

Dolmans Insurance Bulletin

Welcome to the February 2010 edition of
the Dolmans Insurance Bulletin

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- Training Opportunities: Details on tailor-made training seminars aimed at Local Authorities, their Brokers, Claims Handlers and Insurers.
- Employment Briefing and Workshops: Overview on employment briefings and half day workshops.

A DATE FOR YOUR DIARIES.....

Dolmans Defendant Litigation Team's ever popular Key Note Seminar will be held on 17 June 2010 at the Vale of Glamorgan Hotel. Attendance is free and further details will follow shortly.

June 2010						
SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
6	7	8	9	10	11	12
13	14	15	16	17 ★	18	19
20	21	22	23	24	25	26
27	28	29	30			

If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor, **Justin Harris, Partner**, at justinh@dolmans.co.uk

DOLMANS REPORT ON

LIABILITY FOR CHILD IMPALED ON LOCKED PARK GATES?

Bonita Arlett (a minor) v Newport City Council

His Honour Judge Masterman recently dismissed the claim of a teenage girl arising out of an incident when, aged 13, she became impaled on the spikes of a gate of a Newport City Council park into which she had been locked. The Judge described the injury as being one that would cause anyone who heard about it to take a sharp 'intake of breath'.

We anticipate that this case will be of interest to Local Authorities as it dealt with a commonplace scenario of spiked fencing surrounding public parks and the difficulties of locking up such public parks over night with the risk that members of the public, including children, may be locked in.



Circumstances

On the day in question the claimant and her friend had been visiting Beechwood Park all afternoon during the Easter school holidays. It is a large park with 10 gates. At about 8pm they walked another friend to the Chepstow Road gate of the park so that she could catch a bus close to that particular entrance. This gate was open and the claimant and her friend dropped off their friend and turned back into the park to walk to Tennyson Road gate which was

approximately 5 minutes away. When they reached Tennyson Road gate from which they intended to exit the park they found that it was locked. They decided to climb over the gate and whilst doing so the claimant impaled herself on the spikes on top of the gate suffering significant injury.

Allegations

The claimant, by her father and litigation friend, alleged that the Council were responsible for her injuries under the Occupiers Liability Act 1957 and/or in negligence in failing to give any, or any adequate, warning of the closure of the park either by employees circulating the park notifying the public or in the form of adequate signs. Her case was that she was not warned that the gates were going to be locked and having been locked in she had no option but to attempt to scale the gate with spikes on.

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Defendant's position

The park is surrounded by an iron fence the majority of which has spikes situated on the top of it. The gates of the park are locked at dusk everyday in an attempt to prevent vandalism to the park and to keep the public safe.

The council's ranger who locks the gates walks around the park informing any occupants that he sees that the park is about to be locked. Further there are signs on a number of the 10 gates to the park indicating that the park closes 'at dusk' but without providing any timing. The gate which the claimant usually used and through which she was trying to exit when the accident occurred did have a sign but it was in very poor condition and was not legible.



In addition two small pedestrian gates to the park were always left open. The claimant denied that she was aware of their existence.

The council's evidence was that on the evening in question the ranger had walked around the park locking the gates warning anyone he saw that the park was closing. He locked the gate in question at approximately 8.15pm and then went on to lock the Chepstow Road gate. However, the claimant denied that she had seen any ranger on that evening or that she had been warned that the park was about to close.

There were some concerns for the council as it became clear that the council's ranger should have come across the claimant whilst locking up the park if they had indeed each taken the route that they say they did.

Further the claimant had a witness who indicated that the pedestrian gate usually left open was not in fact open on that night.

Cross-examination of the minor claimant and her friend

The claimant and her friend both gave evidence and were cross-examined in detail, albeit sensitively. In particular it was put to her that she was in a hurry as she was late getting home. Although she conceded that her mother had already called her on her mobile she said that was to remind her that she had to be home by 8.30pm and was not to tell her that she was late or to warn her that she might get locked into the park.

