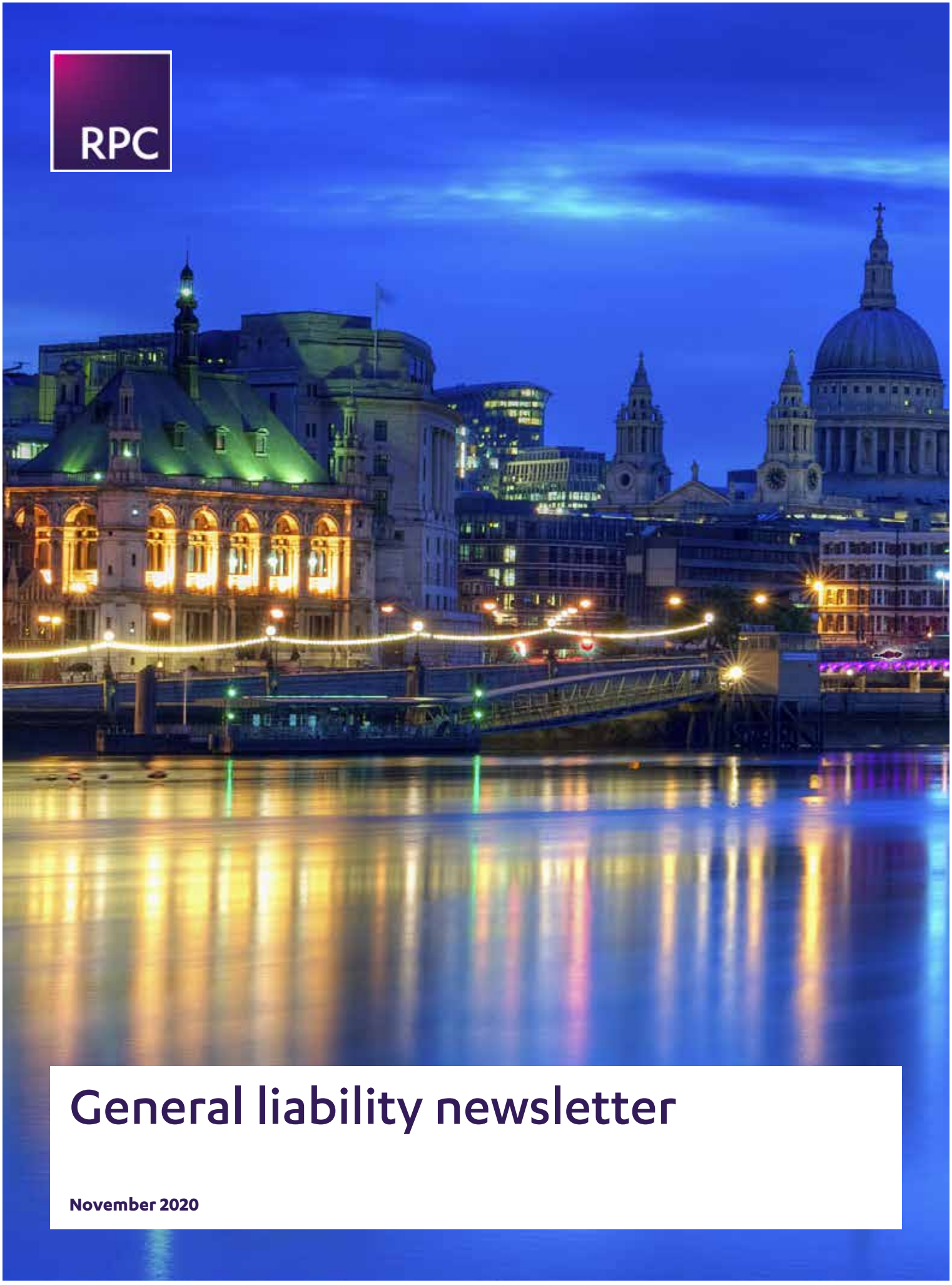

General liability newsletter

November 2020

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“The practical joke must be the lowest form of humour. It is seldom funny, it is often a form of bullying and it has the capacity, as in the present case, to go seriously wrong.

Mark Twain was surely right when he said:

When grown-up persons indulge in practical jokes, the fact gauges them. They have lived narrow, obscure, and ignorant lives, and at full manhood they still retain and cherish a job-lot of left-over standards and ideals that would have been discarded with their boyhood if they had then moved out into the world and a broader life.”

