

Dolmans Insurance Bulletin

**Welcome to the December 2009 edition of
the Dolmans Insurance Bulletin**

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DOLMANS - FOCUS ON

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**On behalf of all the partners and staff
at Dolmans, may I take this
opportunity to wish all of our readers
a Merry Christmas and a
Prosperous New Year**



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

K L v CITY & COUNTY OF SWANSEA

In *K L -v- City & County of Swansea*, the Claimant alleged that during the course of his employment as a labourer and then a foreman labourer in the Highways Department of the Defendant Local Authority's predecessor, West Glamorgan County Council (WGCC), from November 1974 to September 1991, he was exposed to excessive vibration that caused Hand/Arm Vibration Syndrome (HAVS).



Background

The Claimant had not worked since leaving WGCC's employment on grounds of ill health. The Claimant suffered from a plethora of other conditions including cervical spondylosis and back pain; for the relief from which he regularly smoked cannabis.

The Authority had no record of the Claimant having been employed by their predecessor and, whilst breach of duty and causation would be kept in issue, the decision was taken to defend the claim on the basis that it was statute barred by operation of section 11 of the Limitation Act 1980.

It is worth mentioning at this stage that the Claimant had also pursued a claim for damages for personal injury in the form of Noise Induced Hearing Loss (NIHL) through the same firm of solicitors. That other claim was settled directly by WGCC's insurers on 24 June 2008, without proceedings having been issued.

Whilst settlement of the HAVS claim was considered, the Authority was keen to contest the case on limitation initially in accordance with our recommendation.

Proceedings were commenced by way of a Claim Form issued in the Newcastle upon Tyne County Court on 18 July 2008. The Claimant relied on an expert medical report by Mr W. Tudor Davies which confirmed a diagnosis of the vascular and sensorineural components of HAVS, graded bilaterally at 2V 2SN. The Authority subsequently obtained an expert medical report from Dr Roger Cooke which cast doubt on the diagnosis. Medical causation then became the central dispute in the action.

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The Authority did not, however, abandon the limitation defence and witness statements were obtained from an officer in the Council's insurance section and from a manager in the highways department setting out the *forensic* prejudice that had been caused by the Claimant's delay in bringing proceedings. In essence, that prejudice arose due to the passage of time and, specifically, as a result of two events: the break up of WGCC on Local Government Reorganisation in Wales that took place on 1 April 1996 (LGR) and the probable destruction of the Claimant's personnel records in about 1997.

On LGR, the manpower and equipment of WGCC's highways department (known as "Roadforce") was distributed - roughly equally - between the Authority and Neath & Port Talbot County Borough Council resulting in a disruption of continuity of supervision, wholesale changes in working practices and the destruction and/or loss of records. The Authority, in keeping with many other employers, destroys its personnel records for former employees after about 6 years.

The matter came to trial before His Honour Judge Milwyn Jarman QC on 19 November 2009.

Breach of Duty

The Authority could adduce no evidence to undermine the Claimant's allegations of very high levels of vibration exposure. Breach of duty had not been conceded, however, because it was felt that, on balance, doing so would undermine an argument that the Authority had been prejudiced by the delay in bringing proceedings (or, to put it another way, if breach of duty was no longer in issue the Authority could not say it was prejudiced by not being able to investigate the same).



During cross-examination, the Claimant conceded that his evidence on the duration of vibration exposure was little more than a guess.

Nevertheless, and perhaps unsurprisingly (given the nature of the Claimant's job), the Judge found that the Claimant had been exposed to foreseeably injurious levels of vibration in excess of 2.8 m/s² and that the relevant duty had been breached (interestingly, Counsel for the Claimant had not contended that vibration would have been

foreseeably injurious at 1.0 m/s², which is generally accepted to be the case within the medical community).

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Medical Causation

The Claimant had told Dr Cooke in July 2009 that vascular symptoms of finger blanching only affected the palm side of his fingers and not the backs. During cross-examination the Claimant contended that, since seeing Dr Cooke, the backs of his fingers had also begun to be affected by blanching. In addition, the Claimant had described constant stinging pain in all of his finger tips. In our view, and in the view of Dr Cooke, such symptoms were inconsistent with a diagnosis of HAVS.



