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Claims for Credit Hire at Stage 3 Hearings

London Borough of Islington v Bourous and Davis v Yousaf (2022) EWCA Civ 1242

These two appeals raised similar issues. The claimant in each case was a taxi driver who was injured in a traffic accident. Each made a claim under the Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol'). Each succeeded in the county court. The issue concerned the circumstances in which a claimant who made a claim under the RTA Protocol for personal injuries could recover for damages to reflect the losses he suffered because the vehicle he used to earn his living was damaged or written off, and he could not use it until it had been repaired or replaced. The appellants in both cases (who were the defendants in the county court) were, in effect, the insurers.

In the first case, the respondent/claimant sent the Court Proceedings Pack (Part A and Part B) to the appellant/defendant. In Part A, he claimed £11,825.49 for car hire. He also claimed damages for the cost of storing his vehicle while it was repaired. The hire cost was the largest element of his claim. The appellant made a lower offer in respect of the hire charges and also offered a lower daily hire rate.

The respondent then issued a Part 8 Claim. He asked the court to decide his claim at an oral hearing. In its acknowledgment of service, the appellant objected to the use of the procedure in PD 8B on the grounds that the case was not suitable for that procedure. It asked the court to transfer the case to Part 7 so that it could 'file and serve a Defence and evidence in relation to the need, period, rates and impecuniosity'.

IN BRIEF

In two, conjoined appeals, the Court of Appeal dismissed the defendants' appeals against awards for credit hire charges made at Stage 3 hearings.

The decisions serve as a warning to defendants as to how they must approach such claims under the RTA Protocol.

At the hearing, the appellant also argued that the respondent had not served any evidence about loss of profit; that the claim had been incorrectly pleaded; and that the claim for hire charges should be dismissed or transferred to Part 7.

A Deputy District Judge agreed with the appellant's arguments and dismissed the claim for hire charges. A Circuit Judge allowed the respondent's appeal and remitted the claim for a further Stage 3 hearing to determine the amount to be awarded.

In the second claim, the respondent/claimant started a claim for personal injury in accordance with the RTA Protocol by sending a Claim Notification Form to the appellant/ defendant, who admitted liability. The next stage was Stage 2.

At Stage 2, the respondent claimed, among other things, damages for credit hire charges which he had incurred. He relied on the hire agreement and a witness statement in support of his claim.

In his witness statement, the respondent said that he could not afford to repair or replace his vehicle. He had to pay his bills and living costs from his income. He had no surplus income; it was all spent on outgoings. He said that he was a self-employed licensed taxi driver when he had the accident. He needed a replacement vehicle to pay his bills.

The appellant's insurer made a written offer, 'subject to the points made' in that letter, which put the respondent to proof of the claim and raised various other issues. It made a counter offer to the sum claimed.

The parties were not able to agree the claim at Stage 2. A Stage 3 hearing was listed.

On the available evidence, a Deputy District Judge awarded a revised amount for credit hire and a Circuit Judge dismissed the appellant's first appeal.

The version of the RTA Protocol which applied in these cases applied to all relevant claims issued on or after 31 July 2013. It had to be used in all claims which arose from a road traffic accident, and which included a claim for damages for personal injury, and which the claimant valued at less than £25,000, and for which the small claims track would not have been the normal track if proceedings were issued. Damages claimed in relation to a vehicle (including credit hire charges) did not count towards the £25,000 total.

At the relevant times, the most a claimant could claim in the small claims track as damages for personal injury was £1,000, with an overall limit of £10,000. The claim limit for the fast track was £25,000. The RTA Protocol therefore covered what would otherwise have been fast-track claims. Paragraph 6.4 of the protocol acknowledged an expectation that claims for vehicle-related damages would be dealt with outside the RTA Protocol; but claimants were entitled to bring them under the RTA Protocol.

