October 2018


Richard Collier


Dominique Smith

Junior Practitioner Group Briefing

Meet the new tenants

Richard and Dominique joined Chambers as new tenants on 1st October 2018, having successfully completed their pupillages with 1 Chancery Lane. In this briefing Richard will analyse some recent cost decisions and Dominique reviews some recent developments in coronial law. Richard and Dominique will be practicing across all areas of Chambers work and we warmly welcome them to the Junior Practitioner Group.

QOCS UPDATE
Three recent wins for defendants

***Jeffrey Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654**

The proper interpretation of CPR 44.14 with regard to: i) multi-defendant cases; and ii) Tomlin orders.

Facts

In November 2015 C issued proceedings against six defendants for Noise Induced Hearing Loss ("NIHL"). D3, Venduct Engineering Limited ("Venduct"), accepted that it was responsible for any liability that was established on the part of D1 and D2 and accordingly the claims against those defendants were discontinued by consent.

On the 7th December 2015 C served a notice of discontinuance on Venduct, and on the 12th December 2015 C compromised its claim against D4 -D6 by way of Tomlin order. The schedule to this order recorded that C accepted £20,000 "inclusive of general damages, special damages, costs of the action, interest, and CRU" i.e. a global sum.

Pursuant to CPR 38.6(1), which allows defendants to recover costs incurred up to the discontinuance, Venduct sought costs of £8,000 from C which they maintained could be paid out of the £20,000 paid by D4-D6. C responded that it was protected by QOCS and in any event there had been no "order" for damages and interest, rather there was a contractual agreement.

First instance

Regional Costs Judge Hale, sitting in Nottingham County Court, held there was no "order" because while the Tomlin order itself was enforceable the schedule was not an order of the court at all, hence CPR 44.14 was not engaged.

Though unnecessary to do so he went on to consider that it is open to one defendant in multi-defendant cases to utilise CPR 44.14 and recover costs from the damages another defendant was ordered to pay the Claimant.

This decision stood in direct contrast with the decision of HHJ Freedman in *Bowman v Norfran Aluminium Ltd & ors* (unreported, Newcastle County Court, 11th August 2017), for which reason the appeal was leapfrogged to the Court of Appeal.

Court of Appeal

Coulson LJ gave lead judgment with which Henderson and Arden LJJ agreed, taking the issues in reverse order to the Costs Judge though upholding his decision on both.

i) Can one defendant take advantage of sums paid to the Claimant by another Defendant?

In short, yes.

Coulson LJ rejected C's submission that in multi-defendant cases "the proceedings" should be taken to refer to separate proceedings against each individual defendant. The rationale underlying his decision on this point is expressed forcefully at [24]-[25].

He further rejected C's suggestion that allowing defendants to recover costs in this manner would encourage claimants to bring successive separate actions against the defendants. This, he said, would immediately run into limitation difficulties and also constitute an abuse of process as per *Henderson v Henderson*. Rather "it is a much better course for a claimant to consider the position carefully at the outset….. the claimant should also make appropriate Part 36 offers to all of the defendants as soon as reasonably practicable" (at [35]).

ii) Does it make a difference if sums are due by way of a Tomlin order?

In short, once again, yes.

R.44.14(1) could not be construed widely enough to encompass Tomlin orders, which the authorities make clear cannot be described as an "order". Rather it is a record of a settlement reached between the parties intended to have binding effect. The same is true of Part 36 offers which would similarly fall outside r.44.14(1).

There are also insurmountable practical difficulties, for example that a Tomlin order is typically confidential and the normal practice is that a judge does not see or approve the terms of the schedule before making the order. There is also the issue of global settlements, as in the index case, where the sum recorded in the schedule is a lump sum for everything. It is not apparent how a court would embark on the task of identifying the relevant figure in these circumstances. The same is true of settlement terms which do not identify a monetary sum at all, where the defendant has offered the claimant some form of benefit in kind for example continued employment.

Discussion

This decision has important consequences for personal injury cases involving multiple defendants. It is foremost a win for defendants, though there are certainly some helpful pointers for claimants.

As Coulson LJ recognised at [42] of his judgment, claimants may utilise the Tomlin order mechanism to avoid costs liability to other defendants. The same is true of Part 36 offers. Given that the defendant with whom they are making this settlement with has no direct interest in the ability of other (potentially rival) defendants to recover costs, there is no obvious reason why the settling defendant would oppose such a mechanism. It is with this in mind that defendants may be more inclined to discuss settlement tactics collaboratively. It is in their broader, long-term interests to do so. For example it may be deemed to be in the interests of defendants generally in such cases to use Calderbank offers, which settle by way of non-confidential consent orders which would fall under 44.14(1).

What is abundantly clear, and as recognised by Coulson LJ at [35], is that claimants must carefully consider at the outset which defendants to involve. This is a devilishly difficult analysis in claims such as NIHL which typically involve historic employers. If a claimant is facing a potentially enforceable costs order from a successful defendant at the conclusion of trial, one potential way of avoiding the sting of 44.14(1) is to seek a Bullock or Sanderson order. Claimants must be alive to such orders, especially where defendants have blamed each other.