Introduction

Welcome to the latest edition of our general liability newsletter, rounding up the key cases from November 2020.

We are not amused - employer not liable for practical joke at work

In April 2020 we reported on two Supreme Court decisions which we suggested might indicate unwillingness of the Courts to extend the existing scope of vicarious liability. The High Court has rejected a claim that sought to require employers to assess the risk of injury arising from "horseplay" at work.

Thus began the judgment of Mr Justice Spencer in *Chell v Tarmac Cement and Lime Ltd* [2020] EWHC 2613 (QB) (QBD) following the hearing of the Claimant's appeal against his claim being dismissed at trial in the County Court.

The practical joke had been played on Andrew Chell by Anthony Heath. Both were fitters at a site controlled by Tarmac Cement and Lime Ltd ("Tarmac"). However, Mr Chell worked for Roltech Engineering, and Mr Heath worked for Tarmac.

There had been some tension between the employees of each Company; the Tarmac fitters thought they might be replaced by the Roltech fitters.

Mr Heath brought two "pellet targets" on to the site, put them on a bench close to Mr Chell's ear, and then hit them with a hammer, causing a loud explosion. Mr Chell suffered a perforated right eardrum, noise-induced hearing loss, and tinnitus.

Tarmac dismissed Mr Heath. Probably because Mr Heath was considered unable to pay any claim established against him, Mr Chell brought a claim against Tarmac, alleging that Tarmac was vicariously liable for the actions of Mr Heath and also negligent.

Mr Heath alleged that because of the tensions between the employees, which were known to Tarmac, Tarmac should have considered removing Mr Heath or Mr Chell from the site or separated the employees of the two Companies, or disciplined Mr Heath and his colleagues. It was also alleged that Tarmac failed to provide supervision, training or instruction to prevent horseplay.

Tarmac denied liability on the basis that Mr Heath's "horseplay" was not within the course of his employment, and outside the scope of reasonable foreseeability, risk assessment, or HSE guidelines, and that what he did was something on his own account without any sufficient connection to his employment to make Tarmac liable. Tarmac denied any knowledge of any prior event that put it on notice that any action to intervene was needed.

At trial on 14 October 2019 the claim was dismissed. The trial judge decided that what Mr Heath did was not within the field of activities assigned to him for the following reasons:

- The pellet target was not work equipment. It had been brought on to the site by Mr Heath or one of his colleagues.
- The pellet target formed no part of Mr Heath's work to use.
- What Mr Heath did was unconnected with his work;
- Mr Heath did not supervise Mr Chell's work and at the time he should have been working on another job at a different part of the site;
- Hitting the pellet targets with a hammer did not advance the purposes of Tarmac;
- Work at the site merely provided an opportunity to carry out the prank.

The Claimant appealed. Mr Justice Spencer dismissed the Appeal. He decided that the trial judge was correct in deciding that horseplay, ill-discipline and malice are not matters that one would expect to be included within a risk assessment; that it is expecting too much of an employer to devise and implement a policy or site rules which descend to the level of horseplay or the playing of practical jokes; and that it appeared that the criticisms of Tarmac had been made with the benefit of hindsight, and

that the trial judge was right to view the matter from Tarmac's perspective, prospectively.

The Supreme Court decision in *WM Morrisons Supermarkets plc v Various Claimants* [2020] UKSC 12 (which we considered in our April 2020 newsletter) was not available to the trial judge but was available at the hearing of this Appeal. Mr Justice Spencer thought that the correctness of the decision of the trial judge was demonstrated by W M Morrison decision, which emphasised that the wrongful conduct had to be closely connected with the work the employee was authorised to do before it could be treated as being carried out in the ordinary course of employment.

Mr Justice Spencer expressed his sympathy for the Claimant but said that sympathy is not a sound legal basis for a finding of liability.

Employers should nevertheless remain vigilant and mindful of potential or actual conflicts among employees. In this case physical violence or injury was not reasonably foreseeable. An employer with knowledge of conflict where injury is foreseeable could be held vicariously liable for the unauthorised action of an employee.

Hard to stomach – the facts and opinions contained in a medical report which substantially complies with the Practice Direction to Part 35 will be accepted unless challenged through contrary or undermining factual evidence

In *Peter Griffiths v TUI UK Ltd* [2020] EWHC 2268 (QB) the High Court considered an Appeal by the Claimant from a County Court decision to dismiss his claim for damages arising from gastric illness whilst on holiday in Turkey.

