



## POLICE LAW BRIEFING

In the latest Police Law Briefing Julian Walters and Lisa Dobie discuss a novel extension of the employer's duty of care, and the application of QOCS to police malfeasance claims.

### Court of Appeal holds that defendants may owe a duty to safeguard their employees' reputations conducting litigation.

In a remarkable decision with far reaching implications, the Court of Appeal held that the Metropolitan Police Commissioner had arguably owed and breached a duty of care to police officers when he settled a claim brought against him, vicariously, for an assault allegedly perpetrated by those officers (see *James-Bowen v Commissioner of Police for the Metropolis* [2016] EWCA Civ 1217).

The case arose out of the arrest of a terrorist suspect in which the claimant officers took part. The suspect alleged that he had been seriously assaulted by the officers and brought a claim against the Commissioner of Police for the Metropolis ("the Commissioner") on the grounds that he was vicariously liable. The officers themselves were not sued. The officers refused to give evidence on behalf of the Commissioner unless their identities were protected by screens, but the trial court refused an application for such measures to be put in place. Two days in to the assault trial the Commissioner compromised the litigation on terms which involved an admission of most of the allegations of violence and included a public apology.

The claimant officers alleged that the defence of the claim had been conducted negligently and sought damages for reputational, economic and psychiatric harm which they had allegedly suffered.

The Court of Appeal rejected the officers' arguments that the Commissioner's lawyers had owed them a duty of care because of statements

made by counsel and a solicitor at a conference that the legal team was acting in their interests - such statements did not create a contract of retainer when it was plain that the officers had attended the meeting in the capacity of witnesses, not parties, to the litigation; the statements did not evidence an intention to enter legal relations.

The Court also struck out the claims for psychiatric injury on the basis that such harm was not reasonably foreseeable.

However, the Court allowed the claims for reputational and economic damage to proceed. It was arguable that a duty of trust and confidence, of a type implied into employment contracts, existed between a chief constable and his officers in tort. Although there had been no previous case where it had been held that an employer owed a duty of care to his employee in the conduct of litigation, it was arguable that it might be fair just and reasonable to impose such a duty and it was arguable that the Commissioner had owed the officers a duty to "take reasonable care not to sacrifice their interests and professional reputations without good reason and without giving them reasonable warning of what he intended to do."

**Comment:** The Court of Appeal recognised that the starting point is that a party to litigation is entitled, provided he complies with any relevant procedural requirements, to conduct litigation in whatever way he thinks best serves his interests. This is surely right: after all, it is the party who has to pay and of course he has his own reputation and interests to protect. More controversial is the Court's decision

that this is not also the stopping point. The decision seems likely to make it harder for defendants to settle cases involving allegations of misconduct. This is not just likely to affect cases involving the police, but, for example, cases involving allegations of historic child abuse, or even cases involving allegations of professional incompetence. In most, if not all cases, even if there is no actual conflict there is *potential* conflict between the interests of an employee and the employer and the potential for conflict is usually in itself an indicator against a duty of care being owed (see *D v East Berkshire* [2005] UKHL 23). The Supreme Court has now granted the Defendant permission to appeal.

Julian Walters

### QOCS and Police Cases

Where a police claim includes a claim for personal injury, such as a claim for an assault or causing a psychiatric injury of some kind, then QOCS will apply. After all, it is a claim which ‘includes a claim for personal injury’.

But this seems somewhat unjust in circumstances where a claim has had the benefit of a multiple day jury trial and sought (on their best case) tens of thousands of pounds for alleged malfeasance with claims for aggravated and exemplary damages thrown in. By way of extreme example, what if the only personal injury related to bruising from handcuffs?

Well, CPR 44.16(2)(b) may be the answer. The exceptions to QOCS are set out in 44.16, but very little has been said or written about the 44.16(2)(b).

#### ***Exceptions to qualified one-way costs shifting where permission required***

**44.16** (1) Orders for costs made against the claimant may be enforced to the full extent of such

*orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.*

*(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where—*

*(a) .....*

*(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.*

I confess to not paying this provision much attention. The wording of this paragraph (and the intention behind it) is not particularly clear. One could interpret it to mean, then it only applies where a claim does not include a claim for personal injuries, in which case, you aren’t in the QOCS regime, so what is the point?

However, guidance can be found in “*Costs and funding following the civil justice reforms: questions and answers*” that accompanies the 2016 White Book. It states as follows:

#### **6-12**

*CPR 44.16 applies in two types of claims. The one which has received less attention is the second (CPR 44.16(2)(b)), namely where a claim is made “for the benefit of the claimant other than a claim to which this Section applies”. This is intended to cover claims where the beneficiary of the claim is the claimant, but the claimant’s claim is only partially a personal injury claim (the classic example being a housing disrepair claim where there may be a claim for personal injuries as part of a wider claim).*

*By virtue of CPR 44.16(2) the mere fact that procedurally, the claim as a whole is deemed a personal injury claim, because it includes a claim for damages for personal injury, does not prevent the court disapplying QOCS, to the*

*extent just. Commonly, this is likely to be used so that the court can allow full enforcement of adverse costs orders in relation to that part of the claim which was not a personal injury claim, and is likely to be used in cases where the personal injury claim is viewed as being the more modest or less complex part of the claim. An example might be a professional negligence claim which included an ancillary claim for damages for personal injury.*

*At paragraph 6-15 of the same guidance, it notes that "In practice, it is likely that the court will seek to identify the true nature of the claim. Where the personal injury claim was dominant and the 'additional claim' a modest ancillary part which is unlikely to have significantly increased the costs then the court may decide not to allow any enforcement beyond CPR 44.14. Where the 'additional claim' was dominant, then the court may allow full enforcement. Perhaps more commonly, the court may seek to identify, by percentage, date or in some other way, the 'additional claim' and allow enforcement in that regard accordingly.*

There are no reported cases relating to CPR 44.16 (2)(b). Some obiter comments are made in [Howe v MIB \[2016\] EWHC 884](#) as to why it would not be applicable in that case. But a brief analysis of that case reveals clearly why, in that case, the claim for a declaration would not have added anything beyond the alleged claim for personal injury (had the court deemed it to be a personal injury claim, which it did not - I note that this point is the subject of an appeal).

Thus it seems to me that this is fertile ground to run this costs argument. I ran this point in a recent police case following an 8 day jury trial. The claim included claims for false imprisonment, malicious prosecution, misfeasance, assault and aggravated and exemplary damages. It also included a claim for personal injury on the basis that the Claimant's pre-existing psychiatric condition was exacerbated for 18 months. The PI element at trial took

approximately 15 minutes and consisted of reading out two paragraphs of a joint psychiatric report to the jury which summarised the personal injury. All of the claims were dismissed and the Claimant argued that QOCS applied. Pursuant to 44.16(2)(b) the Defendant was permitted to enforce 70% of its costs.

The Claimant has now been granted permission to appeal to the High Court. The appeal is expected to be heard in May 2017

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### Meet the Authors



**Julian Walters** specialises in claims involving the police, including unlawful arrest, malicious prosecution and challenges to warrants; libel and slander. He is listed as a leading junior in the legal directories



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