

## LawAssist – April 2009

### E-News

On the case front, brief mention of the latest in the long running MasterCigars costs battle, some squabbling from the defamation lawyers provides interesting reading on costs again while there is a useful examination from the High Court as to the standard of care required of a driver in a busy street on a Saturday afternoon. Finally we take a look at a High Court judge's assessment of damages for a solicitor's negligent failure to pursue a claim – worrying reading.

- **MasterCigars – reduction for erroneous costs estimate**
- **Peacock v MGN – costs capping**
- **Noorani v Calver – defamation CFAs**
- **Toropdar v D (a minor) RTA – standard of care**
- **Haithwaite v Thomson Snell – damages for professional negligence**

#### MasterCigars Direct Ltd v Withers LLP [2009] EWHC 651 (Ch)

Morgan J has allowed an appeal from the decision of Master Simons (costs judge) to restrict costs due to 20% above the estimate given. This is the second occasion for Morgan J's intervention in this long running saga - his lordship previously arrived at a decision at odds with the assessors sitting with him (see [2007] EWHC 2733 (Ch) and on this second visit he sat with the Senior Costs Judge – we are not this time told whether the views of the judge were at odds with those of the assessors.

The main reason for allowing the appeal was that the 20% margin was not supported by a reasoned decision as to the factors that led to it and it had therefore an appearance of being arbitrary. To resolve this Morgan J has asked the Senior Costs judge to prepare a report to contain the necessary questions that will enable the court to assess the costs.

#### **Comment**

The problem is that Morgan J accepts that once it is shown that the estimate was relied upon it is a matter of judgment as to how, if at all, the erroneous estimate should lead to a reduction in the costs claimed by the solicitor. Costs judges are used to exercising such judgment. We now know that a bald statement as to a percentage won't do as a statement of that judgment but what we don't know is what will do. As for the experience of most practitioners that costs assessments are always carried out in this fashion, including by the Senior Costs Judge (we frequently only get a conclusion cast in terms of a figure) surely the decision is not to be taken to mean all assessments must be conducted at length and with spelled out reasons?

### Peacock v MGN Ltd [2009] EWHC 769 (QB)

We looked last month at the new Part 44 rules on costs capping and in this decision some further comment is made as to those new rules:

“8...it is clear that, at least for the moment, the proactive and interventionist approach recommended by Brooke LJ in *Musa King*...is on the wane. The contrasting judicial viewpoint, exemplified by the cautious approach of Gage J (as he then was) in *Smart v East Cheshire NHS Trust* [2003] EWHC 2806 (QB) at [22], is now in the ascendant. Indeed, it is clearly reflected in the wording of the new rules.

9. There is a general stipulation contained in what is now paragraph 23A.1 of the Costs Practice Direction to the effect that “the court will make a costs capping order only in exceptional circumstances”.”

This is a low monetary value defamation case where the claimant has instructed leading counsel and solicitors at city rates. Eady J was clearly sympathetic to the concerns of the defendants as to disproportionate costs but held that this was not a case where the problems could not be resolved retrospectively at assessment and there were no exceptional circumstances. He declined to make a costs capping order.

### Noorani v Calver [2009] EWHC 592 (QB)

Staying with the High Court and defamation here we have Coulson J expressing severe adverse criticism of the use of CFAs in defamation cases:

Whilst the defendant was incurring costs of £100,000, the claimant had the benefit of a Conditional Fee Agreement (“CFA”). There is no doubt that, in certain cases, a CFA can be beneficial, and allow a claim to be brought where otherwise the claimant may not have had the financial resources to come to court. But, so it seems to me, the operation of a CFA agreement in practice can be fraught with difficulties, and can be a positive disadvantage for the other party.

I am in no doubt that, if the claimant had not had the advantage of a CFA, and had had to pay all his legal costs as they fell due, as the defendant had to do, he would have realised much earlier that his claim should not be pursued, and that he was running a wholly unjustified financial risk.

The existence of a CFA can inure a party like the claimant to the chilly winds of reality; it can make him oblivious to the significant financial risk that he is running, and the potentially ruinous costs liability that he may be incurring. In my judgment, the conduct of libel proceedings on credit is a thoroughly bad idea, and I consider that the claimant’s CFA agreement was a factor in the wrongful maintenance of these proceedings, and their thoroughly unsatisfactory conclusion. [36]

Indemnity costs were awarded with an interim payment of £50,000 required in 14 days.

