

SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/19

Before :

DEPUTY MASTER FRISTON

Between :

TIMOTHY FRANK COLIN SCOTT

Claimant

- and -

MINISTRY OF JUSTICE

Defendant

Mr Michael Fletcher (costs lawyer instructed by **Thompsons Solicitors**)
for the **Claimant**

Mr Paul Joseph (counsel instructed by the **Government Legal Department** for the
Defendant)

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DEPUTY MASTER FRISTON

Deputy Master Friston:

Introduction

1. This judgment concerns the Pre-Action Protocol for Low Value Personal Injury Claims (Employers' Liability and Public Liability) Claims ('the EL/PL Protocol'). I decide two issues: the first is whether this claim was excluded from the EL/PL Protocol by reason of the Claimant's injury having been caused by a 'vulnerable adult', and the second is whether the Claimant elected not to apply that protocol by reason of him having placed too high a value on the claim. These issues are relevant because they will determine whether I should restrict the Claimant's costs to those that would have been allowed had the EL/PL Protocol been applied.

The facts

2. The Claimant was employed by the Defendant as a senior prison officer at HMP Winchester. On 13 August 2013, a male prisoner ('the Prisoner') arrived at the prison after having been transferred from another prison. He was in an agitated state and was demanding his own cell. When this request was refused, he became aggressive and said that he would 'bang someone out'. After he had been placed in a cell, he said that he would 'knock out' the first officer through the door. These events were not recorded in the observation book or in the custody management system.
3. The Claimant came on duty the next day. He checked the custody records prior to beginning his shift but found no mention of the Prisoner's threats. Later that morning, the Prisoner asked to make a telephone call. Lunch was about to be served, so the Claimant told the Prisoner that he could do this later. The Claimant ordered the Prisoner to return to his cell, but he refused to do so.
4. The Claimant and two other prison officers attempted to escort him back to his cell. The Prisoner resisted and had to be restrained; the Claimant was injured as a result of the Prisoner's resistance to the restraint. In particular, he sustained a rupture of the supraspinatus insertion of his left (non-dominant) rotator cuff.
5. The Claimant was off work for a number of weeks. On 20 December 2013 he underwent a shoulder arthroscopy and surgical debridement, but this did not alleviate his symptoms. In due course, the Claimant returned to work, but he was not able to carry out prisoner-facing duties. His earnings were protected for a period of time, but he was concerned that from 2016 onwards he would earn less than he had earned previously.
6. The Claimant instructed solicitors on about 5 September 2014. A letter of claim was sent on 24 April 2015. That letter stated that the claim was being brought under the Pre-Action Protocol for Personal Injury Claims ('the PI Protocol'); it made no mention of the EL/PL Protocol. On 28 April 2015, the Defendant acknowledged receipt of the letter of claim and acknowledged that the PI Protocol was said to apply. The parties subsequently agreed an extension of time under that protocol.
7. The Defendant's decision on liability (which was a denial) was given by way of letter dated 13 October 2016. The primary limitation period was due to expire on 13 August 2016, so the Claimant issued protective proceedings; this was on about 6 July 2016 (or possibly 15 July 2016). The Claim Form was endorsed with the following statement: 'I

expect the total claim to recover [sic] not more than £5,000'. I pause here to say that at this stage, the Claimant did not have the benefit of expert evidence, nor did he have the benefit of counsel's advice.

8. Three days later (namely, on 18 July 2016), the Claimant's solicitor received a report dated 10 July 2016 from his expert orthopaedic surgeon. Following a conference with counsel on 9 September 2016, Particulars of Claim were drafted. They were signed on 28 October 2016 and were served shortly thereafter. In essence, the claim was based on the Defendant's failure to realise and record the fact that the Prisoner had a propensity to violence. The Particulars of Claim did not assert that the Prisoner was a 'vulnerable adult', nor was there any suggestion of abuse or neglect. Indeed, the allegations of breach referred to the fact that the Prisoner posed a threat to others rather than the other way around.
9. At about the same as the Particulars of Claim were served, the endorsement of value on the Claim Form was amended to in excess of £30,000. The chronology was not entirely clear from the papers, but Mr Fletcher told me (and I accept) that this was done prior to service of the proceedings on 31 October 2016.
10. On 2 November 2016, the Claimant made a Part 36 offer in the sum of £30,000. This was not accepted. On about 24 November 2016, the Defendant served a Defence in which liability continued to be denied. On 3 February 2017, the Defendant made a Part 36 offer in the sum of £15,000; this was accepted on 10 February 2017. This was in the context of the Claimant having received advice from counsel that the prospects of success were poor.