The Claimant relied upon a medical report from Professor Pennington to establish that the cause of his illness was food provided by the hotel in which he was staying, rather than any other cause.

Following submissions from Defence counsel, the trial judge considered that Professor Pennington's report, which the Appeal judge later described as "minimalist", was flawed.

Counsel for the Defendant brought to the trial judge's attention Professor Pennington's alleged lack of reasoning regarding bacterial incubation periods and coincidence of symptoms at different times with no explanation as to how this indicated illness caused by consumption of food at the hotel, or explanation why other potential sources of infection should be discounted; the absence of comment by Professor Pennington on documents sent to him regarding the hotel's food procedures, which it was suggested meant that he could find no breach of procedure; the absence of explanation why other viruses (unrelated to food) found in the Claimant should be discounted as causing the Claimant's symptoms; and Professor Pennington's alleged failure to address a number of non-food related methods of transmission for the claimant's illness from the pathogens identified at the time the Claimant was ill. Counsel also asked the judge to consider Professor Pennington's failure to answer all the Part 35 questions put to him.

After commenting that the burden of proof is on the Claimant and that it is open to a Defendant to do nothing other than make submissions, the trial judge considered whether the Claimant's medical causation evidence discharged the burden of proof. He decided it did not.

The trial judge accepted counsel's submissions that several assertions made by Professor Pennington in his report were unsupported by reasoning that connected established factual evidence with his conclusion that the hotel was at fault. The judge thought that the issues in the pleadings which identified several possible causes of infection (such as food eaten at other places) and transmission methods should reasonably have been addressed in the medical evidence, with reasons given why causes other than hotel food should be considered less likely.

The trial judge considered that the medical reports did not in some instances provide a range of opinion and thus did not comply with Part 35 of the Civil Procedure Rules. Also, that they did not provide sufficient information to be able to say that there was a clear train of logic between things such as incubation periods and onset of illness, such that for example the Claimant's pre-flight meal could be excluded as the cause of illness rather than the food provided by the hotel.

The trial judge decided that the Claimant had not established causation and dismissed the claim. The Claimant appealed.

Referring to case law which had considered whether the court could accept expert evidence that amounted to a simple

statement of opinion, the Appeal judge decided that the court could accept such evidence, provided it had not been challenged by other evidence. Such acceptance had its limits, though. If an expert's report was confined to an expression of opinion only, the court would be entitled to reject it, even if it had been uncontroverted. However, because all experts reports are now governed by Part 35 of the Civil Procedure Rules, the Appeal judge considered that if an expert's report "substantially" complied with the provisions of Part 35 and there was no evidence to challenge it, then the report should not be subjected to the same kind of analysis and critique as if the court was evaluating a controverted or contested report. In other words, it should not be subjected to the kind of challenge and analysis that took place at trial.

The Appeal judge considered that if the Defendant had served controverting evidence, Professor Pennington might have expanded his reasoning that formed the basis of his opinion; and that the Defendant had the right to call Professor Pennington to cross-examine him at trial and challenge his reasoning, but did not do so.

Under the circumstances the Appeal judge decided that the court must assume that there was some reasoning behind the unchallenged conclusion reached by Professor Pennington and accordingly must accept his opinion on causation. The Appeal judge accepted that the criticisms of Professor Pennington's report were strong and commented, obiter, that the criticisms of the report might have caused the Professor serious embarrassment had the report been controverted. However, because the report had not been challenged, the trial judge was not entitled to evaluate the evidential weight to be given to the report and should have accepted it.

The Appeal court reversed the original decision and entered judgment in the Claimant's favour.

The effect of this judgment on the approach to expert evidence is significant. It is no longer practical to wait until trial to challenge the Claimant's expert evidence through submissions to the trial judge.

The problem for those defending claims is largely a procedural one. Most claims for injury proceed in the Fast Track. Claimants' solicitors almost invariably do not agree to another expert being instructed by the Defendant, saying that challenges can be made through Part 35 questions to the Claimant's expert. However, this case demonstrates that the Court does not regard Part 35 questions as representing a challenge to the opinion of an expert no matter how the questions are expressed. Such questions are for clarification of an issue, not for challenge. A further problem is that Part 35 questions can normally be made only once; if an expert ignores or side-steps the issue put in a question (which happens frequently) there is little prospect of follow-up questions.