Notwithstanding the inconsistent symptoms, the Judge found that the Claimant was an honest, but poor, historian and he was persuaded on the balance of probabilities that the most likely cause of the Claimant's condition was the use of tools with 10% of his symptoms being due to his cervical spondylosis.

Limitation

The Claimant alleged that he first became aware of his symptoms when he began having difficulty tying fishing flies whilst still employed by WGCC and his Counsel had to concede that the injury had been significant from that time. The Claimant denied attributing his injury to his work for WGCC prior to seeing an advert in a newspaper in 2006 (a point accepted by the Judge) and he stated that he had reported symptoms of cold hands to his GP in the 1990s and been told to "wear gloves".



The Judge accepted the submission made on behalf of the Claimant that GPs in the 1990s would not have had the requisite experience to diagnose HAVS effectively. However, the Claimant had seen a number of specialist surgeons, including orthopaedic surgeons, about his other complaints and the Judge found that the Claimant could have mentioned his hand symptoms to them and that he was fixed with constructive knowledge from the early 1990s and in particular from 1992 to 1995.

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The Judge refused to exercise his discretion under section 33 to allow the claim to proceed on the ground that the Authority had suffered significant prejudice in being prevented from possibly obtaining evidence which would cast doubt on the amount of vibration exposure the Claimant had.

Conclusion

This case is noteworthy in several respects. The Claimant's evidence under cross-examination was so poor that his own Counsel felt it necessary to ask the Judge whether he wished to proceed to hear evidence from the Authority. Nevertheless, the Judge's assessment, ultimately, was that the Claimant was an honest witness with genuine symptoms. Despite the aforementioned inconsistent symptoms, the Judge found that the Claimant suffered from HAVS.

Readers familiar with this area of law will be disappointed to learn that much reference was made by the Claimant's Counsel to the judgment of HHJ Graham Jones in *Morgan -v- Corus*, where the evidence of Mr Tudor Davies was preferred over that of Dr Cooke (however, we remain of the view that Dr Cooke is the defendants' expert of choice in HAVS matters).

Yet despite this, the Judge found fault with the Claimant not obtaining medical advice that would have helped him connect his HAVS symptoms with his workplace. Additionally, the Judge then refused to exercise his discretion and to allow the claim to proceed in circumstances where the prejudice to the Claimant would clearly be very significant (he had won on every other point and was only prevented from recovering damages because of limitation) whereas the prejudice to the Authority was, arguably, hypothetical in that it related to a potentially indefensible claim brought by a former highways worker.



The question of entitlement to costs has not been resolved and the Judge has hinted that he would consider making an issue based costs order on the basis that the Claimant succeeded on all points, save for limitation.

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We were and remain of the view that, in occupational disease cases, breach of duty, causation and limitation are tightly bound together (for the reasons set out above - that an admission of breach of duty would undermine arguments on prejudice through delay).

However, it may be necessary to consider, in appropriate cases, requesting the court to order a limitation only trial, where it is clear that the injury would have been apparent to the claimant as significant and where there is strong evidence of forensic prejudice to the defendant.

Such an approach removes the risk of an issue based costs order following a result such as that described above; however the situation is finely balanced because it is strongly arguable that the above result would not have been achieved if an admission as to breach of duty had been made. Equally, it was clearly inappropriate to make an admission as to medical causation because a triable issue on this aspect was created by Dr Cooke's evidence.

