General liability newsletter

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In the latest edition of our General Liability bulletin, we take a closer look at changes to the QOCS scheme, an update on Covid-19 related death at work and the Ministry of Justice Call for Evidence in relation to possible changes to the discount rate for personal injury claims.

New changes to CPR 44.14 reversing previous case law on QOCS

Claims issued from 6 April 2023 will now be subject to long-awaited reforms to QOCS rules re-balancing the scheme in favour of defendants.

The current position

Under the current regime, the general rules under the QOCS scheme operate to protect claimants by preventing the defendant from enforcing costs orders against the claimant except in a limited range of circumstances (e.g., strike out of the claim, finding of fundamental dishonestly) where the rules could be disapplied. However, defendants could still enforce costs orders against claimants in circumstances arising from either defendants' Part 36 offers to settle or costs order from interim applications within certain limits. These limits restrict enforcement of costs orders by the defendants to the value of damages and interest awarded to the claimant by an Order of the Court (i.e. a successful award of damages at trial).

The question therefore arises as to whether costs orders can be enforced against claimants in circumstances where a claim settles before trial and whether any settlement by Part 36 or otherwise amount to an order for damages within the wording of CPR 44.14. Case law has firmly set out that this is not the case for both claims settled by Part 36 (*University Hospitals of Derby & Burton NHS Foundation Trust v Harrison [2022] EWCA Civ 1660*) and claims settled by Tomlin Order (*Cartwright v Venduct Engineering Ltd [2018] EWCA Civ 1654*).

Furthermore, the second question that arises is whether even when damages are awarded at trial can the defendant enforce costs orders against the claimant up to the value of both the value of damages and interest and the claimant's costs. However, in *Ho v Adelekun [2021] UKSC 43,* the Supreme Court held that costs orders made in a claimant's favour should not be considered when determining the limit up to which a defendant may enforce an order for costs in its favour. Therefore, the limit that defendants could enforce costs orders was definitively only up to the amount of damages and interest awarded since the *Ho* case.

The new rules

The new rules extend the circumstances in CPR 44.14(1) for when a defendant can enforce costs order to include both orders *and* agreements to pay or settle damages and interest in favour of the claimant. Furthermore, defendants will be able to offset their enforceable costs order against both damages and interest and costs orders, effectively reversing the judgements from recent case law on the QOCS scheme. The cap for enforcement of defendants' costs orders will now be the aggregate of damages, interest and costs recovered by claimants at trial or through settlement. This will effectively create more risk for claimants and allow defendants to enforce and offset their costs under relevant order against claimants' costs particularly when large amounts have been incurred on either side.

CPR 44.14 – new drafting

(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for, or agreements to pay or settle a claim for, damages, costs and interest made in favour of the claimant.
(2) For the purposes of this Section, orders for costs includes orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.
(3) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.
(4) Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.
(5) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

When will we see the rules have an effect on litigation?

Given that the new rules will affect claims issued after 6 April 2023, we may see more claims being issued in advance of the new rules' implementation to avail of the more favourable position under the current rules. Defendants may not see these claims being served until July or August as the 4-month service period is used to gather the relevant medical evidence for these claims. Furthermore, as was the case with the previous drafting of the rules satellite litigation on the exact interpretation of the new rules is likely to take place, particularly if a defendant is likely to gain a significant advantage as a result. Claims currently already in litigation will obviously continue to be subject to the previous rules and for a period there will be a tandem of two sets rules operating on different claims.

Even when a Defendant's Part 36 offer is accepted out of time, QOCS protection still applies to prevent enforcement of costs orders

Whilst the rule changes outlined above are due to come into force for claims issued after 6 April 2023, claims currently in litigation will continue to be subject to the current rules and judicial decisions on the current QOCS rules. The latest in a string of recent cases on the interpretation of QOCS within the meaning of CPR 44.14 is the case of *University Hospitals of Derby & Burton NHS Foundation Trust v Harrison (Association of Personal Injury Lawyers intervening) [2022] EWCA Civ 1660* regarding whether an order made under Part 36 constitute "orders for damages and interest" under CPR 44.14 such that they can be used to enforce or set-off defendant's costs.