It appears that the only reliable way of preventing a trial judge from accepting the opinion of an expert is to call another expert, or to require the original expert to attend trial for cross-examination. If the Court's initial Directions do not permit this, then an application to the court will be necessary, with supporting evidence explaining why the claim cannot properly be determined without such additional evidence.

Court of Appeal emphasises the importance of considering all the circumstances of the case when deciding whether to exercise its discretion to grant relief from sanctions

In *Barry Cable v Liverpool Victoria Insurance Co Limited* (Court of Appeal, 31 July 2020) the Claimant had sustained injury in a road traffic accident on 1 September 2014. On 24 September 2014 his solicitors issued a Claim Notification Form in the RTA Portal. Liability was admitted on 2 October 2014.

A medical report on 28 November 2014 indicated that the Claimant's injuries were likely to be minor, but there was no definitive prognosis and the report recommended a further report from a neurologist. The Claimant was seen by a neurologist in April 2015 who provide a report to the Claimant's solicitors in January 2016. The report said that the Claimant's condition had deteriorated and that the Claimant (who earned £130,000 per year) was unable to work. His employment was terminated in December 2015.

On 26 January 2017 the neurologist provided a second report to the Claimant's solicitors, describing the Claimant's condition as having deteriorated and unlikely to improve.

The Claimant's solicitors did not disclose the new medical evidence. On 25 July 2017 they issued a Part 8 Claim Form on an ex parte basis, seeking a stay of proceedings on the basis that compliance with the RTA Protocol (which required the Claimant to submit a Stage 2 settlement pack to the Defendant for potential agreement of damages) could not be completed before expiry of the limitation period. On 31 July 2017 the court granted a stay to 20 August 2018. The order required the Claimant's solicitors to serve a copy of the order on the Defendant by 20 August 2017

and stated that if an application to lift the stay was not made by 20 August 2018, the claim would be struck out.

The Claimant's solicitors did not send a copy of the Part 8 Claim Form of the Order to the Defendant until 15 February 2018.

By email on 16 August 2018 the Claimant's solicitors notified the Defendant's solicitors about the Claimants' inability to work and his termination of employment in December 2015. They disclosed the neurologist's two medical reports the next day.

On 18 August 2018 the Claimant's solicitors applied on an ex parte basis to lift the stay and for the claim to proceed as a Part 7 claim.

On 21 August 2018 the court issued an ex parte order lifting the stay and requiring an amended Claim Form and Particulars of Claim to be served by 4 September 2018. The Claimant's solicitors did not notify the Defendant's solicitors of the existence of this order, or serve the claim, but the Defendant's solicitors learned of the existence of the order and on 6 September 2018 applied for the order listing the stay to be set aside and for the claim to be struck out. The Claimant's solicitors served the amended Claim Form and Particulars of Claim which claimed £2.2m, on 26 September 2018, and sought relief from sanctions for late service.

The County Court judge struck out the claim on the basis that the Part 8 application on 25 July 2017 was an abuse of the court process, because it was clear at that time that the claim had a value far higher than £25,000 and could not be dealt with within the RTA Protocol; that the Claimant's solicitors did not intend to use the period of the stay for the proposed purpose, and that a Part 7 claim should have been issued instead.

The Claimant's Appeal to the High Court was dismissed on 9 August 2019. The Claimant Appealed to the Court of Appeal.

On 31 July 2020 the Court of Appeal decided that although the application to have the claim stayed was an abuse of the court process – the Claimant's solicitors ought to have been aware at that time that the claim was unsuitable for the RTA Protocol and should have proceeded as a Part 7 claim – this alone did not justify striking-out the claim, which was a disproportionate sanction in the circumstances.

Key factors were that the Defendant had admitted liability and the only prejudice to the Defendant was a one-year delay caused by the Claimant's solicitors, which could be addressed by an appropriate costs order, which was to order the Claimant to pay the Defendant's costs on an indemnity basis up to the initial hearing on 17 October 2018 and to bar any claim for interest up to that date.

The Claimant in this case was somewhat saved by issuing the claim – albeit incorrectly as a Part 8 claim – within the limitation period. That, and the earlier admission of liability, made it easier for the court – after two appeals – to allow the claim to proceed, despite the Claimant's solicitors abusing the Part 8 court process.

It is difficult to understand why the Claimant's solicitors decided to use this procedure. All that was really needed in this case was for the Claimant's solicitors to disclose the new medical evidence and notify the Defendant that as the claim was no longer suitable for the RTA Protocol procedure, and to issue a Part 7 claim instead of the Part 8 claim.