She was asked about her use of the park and knowledge about its closing time. She conceded that she had used the other entrances of the park upon which legible signs

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that it closed 'at dusk' were placed. Indeed her friend conceded that she knew the time that the park closed.

She was asked why she did not return to the Chepstow Road gate which had been open a few minutes previously. She said that she assumed that it would have been locked by that point. However, she did concede that the Chepstow Road gate would have been much easier to climb over as it had areas with no spikes on. In addition, she was asked why she chose not to call her mother on her mobile phone for assistance when she realised that she had been locked out.

The claimant did say that had there been an emergency number on the sign then she would have called it or that if there was a map on the gate showing where the gates were that were always kept open then she would have walked to one of these gates. However the Judge did not accept this as it contradicted her failure to call her own mother for assistance and her failure to walk to another gate which she knew had been open only a short time previously.

Further, the claimant and her friend both conceded that they were aware of the risk in climbing the gate.

Decision

In dismissing the claim HHJ Masterman came to the view that as the claimant was in a hurry she chose to climb over the gate knowing of the risks rather than attempting to ascertain if there was another safer method of exiting the park or telephoning for help. The Judge did find it difficult to reconcile the evidence of the claimant with that of the council's witnesses as the ranger should have come across the claimant in light of the routes that they each took. However the Judge accepted the evidence of the ranger and found that in any event



none of the alleged breaches of duty were causative of the incident as it was clear that the claimant was going to climb over the gates regardless of the alternatives available to her. Further HHJ Masterman considered that the system in place was sufficient.

The Judge's decision to dismiss the claim was made much easier due to the significant concessions that the claimant and her friend made as a result of lengthy but very careful cross-examination at the Trial.

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Comment

This case really highlights the need for sensitive but detailed cross-examination of minors in cases where they are of a sufficient age to be able to make important decisions themselves.

Further, this is another example of where in Occupiers Liability cases the court is not looking for a system that rules out the possibility of all danger arising but just requires a reasonable system to be in place. There are of course all sorts of fairly inexpensive improvements that the council could have made to the system such as using whistles or a loud speaker system to warn of the closing of the park, installing new signs with emergency telephone numbers, and providing information about which gates are left open. The list could go on. However the Judge did not explore these options in any detail but instead was prepared to accept that the considered system that the council had put in place was a reasonable one and therefore sufficient to avoid liability.



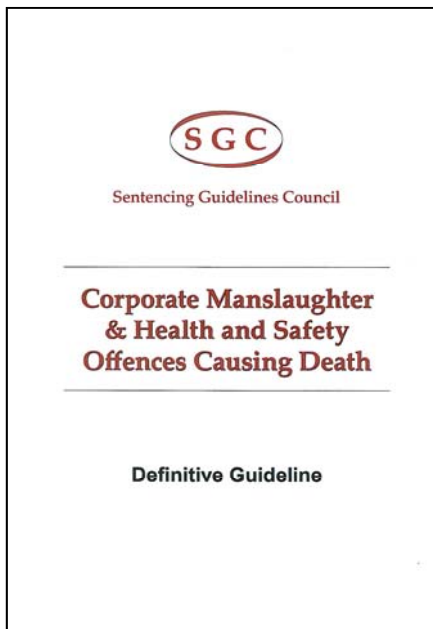
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DOLMANS FOCUS ON

SENTENCING GUIDELINES ISSUED IN RELATION TO CORPORATE MANSLAUGHTER

Readers of this publication will recollect previous discussion of the consultation process being undertaken in respect of the sentencing guidelines for convictions of the offence of Corporate Manslaughter. That process has now, at long last, borne fruit and the resultant sentencing guidelines came into effect on 15 February 2010. A copy of the guidelines can either be obtained from the relevant website (www.sentencing-guidelines.gov.uk) or from the Writer via the email address below.



