

Determining cost liability in multi handed cases (Jabang v Wadman 2017)

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Dispute Resolution analysis: Costs advocate Alex Bagnall of Just Costs Solicitors comments on what lessons can be learned from a recent case relating to the cost liability of an unsuccessful defendant in a multi handed case and considers the wider implications for these types of cases.

Original news

Jabang v Wadman and others [\[2017\] EWHC 1993 \(QB\)](#)

The claimant brought a clinical negligence claim against five different defendants. He alleged that some of the doctors he consulted were negligent because of their failure to take sufficient care to investigate or identify the cause of his pain. Following a contested trial, he succeeded in his claim against only one defendant (his GP). The trial judge made a *Bullock* order against the unsuccessful defendant ordering him to indemnify the claimant against this costs liability to the successful defendants. The judge also ruled that even though only about 70% of the claim succeeded it was nevertheless appropriate to order the GP defendant to pay all the claimant's costs with neither reduction nor issue based costs orders being appropriate.

What is the significance of this case? Why is it important for practitioners?

Firstly, to set the scene in context, this was a claim for clinical negligence. In 2011 the claimant woke up with severe pain across his back, he was infected with spinal tuberculosis. Over four months he consulted many doctors but none of them identified spinal TB as the cause of his pain. In January 2012 he left for the Gambia but returned to the UK in May 2012 where he had to be taken immediately to the hospital. By then the disease had progressed to a point where it could not be effectively treated. He is now paraplegic and unable to walk or to work. The claimant brought a claim against five different defendants and alleged that some of the doctors he consulted were negligent because of their failure to take sufficient care to investigate or to identify the cause of his pain. However, following a contested trial, he succeeded in his claim against the second defendant (his GP) only.

The claims against the NHS Trust and two other individual doctor defendants were wholly unsuccessful. Shortly before trial the claimant had discontinued his claim against another doctor defendant. The judge had to decide whether to make a *Bullock* order for costs in relation to the unsuccessful defendant (*Bullock v London General Omnibus Ltd* [1904-7] All ER Rep 44). If a *Bullock* order was made, then not only would the unsuccessful second defendant have to pay the claimant's costs but he would also have to indemnify the claimant for his liability to pay the costs of the third and fourth defendants too.

The judge made a *Bullock* order in these terms:

- the second defendant must pay all of the claimant's costs as assessed or agreed
- the claimant must pay the costs of the third, fourth and fifth defendants
- the second defendant must indemnify the claimant for his liability for the third, fourth and fifth defendants' costs

The judgment provides a concise overview of the costs principles which are to be applied where a party who is successful against some, but not all, of his opponents.

How helpful is this judgment in clarifying the law in this area? Are there any remaining grey areas?

Bullock orders were developed in the early twentieth century as a means of avoiding injustice where a claimant properly sued more than one defendant but does not succeed against each. Such an order provides an indemnity to a claimant for the costs payable to the successful defendants from the unsuccessful defendant or defendants. They are similar to *Sanderson* orders (*Sanderson v Blyth Theatre Co* [\[1903\] 2 KB 533](#)), the result of which is that the costs of the successful defendants are paid directly by the unsuccessful defendant and which are most often seen where the claimant is legally aided.

There has never been any doubt that *Bullock* orders survived the introduction of Civil Procedure Rules 1998, [SI 1998/3132](#). However, in *Whitehead v Searle* [\[2007\] EWHC 2046 \(QB\)](#) Griffiths Williams J appeared to restrict the scope of such orders to 'cases where the claimant does not know which party is at fault'.

The judgment in *Jabang* makes it clear that the scope of *Bullock* orders is not restricted to those cases. Rather, the test is whether a claimant behaved reasonably in suing the successful defendants.

What are the practical implications of the judgment? What should practitioners be mindful of when advising in this area?

A claimant can still in principle get his costs against an unsuccessful defendant in a multi handed case. Here also the claimant got his full costs against the second defendant even though the trial judge found he only succeeded on 70% of claim which he said was 'not negligible' but rather had 'occupied a minimal proportion of the time spent' at trial.

One of the successful defendants was a partner in the GP's practice with the unsuccessful defendant, so this costs judgment is one in principle only. This is because the judge foresaw issues this could cause. Despite the availability of *Bullock* orders, this is still no substitute for proper pre-action investigation of claim and seeking to identify the correct defendants and eliminate those who are clearly not culpable.

That said, one argument raised by the claimant here which found favour with the court in relation to the question of whether the claimant should pay any costs was that, if the unsuccessful defendant had accepted liability at an early stage, all of the costs associated with pursuing the successful defendants would have been avoided.

How does this case fit in with other developments in this area of the law? Do you have any predictions for future developments in this area?

Jabang serves to further emphasise the scope of a court's discretion when issues as to costs come to be decided.

Bullock orders are commonly found in personal injury and clinical negligence cases where pre-action liability investigations can be complex and often fail to identify a clear wrongdoer. It remains to be seen how, if at all, these difficulties will be reflected in any extension to fixed recoverable costs which arises out of the recent report of Lord Justice Jackson.

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