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DEVON CHAMBERS

3 St. Andrew Street,
Plymouth PL1 2AH
DX 8290 Plymouth 2

T. 01752 661659
F. 01752 601346
E. info@devonchambers.co.uk
W. www.devonchambers.co.uk

PERSONAL INJURY UPDATE

A concise, practical update, for the busy practitioner

COSTS, and the winner is….

Medway v Marcus [2011] EWCA Civ 750

SUMMARY

- This is yet another case where the court has considered who really won.
- The substantive claim concerned clinical negligence.
- The case was pleaded at about £750,000.
- Quantum was agreed at £525,000.
- At trial, the Claimant was awarded £2,000.
- The Defendant had made no offers.
- On appeal, the Defendant was awarded 75% of their costs.

THE FACTS

- The Claimant contracted a very unusual condition in his lower leg.
- Arteries became blocked and the leg was amputated below the knee.

- C claimed that the First Defendant GP failed to treat the condition properly.
- C claimed the Second Defendant locum GP failed to diagnose the condition.
- If the doctors had not been negligent, his leg would have been saved.

- The locum (D2) admitted breach of duty in his Defence.
- This was his first opportunity, since there had been no pre-action protocol letter.
- The Claimant had not been at fault in this regard.

- The GP (D1) denied that the breach of duty had caused the Claimant's loss.
- Specifically, the suggested treatment would not have prevented the amputation.
- Following a meeting of experts, breach of duty was admitted, 2 days before trial.

- In essence, the Claimant lost the trial on causation.
- C contended for modest damages for additional pain before the amputation.

- C was awarded £2,000 for this, being about 0.25% of the sum claimed.

- On costs, the deputy High Court Judge concluded that C was the successful party.
- He took into account the late admission, and the denial of causation.
- The damages were not nominal and C had not exaggerated his claim.
- The Defendants had succeeded on the most important issue.
- Neither Defendant had made an admissible offer.
- The Claimant was awarded 50% of his costs.
- It had been open to the Defendants to make a Part 36 offer.

ON APPEAL

- It was wrong in principle to conclude that C was the successful party.
- The damages were insignificant in the context of a claim for the loss of a leg.
- It was a last minute addition to salvage something from an action which C lost.
- When the Claim Form was served, the costs probably exceeded £100,000.
- If the Defendants had made a Part 36 offer they would have faced those costs.
- The failure to make a Part 36 offer was of no consequence, a technical triviality.

NOTE

- Costs cases are notoriously fact sensitive.
- This case does not represent a tectonic shift in this area of law.
- It is a move away from “who writes the cheque,” back towards “the real winner”.
- This case increases the uncertainty surrounding Part 36 and offers in general.

- The Defendants could have made a Part 36 offer then challenged the bill of costs.
- Alternatively, a *Calderbank* offer in terms of damages and costs.

- There is an urgent need for clarity and certainty in this important area of law.

Our Personal Injury Team:

Stuart Frampton

Russell James

Edward Bailey

Matthew Dors

Nicola Isaacs

This update prepared by: Stuart Frampton

Telephone 01752 661659
Fax 01752 601346
DX 8290 Plymouth 2
Email clerks: peterdadge@devonchambers.co.uk

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