The entire guidelines are not a lengthy document (16 pages effectively) and we would recommend that anyone with a potential interest in this area reads them as any article on the subject can only convey so much information without, in effect, regurgitating the guidelines themselves.

Background

Readers of our previous articles on this subject and anyone who attended one of Dolmans Corporate Manslaughter seminars in 2008-2009 will be aware of the concern expressed, during the inception of the Act, by representative organisations such as the TUC, that the penalties contemplated by the Act were purely financial and therefore, the perception that insufficient punishment could be issued to guilty parties.

Certain Trade Unions, for example, have continued to make clear their dissatisfaction with the lack of imprisonment as an appropriate penalty for Directors and Senior Managers involved in the commission of an offence of Corporate Manslaughter.

It is clear that the sentencing guidelines are intended, in part, to address such concerns. In particular, it is now very clear that any conviction under this statute will entail a very serious financial penalty, regardless of the size and financial status of the organisation involved. Indeed, it is specifically contemplated by the guidelines that the size of fine, in a particular case, may nevertheless be appropriate even if it brings about the demise of the Defendant company.

Fines

Predictably, the sentencing guidelines do not establish “tariffs” for fines or stipulate a range of “suggested” or “suitable” fines. To do so would fetter the discretion of the Trial

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Judge to an inappropriate extent and would also, it is submitted, prove to provide an unworkable system as offences of this nature are largely impossible to categorise.

Accordingly, whilst the sentencing guidelines provide some welcome further clarity in the context of the level of fine to be imposed, until a number of cases have passed through the Courts, it will be difficult to provide advice as to the likely level of fine to be imposed in given circumstances.

*“The offence of corporate manslaughter, because it requires gross breach at a senior level, will ordinarily involve a level of seriousness significantly greater than a health and safety offence. The appropriate fine will seldom be less than **£500,000** and may be measured in **millions of pounds.**”*

The above quote is as close as the new guidelines come to specifying a “bracket” for fines arising from this offence.

The reality appears to be that fines will be significant indeed. Interestingly, the guidelines expressly exclude any linkage between the level of fine and turnover of the organisation concerned.

At one stage it was thought that turnover would provide some kind of reference point for the fixing of fines, this is now expressly excluded. This is potentially of some comfort to corporate organisations; however, in the context of public sector organisations, the removal of this linkage tends to limit the extent of argument available in terms of fines. Some specific elements of mitigation are afforded to public sector organisations, however (see below).

Aggravation v Mitigation

As with any offence, the aggravating and/or mitigating features of the Defendant’s conduct will have a significant effect upon the nature and level of penalty. The guidelines, very usefully, set out (NB: non exhaustive) lists of aggravating and mitigating features.

In the usual manner, it is anticipated that the prosecution will seek to set out the factual circumstances which are said to aggravate and/or mitigate in terms of the offence and the defence is expected, via the appropriate “*Friskies Schedule*” to set out the manner in which these factual elements of the offence are agreed or disputed.

The main aggravating features of an offence (in all likelihood leading to an increased fine) are –

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- (a) **How foreseeable was serious injury?** The more foreseeable it was, the graver usually will be the offence.
- (b) **How far short of the applicable standard did the defendant fall?**
- (c) **How common is this kind of breach in this organisation?** How widespread was the non-compliance? Was it isolated in extent or indicative of a systematic departure from good practice across the defendant's operations?
- (d) **How far up the organisation does the breach go?** Usually, the higher up the responsibility for the breach, the more serious the offence.