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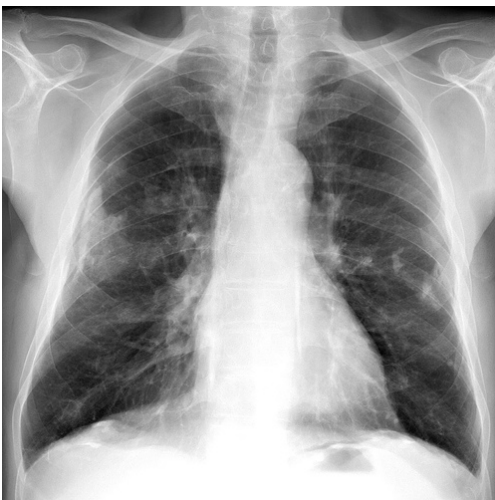
DOLMANS FOCUS ON

RECENT CASE LAW DEVELOPMENTS IN MESOTHELIOMA & ASBESTOS INDUCED DISEASE CLAIMS

What is the appropriate remedy in circumstances where the family of the Deceased have allowed vital pathological samples to be destroyed?

This issue was discussed in the case of **Weaver and Gurney-v-Contract Services Division Limited (unreported at date of writing, Senior Master Stephen Whitaker, 3 September 2009)** .

In this case, the Defendants sought to strike out the claim (for damages for asbestos induced disease in the form of asbestosis). The basis of this application was that the Claimants, personal representatives of the Deceased (a former employee of the Defendants allegedly exposed to significant quantities of asbestos dust), had caused to be destroyed certain tissue samples taken from the Deceased's lungs at post mortem in October 2008.



This was potentially a case involving a dispute as to diagnosis, as between asbestos induced fibrosis (asbestosis) and so called idiopathic fibrosis (fibrosis arising without the influence of a precipitating factor such as asbestos). As readers may be aware, one of the principle sources of evidence in such disputes is via examination of the lung tissue of the deceased to consider the level of asbestos fibres within the lung tissue and, specifically, the levels of asbestos bodies within the lung tissue.

Against that background, in March 2009, Master Eastman sitting in the QBD in London made an Order that the Deceased's lung tissue (which had seemingly been preserved since his death in October 2008) should be subjected to histopathological examination by suitable expert(s).

It later emerged, via the Claimants' Solicitors waiver of privilege of certain attendance notes, that, in fact, at that stage, the tissue samples had already been destroyed following a conversation between the Claimants' Solicitors and the Claimants on 28 January 2009 when the Claimants telephoned their Solicitor to confirm that they were arranging to have the tissue samples destroyed. The Solicitor did not seek to intervene in that process, despite the fact that the Defendants had not had an opportunity to examine the samples at that point in time.

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Accordingly, when the position emerged, subsequent to the Hearing in March 2009, the Defendants applied to strike out the entire claim.

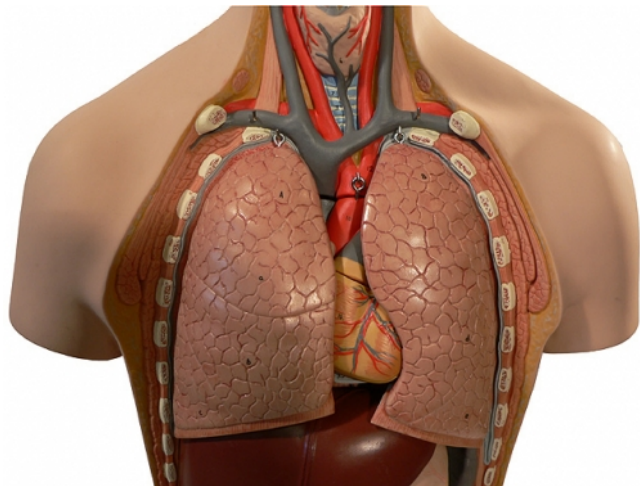
In a 17 page Judgement which is unflinching of its criticism of the conduct of the Claimants and their representatives, Senior Master Whitaker, having been at pains to balance the interests of both parties, eventually dismissed the claim with costs.

Comment: The precise circumstances of this case are unlikely to be replicated, but, the case itself provides a very useful reminder to Claimants' representatives as to their duties in terms of ensuring that the Defendants have proper access to post mortem tissue samples; material which, otherwise, the Defendants have very little actual control over. Thus, it is a useful case to have in one's armoury for quotation as necessary.

Living Claims: Can Funeral Expenses Be Claimed?

