

## DOLMANS INSURANCE BULLETIN

Welcome to the December 2011 edition of  
the Dolmans Insurance Bulletin

In this issue we cover:

### REPORT ON

- I told the truth, just not the whole truth - Clint David James Wells v City & County of Swansea
- Time limits are key in defamation claims - P v Vale of Glamorgan Council

### FOCUS ON

- Recent case law reignites the defensibility issue in mesothelioma claims - Julie Williams v University of Birmingham & Lilian Rose Asmussen v Filtrona UK

### CASE UPDATE

- Civil procedure - appeals - court attendance
- CFA - level of success fee when liability admitted
- Credit hire
- Interim payments
- Personal injury - road traffic accident - apportionment of liability/contributory negligence
- Service of Claim Form

### COMING UP

- 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.

**Dolmans would like to wish all  
of our readers a very 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](mailto:justinh@dolmans.co.uk)

## DOLMANS REPORT ON

### I TOLD THE TRUTH, JUST NOT THE WHOLE TRUTH

#### Clint David James Wells v City & County of Swansea



We represent the City and County of Swansea in the defence of the Claimant's claim for damages for personal injury and financial loss arising out of an accident on 15 February 2009. The Claimant was a member of a refuse crew which was collecting waste in the Penclawdd area of Swansea. The Claimant alleged that whilst he was standing adjacent to the cab of the refuse collection vehicle ('RCV'), on its passenger side, talking through the open window to the driver of the RCV, the driver of the vehicle, who was allegedly looking for paperwork located on the dashboard, drove the RCV forwards allowing the near side front wheel to drive onto the Claimant's left foot, causing the Claimant to suffer significant and serious crush injuries, from which the Claimant continues to suffer.



The Authority conducted an investigation into the circumstances of the Claimant's accident immediately following the incident. In contemporaneous statements taken at the scene by Supervisors, the driver of the vehicle said that whilst turning into a minor road, looking to his right, he heard the Claimant shout, stopped the lorry, and then reversed it, releasing the Claimant's foot. The two other members of the refuse crew gave statements that they had not seen what had happened to the Claimant.

The Claimant was taken to Morriston Hospital, Swansea, by his Supervisor. During the course of that journey, the Claimant said that he had stood too close to the vehicle and the driver was not to blame for the accident. The Claimant had himself reported his accident to another Supervisor at the scene and had repeated that he had stood too close to the vehicle.

## DOLMANS REPORT ON

In the days and weeks following the Claimant's accident, one of the Claimant's Supervisors received a telephone call from the Claimant's wife requesting that a message be passed to the driver of the vehicle indicating that the Claimant did not blame him for the incident. The Claimant maintained this position in a subsequent health and welfare visit.



The driver of the RCV underwent a driver assessment course, which he passed. Accordingly, as it appeared to the Claimant's Team Leader that the Claimant's accident was explained by the Claimant's inattention to detail, no further action was taken in the matter.

It was only upon receipt of the Letter of Claim, subsequent correspondence and the Court proceedings, that it was appreciated that the Claimant, in fact, held the driver of the RCV solely responsible for the circumstances of his accident and subsequent injuries, alleging negligence on the part of the driver.

Upon receipt of the proceedings, arrangements were made to interview all members of the refuse crew, the Supervisors and Team Leader involved in the investigation of the Claimant's accident, together with the Waste Operations Manager. The driver of the RCV had been involved in a similar incident some years prior to the Claimant's accident, which also involved a work colleague sustaining serious injury. For this reason, and given the potential value of the Claimant's claim, a decision was taken to interview the driver of the vehicle in the presence of the Authority's Waste Operations Manager.



During that interview, the Claimant's allegations in the Letter of Claim, subsequent correspondence and Particulars of Claim were put to the driver of the RCV. During an extensive interview, the driver of the vehicle firmly denied the Claimant's allegations, and every time he was challenged as to the circumstances of the Claimant's accident, maintained that he had not seen what has happened to the Claimant.