Conversely, the main mitigating features (potentially leading to a reduced fine) are –

- (a) **prompt acceptance of responsibility;**
- (b) **high level of co-operation with the investigation, beyond that which will always be expected;**
- (c) **genuine efforts to remedy the defect;**
- (d) **good health and safety record;**
- (e) **responsible attitude to health and safety, such as the commissioning of expert advice or the consultation of employees or others affected by the organisation's activities.**

In assessing the level of a fine, the Court is also required to consider (i.e. these factors may negatively affect the fine, positively affect the fine or be of no material relevance, dependent upon discrete factual issues intrinsic to a particular case) –

- (i) **the effect on the employment of the innocent may be relevant;**
- (ii) **any effect upon shareholders will, however, not normally be relevant; those who invest in and finance a company take the risk that its management will result in financial loss;**
- (iii) **the effect on directors will not, likewise, normally be relevant;**
- (iv) **nor would it ordinarily be relevant that the prices charged by the defendant might in consequence be raised, at least unless the defendant is a monopoly supplier of public services;**
- (v) **the effect upon the provision of services to the public will be relevant; although a public organisation such as a local authority, hospital trust or police force must be treated the same as a commercial company where the standards of behaviour to be expected are concerned, and must suffer a punitive fine for breach of them, but a different approach to determining the level of fine may well be justified;**

Paragraph (v) is obviously the most interesting to those involved in the public sector. It appears to suggest that any fine imposed upon a public sector organisation will have regard to the duty of that organisation to provide services elsewhere and, conceivably, could be influenced by evidence that an inability to provide such services may result from a particular level of fine. At the same time, however, it is abundantly clear that any fine imposed will still need to meet the underlying requirement of being genuinely

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punitive (and therefore of deterrent effect to others).

Publicity Orders & Remedial Orders

A new feature of the legislation is the concept of Publicity Orders and/or Remedial Orders. The guidelines place these 2 additional penalties into an interesting hierarchy which appears to greatly enhance the likelihood of Publicity Orders in most cases and, at the same time, diminish the likelihood of Remedial Orders in the context of organisations with a defined health & safety system.

However, there is a “sting in the tail” in that this analysis is upon the basis that Remedial Orders are to be utilised only in situations which do not fall within the following –

“A defendant ought by the time of sentencing to have remedied any specific failings involved in the offence and if it has not will be deprived of significant mitigation”.

Thus, a Remedial Order is seen, in effect, as a Judicial tool to effect changes which ought to have already taken place; thus, the “cost” of those changes will, presumably, have already been incurred. However, it is important to consider that this approach to Remedial Orders does allow Defendants to implement changes on their own terms (at least initially); although care will be needed to ensure that these changes are sufficiently wide reaching to ensure that there can be no argument as to insufficiency later. As can be seen from the above quote, such an argument is likely to give rise to a “double whammy” in that a Remedial Order is likely to be imposed and the mitigation ordinarily afforded by such actions will have been negated entirely.



Publicity Orders are clearly seen as being required in the vast majority of cases, regardless of the position in terms of any fine. In particular, the guidelines state –

“(Publicity Orders) should ordinarily be imposed in a case of corporate manslaughter. The object is deterrence and punishment.”

Pursuant to the sentencing guidelines, the Court is reminded that it is entitled to stipulate such requirements as the size of the advertisement required by the Publicity Order, the wording to be used and the identity of the newspapers involved and/or the number of insertions required.

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The guidelines envisage that the prosecution arrive at Court with a proposed wording in respect of the advertisement(s) to be inserted. Ominously, there is no specific requirement within the guidelines for the Court to hear from the Defendant as to the proposed or actual wording of such advertisements.

Generally

The new sentencing guidelines in respect of Corporate Manslaughter offences continue to expand knowledge in terms of how these offences are likely to be treated by the Court. Given the stern words within the guidelines concerning the level of fines (NB – in certain circumstances, a fine which may put a Defendant out of business may, nevertheless, be considered appropriate), clearly the most appropriate advice to give is to make strenuous efforts at all levels within the organisation to ensure that an appropriately robust health and safety culture is embedded within the organisation.

Taking appropriate expert (legal and other) advice on this is accorded prominence in the guidelines and, therefore, achieves a double importance in that the provision of such advice ought to reduce the likelihood of tragic events of this nature and can, where appropriate, be used as appropriate mitigation if an offence arises.