Readers may have encountered this issue in living Mesothelioma cases, the Claimant is still alive and therefore, technically, funeral expenses have not been incurred; however, they are claimed as an inevitable expense – what approach is the Defendant to take in these circumstances?

Previously, there has been very little case law on this point and frequently Defendants have been forced to take a pragmatic view, paying such claims (in some measure).



However, there is now specific and helpful guidance on the point in the form of the case of **Loyola Watson-v-Cakebread Robey Limited (Satinder Hunjan QC, sitting as a Deputy High Court Judge, 10 July 2009)**

In this case (a living peritoneal Mesothelioma claim) damages were assessed by the High Court Judge in the usual manner. Amongst the heads of claim advanced by the Claimant was a claim for funeral expenses (the extent of which is unspecified in the reported Judgement).

Following submissions from the parties' Counsel, the Judge dismissed the claim for funeral expenses upon the basis that the Claimant was alive at the time it was made

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and, therefore, did not come within the ambit of the Law Reform (Miscellaneous Provisions) Act 1934 which allowed such claims on behalf of the Estate of a deceased Claimant. The Judge further found that to allow heads of claim of this nature would, in effect, allow any and all Claimants who suffered a reduction in life expectation as a result of a Defendant's negligence to claim funeral expenses, regardless of the extent of the said reduction.

Comment: This judgement provides welcome clarification to a frustrating area of Mesothelioma litigation. It provides Defendants with a judicial basis upon which to deny such claims which, previously, had been lacking.

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REDUCING THE NHS CHARGES LIABILITY TO REFLECT CONTRIBUTORY NEGLIGENCE



Contributory negligence is a common feature in personal injury cases and, in terms of NHS charges, it represents an opportunity for compensators to reduce their liability by the same proportion as any finding or agreement reached in respect of contributory negligence. The CRU has recently issued a reminder in relation to this feature of the compensation recovery scheme, which it views as under or incorrectly utilised, and this provides an opportunity to consider the procedure in detail.

On 29th January 2007, Part 3 of the Health and Social Care (Community Health and Standards) Act 2003, came into effect. This triggered the commencement of the NHS Charges Recovery Scheme, administered by the Compensation Recovery Unit (CRU) on behalf of the Department of Health.

From 29th January 2007, the CRU had a legislative mandate to recover NHS Charges from all compensators where damages had been paid for personal injuries sustained in the areas of motor, employment, product liability and public liability.

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The NHS charges that apply depend upon the amount of treatment the Claimant receives. The charges applicable from April 2009 are shown in the table below. The total cap on NHS Charges currently stands at £41,545.00 in England and Wales.

Incident date (on or after)	Out-patient	In-patient	Cap	Ambulance Charges (per person per journey)
Pre 2.7.1997	£295	£435	£3,000	
02.07.1997	£354	£435	£10,000	
01.01.2003	£440	£541	£30,000	
01.04.2003	£452	£556	£33,000	
01.04.2004	£473	£582	£34,800	
01.04.2005	£483	£593	£35,500	
01.04.2006	£505	£620	£37,100	
29.01.2007	£505	£620	£37,100	£159
01.04.2008	£547	£672	£40,179	£165
01.04.2009	£566	£695	£41,545	£171

The matter does not have to reach Trial for binding findings on contributory negligence to be made: settlement between the parties which includes an element of contributory negligence can be used to reduce the NHS charges liability accordingly. The same cannot be said of CRU liabilities as these remain governed by a separate statutory framework.

In short, there are potential savings to be made, particularly in cases of catastrophic injury where the Claimant has received a large amount of NHS treatment and contributory negligence is a real issue in the claim.

To achieve these savings when settling claims, compensators and their representatives have to comply not only with the time limits for applying for the reduction but, in the case of pre-action settlements, they also have to prove the contributory negligence agreement was arrived at properly, providing appropriate evidence of the agreement reached.

Whilst these steps may seem fairly straightforward, it appears that not everyone is complying and the CRU has felt it necessary to remind compensators of the formalities set out in the legislation. We trust that this article assists you in dealing with the issue.