## Toropdar v D (a minor) [2009] EWHC 567 (QB)

Cable Street is an inner city one-way street in a residential area where pedestrians, among them children, might well be present. There is an education centre that was closed at the time. A bus was parked at a bus stop and behind the bus was a further 12 metres of bus stop, in which there was nothing parked. Behind that there were 3 parked vehicles – a saloon, what looks like some form of camper van, and another saloon. Because of the presence of the three vehicles and the bus, T's ability to see the area of the steps of the Education Centre was limited. A 10 year old child ran from the steps of the education centre into the road and was knocked down by T's car. The child suffered catastrophic brain injuries.

This is the judge's assessment of the standard of care expected:

### Speed

I do not, however, accept that 27.5 mph was, in all the circumstances, a reasonable speed. It was in my view too fast for this street at the time in question, as was, whatever was the greater speed the claimant was travelling at before then. As the claimant was approaching the Education Centre the three vehicles on his left (particularly the van in the middle) obscured his view of who might be at or around the Education Centre; and the bulk of the bus obscured his view of who was or might be at the side or in front of the bus. The bus was empty, save for the driver, and appeared to the claimant to be so. But he had no way of knowing who was in front of the bus or along its nearside at the front. In the words of the Code he should have adjusted his speed as a precaution. To drive at a speed close to the legal limit on a street, and a location in the street, such as this on a summer Saturday afternoon falls, in my judgment, short of the standard of the careful driver, who needs to drive with the safety of children in mind at a speed suitable for the conditions, particularly when driving past bus stops (Highway Code paras 181-2).

### Braking

In my judgment the claimant, as he approached the gap behind the bus (i) should have been proceeding slower and (ii) should have carried out precautionary braking, whether or not he saw the boys playing when they came within his line of vision. This is because he was approaching an area on his near side in relation to which his line of vision to the Education Centre was initially obstructed by the three vehicles on the nearside and then by the bus, and, particularly, because the front of the bus (which he could not see) was just the sort of area from which a person might unexpectedly emerge. I do not regard my conclusion as representing a counsel of perfection but a reflection of the standard required of the reasonably competent motorist in the prevailing circumstances.

This is an unusual case in that it concerned an insurer seeking a negative declaration that its insured (T) was not liable – D had not brought a claim but it shows a High Court judge's approach to very ordinary circumstances and a description of driving ability many might find surprising as a standard required. The declaration was not forthcoming. The speed limit in Cable Street has now been reduced from 30 to 20 mph.

## Haithwaite v Thomson Snell & Passmore (a firm) [2009] EWHC 647 (QB)

The difficult question of how to assess damages in a professional negligence claim where solicitors have failed to pursue a claim for clinical negligence receives a mathematical answer from Nicol J that makes for disturbing reading.

The judge focuses on the fact that a negligence claim involves two stages – negligence and causation and that a claimant needs to succeed on each. He then assesses the prospects of the claim on each point – 40% on negligence and 75% on causation. (Counsel had given 50-60% on each). We are not given any reasons for the new figures (wouldn't do in a costs decision (see Withers above!)) Nicol J then multiplies the 40% by the risk of not succeeding on causation (25%) – giving a result of 30% prospects overall.

### Comment

This is an application of the multiplication rule applicable to finding the probability of independent events occurring in sequence. It leads to results that are highly dependent on the figures we start with and will surprise most practitioners if they were to use it as a calculation for success fee purposes. Just take counsel's figures for a moment – even at their highest of 60% Nicol J's approach would leave you with an overall prospect of success of a mere 36%. To reach even 50% overall (which equates to a 100% success fee) you would need 71% on each element.

Suppose now that the case also raised an issue of duty of care or contributory negligence - we then have three elements to multiply. The more elements you have the lower the resulting figure from multiplication will be.

The resulting 30% prospects in this case were then applied to the damages that the judge assessed would have been awarded; a massive reduction on any view.

In a professional negligence claim of this sort it is necessary to consider the prospects of the case succeeding because it is exactly that prospect that the claimant has lost through the negligence. The problem with adopting a mathematical approach as here, is that the figures are not at all statistically valid in the first place – they are expressions of subjective assessments – the method is fine if we are talking about coin tosses not if we are considering litigation risk.

You could try using this case though to support your 100% success fee!

### E-News

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