Ketchion v McEwan (28th June 2018, Newcastle Upon Tyne County Court)

A claim and the Part 20 counterclaim are parts of the same 'proceedings', hence defendants counterclaiming for PI benefit from QOCS protection where they lose the main action.

The Defendant faced a claim for financial losses arising out a road traffic accident, and

counterclaimed for damages for personal injury. The main action succeeded, and the part 20 claim failed. The question was whether the Defendant benefits from QOCS protection in accordance with CPR 44.13 in respect of the Claimant's costs of the main action.

Applying *Cartwright* as discussed above, and finding that the term 'proceedings' must now be construed sufficiently widely such as to include the claim and the part 20 counterclaim, HHJ Freedman found that defendants/ part 20 claimants are entitled to this protection. In doing so HHJ Freedman expressly recognised that his decision in *Bowman* is now bad law.

This is undoubtedly a significant win for defendants.

***Andrea Brown v The Commissioner of Police of the Metropolis & the Chief Constable of the Greater Manchester Police & the Equality and Human Rights Commission (Intervener)* [2018] EWHC 2046 (Admin)**

How QOCS applies to 'mixed' claims

Facts

C sued the Met police, pursuing four cases of action. Part of her claim was for personal injury. She succeeded in part although the personal injury part of claim was rejected.

The issue of costs arose. In essence the question was whether QOCS applies to 'mixed' claims i.e. On appeal Whipple J overturned the first instance judge. The crux of her reasoning is at [49]-[51]:

> 49. Thus, CPR 44.16(2) applies in any proceedings where a claim has been made for damages for personal injuries as well as for something else (ie, as well as a claim other than a claim for damages for personal injury). This is a "mixed claim".
>
> 50. Once that point is resolved, the construction of CPR 44.16(2)(b) becomes clear. Mixed claims are within the scope of QOCS, by virtue of CPR 44.13(1). But CPR 44.16(2)(b) provides a mechanism to deal with mixed claims. The mechanism is quite simply to leave it to the Court at the end of the case to decide whether, and if so to what extent, it is just to permit enforcement of a defendant's costs order.
>
> 51. In this way, the infinite variety of mixed claims can be dealt with fairly and flexibly, according to the justice of the case. Read in this way, the provision is entirely consistent with the overriding objective.

Thus for 'mixed claims' of this kind QOCS protection is not automatic rather it is a matter for the judge's discretion.

Whipple J affirmed the decision of Morris J in *Jeffreys v Commissioner of the Metropolis* [2017] EWHC 1505 (QB), successful counsel in which was Lisa Dobie of 1 Chancery Lane. The Intervener had argued this was wrongly decided and had a 'chilling effect' on personal injury claims, which arguments Whipple J robustly dismissed at [58]-[60].

Interestingly she confirmed that the discretion for 'mixed claims' would apply in theory to an ordinary claim arising out of an RTA involving claims for both personal injury and damage to property. Although it might be thought unlikely that a court would consider it just to remove QOCS protection, it may well do so in an unusual case where the personal claim is modest but the main issue in the case relates to car damage.

Discussion

This decision is undoubtedly correct in my opinion, as the alternative – where QOCS protection is automatic even in 'mixed claims' - would render 44.16(2)(b) redundant.

Of course this win for defendants only extends so far, in that they still need to go the extra step of persuading the judge to exercise the discretion. Indeed, as noted above, Whipple J commented that such a finding would be unlikely in routine

mixed personal injury claims. That said defendants should still have this decision in the back of their minds, and be alive to situations where the personal injury claim is the smaller part of the whole. This could easily be the case where in an RTA the damaged car is an expensive one which required costly repairs, or where there is a considerable credit hire claim.

By Richard Collier

Article 2 ECHR and suicide – the latest updates in the inquest law landscape

2018 has marked a dramatic year in respect of inquest law. The inquests touching the deaths of James Maughan and Kathleen Parkinson have led to radical decisions from the High Court, clarifying issues both in relation to the standard of proof in a death by suicide and the applicability of Article 2 ECHR ("Article 2") in inquests concerning healthcare related deaths.

Probable suicide?

In *R (Maughan) v HM Senior Coroner for Oxfordshire and others* [2018] EWHC 1955 (Admin), Lord Justice Leggatt and Mr Justice Nicol considered that the standard of proof required for a conclusion of suicide is the civil standard of proof, namely on the balance of probabilities.

The facts

On the 11th July 2016, Mr Maughan, who was in custody at HMP Bullingdon, was found hanging in his prison cell. An inquest was held with a jury in October 2017. The Senior Coroner accepted at the close of the evidence that there was insufficient evidence for the jury to be sure that Mr Maughan intended to commit suicide. As such, the jury could not consider a short-form conclusion of suicide. The Coroner invited the jury to record a narrative conclusion which answered five questions. The Coroner included written instructions to the jury to assist in answering the questions. One of the instructions included: "*the standard of proof you should apply when considering these questions is the balance of probabilities. In reaching your conclusions, you therefore have to be satisfied it is probable (more likely than not) that something did or did not happen*" [4].