Time Limits

The application for a reduction in the NHS charges liability should typically be made within 3 months from the final settlement of the claim. In litigated cases, it is advisable to make one's application within 3 months of the date of Judgment Order or, if settled by consent, within 3 months of the date of the sealed Consent Order.

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Where the claim is settled in the pre-action stages, the time for the application to be made is 3 months from the date the settlement is achieved (**NB** not payment of the damages).

Evidence

With litigated claims, it is vital to the success of any application for a reduction in NHS charges that the Judgment Order or Consent Order specifies the percentage of contributory negligence either decided by the Court or agreed between the parties.



A letter to the CRU enclosing the sealed Judgment Order or sealed Consent Order and requesting a reduction in the NHS Charges liability by the same proportion as the contributory negligence finding /

agreement should be sufficient, both in terms of format of application and supporting evidence, for the CRU to reduce the NHS charges accordingly.

In pre-action cases, where there will not be a sealed Order, a report has to accompany your application to the CRU. The report must include:

1. A statement that it has been agreed between the parties that the damages payable under the terms of the settlement are to be reduced to reflect the injured person's share in responsibility for the accident;
2. A statement of how that agreement was reached;
3. The amount of damages payable under the settlement had there been no such agreement;
4. The percentage reduction for contributory negligence agreed upon, and;
5. The names of all those involved in the settlement process.

The report must be signed by the parties to the settlement. We anticipate that it would be possible to arrive upon a suitable pro forma document for the basis of this report, the relevant information material to the individual case(s) being inserted into such pro forma.

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The Secretary of State (the CRU) will then decide whether the reduction for contributory negligence was fairly reached.

It is advisable to attach to the report copies of all relevant correspondence and documentation detailing the settlement. It is also advisable to submit one's application as promptly after settlement as possible.

Unlike an appeal of a CRU / NHS Charges Certificate, one does not have to pay the NHS charges at the time of making the application. Re-payment does however have to be made within the overall time limits applicable in all cases (3 months from the date of the NHS Certificate or, if later, 3 months from the date the settlement was paid).

Conclusions

In most cases, the additional cost of NHS Charges can be reduced by the same proportion of any finding or proper agreement reached in terms of contributory negligence.

In pre-action cases one has to demonstrate to the CRU, with assistance from the Claimant's representative, that the contributory negligence reduction agreed is fair. This may cause difficulties in cases where the settlement includes contributory negligence and litigation risk and may call for a separate percentage identification of these elements.



In substantial cases, there are savings to be made which should not be overlooked.

At present, CRU liabilities cannot be reduced in the same manner.

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Occupiers' Liability

Jonathan Harvey v Plymouth City Council **Lawtel 13/11/09**

The claimant after an evening out drinking alcohol had whilst running away from a taxi run into vegetation on the defendant's land and tripped over a fence which had been pushed down falling 5.5 feet onto a car parking area of a Tesco superstore.



The claimant submitted that it had been reasonably foreseeable that youths might be fooling around on the land and he had therefore been an implied licensee and was owed a duty of care under the Occupiers' Liability Act 1957. The local authority argued that it could not impliedly license such use of the land as it had not known it owned and occupied it. The land had been licensed to the superstore from the defendant for 2 years, some 8 years previously. However

the defendant alleged that no-one within the defendants who might have initiated action to inspect and protect the public from hazards on the land had been aware that the land was owned by it. Therefore the authority did nothing to inspect or maintain it.

The defendant had admitted that it occupied the land. It was implicit in the acceptance of occupation that the occupier knew or ought to know the uses to which the land was or might reasonably foreseeably be put. The claimant's conduct was in the same category as that of many other youths who would have gone on to the land and entered the bushes out of high spirits. It did not have to be proved that the defendant had actual knowledge of the uses to which the land was put. The claimant was considered to be a visitor to the land and the defendant had breached its common duty of care towards him by not securely fencing the edge and by allowing the fence to be in such a condition that it constituted a tripping hazard. The claimant however was 75% responsible for his injuries as had he been sober he would have been far more aware of his surroundings and it was very likely that he would have realised that there was a fence next to a significantly lowered edge.