'Vulnerable adult'

11. Mr Fletcher said that the EL/PL Protocol (and therefore CPR, Part 45) did not apply because the Prisoner was a 'vulnerable adult'. This, he says, engages the exception in paragraph 4.3(8) of that protocol, which reads as follows:

'This Protocol does not apply to a claim ... for damages in relation to harm, abuse or neglect of or by children or vulnerable adults.'
12. Mr Fletcher drew my attention to the words 'of *or by*' (emphasis added). He said—rightly, in my view—that those words mean that the exception created by paragraph 4.3(8) is not limited to claims brought by 'vulnerable adults' who have been injured, but that it is also capable of applying where a 'vulnerable adult' has caused an injury to someone else.
13. According to Mr Fletcher, the words 'in relation to' require (in his words) 'a very broad interpretation'. I agree: taken in isolation, those words do indeed convey a broad meaning. That may be so, but in my view, they are not the only words that define the scope of the exception in paragraph 4.3(8); in order to examine that issue, one has to look at the whole of that paragraph, including the words 'harm, abuse or neglect'.
14. Before I do this, however, I should expand upon Mr Fletcher's argument. In view of the fact that there was no suggestion of neglect or abuse in this case, he focuses on the words 'in relation to *harm* ... by a vulnerable adult' (emphasis added). In essence, Mr Fletcher says that the Prisoner was a 'vulnerable adult', that he caused the Claimant

‘harm’, and that therefore the EL/PL Protocol did not apply. It is implicit in this analysis that the word ‘harm’ means, or is capable of meaning, personal injuries *per se*.

15. I cannot accept this argument. I do not believe that it is permissible to run a blue pencil through words ‘abuse or neglect’ and to focus on the word ‘harm’ as if it stood in isolation. In my view, the true meaning of the word ‘harm’ is given by its surrounding words. Put otherwise, the words ‘harm, abuse or neglect’ ought to be read as a phrase, with each word giving context to the others.
16. If that phrase had read ‘abuse, neglect or harm’ (namely, if the order of the words had been different), I would have had no hesitation in saying that the word ‘harm’ was a reference to acts or omissions that are akin to abuse or neglect. The fact that the word ‘harm’ precedes the words ‘abuse’ and ‘neglect’ makes me pause for thought, but I am not overly troubled by this as there is precedent for qualifying words following (rather than preceding) words that are qualified (see, for example, *Pengelly v Bell Punch Co Ltd* [1964] 1 WLR 1055). In my view, the meaning of the phrase ‘harm, abuse or neglect’ is that it means abuse, neglect or other such harm. Put otherwise, it focusses on the nature of the acts or omissions in question, not on the mere fact that a personal injury has been caused.
17. Furthermore, if it were right to say that the word ‘harm’ encompassed personal injuries *per se*, I would have expected it to be separated from the words ‘abuse or neglect’ by something weightier than a mere comma. This is because harm (in the sense of injuries) is fundamentally different from abuse and neglect (which are acts or omissions); by way of illustration, the phrase ‘personal injury, abuse or neglect’ reads badly and is jarring.
18. There is, however, a more fundamental problem with Mr Fletcher’s argument. If the word ‘harm’ could be read as meaning personal injuries *per se*, this would cause serious internal inconsistencies in the EL/PL Protocol. In particular, if Mr Fletcher’s analysis were correct, it would also apply to children (including those who bring public liability claims as a result of having sustained an injury). This would mean that *any* child with *any* personal injury (whether as a result of abuse or neglect or otherwise) would be excluded from the EL/PL Protocol. This, however, is demonstrably false, as that protocol repeatedly makes reference to children. By way of example, paragraph 6.4 states that ‘where the claimant is a child, this must be noted in the relevant section of the CNF, and paragraph 6.5 says that ‘where the claimant is a child the statement of truth may be signed by the parent or guardian’. There are similar references at paragraphs 6.16, 7.24, 7.44 and 7.53. In my view, it would make no sense at all for the EL/PL Protocol to include multiple provisions relating specifically to child claimants, only for that same protocol to disapply itself. This requires a different reading of the meaning of the word ‘harm’ to that urged upon me by Mr Fletcher.
19. As a crosscheck (and it is no more than that), I note that if Mr Fletcher’s analysis were correct, the exception created by paragraph 4.3(8) of the EL/PL Protocol would be a demographically sizeable one. It would include all claims involving children, and would potentially include claims involving the elderly (not to mention disabled people and people with mental illnesses). This could include, say, a quarter of the population. In my view, it is inherently unlikely that the exception created by paragraph 4.3(8) of the EL/PL Protocol was intended to be so broad.

