



Informing Progress - Shaping the Future

FOIL UPDATE 6th December 2021



Can a claimant be obliged to join additional defendants?

Pawley v Whitecross Dental Care Limited and another (2021) EWCA Civ 1827

The claimant was a patient at the defendants' dental practice between 2012 and 2018. During that time, she was treated by four different dentists at the practice ("the Dentists"). She issued these proceedings in the county court, alleging that her treatment was negligent. She chose to sue the defendants and not the Dentists, alleging that the defendants owed her a non-delegable duty of care and that they were to be held vicariously liable for the negligence of those individuals who treated her.

The defendants denied the existence of a non-delegable duty and denied that they were vicariously liable for any negligence on the part of the individual dentists that the claimant may prove. The defendants reserved the right to pursue contribution proceedings against the Dentists and/or join them to these proceedings but did not do so at this stage of the proceedings.

The claimant resisted any temptation to join the individual dentists as additional defendants. Instead of applying to join the Dentists as additional parties pursuant to CPR Part 20, the defendants applied pursuant to CPR Part 19 to join them as additional defendants to the claimant's claim.

IN BRIEF

The Court of Appeal held that a claimant could not be forced to join additional defendants under Part 19 at the behest of the defendants.

The defendants had elected not to bring Part 20 proceedings at this stage.

A District Judge acceded to the defendants' application. On the claimant's first appeal, the County Court Judge upheld the decision of the District Judge.

The Court of Appeal allowed the claimant's further appeal.

Having considered the relevant provisions of CPR 19 and 20 (including the Practice Directions), the court found that there were two possible routes to be considered when it was suggested that it was necessary or desirable that someone who was not presently involved in the litigation should have some involvement. By its express terms Part 20 was the relevant route where a defendant suggested that, although they contested liability, they were or should be entitled to an indemnity or a contribution from someone else in the event that they were held liable to the claimant.

The claimant had permission to pursue two grounds of appeal:

Ground 1 was that the court wrongly distinguished the case law and failed to give any or any adequate weight to the statement of Coulson J in *Viridor (2016)* that a claimant could not be forced to bring proceedings against defendants and become liable for their costs;

Ground 2 was that the judge wrongly conflated the issues of "necessity" and "necessary" in that he imputed a wider power under CPR 19.5(4) which relied upon "all the circumstances, including the overriding objective", to allow the joinder of the Dentists, when such was inconsistent with his finding that it was not necessary under CPR 19.5(2) and 19.5(3)(b) to join them.

On Ground 1, the appellate court found that subject to two qualifications, the approach of Coulson J was correct in any normal claim for damages where the claimant had chosen to sue some but not all potential defendants and had advanced their claim against the chosen defendants on a basis that could not be dismissed as fanciful. The first qualification was that Coulson J's reference to the court not having *the power* to join a party where the claimant opposed that joinder should be read in the context that, on a literal interpretation, the rules were wide enough to create a power to add a party as a defendant and did not exclude that power where the claimant opposed joinder. The second qualification was that the principle was not limited to cases where the claimant would become potentially liable for the costs of the new defendant.

No one may be compelled to bring proceedings to claim damages for injury loss or damage caused by another person's tort. This had two consequences of fundamental importance. First, a person who was competent to litigate was entitled to decide who they would sue. Second, a person who was competent to litigate was entitled to decide what cause or causes of action they would pursue against those they had chosen to sue.

It followed that a decision to bring a claim for damages on a particular basis should in all normal circumstances be respected, particularly when it served to limit the number of parties and thereby tended to save expense and to approach the litigation proportionately.

The reasons for not requiring a claimant to sue a party against their wishes became even more compelling where the proposed defendant had or might have either a partial or a complete defence to the claim that would be brought. The most obvious example of such a defence was limitation and in the present case, most of the treatments of which the claimant complained happened more than three years before any joinder of the Dentists. The claimant submitted that if obliged to join them, she would be entitled to discontinue against the Dentists. This question emphasised the intolerable position facing the claimant if the order of the courts below were to be upheld.

The second question raised by the possibility of a limitation defence was the threshold that had to be satisfied for an order to be made, which was the subject of Ground 2 (see below). Having considered the authorities, the Court of Appeal held that if the Dentists were not joined, their rights would not be affected in the sense that any decision made in the proceedings between the claimant and the defendant will not be binding on them. Second, it was not the Dentists who considered that their interest required them to be joined as parties: it was the defendants who had made the application. Third, even giving the most general and generous scope to any concerns that the Dentists might have, in the absence of Part 20 proceedings, their concerns were only potential. Fourth, an appeal to the overriding objective supported the claimant's decision to pursue the streamlined claim that she had.

If a defendant wished to involve an additional party in a case such as the present, the conventional route (as was recognised by the District Judge and the Judge) was to join them by Part 20 proceedings, particularly if they had an interest (as the defendants obviously did in the present case) in securing an indemnity or a contribution from the Part 20 defendant.

The defendants had, thus far, chosen not to issue Part 20 proceedings against the Dentists. One reason suggested by the defendants was that to do so might be seen by the Dentists as a hostile act which precluded further co-operation between them and the defendants. This possible concern could be overstated, as there was no conflict of interest between the defendants and the Dentists on the issue whether the Dentists were negligent; and it was always open to a defendant to bring their Part 20 proceedings on a more or less contingent basis.

The issuing of Part 20 proceedings did not affect and was not affected by the court's normal case management powers.

On Ground 2 the Court of Appeal held that where no question of limitation arose, the threshold to be satisfied was that it was "desirable" to add the new party. Special provision was made for claims for personal injuries by CPR 19.5(4). What CPR 19.5(4) did not say was whether the threshold in such cases was that it was "desirable" or that it was "necessary" to add the party. The problem was that the rule neither said nor indicated how this conundrum should be resolved.

However, given the findings on Ground 1, it was not necessary to reach a concluded view on where the threshold should be set for a case falling within CPR 19.5(4). A threshold test of desirability (which would bring into play all the circumstances and the application of the overriding objective) would not be satisfied in the present case.

The full report may be found at: <https://www.bailii.org/ew/cases/EWCA/Civ/2021/1827.html>

This publication is intended to provide general guidance only. It is not intended to constitute a definitive or complete statement of the law on any subject and may not reflect recent legal developments. This publication does not constitute legal or professional advice (such as would be given by a solicitors' firm or barrister in private practice) and is not to be used in providing the same. Whilst efforts have been made to ensure that the information in this publication is accurate, all liability (including liability for negligence) for any loss and or damage howsoever arising from the use of this publication or the guidance contained therein, is excluded to the fullest extent permitted by law.