It is clear that the level of fines to be imposed where an offence is proved is likely to be very significant, regardless of the nature of the organisation (public sector or private sector). Public sector organisations are afforded specific mitigation in terms of the affect that a fine will have upon the delivery of services, which is helpful; however, the removal of the linkage between fines and turnover potentially adversely affects a public sector organisation's ability to effectively mitigate. It is also clear that any fine must be punitive in nature.

Publicity Orders are afforded specific prominence in the new guidelines and are likely to be a common feature of any sentencing "package". The lack of involvement by the Defendant in the wording of such Orders is not entirely unexpected but, nevertheless, an added difficulty.

Clearly any organisation faced with a prosecution under this legislation will need to ensure it is fully prepared, even in the context of an event which is likely to give rise to a rapid guilty plea; indeed, given the approach taken in terms of aggravating versus mitigating factors within the guidelines, early appropriate advice is clearly essential.

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DOLMANS RECENT CASE UPDATE

Issue Based Costs

Cheltenham Borough Council v. Christine Laird (2010) CA

Readers will no doubt recall our previous reports on this claim in which Dolmans successfully defended Rhondda Cynon Taf County Borough Council and secured a discontinuance prior to Trial. The substantive hearing of the issues between Cheltenham Borough Council and Christine Laird resulted in Judgment being handed down on 15 June 2009. Christine Laird successfully defended allegations of misrepresentation and fraud. The Court when dealing with costs ordered Cheltenham Borough Council to pay 65% of Christine Laird's estimated £540,000 legal costs. Christine Laird appealed on the basis that she had been entitled to resist fraud allegations to the full extent available and because she had successfully defended them she should be entitled to the entirety of her costs provided she had acted in good faith. It must, however, be remembered that not only did Cheltenham Borough Council make very serious allegations against Christine Laird but she also made numerous allegations against Cheltenham Borough Council by way set off the vast majority of which were dismissed.



The Appeal came before the Court of Appeal on 4 February 2010. The Court of Appeal whilst having "considerable sympathy" for Christine Laird took the view that despite having to defend serious allegations of fraud that did not justify her taking all the points she did and which the Trial Judge had found to be disproportionate. Lord Justice Thomas stated "*The fact that a party succeeds overall is not sufficient to entitle them to recover all their costs*". Thomas LJ went on to state that in awarding costs a Judge must exercise discretion taking into account the conduct of the parties and success or failure of the issues raised. It was held that:

1. Before the CPR the general position was that if a party pleaded fraud and lost they were likely to have all of the costs awarded against them (*Muller v. Cowan 1998 CA*).
2. The CPR set out a complete costs code. There was no specific rule for fraud claims.
3. Under CPR 44.3(4)(b) the Court adopted an issue based approach. The Judge had been entitled to hold that a number of points had been taken indiscriminately.
4. The Appeal was dismissed.

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School's Negligence for Assault on Pupil

Webster v Ridgeway Foundation School (2010) EWHC 157 (QB)

The claimant claimed damages in negligence from the defendant school for an assault resulting in a head injury that he suffered on school premises at the hands of non-pupils.



There had been racial tension at the school and the claimant a pupil at the school had agreed to have a fight with an Asian pupil after school on the tennis court. The other pupil had contacted friends and family who had come to the school and attacked the claimant with a claw hammer. The claimant's family were called and came to the school and saw him lying in a pool of blood. They claimed damages for psychiatric injury as a result of witnessing the aftermath of the attack.

The claim was dismissed. The school was not in breach of its duty of care in failing to fence the site to keep out intruders. There were a number of obstacles to the construction of such a fence and the risks perceived before the attack were not such to oblige the defendant to overcome those obstacles. Further the school had a reasonable system of supervision in place at the end of the day and was not required to have a teacher supervising the tennis court at that time.