20. I now deal with meaning of the phrase ‘vulnerable adult’. Sub-paragraph 1.1(20) of the EL/PL Protocol reads as follows:
- “‘vulnerable adult’ has the same meaning as in paragraph 3(5) of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ...’
21. Thus, the Protocol relies on a definition in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. That definition is as follows:
- “‘vulnerable adult’ means a person aged 18 or over whose ability to protect himself or herself from abuse is significantly impaired through physical or mental disability or illness, through old age or otherwise.’
22. I pause here to note that this is a non-exhaustive definition in the sense that it concludes with the words ‘or otherwise’; I asked Mr Fletcher whether he relied on those words, and he confirmed that he did.
23. As can be seen, the definition of ‘vulnerable adult’ is itself dependant on the definition of ‘abuse’; that word is defined in paragraph 3(5) of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in the following way:
- “‘abuse’ means physical or mental abuse, including—
- (a) sexual abuse, and
 - (b) abuse in the form of violence, neglect, maltreatment and exploitation’
24. Thus, the word ‘abuse’ includes violence, neglect, maltreatment and exploitation but not limited to such acts or omissions (this being made clear by the use of the word ‘including’); this, no doubt, is because abuse may take many forms and will tend to depend on the circumstances and the context.
25. I take a similar view as to the meaning of the phrase ‘vulnerable adult’: in particular, I believe that the question of whether a person is a ‘vulnerable adult’ will depend on the circumstances. By way of example, a woman may well be ‘vulnerable’ for the purposes of the EL/PL Protocol if she were to bring an employers’ liability claim alleging sexual abuse within her workplace, but that same person may well not be classed as being ‘vulnerable’ if she were to bring a public liability claim against a supermarket because she slipped on a grape. Put otherwise, a person’s status may change depending on the circumstances. In this regard, I note that a context-specific approach tends to apply in other circumstances in which the court considers the phrase ‘vulnerable adult’ (see, for example, *A Local Authority v (1) MA (2) NA and (3) SA* [2005] EWHC 2942 at [77] and [78], per Mumby J, which deals with the use of that phrase for the purposes of the court’s inherent jurisdiction).
26. In view of the above, I take the view that in order to bring a claim within the ‘vulnerable adult’ exception in paragraph 4.3(8) of the EL/PL Protocol, the context in which the claim is being brought must sensibly support such a conclusion. Each case will turn on its own facts, and in this regard, the court will, no doubt, to take into account the basis upon which the claim has been advanced. Indeed, in my view, the fact that paragraph 4.3(8) uses the words ‘in relation to’ means that the putative vulnerability needs, in some way, to be relevant to the claim. Clearly, if the basis of the claim is that a person had been subjected to abuse or neglect, then such a conclusion would naturally follow.

If, on the other hand, the putative vulnerability was merely incidental to the claim and is relied upon solely for the purposes of avoiding the operation of CPR, Part 45, then the opposite conclusion would tend to follow.

