the tortfeasor is liable to compensate them for, if a claim is brought (whether suffered by the bailor or, indeed, the bailee) by virtue of the accident. The intervention of, or pursuit of, a contractual liability gives rise instead to a claim for pure economic loss which, as a matter of law, I am satisfied is in itself irrecoverable on these facts. Had the Claimant brought an alternative claim as a bailee claiming for a bailor's loss rather than for a contractual liability I would have found for the Claimant, but that is not the claim before me, and for that reason and for those reasons the claim will be dismissed.'

Given the claim was dismissed Judge Walsh did not need to consider the Defendant's third argument that the relevant contractual term was in any event unfair for the purposes of the Consumer Rights Act 2015 and was, therefore, unenforceable against Mr. Phillips and in turn not recoverable as a liability from the Defendant. However, Judge Walsh was of the view that:

'There is a cap here on the liability of the bailee. It is right that the contractual obligation overlays and, indeed, supplants, the common law liabilities of the bailee with a contractual liability, that it is limited to 30 days and there is, in my view, nothing unusual about that, nor does it cause a significant imbalance in the parties' respective positions. Rather, it legislates for the possibility that the bailor will be kept out of a chattel that would otherwise have been earning it a commercial revenue. For those short reasons I would have found for the Claimant on the issue of the enforceability or unfairness of clause 17. However, because I have already found that the loss is otherwise irrecoverable as a matter of law and because the wrong form of loss is claimed, the claim will be dismissed.'

Split Liability: Luxton V Raja [2019] EWHC 644 (QB)

Facts

Two cars collided at the junction of Canterbury Street and Chaucer Road, next to Byron Primary School, in Gillingham, Kent.

The Claimant had been driving her car up Canterbury Street, but had pulled off into the line of parked cars, facing the direction of travel, at a spot near the junction, opposite the corner of the school playground. The Defendant was driving his vehicle down Canterbury Street. As the Defendant was approaching from the opposite direction, the Claimant, from a stationary position, began a manoeuvre which involved crossing Canterbury Street. She may have been turning right into Chaucer Road, or making a U-turn using the T-junction.

As the Claimant pulled out and was manoeuvring, the Defendant's car went straight into the passenger side of her car, shunting it into the corner of the school walls. The Defendant and his passenger, his brother, were bruised and shaken, however the Claimant was seriously injured, having to be cut out of her car by Emergency Services, before being airlifted via helicopter to the hospital. The most significant of the Claimant's injuries was to her head and she was left with significant brain-damage.

The matter came before Judge Rice, sitting as a Deputy High Court Judge, in respect of two elements: liability and the issue of whether or not the Claimant had been wearing her seatbelt at the material time.

Canterbury Street had a speed limit of 30mph. There had not been anything special about the driving conditions on the day in question. Weather conditions were dry and clear and there was traffic and pedestrians as usual. It was confirmed that the main school rush had ended. Both the Claimant and Defendant knew the area well; the Defendant had grown up locally and was therefore very familiar with the area. The Court noted: *Both had been driving since their teens, without previous incident. Neither had any impairment or particular reason to be driving below par on the day*.

The Claimant however had no memory of the accident and her injuries had rendered her incapable of providing an account or explanation of what had transpired. The Defendant had given written and oral evidence. No other witnesses were able to give a first-hand account of the accident.

The Defendant's account was that he was driving down Canterbury Street at 20-25mph, possibly a little more, with a clear view ahead of him, when the Claimant darted out in front of him, from the line of parked cars, without warning. He did not think she had indicated. The Defendant said he performed an emergency stop in the moments before impact and had had time to feel the hard braking of his vehicle and see the front of his car dip down in the split second before the collision. He also had time to register the Claimant making eye contact with him before the crash. The Defendant therefore argued that he did all he could to avoid the accident as soon as he became aware of the danger.

The expert accident investigation and reconstruction evidence in the case was by way of a joint report, accepted by the Judge. The experts for both the Claimant and Defendant agreed on all points. Most importantly, the Judge noted, they agreed on the speed of the Defendant's vehicle at the point of impact at being between 37 and 40mph. This was not consistent with the Defendant's own account of his speed.

The Judge found that, although the Defendant had been "well intentioned", she could not put conclusive weight on his estimate of speed. She stated: *"It can be difficult to get perception and memory of distance and speed right. [The Defendant] said himself, very fairly, that he was not a good judge of distances. I conclude that, on a routine trip on a familiar road, on an otherwise unremarkable day, when he was not particularly focused on the question, the same is true of speed. He was probably going faster than he realised then or would like to think now"*.