The case concerned an original claim for clinical negligence which was issued in February 2019 and eventually seeking up to £5.7 million. The Defendant made an early Part 36 offer to settle the claim for around £420,000 in December 2019 which was not accepted until November 2021. As the offer was accepted outside of the relevant period and further deductible benefits had been incurred, then the court's permission was required for the offer to be accepted under CPR 26.11(3)(b). The court duly gave permission for acceptance in March 2022 and determined the value of the CRU deductions and an order was made to this effect. The order however went on to say that whilst the defendant costs were payable after the expiry of the relevant period, these could not be offset or enforced against the claimant pursuant to r44.14.

The defendant appealed arguing that as the order also identified the relevant benefits to be deducted, it was an order that was consistent with r44.14(1) conceding that without the direction on the amount of CRU deductions, the order merely giving permission to accept out of time would not have been an order for payment of damages. However, Lord Justice Coulson rejected the defendant's arguments and dismissed the appeal. In his judgement he set out that *"on my analysis, an order under r.36.22(9) is not "an order for damages and interest made in favour of the claimant" (as per r.44.14(1))"* and that *"what the appellant says that r.44.14(1) means in its present form is not what the rule provides, and that problem may explain why there is a proposal to amend the words of the rule"*.

Therefore, whilst Coulson LJ alludes to the upcoming rule changes (where Part 36 settlements do fall under r44.14(1)), so far as the current rules are concerned, this case sounds the death knell for any attempts to construe Part 36 offers as falling within r44.14 such that costs orders can be enforced against claimants for late acceptance of Part 36 offers (or interlocutory application costs). This decision will affect all claims currently in litigation (and any issued in advance of the rule changes on 6 April 2023) and will inform any future settlement strategy for both claimants and defendants. Defendant will only be able to enforce their costs orders as a result of Part 36 against claimants following assessment of quantum at trial and the question over whether Part 36 offers come under this scope as definitively been laid to rest.

Covid-19 ruled as an industrial disease in first coroner's ruling of its kind – will there be an impact on claims?

In the first case of its time a coroner has ruled that Covid-19 contracted at work is an industrial disease. In the joint inquests into the death of Gareth Roberts and Dominga David, both nurses at hospitals run by the Cardiff and Vale University Health Board.

The senior coroner ruled that they were both *"exposed to Covid-19 infection at work, became infected" and that infection caused"* their deaths, making a finding of industrial disease. Evidence was heard from nurses, healthcare support workers and a doctor at the hospital, as well as an expert witness from Public Health Wales, who inputted into the national guidance. The ruling represents the first of its kind and will likely be used as supportive evidence in a civil claim.

We are nearing 3 years since the start of the pandemic meaning that limitation in such claims will shortly start to expire for the earliest exposure cases. There are still significant hurdles for claimants to overcome in pursuing these claims requiring careful consideration. What employers should have done and when will likely be a major battleground given the changing government advice throughout the pandemic. It will also be difficult for many claimants to establish that Covid-19 was contracted during employment especially during the peaks of infections. There is therefore some way to go before this ruling will have any immediate effects on related personal injury claims. However, the decision may affect the government's Industrial Injuries Advisory Council's next report on Covid-19 in occupational settings and whether it should be a prescribed disease. Nonetheless, with limitation on these cases expiring, it may only be a matter of time before there is judicial consideration on the issue.

Ministry of Justice opens Call for Evidence in consultation on a dual/multiple Personal Injury Discount Rate

The Ministry of Justice is currently opening a Call for Evidence in relation to the possibility of introducing a dual or multiple discount rate in England & Wales when the next review has taken place (this must start by mid-2024). This is positioned as an alternative to the current simplicity and certainty of the single discount rate that applies to all future losses regardless of duration and type of head of loss. In a dual or multiple rate system, for example, a lower rate would be used for short term claims (to account for the relative higher investment risk and lower investment returns) and a higher rate for long term claims (to account for larger investment returns that can be made from the market over a long period).