The school's discipline policy was appropriate although more could have been done in terms of race relations. However in any event the attacker as a non-pupil was not subject to any such policy. Further there was not a sufficient causal link between any of the allegations of negligence and the head injuries suffered as a result of the hammer wielding attacker.

Expert's Immunity

Jones v Kaney (2010) EWHC 61 (QB)

The claimant sued his psychologist expert for negligence in his preparation of a joint statement with the expert of the defendant in the claimant's personal injury claim. The psychologist claimed witness immunity and applied for summary judgement striking out the claim.

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The Judge struck out the claim as the decision in Stanton v Callaghan (2000) QB 75 providing witnesses with immunity was binding. Any human rights considerations that may undermine the policy basis for witness immunity did not deprive the decision of its binding authority. However as the superior court was likely to consider that a blanket policy of immunity for expert witnesses was too broad, the judge granted a certificate under s12 of the Administration of Justice Act 1969 enabling the Supreme Court to decide whether to grant leave to appeal.

Highway Verges

West Sussex County Council (2010) EWHC Civ 71 Court of Appeal

The claimant had crashed into a tree after losing control of her car on a frosty road. It was accepted that she was driving too fast for the conditions. Her car had driven on to the verge which was 6 to 12 inches below the level of the carriageway. The defendant had previously applied topsoil to raise the level of the verge to the carriageway level but it had sunk by the time of the accident.



The parties' experts agreed that the drop created a hazard to any vehicle that was on the edge of the carriageway. The defendant conceded that the verge was part of the highway. At first instance the Judge found the council liable under S41 of the Highways Act 1980.

The decision was appealed on the basis that the judge had failed to address whether there was a failure under s41 to maintain the verge as part of the highway.

The Court of Appeal decided that the judge had considered that the drop-off rendered the highway as a whole not reasonably passable for ordinary traffic without danger and it was clear that he considered the authority to be in breach of its obligation. This was despite 'highly attractive' submissions by the defendant that this was a rural road with white lines on each side in order to indicate to drivers that they should not exceed them, that topsoil in verges will inevitably sink and that the drop-off would not have represented a danger to drivers not driving at excessive speed.

Further the Court of Appeal considered that the authority could reasonably have been expected to know that the height of the drop-off was likely to cause danger to users of the road but had failed for the purpose of s58 to prove that it had taken such care as was reasonably required to ensure that the road was not dangerous.

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Costs

The Court of Appeal heard the following two cases consecutively, and handed down Judgment in both cases at the same time as the Appeals raised similar points.

Drew v Whitbread [2010] EWCA Civ 53 Court of Appeal

'D' brought a personal injury claim seeking damages exceeding £15,000.00. His Special Damages Schedule totalled in excess of £30,000.00. The claim was allocated to the Multi Track. At the Trial, which went into a second day, 'D' was awarded damages, after reduction for 25% contributory negligence, of £9,291.56. 'W' was ordered to pay 'D's' costs on the standard basis if not agreed. 'W' disputed 'D's' Bill of Costs as disproportionate, and submitted that 'D's' claim had been exaggerated. On Detailed Assessment, the Costs Judge ruled that after the date of an Application by 'W' to see 'D's' medical reports, it should have been apparent that the case should have been pursued as a Fast Track case and, from that date, costs would be assessed on that basis. In particular, the Costs Judge reduced Counsel's Brief fee for Trial to the Fast Track fixed fee and disallowed 'D's' Solicitors' costs of the second day of Trial. 'D' appealed, submitting (1) that the Costs Judge had, in effect, rescinded or overruled the Order of the Trial Judge ordering costs to be assessed on the standard basis, which she had no power to do; (2) it was not open to 'W' to take the point that costs should be assessed by reference to the Fast Track and, thus, deny the Claimant any costs for the second day of the Trial, because 'W' had not raised that point before the Trial Judge; and (3) the Costs Judge had been misled by an inaccurate note of the Trial Judge's ruling as to exaggeration.



