Fair cost outcomes and late part 36 offers

The Court of Appeal's decision to allow full cost recovery in a case where a part 36 offer was accepted two years later will have undesirable consequences, says **Simon Gibbs**

The ruling in the case of *SG v Hewitt* [2012] EWCA Civ 1053 (see www.solicitorsjournal.com/node/13839) represents an interesting development as to the approach courts should take as to liability for costs.

The case concerned a child who had suffered a severe head injury and brought a claim for damages. At an early stage in the claim the defendant made a part 36 offer in settlement. At this stage, the medical experts did not consider a long-term medical prognosis could be given. Given the same, counsel instructed to advise on settlement did not feel in a position to give a firm advice as to whether the offer should be accepted or rejected. The offer was subsequently accepted two years later once the medical condition had crystallised.

The issue arose as to whether the normal costs rule should apply, with the claimant being responsible for the defendant's costs after the time for acceptance of the offer had expired. The Court of Appeal decided it would be unjust to follow the normal rule and therefore ruled that the claimant should recover costs in full.

Normal rule unjust

At one level this decision is entirely unsurprising. Taken from first principles, it must be accepted that the purpose of the civil justice system is not only to enable claimants to recover an appropriate level of damages to reflect their injuries but also to enable those claimants to recover the reasonable legal costs of establishing the extent of such injuries. If further medical investigation is required to properly quantify the appropriate level of damages then the defendant should be liable for the same. On this analysis it would be wrong for a defendant to avoid the full costs of such investigations simply by virtue of making an early tactical offer.

The issue is, however, not quite so straightforward. Firstly, the decision largely runs contrary to the earlier decision in *Matthews (a patient) v Metal Improvements Co Inc* [2007] EWCA Civ 215 which recognised that "a defendant may quite properly make a low [offer] in the hope that events or evidence will favour him: for example...that a prognosis of the claimant's injuries which are the subject of his claim will prove over-pessimistic".

When defendants complain about disproportionate costs, the common response is that the fault lies at the door of defendants and their representatives. The argument goes that defendants should make reasonable offers at a much earlier stage and thereby avoided further costs being incurred. This decision though, at least on the facts of the particular case, removes the ability of defendants to give themselves such costs protection.

Black LJ sought to emphasise that costs decisions are fact sensitive and the facts here were unlikely to be replicated precisely in another case, such that the result in other cases should differ from the result here. Though this appears to be an attempt to limit the impact of this decision, the reality is that claimant practitioners will seek to find sufficient similarities in other matters to produce the same outcome.

Claimant status

One of the difficulties with this decision is that the judgments of the different judges do not appear to agree on the extent to which it was relevant that the claimant was a child and any settlement would require the court's approval. To an extent, of course, it is difficult to see what difference the status of a claimant should make. If the purpose of the system is to ensure that injured parties are adequately compensated, then that should apply equally whether or not a claimant is an infant. If uncertainty of prognosis is sufficient to rebut the normal rule, it should do so in all cases.

In the event, the part 36 offer made by the defendant proved to be a generous one that almost certainly overcompensated the claimant. Defendants may be willing to make offers that ultimately prove to be over generous if they believe the offer affords them costs protection. If it is now the case that in similar circumstances no such protection is afforded, then defendants will almost certainly not make early offers. It must be questioned as to whether this would represent a positive step forward in the conduct of such litigation.

From April 2013 claimants who make successful part 36 offers will benefit from a 10 per cent uplift to their damages. However, if in cases such as this a defendant cannot benefit from part 36 offers, surely it cannot be right that claimants can. Not only is this therefore likely to undermine the advantages of the part 36 regime but it will also increase satellite litigation over whether a claimant or defendant, as the case may be, should have been allowed to make an effective part 36 offer.

One fears that an attempt to produce a fair outcome in the facts of this case will have unintended, and undesirable, consequences in other cases.

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