The Court of Appeal held that these appeals turned on the uncontroversial application of the RTA Protocol to their own procedural facts and did not raise any wider points. Defendants in these cases are almost always insurers, as they were in these two appeals. There were hundreds of thousands of these claims every year, and they were routine for insurers. Insurers could be assumed to be familiar with the provisions of the RTA Protocol and to have ready access to legal advice if an unusual or difficult issue arises in one of these cases.

The themes which emerged from the RTA protocol and the case of *Phillips v Willis* were that the RTA Protocol was intended to be a quick and cheap procedure to enable the parties to settle at a cost which was proportionate both to the sums at stake, and to the run of the mill legal issues which arose, and in a way which did not place an undue burden on the courts. The RTA Protocol was designed to enable the parties to narrow and limit the issues in dispute, so that if a decision by the court was necessary at Stage 3, that decision would only concern the narrow issue which the parties' exchanges under the RTA Protocol would already have defined for the court.

In the first case, the appellant, on analysis had made two linked points: a claim under the RTA Protocol must be pleaded and proved in the same way as a claim to which the RTA Protocol did not apply, and, further, that, if, as late as the Stage 3 hearing, the defendant argued that the claim had not been pleaded and proved in that way, a District Judge was obliged to dismiss the claim.

The appellate court found that each of those points was based on a fundamental misunderstanding of the express provisions of the RTA Protocol, and of its purpose.

As HHJ Freedman had said in *Mulholland v Hughes*, '…to make an offer in respect of hire charges is not to admit the need for hire, but not to challenge the need at Stage 2 is equivalent to saying that the claimant does not need formally to prove it'. In this case, on the first appeal, the Circuit Judge had rightly said that on both a literal and a purposive interpretation, a defendant could not object, at Stage 3, to a particular head of damages except on grounds raised at Stage 2. Here, there was no dispute about the need for car hire at Stage 3, because the appellant had, in effect, conceded the need for car hire by offering the respondent, at Stage 2, a different rate from the rate which had been claimed.

In the second appeal, there was a dispute about whether the question of the respondent’s impecuniosity was argued before the Deputy District Judge. The transcript suggested that it was raised in passing, but the question of impecuniosity was one of the grounds of appeal to the Circuit Judge and she decided it, so this court should also rule on that ground.

In the context of the RTA Protocol, if it was necessary for this respondent to show that he was impecunious, the evidence on which he relied was sufficient for that purpose. If the appellant wanted to argue that the evidence was insufficient for that purpose, it was for her to ask, at an appropriate time, for a transfer to Part 7, so that the issue could be investigated further. It was simply not feasible for a District Judge to investigate such an issue in the depth which the appellant now demanded in the context of a Stage 3 hearing.

The court was not impressed by appellant's argument that this approach was anomalous or unjust. Insurers must be taken to know about both the purpose and the detailed provisions of the RTA Protocol, and how it differed from other methods of deciding civil claims. The sheer number of these claims meant that they were a form of bulk business. Insurers could take advantage of the economies of scale and cost created by the RTA Protocol for these claims. Insurers were not locked into the RTA Protocol. First, they could take advantage of the 'industry agreements' dealing with vehicle-related damages which were referred to in paragraphs 6.4 and 17.23. Secondly, there were many opportunities for a defendant to take a claim out the RTA Protocol if a defendant considered that it was better suited to investigation and determination under Part 7 (with the costs risk which that entails).

A second ground of appeal was dismissed because the point had not been raised at trial.

At the conclusion of the judgment the court added the following observations.

The editorial note in paragraph 8BPD.7.1 of the *White Book* says that *Phillips v Willis*, 'illustrates that transfer out of the Protocol Stage 3 procedure to Part 7 will be rare and for exceptional cases only'. The note is not an accurate statement either of the actual decision in *Phillips v Willis*, or of its implications. The power to transfer cases to Part 7 is not constrained in the way that the note suggests.

The full judgment may be found at: London Borough of Islington v Bourous [2022] EWCA Civ 1242 (16 September 2022) (bailii.org)