The Court of Appeal held that it would not be consistent with the express provisions of CPR 44.3 and CPR 44.5, and with the Court's duty to see that costs were proportionate and reasonable, to preclude a party raising a point highly material to that question because it had not been raised before the Judge under CPR 44.3. If what is sought is a special order as to costs, which a Costs Judge should follow, that should be sought from the Trial Judge. If it is clear that a Costs Judge would be assisted in the assessment of costs by some indication

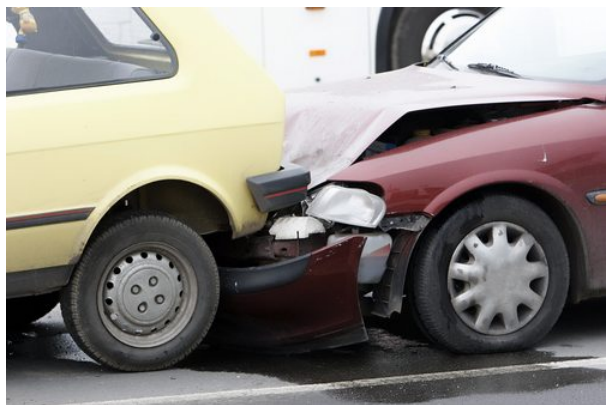
from the Trial Judge about the way in which a Trial has been conducted, a request for that indication should be sought, but this does not need a rule that a failure to raise a point before the Trial Judge will preclude the raising of a point before the Costs Judge.

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In this case, whilst 'W' did not seek to obtain an Order from the Trial Judge that costs should be limited to those recoverable on a Fast Track basis, that did not prevent the issue of whether the case was, in reality, a Fast Track case from being raised before the Costs Judge. Whilst 'W' had raised the issue of exaggeration before the Trial Judge and failed to obtain a special order, the Costs Judge would have been entitled to consider how, if lawyers had been properly instructed, the case should have been fought and, in particular, whether it would have ended up as a Fast Track case. The Costs Judge was not entitled simply to rule that she was going to assess the costs of Trial as if the case were on the Fast Track. To do so would rescind the Trial Judge's Order. In ruling as she did, it could not be said that the Costs Judge was simply *"assessing costs on the standard basis taking into account that the case should have been allocated to the Fast Track"*, which would have been the permissible approach. Simply ruling that costs of the Trial should be on a Fast Track basis may have meant that the Costs Judge gave no separate consideration to the question whether it was a Trial that would always have been likely to run into a second day. Accordingly, and taking into account the inaccurate note before the Costs Judge regarding the Trial Judge's findings on exaggeration, the case was remitted to the Costs Judge for reconsideration.

O'Beirne v Hudson **[2010] EWCA Civ 52** **Court of Appeal**

'O' was the driver of a stationary vehicle hit from behind. Costs of repairs to 'O's' vehicle were paid. 'O' subsequently issued proceedings for General Damages exceeding £1,000.00. Prior to allocation, the case was settled for £400.00 General Damages and £719.06 hire charges. The Consent Order provided for the *"Defendants to pay the Claimant's reasonable costs and disbursements on the standard basis, to be subject to Detailed Assessment if not agreed"*.



Upon Detailed Assessment, 'H's' Points of Dispute raised a general point that if the case had gone to the allocation stage, it ought to have been allocated to the Small Claims Track. Accordingly, only Small Claims Track fixed costs, pursuant to CPR Parts 27 and 45, should be allowed. 'H' responded to the general point that the terms of the Consent Order precluded the application of fixed costs.