This decision is helpful in determining the court's approach to dealing with abuse of the court process. If the court decides that there has been such abuse, its consideration of the appropriate sanction will include looking at all the circumstances of the case, the history of the claim, potential prejudice to either party, justice and fairness.

Solicitors who have charged their client more than the sum that might be recovered from an opponent in litigation must have secured informed consent first

The Claimant was a pillion passenger who was injured in a road traffic accident with a car.

She instructed the Defendant solicitors who entered into a CFA with the Claimant. The client care letter estimated the costs of bringing the claim to be £2,500 plus VAT and disbursements. Although the agreement provided for a cap of 25% of the damages recovered for a success fee, the client care letter limited overall solicitors' charges only in the event that the claim fell within the small claims track.

On behalf of the Claimant, the Defendant pursued the claim against the car driver's Insurers under the RTA Protocol. Liability was admitted. The Insurers paid the Stage 1 fixed costs, £200 plus £40 VAT. The Defendant then obtained medical reports and sent a stage 2 Settlement Pack to the Insurers with an offer to settle damages at £1,916.98 plus the Stage 2 fixed costs, £300 plus £60 VAT and disbursements. The offer was accepted. The total costs paid by Insurers was £1,783.19, comprising £500 plus £100 VAT for costs and £1,183.19 for disbursements.

The Defendant paid £1,531.48 (the agreed damages of £1,916.98, less £385.50), to the Claimant, but did not submit a bill of costs or an invoice for the Defendant's services.

The Claimant instructed Checkmylegalfees.com Limited who issued a Part 8 Claim Form seeking an order for delivery of a statute bill to the Claimant. The Defendant did this. The Bill claimed £4,306.07 including success fee and VAT, before taking into account the sum recovered from Insurers.

The Claimant argued that the Defendant was asserting that it could have charged £2,522.88 (comprising £4,306.07 less the £1,783.19 received from Insurers) which would have been £605.90 more than the amount recovered by the Claimant in damages, and that as this had not been drawn to the attention of the Claimant at the time the Defendant was instructed, the Claimant had not given informed consent to any deduction from her damages.

At first instance the judge decided that, after taking into account the costs recovered from Insurers, the Defendant was entitled to recover only £385.50 (the sum it had sought to recover). The judge did not consider that informed consent was needed because the documentation provided adequate notice to the Claimant.

On appeal to the High Court (*Belsner v CAM Legal Services Ltd* [2020] EWHC 2755 High Court 16 October 2020) the Appeal judge decided that the informed consent of the Claimant was necessary to satisfy CPR 46.9(2), which permits a solicitor to charge a client more than the sum that could have been recovered from another party to the proceedings (which is otherwise prohibited by Section 74(3) of the Solicitors Act 1974). The judge thought that the fact that the costs recoverable from Insurers (£500 plus VAT) was only a small fraction of the Claimant's costs estimate of £2,500 plus VAT was a factor that should have been brought to the Claimant's attention before she could be considered to have given informed consent to entering into the agreement with the Defendant.

The Appeal judge commented that every case must be decided on its own facts, and arguably this decision is based upon the documents in this particular case which failed to limit the Claimant's liability to pay her own solicitors if her claim exceeded the small claim track.

However, the original sum in dispute was £385.50 and both parties instructed leading Counsel and reportedly spent a total of £87,715.53 on the Appeal. This suggests that challenges such a this are of significant commercial value. Further similar challenges may be expected.

Practice Direction 51ZA – extensions not extended

CPR 3.8(4) allows the parties to litigation to agree extensions of up to 28 days to the time allowed by a rule, Practice Direction or court order which specifies a consequence for failure to comply.

To help alleviate the adverse effects of the Coronavirus pandemic on the administration of justice, Practice Direction 51ZA was introduced on 2 April 2020. It stated that so long as the Practice Direction was in force, CPR 3.8(4) was revised so that the parties could agree extensions of up to 56 days.

The Practice Direction stated that it would cease to have effect on 30 October 2020.

Although Coronavirus measures still restrict or prevent normal work activities, no extension to the Practice Direction has been implemented.

Accordingly, CPR 3.8(4) reverted to its original form since 30 October 2020, meaning that the capacity to agree extensions since that date has again been limited to 28 days. A longer extension will require an application to the court.

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