The Judge accepted the Defendant's evidence that had, at the last moment, braked hard to perform an emergency stop. However, this meant that he must have been going faster than the 37-40mph impact speed. Exactly how much faster would depend on how long before the collision he applied his brakes. The Judge concluded that, on the basis of the expert evidence and the Defendant's evidence that he had an unobstructed view for a good distance and had started to brake as early as possible, the Defendant's speed was likely between 42 to 45mph.

Liability

Notwithstanding the Defendant's speed, and that this necessarily attracted liability, it was argued on his behalf that the main cause of the accident was the Claimant's unpredictable manoeuvre across the path of the oncoming traffic, and that she was

at least 75% liable. It was argued on the Claimant's behalf that the Defendant was entirely at fault and, even if there were some possible criticism of the timing of the Claimant's manoeuvre, it could not lower the Defendant's liability below 75%.

The Judge reiterated that the Defendant's excessive speed had been *a* cause of the accident and that this was unsafe driving.

She went on to consider the evidence relating to the Claimant's driving. She noted that the Claimant had a "long, clear line of sight" on the expert evidence, but that she had pulled out from a stationary position to turn across both carriageways in the path of an oncoming vehicle. The Judge stated: *"This was at a moment when the combined speeds of the two cars made the accident unavoidable. She could not have safely completed the manoeuvre she had started. That was also unsafe driving, and a cause of the collision. I am clear that there must be a measure of responsibility on both drivers for this accident*".

This meant that the issue of liability was an exercise of apportionment. The Judge adopted the Supreme Court's approach in the case of *Jackson v Murray* [2015] UKSC 5, taking account of *"the relative 'causative potency' and 'blameworthiness' of each driver's conduct, as aids to forming a conclusion on a just and equitable apportionment of liability*". This was not however an exercise in coming up with a unique, demonstrably correct answer, but a somewhat *rough and ready exercise* in settling on round percentage figures, where a variety of possible answers could legitimately be given. This was necessarily a highly fact sensitive and evaluative exercise, the Judge noting that no two cases were ever wholly alike.

Apportionment

Starting with the Defendant's driving, the Judge noted that there was no basis for criticism, save for on the issue of his speed. On this issue she noted, *"his speed was seriously at fault*", exceeding the speed limit by up to 50%. Taking into account the expert evidence on the effect of the Defendant's speed, the Judge noted that, assuming the Defendant had indeed been travelling at 39 to 43mph, the difference if he had stuck to the speed limit would have been that although he would still have been unable to stop in time, the Claimant would either have completed her manoeuvre and would have been out of harm's way, or, the collision would have

been to the back of her vehicle with significantly less force. The Judge therefore found that the Defendant's speed was *"the difference between the serious collision that happened, and a much less serious collision or even perhaps no collision at all – a near miss*".

The Judge however noted that the Claimant also had the choice about the timing of her manoeuvre and should not have started it unless she had assessed that there was a safe gap in the traffic to allow her to complete it *"without creating an unavoidable hazard for herself and other road users*". The Judge noted the expert evidence on the point; the Claimant had clear lines of sight and the Defendant had been in plain view. It was agreed by both experts that the Defendant's vehicle would have been clearly visible to the Claimant and he had been approaching at "*significant and obvious speed*". The Judge concluded, "*instead of waiting, she pulled out, across his right of way, in circumstances when in fact he could not avoid hitting her*".

The test of causative potency therefore started from the point that both drivers had created a serious hazard for the other. Neither had been at any particular disadvantage or more vulnerable than the other. Had the Defendant observed the speed limit the accident would have, at worst, been a minor one, if not entirely avoidable altogether. Similarly, had the Claimant waited for a safe gap in the traffic and allowed an obviously speeding oncoming car to pass before manoeuvring, the accident would not have occurred.

In terms of blameworthiness, the Judge noted that the context was important, of an ordinary, busy town street with two-way traffic, and drivers and pedestrians going about their normal business. In those circumstances, the Judge found, the Defendant should have moderated his speed and his failure to do so was "seriously wrong" but had been careless or misjudged, rather than reckless and flagrant. The emergence of hazards, such as pedestrians stepping out into the road and cars parking or leaving a line of parked vehicles, was an everyday occurrence he should have allowed for.

On the question of the Claimant's blameworthiness, the Judge noted that, while her manoeuvre was not objectionable or unusual, she also needed to be alert for

hazards. The Claimant's starting point therefore needed to be the priority of oncoming vehicles, to which she had to give way. The Claimant did not have any entitlement to drive over the wrong side of the road without having made sure it was safe to do so and it had been unsafe in the circumstances she faced. The Judge stated that this should probably have been obvious: *"All the information she needed to make a judgment was available to her before she made her decision. These are everyday judgments. Once she began her manoeuvre, there was little either of them could do avoid the accident. She made a serious timing misjudgement"*.