27. On the facts of this case, I have no hesitation in saying that the exception in paragraph 4.3(8) of the EL/PL Protocol did not apply. To his credit, Mr Fletcher recognised that he faced an uphill struggle in persuading the court that a high-risk prisoner who needed to be restrained by no less than three prison officers (and who injured one of them) would readily fall into the category of being ‘vulnerable’. He pointed out, however, that the Prisoner had recently lost his son and that he was very agitated. That may be so, but there is no evidence that this impaired his ability to protect himself from abuse, less still was there any evidence that he was *significantly* impaired in this regard.
28. Mr Fletcher said that the fact that the Prisoner was being restrained was relevant. I accept that restraint (or constraint) may, in certain circumstances, be relevant if it is done in an abusive way, but I find it impossible to characterise the lawful and proper restraint of a prisoner as being an act that makes that person into a ‘vulnerable adult’. Indeed, as Mr Joseph pointed out, the Prisoner had refused to comply with a lawful order given by a prison officer; it would be contrary to common sense to suggest that the fact that he subsequently had to be restrained should, of itself, make him ‘vulnerable’.
29. Finally, I should note that Mr Fletcher referred me to two County Court decisions. The first was *Gibbons v Rotherham, Doncaster and South Humber NHS Trust* [2019] Lexis Citation 77, an *ex tempore* decision of District Judge Hickenbottom. I did not find that decision to be particularly helpful because the defendant in that case had accepted that it involved a ‘vulnerable adult’; moreover, District Judge Hickenbottom seems to have been directed solely to paragraph 4.3(8) of the EL/PL Protocol rather than the protocol as a whole. The second was *Zlupko v Manchester City Council*, which was a transcript of a hearing before Judge Evans on 13 February 2019; I have not found that transcript to be helpful because the judge heard only very brief legal argument and, in any event, there is no approved judgment.
30. For all these reasons, I find that the exception in paragraph 4.3(8) of the EL/PL Protocol does not apply on the facts of this case.

The valuation of the claim

31. I now turn to the second issue, which is whether the Claimant unreasonably valued the claim at more than £25,000. Before I do that, however, I deal briefly with the law.
32. The claim settled by way of the acceptance of a Part 36 offer, so no judgment has been entered in favour of the Claimant; this means that I am unable to apply the provisions in CPR, r 45.24(2)(b)(ii). Nothing turns on this, however, as Mr Fletcher accepts that the Defendant is able to rely on the provisions in CPR, Part 44 to argue that Claimant’s costs should be restricted to those that would have been allowed had the claim been valued correctly. In this regard, Mr Joseph drew my attention to *Williams v Secretary of State for Business, Energy & Industrial Strategy* [2018] EWCA Civ 852, in which Coulson LJ had this to say (at [52]):

‘These provisions [namely, CPR, rr 44.2 and 44.11] contain numerous ways in which a party whose conduct has been unreasonable can be penalised in costs (what I shall call “the Part 44 conduct provisions”). In my view, the Part 44 conduct provisions provide a complete answer to a case like this. They provide ample scope for a District Judge or a Costs Judge, when assessing the costs in a claim which was unreasonably made outside the EL/PL Protocol, to allow only the fixed costs set out in the EL/PL Protocol.’

33. In view of this, the only issue I have to decide is a question of fact, namely whether the Claimant unreasonably valued the claim at more than £25,000.

34. In his statement dated 23 October 2017, the solicitor with conduct of the Claimant’s claim (Mr Reynolds) had this to say:

‘Taking into account the claimant's injuries and potential financial losses it would have been reasonable to assess his general damages in the region of £11,200 to £16,830. In terms of special damages the claimant was aged 53 [sic] at the date of his assault. As a Prison Officer he was earning in the region of £23,000-00 per year, therefore there was a potential loss of earnings to retirement age of up to £276,000-00 (not accounting for multipliers and residual earning capacity). In addition there was a potential pension loss claim. In the circumstances, it was entirely reasonable at the commencement of the claim to conclude that the value of the claim would exceed £25,000-00.’

35. Put otherwise, Mr Reynolds says that the claim could have been valued on a full-liability basis at considerably more than £25,000.

36. I pause here to say that Mr Reynolds was not the fee earner with conduct of the file at the time that the letter of claim was sent (which, in my view, is the relevant point in time). In view of this, I read the Claimant’s entire file for the purposes of forming my own view on the matter. I did this in the presence of the parties but without putting the Claimant to his election; Mr Joseph sensibly did not object to this.

37. Mr Joseph had a number of points to make. The first arose out of the fact that the Claimant had said in the letter of claim that the PI Protocol applied. He said that this was relevant because that protocol applies only to fast track claims (the implication being that if the claim was suitable for the fast track, then it would also have been suitable for EL/PL Protocol). I do not accept that submission. This is because paragraph 1.1.1 reads as follows (with my emphasis):

‘This Protocol is primarily designed for personal injury claims which are likely to be allocated to the fast track ...’