The jury's narrative conclusion including findings that Mr Maughan "*deliberately tied a ligature made of sheets around his neck and suspended himself from the bedframe*" and that "*on the balance of probabilities, it is more likely than not that James intended to fatally hang himself…*" [5].

The legal challenge

Mr Maughan's brother challenged the jury's conclusion. He considered that it was unlawful, as it amounted to a conclusion of suicide using the civil, rather than the criminal, standard of proof.

The Court rejected these submissions. The Court drew a distinction between criminal proceedings and inquests, identifying that a higher standard of proof is required in criminal proceedings because of the serious consequences that arise when an accused receives a criminal conviction, such as a loss of liberty. The Court considered that there was no relationship or analogy between criminal proceedings and inquests which could justify applying the criminal standard of proof in an inquest. Further, the Court did not consider that the authorities cited to them bore out that a verdict of suicide at an inquest could only be returned on the criminal standard of proof.

The Court emphasised that suicide should not be presumed. It was wrong to conclude that an individual committed suicide, "*simply because other explanations of the death appear improbable or more improbable, and that a conclusion of suicide is only justified if it is proved by evidence*" [55]. Consequently, the Court held that the jury's conclusion was indeed lawful.

Comment

The Judgment in *Maughan* shows a significant departure from a long line of judicial thinking. There remains a question as to whether the standard of proof in relation to unlawful killing should similarly be on the balance of probabilities. As permission to appeal has been granted, time will tell whether any clarification will be provided

in further proceedings.

Healthcare related deaths and Article 2

In *R (Parkinson) v HM Senior Coroner for Kent and others* [2018] EWHC 1501 (Admin), the Divisional Court, comprised of Lord Justice Singh, Mr Justice Foskett, and His Honour Judge Lucraft QC, clarified that the enhanced investigative duty under Article 2 arose where there was a failure of a "*systematic nature*" and did not arise in "*ordinary*" medical negligence.

The facts

Mrs Parkinson, a 91 year old woman, had a short history of suffering from a chest infection. She was taken to Darent Valley Hospital via ambulance on the 9th January 2011 after collapsing at home. She was seen by Dr Hijazi, who considered that she was dying and that further treatment would not be of any benefit. Mrs Parkinson subsequently passed away shortly afterwards.

An inquest took place in May 2016, with the Senior Coroner delivering his findings on the 14th July 2016. The Senior Coroner did not consider that Article 2 was engaged, however he kept this under review throughout the inquest. When delivering his findings, the Senior Coroner remained of the view that Article 2 was not engaged and concluded that Mrs Parkinson's death was due to natural causes. He found that the treatment provided to Mrs Parkinson was indeed appropriate.

The legal challenge

Mrs Parkinson's son brought a claim for judicial review, advancing five grounds of challenge:

1. The Senior Coroner was wrong in finding that the enhanced investigative duty under Article 2 did not arise;
2. The finding concerning the medical cause of death was irrational;
3. The use of a short form Conclusion did not constitute a sufficient discharge of the Senior Coroner's duties under the Coroners and Justice Act 2009 ("CJA 2009"), subordinate legislation and common law, and/or was irrational;
4. The finding that Mr Parkinson's conduct obstructed the care that would have been provided by Dr Hijazi to Mrs Parkinson was irrational; and
5. The Senior Coroner's failure to make a Prevention of Future Death Report could only have arisen from a misunderstanding of the nature of his duty to do so under the CJA 2009.

The claim was dismissed on all five grounds. The Court placed a great deal of emphasis on the judgment of the Grand Chamber in *Lopes de Sousa Fernandes v Portugal* (Application no. 56080/13). The Court confirmed that errors of judgment or negligent coordination in the treatment of a patient are not sufficient to engage Article 2. For Article 2 to be engaged, the case must in itself be an exceptional one, going "*beyond mere error or medical negligence, in which medical staff, in breach of their professional obligations, fail to provide emergency medical treatment despite being fully aware that a person's life would be put at risk if that treatment is not given. In such a case the failure will result from a dysfunction in the hospital's services and this will be a structural issue linked to the deficiencies in the regulatory framework*". In essence, there must be reason to believe that there may have been a breach which is a "systemic failure". The Senior Coroner was entitled to find there was no systemic failure in this case.

As to the remaining grounds of challenge, the Court considered that the Coroner's duty to write a Prevention of Future Death Report only arose where the Coroner has a relevant concern and forms a relevant opinion, which the Senior Coroner did not have in this case.

Comment

Following the decision in *Parkinson*, it is likely that parties will face some challenges in attempting to persuade a Coroner that Article 2 is engaged in an inquest concerning a healthcare related death. Unless the case itself is exceptional, Article 2 is unlikely to be engaged.

By Dominique Smith