On this basis, the Judge concluded, "*no distinction should be made to identify either Mr Raja's or Mrs Luxton's driving as the more exceptional for the conditions, or the more negligent in kind or degree. Each created a considerable hazard for the other*". Although the Claimant had suffered "disastrous consequences" and deserved sympathy accordingly, the law precluded the Court from being predisposed on its decision on liability by the clear disparity in long-term impact on the two drivers.

The court held that a just and equitable apportionment of liability, in the circumstances, was 50% in respect of the Defendant, and 50% contributory in respect of the Claimant.

The Judge subsequently also concluded, on the balance of probabilities, that the Claimant had been wearing her seatbelt at the time of the collision.

Exceptional Circumstances, Fixed Costs: Ferri V Gill [2019] EWHC 952 (QB)

The Court held that a strict approach should be taken when finding "exceptional circumstances" under CPR r.45.29J(1) justifying allowing more than fixed costs in cases which had exited one of the relevant pre-action protocols.

Facts

The Appellant appealed against a master's decision that the Respondent's costs should be subject to a detailed assessment.

On 26 January 2015, the Respondent was riding his bicycle when the Appellant's opening car door struck him, causing him to suffer injuries to his arm, abdomen, back, neck and left shoulder. He was a self-employed builder and decorator and was off work for a week, with some subsequent restriction in his ability to work.

He instructed a firm of solicitors who obtained a GP's report. The prognosis was for a full recovery within four months. On 29 January 2015, the CNF was completed under the pre-action protocol for low-value personal injury road traffic accidents. Liability was admitted with no allegation of contributory negligence and the Appellant made an offer to settle of £1,500.

The Respondent subsequently instructed new solicitors who, on 3 November 2015, wrote saying that they did not consider the case to be a "fast track portal claim", on the basis that the Respondent had suffered a serious shoulder injury, had an ongoing loss of earnings and required private treatment. The solicitors obtained a report from an Orthopaedic surgeon, who diagnosed damage to the acromioclavicular joint and advised that the respondent be referred for corrective surgery.

On 20 October 2016, the Respondent underwent arthroscopic examination of his left shoulder, as well as other enquiries. By January 2017, he had regained full movement with little pain and, on 13 February 2017, the claim was settled for £42,000.

The Respondent sought more than fixed recoverable costs under CPR 45 and issued Part 8 proceedings. Sub paragraph IIIA of CPR 45 dealt with fixed recoverable costs in cases which had exited the protocol. Rule 45.29J(1) provided that if it considered that there were "exceptional circumstances making it appropriate to do so", the Court would consider a claim for costs which was greater than the fixed recoverable costs.

The Master, sitting as a Deputy Costs Judge, found that such exceptional circumstances existed and ordered that the Respondent's costs should be subject to detailed assessment. She held that a low bar should be set for a finding of exceptional circumstances and that exceptional circumstances were circumstances *"which take [the case] out of the general run of the type of such a case"*. She also

stated that exceptionality should be measured by reference to both cases that were within the protocol and cases which had left it.

The Appeal

On Appeal, Stewart J considered: whether the master had been right in her test of "exceptional circumstances" and whether she had been right in identifying the "basket" of cases against which a case had to be exceptional.

An expression such as "exceptional circumstances" had to take its colour from the setting in which it appeared. Given the context of r.45.29J, the Master had been wrong to set such a low bar for a finding of exceptional circumstances. In *Hislop v Perde* [2018] EWCA Civ 1726, a case which had been decided after the Master reached her decision, and which had therefore been unavailable to her, the Court of Appeal stated that *"a test requiring exceptional circumstances [was] already a high one"*. Further, the policies of the fixed-costs regime were providing certainty and expecting that solicitors would take the rough with the smooth in a "swings and roundabouts" approach.

The setting of those policy reasons, while allowing for exceptional circumstances as a departure from the regime, required a strict, not a "low bar", approach.

By including cases which remained within the protocol, the master had used the wrong "basket" for comparison. Exceptionality had to be measured only against the types of cases that were covered by Subparagraph IIIA, namely, those which had exited the Protocol

The Appeal was therefore allowed, with the case to be remitted for reconsideration by a different Master.

The information and any commentary within this document are provided for information purposes only. Every reasonable effort is made to ensure the information and commentary is accurate and up to date, but no responsibility for its accuracy, or for any consequences of relying on it, is assumed by either author or 3PB. The information and commentary does not, and are not intended to, amount to legal advice.

24 July 2019

Henrietta Hughes

Barrister
3PB

Telephone 020 7583 8055

Email henrietta.hughes@3pb.co.uk

Gabriel Adedeji

Barrister
3PB

Telephone 020 7583 8055

Email Gabriel.adedeji@3pb.co.uk