Counsel for the defendant has indicated that the defendants intend to appeal.

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Protection from Harassment Act 1997

Judy Veakins v Kier Islington Ltd Court of Appeal (2009) EWCA Civ 1288

The claimant claimed damages for harassment against her former employer claiming harassment by her supervisor resulting in her suffering depression and going on sick leave never to return. She claimed damages under s3 of the Protection from Harassment act 1997. She alleged that her supervisor for 2 months picked on her and humiliated her in front of others, was unreasonable in respect of a number of issues in respect of which they were in conflict, and ripped up a letter of complaint that the claimant had written about her. The claimant's medical evidence was that the cause of her depression was as a result of her dealings with the supervisor. The defendant did not seek to rely upon any evidence to deny the incidents nor did it deny vicarious liability for the supervisor.

The Judge at first instance had decided that the conduct complained of did not constitute harassment within the meaning of s1 of the Act as no sensible prosecuting authority would pursue the allegations criminally.

The Court of Appeal identified that the focus should have been on whether the conduct complained of was 'oppressive and unacceptable' (and the judge had not done that) albeit the court had to keep in mind that the conduct was of an order that would sustain criminal liability. It held that had the judge considered this he would have concluded that the conduct was oppressive and unacceptable and although a prosecutor may have been reluctant to prosecute, the consideration is whether the conduct is 'of an order which would sustain criminal liability'.



Negligence – Duty of Care

Glaister & Others v Appelby-In-Westmorland Town Council [2009] EWCA Civ 1325 Court of Appeal

The Claimant suffered serious injuries at a horse fair when he was kicked in the head by a horse which had broken loose of its tether. The owner of the horse was never

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identified. The Defendant was not the occupier of the land where the accident occurred. The horse fair had been held for several centuries. There was no one body which had exclusive control over it. A committee, 'The New Fair Committee', had no duties or powers to direct operations relating to the conduct of the fair, but its various constituent members, including the Defendant, had different statutory powers and duties which bore on different aspects of the fair, such as environmental issues, highway safety and fire precautions.



The Claimant originally alleged that the accident was caused by the Defendant's negligence, in particular, in allowing horses to be tethered in close vicinity to other horses racing along the highway and failing to ensure that the tethered horses were properly supervised. That part of the claim was abandoned. The action proceeded on an alternative claim that the Defendant negligently failed to take proper care to see that public liability insurance was arranged which would have covered the circumstances of the accident.

At first instance, the Recorder held that it was fair, just and reasonable to impose a duty of care on the Defendant to see that the insurance was put in place because, amongst other things, the Defendant was the body on whose land the primary site of the fair lay, it took the leading role in the New Fair Committee and it was aware of the risks to safety. The Recorder held that the absence of the insurance had caused the Claimant to lose the remedy of suing a Defendant who was appropriately insured. The Defendant appealed.

The Court of Appeal held that the Defendant did not owe a duty of care to ensure the placement of public liability insurance. There was no special relationship of proximity, as was required to give rise to a duty of care to protect the Claimant from economic loss. The Court further considered that the Defendant did not owe a duty of care to ensure that there was safe segregation and supervision of tethered horses in the area where the accident occurred. Accordingly, even if there were a breach of duty of care to procure the placement of public liability insurance, but no wider duty of care for the Claimant's safety, it did not cause any loss falling within the scope of the duty.

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Limitation – First Action Served Out of Time

McDonnell & Another v Walker
[2009] EWCA Civ 1257
Court of Appeal

The Claimants were injured in a road traffic accident on 24 April 2001. The Defendant's Insurers admitted liability on 24 November 2001. On 20 April 2004, a claim was issued limiting damages to £15,000.00. The Claimants' Solicitors subsequently sent the Defendant's Insurers orthopaedic medical reports on 5 July 2004. The proceedings were served on 23 August 2004, one day late. The Defendant took issue with late service. The Claimants' Solicitor's Application for a retrospective extension of time for service was refused.