The Call for Evidence document sets out the current pros and cons of using a dual or multiple discount rate based upon the experience in other jurisdictions who use it. Examples cited are Ontario, Canada and Hong Kong who have different rates for short-term and long-term claims and Ireland which uses a lower rate for care claims and a higher rate for loss of earnings claims. The latter is based on the assumption that claimants are likely to invest loss of earnings awards with more risk that care costs awards which would be held as cash or invested with minimal risk due to the necessity of the care involved. The aim in any implementation of a dual rate system is to achieve fairness for claimants and their compensators and avoid any under or overcompensation that comes from a single discount rate. For example, in Ontario, Canada where the discount rate is split based on the length of any future losses claim, the long-term rate (currently at 2.5%) has remained unchanged in the 22 years since the system was introduced whilst the short-term rate (currently at 0.5%) has been amended 16 times. This provides more certainty for claimants and defendants as it is based on the assumption that over the long term (in the case of this particular system, over 15 years) investment gains are broadly uniform whereas investment volatility on the whole affects mostly short-term claims reflected a regularly adjusted discount rate.

The paper asks questions of stakeholders and consultees on whether and how such a system should be adopted for England and Wales. The main issues to tackle are whether a dual or multiple discount rate has the potential to cause additional disputes and costs despite the fairness and proportionality it seeks to achieve in valuing future loss claims. The Call for Evidence is also extended to comments on the current system of Periodical Payment Orders (PPOs) particularly relevant to data on the amounts and frequency of these orders that are made. Additionally, views are sought as to the appropriate rate of inflation to me factored into PPOs, the implication being that where a multiple discount rate is opted for in relation to different heads of loss, it would be more appropriate for a higher discount rate to be used in settlements that include a PPO element.

A firm decision will not be made until 2024 or later and may be introduced on a phased or rolling basis, but this is nonetheless an interesting development on where the discount rate in England & Wales may be headed. On a practical note, if it appears during or after consultation that such a system is advantageous to claimants, we could expect delaying tactics from opponent solicitors to avail of the better rate, although the Government hopes that a phased introduction would mitigate this.

The consultation period concludes on 11 April 2023 and the Ministry of Justice will report on the consultation in July 2023. Practitioners with an interest in high value personal injury claims can submit their views via the online survey here.

Making every statistic count

A recent appeal decision is of particular interest due to the type of expert evidence submitted by the Defendant's representatives, containing its own statistics produced from defending claims by the same claimant firm of solicitors. In Kerseviciene v Quadri & Anor [2022] EWHC 2951 (KB) five claimants brought claims for personal injury arising from road traffic accidents. In each claim, damages were valued between £5,000 and £10,000, alleging neck and back injuries. All claimants were represented by Ersan & Co, a firm of solicitors based in central London.

In support of their defence, the Defendants served a witness statement from one of their employees, Mr Stevens, who was a director at the firm and its head of organised fraud. In his witness statement, Mr Stevens submitted evidence containing an analysis of claims data collected by the defendant firm in relation to claims submitted by claimants represented by Ersan & Co. The data arising from about 372 cases showed that:

i. *"95% of claims represented by Ersan & Co contain an allegation of psychological injuries;*

ii. *67% of the claimants were recommended for further psychological examination;*

iii. *68% of the claimants served a psychological or psychiatric report;*

iv. *in 100% of the reports provided by Doctor Yahli, he diagnosed a recognised psychiatric condition;*

v. *67% of the 207 reports of Dr Yahli provided a recovery period (with intervention) of two years or longer."*

The Defendants suggested that the figures were unusually high, particularly in the case of recovery periods for relatively minor injuries being so long and the rates for further examination. The Claimants argued that the allegation of fraud was irregular and applied to have Mr Stevens' statement excluded. The Circuit Judge refused to debar the Defendants from relying on Mr Stevens' witness statement. The Claimants then appealed that decision, arguing amongst other things that there was no evidence as to how the selection of the 372 cases had taken place and that this could invalidate the statistics, and that the witness statements implicitly involved an expression of opinion based upon the statistics so as to attack the merits of the claims.

The Claimants were not successful on appeal and the statement was held to be admissible as witness evidence. The Judge accepted that there were no comparators showing the experience of other firms and that more importantly, that there were real questions as to what could be inferred from the evidence (e.g. the assumption that the statistical evidence demonstrated fundamental dishonesty). However, they concluded that it would be for the trial Judge to make of the evidence *"what they will"*. The Judge accepted that there was a risk that there were embedded assumptions in the evidence but that this was not an adequate reason to have Mr Stevens' evidence excluded.

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