38. This, to my mind, does not exclude claims that are destined for the multi-track; indeed, in my experience, the PI Protocol is almost universally applied to such claims.

39. Mr Joseph also pointed to paragraph 1.1.2, which read as follows:

‘If at any stage the claimant values the claim at more than the upper limit of the fast track, the claimant should notify the defendant as soon as possible.’

40. It is common ground that the Claimant did not notify the Defendant that the claim was valued at more than £25,000, but I do not believe that anything turns on this. At most, this was breach of the PI Protocol (and a fairly minor one at that in the context of the other information in the letter of claim). I do not believe that this sheds much light on the issue of whether the Claimant unreasonably valued the claim at more than £25,000.
41. Mr Joseph's next point was to remind me of the fact that the Claim Form in its original form said that the value of the claim was limited to £5,000. In this regard, Mr Joseph was on stronger ground as it is clearly difficult to reconcile this with the fact that the Claimant had putatively valued the claim at more than £25,000 only a few months previously. This is something that, in my view, calls for an explanation.
42. In his statement dated 13 June 2019 (at [10]), Mr Reynolds had this to say:

‘There was no intention to mislead the court or to undervalue the claim. With hindsight I could have issued the case with a valuation of up to £50,000-00, however, I was mindful that I was protectively issuing the proceedings, I did not have my medical evidence, there were liability and causation difficulties and the future loss of earnings and pension loss would be significant and required Counsel's input following a conference. Prior to service of the proceedings these issues were reviewed in conference and by that stage it had become clear that due to the legal causation difficulties meant [sic] that the claim no longer had reasonable prospects of success if early settlement could not be achieved.’
43. I was not entirely satisfied with this explanation, but having reviewed the file, I can see that it confirms that Mr Reynolds is entirely right to imply that there was an intention to review the endorsement as to value once the Claimant had received his expert evidence and once counsel had advised in conference. In view of this, I accept Mr Reynolds's explanation.
44. Mr Joseph's next point was to point to the fact that the Claimant accepted a Part 36 offer of only £15,000; this, he said, implied that the true value of the claim was less than £25,000. I can deal with this very briefly as I can see that file confirms Mr Reynolds' evidence, namely, that the Claimant accepted the Defendant's offer because he had concerns about whether he would succeed on liability. As such, the fact that the offer was accepted sheds little light on the Claimant's full-liability valuation of the claim.
45. For all these reasons, the points made by Mr Joseph fail. In any event, having seen the relevant attendances notes and solicitor-and-client correspondence, I am quite satisfied that at the time that the letter of claim was written the Claimant reasonably valued the claim on a full-liability basis at considerably more than £25,000. It is fair to say that there is no note or calculation that expressly records this, but the Claimant's solicitors did record the fact that the claim potentially included a claim for future loss of earnings. Multiplicands are recorded in this regard, and as a matter of simple arithmetic, it is easy to conclude that on a full-liability basis, the claim was worth considerably more than £25,000.
46. For all these reasons, I find that the Claimant did not unreasonably value the claim at more than £25,000.

Misconduct

47. During the course of the hearing, Mr Joseph made an application under CPR, r 44.11. That application was that the Claimant had acted unreasonably and or improperly by endorsing the Claim Form with a value of less than £5,000 in circumstances in which the Claimant's solicitors believed that the value of the claim was likely to be considerably more. In essence, Mr Joseph said that the Claimant (or, more accurately, his solicitors) had attempted to mislead both the court and the Defendant. I should record that I allowed Mr Joseph to make that application because it was based on information that came to light only during the course of the hearing itself.
48. I did not need to hear from Mr Fletcher on this point. This is because, in my view, the conduct complained of was not misconduct (or even close to being misconduct). I do not believe that there was any intention to mislead anyone, this being because the Claimant's solicitors had at all material times intended to review and revise the Claim Form once they had received the expert's report and taken counsel's advice. The impression I got from the papers was that the Claim Form was a holding measure. In any event, Mr Fletcher is right in saying that the Claimant could not have been misled as to the true value of the claim, this being because the Claim Form had already been amended before being served.

Conclusion

49. In view of the above, I find that the costs should be assessed without reference to CPR, Part 45. The parties have agreed that I ought to provisionally assess those costs.