At that time, the law was that a Court could not exercise its power to disapply the ordinary time limit in a personal injury action under section 33 of the Limitation Act 1980 where the Claimant had brought an action before the expiry of that limit and was bringing a second action in which the Application under section 33 was made (*Walkley v Precision Forgings Limited* [1979]). Accordingly, in January 2005, the Claimants instructed new Solicitors with the intention of suing their previous Solicitors. A



letter of claim was not written until 3 April 2007. In the meantime, on 14 June 2006, the House of Lords' decision in *Horton v Sadler* [2007] changed the law such that, from that date, it was possible for a Court to exercise its discretion under section 33, even though a Claimant had brought an action prior to the expiry of the limitation period and the action had been halted for any reason. The Solicitors acting for the Claimants' former Solicitors responded to the letter of claim, on 26 July 2007, suggesting that a claim should be pursued against the original Defendant.

On 17 April 2008, the Claimants commenced a second action against the Defendant, in which they applied to disapply the limitation period under section 33. In the second action, the Claim Form stated that the First Claimant expected to recover damages of more than £300,000.00 and the Second Claimant more than £100,000.00. Significant claims were made for past and future loss of earnings. Medical evidence in support of psychological injury was also served. At first instance, the Application succeeded. The Defendant appealed.

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The Court of Appeal considered that the Judge had failed to identify the correct period of delay. The Judge had incorrectly concentrated on the period after the House of Lords' decision in *Horton*. The 'delay' in section 33 (3) (a) and (b) was the delay since expiry of the limitation period, but the overall delay was also relevant as part of all the circumstances of the case. The Judge's approach to forensic prejudice was also flawed. The Judge suggested that there was correspondence during the period of 3 years from the accident and that it was for the Defendant's Insurers to investigate. However, until the Insurers had details of the claim, they were in no position to investigate. Medical reports were only received 3 years after the accident. No psychological report was received at that time and no claim for loss of earnings, present or future, was received at all. The claim ultimately received 7 years post accident was of a different magnitude. Clearly, forensic prejudice had been suffered by the Defendant.

Since the Judge had misdirected himself, the Court revisited the question of whether it was appropriate to disapply the limitation period. There was clearly forensic prejudice to the Defendant. The major part of that delay was the fault of the Claimants or their Advisers and was inexcusable. The Claimants would suffer only minor prejudice if they had to proceed against their former Solicitors and some of that prejudice was their own fault. Accordingly, the Defendant's appeal was allowed and the Claimants' Application to disapply the limitation period under section 33 was refused.

Personal Injury - Duty of Care

Susan Parker v Tui UK Limited
[2009]
EWCA Civ 1261



The Claimant claimed for personal injury against the Defendant tour operator as a result of an injury that she sustained after participating in a toboggan run in a ski resort. The tobogganing activity was not part of the pre-arranged package, but was organized by the Defendant tour operator in conjunction with a local operator, who organized the toboggan run. The Claimant successfully completed the toboggan run and was then told to get off of the toboggan at the bottom and walk down to the coach. The Claimant and her friend, however, chose to remount their toboggan to go

down the road to the coach, but were unable to control the toboggan and crashed into the barriers which caused injury to the Claimant. At first instance, the Judge found that

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there was no contract between the Claimant and the tour operator in respect of the tobogganing and that whilst the tour operator did have a duty of care towards the Claimant, they had not breached the same. The Claimant argued on appeal that there was a contract between herself and the tour operator and that the lower part of the road where the accident occurred should have been risk assessed and that also there should have been a system to stop people getting back on their toboggans.

