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Part 36: Yet another Court of Appeal ruling

Seabrook v Adam (2021) EWCA Civ 382

Following a road traffic accident, the claimant claimed for a whiplash type injury to the neck and a lower back injury. The defendant admitted breach of duty but causation was denied.

Two Part 36 offers were made were made by the claimant:

"To accept on condition that liability is admitted by the offeree, 90% of the claim for damages and interest, to be assessed." (the "First Offer") and "To agree the issue of liability on the basis that the Claimant will accept 90% of the claim for damages and interest, to be assessed." (the "Second Offer").

Following a fast track hearing a Deputy District Judge entered judgment in the sum of £1,574.50. It was accepted that that related to the whiplash injury. It was also accepted that causation was not proved in relation to the lower back injury and that none of the damages awarded related to that head of loss.

A District Judge, who dealt with the costs of the action, refused to give effect to either of the Part 36 offers and that decision was upheld on appeal.

IN BRIEF

The Court of Appeal ruled that two Part 36 offers made by the claimant, to accept 90% of the claim for damages, were ineffective.

Dismissing the claimant's further appeal, the Court of Appeal held that the real question here was how these Part 36 offers should be construed. They must be interpreted in the light of the pleadings and, in particular, in the light of the fact that the defendant had admitted breach of duty which had been referred to as "primary liability" but had disputed causation in relation to both heads of damage. With that context in mind, it seemed quite clear that the reasonable reader would have understood both offers to be addressing liability and causation and to relate to both heads of damage.

First, it would make no sense if the references in the offers to liability were construed to mean liability, in the sense of a breach of a duty of care, rather than liability and causation. A breach of a duty of care had already been conceded. This was all the more so, with regard to the First Offer. Further, if the offers were concerned only with liability in the sense of the breach of duty which had already been conceded, they could not have been genuine attempts to settle.

Secondly, both offers were framed in terms of a discount on the "the claim for damages and interest, to be assessed". They contained no reference to the separate heads of damage in relation to the neck and back injuries. The reasonable reader, taking into account all the relevant context, would construe the reference to "the claim for damages" to mean the claim in its entirety and to construe the offers as a whole to mean that a concession as to liability and causation was required in relation to both injuries. simply to say that someone is liable in tort. He must be liable for something.

Furthermore, with the relevant context in mind, it seemed quite clear that although the Second Offer was confined expressly to the "issue of liability", the reasonable reader would have understood the First Offer to be addressing the entire claim. It was an offer to accept 90% of "the claim for damages and interest, to be assessed" on condition that liability was conceded. It left no room for any argument about whether the defendant's breach of duty caused a particular head of loss. It was quite plainly concerned with the damages claimed in relation to both injuries and the claim as a whole. In that context, the ordinary and natural meaning of "liability" inevitably included causation. Otherwise, the First Offer would be self-contradictory and meaningless.

Had the defendant accepted either of the Part 36 offers, it would have meant that he had admitted liability for both the neck and the back injuries and he would not have been able to argue, subsequently, that he had not caused the back injury at all. It followed that as he was only found liable in relation to the neck injury, he bettered both Part 36 offers.

The court observed that cases of this kind turn, inevitably, on the precise wording of the pleadings and the particular terms of the Part 36 offer. In order to avoid the kind of dispute which had arisen here, especially in a low value claim, it was important to make express reference in the Part 36 offer to whether the offer related to the whole claim or part of it and/or the precise issue to which it relates, in accordance with CPR 36.5(1)(d). In particular, if the issue to be settled is "liability", it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty.

Matthew Hoe of Taylor Rose MW, a member of the Costs SFT, questions whether these appeals were pursued with such vigour in an attempt to escape fixed costs by coming within the *Broadhurst v Tan* exception, and to establish that these sort of arbitrary percentage offers could be a reliable way to evade fixed costs. On the facts of this case fixed costs were not escaped via Part 36.

However, in a case where damages *are* awarded for all heads of claim, it seems such an offer could achieve that purpose. Accordingly, defendants must remain vigilant against these offers which have the potential to increase significantly the adverse costs liability, taking them as further motivation to run only the best defences, and in other cases to accept the windfall that they might represent.