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The Court of Appeal held that the Consent Order provided for costs to be assessed on the standard basis. It followed from that the Costs Judge was not free to rule that the costs would be assessed on the Small Claims Track basis. However, in making an assessment, the Costs Judge was entitled to take account of all circumstances, in accordance with CPR 44.5 (1), including the fact that the case would almost certainly have been allocated to a Small Claims Track if it had been allocated. In so doing, the Judge would have regard to what could or could not be recovered if the case had been so allocated. The Costs Judge had no power to alter the Order for costs and, thus, make a direction from the outset where costs have been awarded on the standard basis that costs would be assessed on a Small Track basis, but provided that the Costs Judge did not purport to vary the original Order, or tie himself to assessing by reference to the Small Claims Track, it was quite legitimate to scrutinise items on a Bill to see whether costs were necessarily, or reasonably, incurred and, thus, whether it was reasonable for the paying party to pay more than would have been recoverable in a case that should have been allocated to the Small Claims Track.

Contributory Negligence – Road Traffic Accidents

Osei-Antwi v South East London and Kent Bus Company Limited [2010] Court of Appeal



The Claimant appealed against the first instance decision that she was one third to blame for an accident which occurred when she was a pedestrian. The Claimant had been stood on the pavement near safety railings a few inches from the edge of the road, when a bus had turned the corner too tightly, and the Claimant was struck by the rear of the bus as it mounted the pavement where she was stood. At first instance, the Judge accepted that the Claimant was stood in a designated pedestrian area, but

also found that the Claimant had failed to keep a proper lookout and was stood in an obviously dangerous position and, therefore, found that she was one third contributory negligent.

The Court of Appeal held that the Judge was wrong to come to this conclusion. Having found that the Claimant was stood in a designated pedestrian area, it was inconsistent for the Judge then to find that the Claimant was stood in an obviously dangerous place. Buses did not normally mount the pavement in that area and the Claimant had been

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stood several inches back from the edge of the road. The Court of Appeal found that there was no clear evidence to suggest that any blame should be placed upon the Claimant as it was not clear how she had contributed to this accident, save that she failed to realise, until too late, that the bus had mounted the kerb. The Court of Appeal, therefore, found that there was no blame to be placed upon the Claimant for this accident.

Appeal allowed.

Personal Injury – Sporting Activities

Robert Lee Uren v (1) Corporate Leisure UK Limited (2) Ministry of Defence (3) David Lionel Pratt & Others
[2010]
EWHC 46

The Claimant was taking part in a health and fun day activity organized by D1 on behalf of D2. D3 were the public liability insurers of D2. The activity day included various games and races played in teams. One game involved entering an inflatable pool filled only to a shallow depth, in order to retrieve an object in a relay style race. On the Claimant's turn, he ran to the pool and entered it head first in a diving action. The Claimant hit his head on the bottom of the pool and suffered severe injuries, leaving him tetraplegic. The Claimant alleged a failure on the part of D1 and D2 to ensure that the game was safe to take part in. In particular, the Claimant argued that head first entry should have been prohibited as it was foreseeable that people would do that. Alternatively, the Claimant argued that the game should have been stopped when it became apparent that people were entering the pool head first. D1 and D2 both relied on expert evidence that the risk of injury had to be balanced against the benefit of the activity and the expert's conclusion was that the Claimant had been extremely unlucky to sustain such serious injuries, but the actual risk of such serious injury was, in fact, low. The Court found that if the game had been vetted as the Claimant argued it should have been this would have taken away the fun and challenge and therefore the benefit of the activity.



DOLMANS RECENT CASE UPDATE

Held

The Appeal Court agreed that the risk of serious injury in this type of game was very low and, therefore, neither D1 nor D2 were in breach of their duty owed to the Claimant. The type of activity being undertaken was important and beneficial to the people taking part in it and society generally, and the Court held that it had to be accepted that such activities are never risk free. The balance had to be struck between the benefits of the activity and the risks. If D1 and/or D2 had vetted the game in any way so as to stop head first entry into the pool, it would have removed the benefit of the challenge of that particular game.

Judgment for the Defendants.



For further information on any of the above cases, please contact
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COMING UP

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If you would like any further information in relation to any of our training seminars or wish to have an informal chat regarding any of the above, please contact our Training Partner,

Clare Hoskins, at clareh@dolmans.co.uk

COMING UP

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