Held

The Court of Appeal found that as the Judge at first instance had found that there was a duty of care in tort, the issue of whether or not there was a contractual relationship between the Claimant and the Defendant was of little import. In any event, the Court of Appeal found that there was no contractual relationship between the Claimant and the Defendant tour operator as they were simply the middle men. When looking at the duty of care in tort, the Court of Appeal found that whilst there was no specific risk

assessment for the lower part of the road where the accident occurred, it would have made no difference even if there was. The risk assessment would only have identified that a warning should be given not to remount the toboggan. The Defendant tour operator's representatives were spaced out along the toboggan run, including someone at the end of the toboggan run providing a warning that the toboggans should be dismantled



and participants should walk down to the coach. The Court found that the only additional precaution that could have been included in a risk assessment would be to have another representative further down the road repeating the warning. The participants in the tobogganing were all adults and, therefore, the Court found that there was no duty on the Defendant tour operator to repeat simple warnings that had already been given. Furthermore, the Court considered that if such a finding were made, it would only encourage potential Claimants to believe that in the event of any injury occurring, someone must be to blame. Appeal dismissed.

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Civil Procedure – Costs Orders

Martine Widlake v BAA Limited
[2009]
EWCA Civ 1256

The Claimant brought a claim for personal injury arising out of her employment with the Defendant, in which liability was admitted. In relation to quantum, there was a dispute in this claim as to whether the index accident had simply caused a 12 month exacerbation to a pre-existing condition, or whether it was, in fact, an acceleration case. The Claimant told two separate Experts, both instructed by her, that she had no pre-existing back condition. The Claimant's second Expert, and the Defendant's Expert, however, agreed that the Claimant had a significant and relevant pre-accident history. The Judge found that the Claimant had deliberately concealed the fact of her pre accident history in the hope of increasing her claim for damages. The Defendant had made a Part 36 Offer, which the Claimant did beat at Trial, but the Judge made an Order that the Claimant pay the Defendant's costs. The Claimant argued that this was not the correct Order and that the Claimant should be awarded her costs, subject to the same being reduced by a proportion to reflect the fact of the exaggeration.

Held

The Court of Appeal found that the Judge at first instance had been wrong to find that the Claimant's exaggeration was of such a scale that it was effectively an abuse of the Court's process. Considering the case of Ul Haq v Shah [2009], the Court reiterated that there was no rule of law that a Claimant who dishonestly exaggerates a claim will have the whole of their claim struck out. The Court of Appeal, therefore, found that the Judge had misdirected himself and it was for the Court of Appeal to exercise its own discretion in relation to costs.



The Court, therefore, held that the correct approach was to consider who the successful party was, but also taking into account other matters when considering whether or not to apply the general rule that costs follow the event. The Claimant was clearly successful, having made out her claim and beaten the Defendant's Part 36 Offer. However, the Claimant's conduct in exaggerating her claim could, and should, be taken into account. Due to the way in which the Claimant exaggerated her claim for personal injury, the claim was more heavily contested, whereas it was a claim of a type that could have been settled without the need to proceed to Trial. This was balanced

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against the fact that the Defendant could have made a better Part 36 Offer providing them with greater costs protection. The Court, therefore, found that the correct Order was no Order as to costs.



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

Training Opportunities

At Dolmans, we want to ensure that you are kept informed and up-to-date about any changes and developments in the law.

To assist you in this, we can offer a whole range of training seminars which are aimed at Local Authorities, their Brokers, Claims Handlers and Insurers.

All seminars will be tailored to make sure that they cover the points relevant to your needs. Seminars we can offer include:-

- Defending claims – the approach to risk management
- Highways training
- Flooding and drainage – duties and powers of landowners and local authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage.
- Flooding and drainage – duties and powers of highway authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the highway authority in respect of highway waters.
- Employers' liability update
- Employers' liability claims – investigation for managers and supervisors
- Corporate Manslaughter
- Ministry of Justice Reforms
- Housing disrepair claims
- Public liability claims update
- Liability of Local Education Authority for accidents involving children
- The Display Screen Regulations – duties on employers
- Bullying, harassment, intimidation and victimisation in the workplace – personal injury claims
- Industrial disease for Defendants
- Apportionment in HAVS cases
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Conditional Fee Agreements and costs issues

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

Employment

Our employment team also run a series of employment breakfast briefings and half day workshops. These seminars will be of interest to all employers who want to minimise their exposure to costly tribunal claims and who want to ensure their human resources procedures and managers are up-to-date with significant changes in the law.

For further details please contact
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