## DOLMANS REPORT ON

However, during one exchange in which the Claimant's allegation that the driver *was rifling through documentation whilst driving the vehicle*, the driver was seen to gesture with his left hand toward such documentation. The driver was asked why he had made such a hand gesture if the Claimant had been standing outside of the RCV as alleged by the Claimant. It was at this stage of the interview that the driver disclosed that the Claimant had, in fact, been sat alongside him in the cab and that the Claimant had jumped from the vehicle whilst it was still moving negotiating a turn into the cul-de-sac where refuse was to be collected. Not surprisingly, this was contrary to instruction and the Claimant's training.

Due to the driver's nondisclosure of this information at the time of the original investigation, the driver was removed from driving duties pending the outcome of the litigation.

The other members of the crew maintained the position they had advanced during the original investigation that they had not seen the circumstances of the Claimant's accident. However, aspects of their testimony were consistent with the driver's evidence in relation to the work being undertaken by the other members of the crew and the position of the vehicle.

There was an obvious litigation risk in defending this case when the main witness, namely the driver of the vehicle, had not given full disclosure. The driver's motivation was that there was an unspoken rule operating amongst the workforce in the Cleansing Department that one did not inform on a colleague. The driver accepted that what he had done was wrong and that he should have given full disclosure from the start. The driver was also aware that he was going to be criticised for not having disclosed fully when he first became aware from the Letter of Claim that he was being blamed by the Claimant. However, we considered that it would be possible to persuade the Court that the driver had no motivation to now not tell the truth as he had nothing to gain from claiming that the Claimant had jumped from a moving vehicle. Indeed, to the contrary, he did so knowing that he was likely to face disciplinary action, which, indeed, was the case, following his removal from driving duties.



Accordingly, the case was defended based upon the account now given by the driver of the RCV.

## DOLMANS REPORT ON



Issues relating to causation and quantum were fully investigated, as readers would expect, to include obtaining medical evidence on behalf of the Authority, together with evidence to rebut the Claimant's allegations that he suffered ongoing partial loss of earnings due to a loss of overtime. Important evidence was obtained from the Authority's Waste Operations Manager and Head of Legal Services to demonstrate that such overtime opportunities would not have been available to the Claimant, irrespective of his accident, due to the austerity measures being implemented within the Department.

At Trial, the Claimant was cross-examined at length as to his own change of evidence. The Claimant disclosed, for the first time, that the driver of the vehicle allegedly *manoeuvred himself out of the seat of the cab by using the steering wheel, simultaneously reaching for paperwork to the left of the dashboard*. The Claimant speculated that in undertaking this manoeuvre, the driver had taken his foot off the brake, which allowed the vehicle, which has automatic transmission, to roll forwards, trapping the Claimant's foot.

The driver of the RCV was subjected to extensive cross-examination, but maintained the account given to us during interview, and he provided powerful testimony as to the true circumstances of the Claimant's accident. The Claimant also alleged *that the driver had pleaded with him not to disclose the Claimant's account of what happened because this was the second occasion in which the driver had been involved in a significant incident*. The driver rejected this allegation, maintaining that his initial nondisclosure was based upon a desire not to inform upon the Claimant against an understanding that he was not being blamed by the Claimant for the accident.



HHJ C Vosper QC gave Judgement in favour of the Authority, finding that the Claimant had not satisfied him as to the circumstances of the Claimant's accident, and ordered the Claimant (his Union) to pay the Authority's costs of the action.

The Judge made it clear that his Court was not the appropriate forum to resolve any issues of a disciplinary nature and that this was a matter for the Authority to deal with. The conduct of the Claimant and that of the driver will now be reconsidered in the context of the full Judgement.

## DOLMANS REPORT ON

The case emphasises the importance of ensuring contemporaneous recording of initial accounts as to the circumstances of an accident. It also emphasises the importance of being fully prepared when undertaking any witness interview to ensure that when responses are given to questions, those responses are tested against contemporaneous accounts and documentary evidence so as to test their veracity.

At Dolmans we pride ourselves on being one part of the defence team, recognising the importance officers and employees also have in establishing successful defences. The Waste Operations Manager had a suspicion as to the true circumstances of the Claimant's accident, and, by working as a team, we were able to extract the exact truth as to the circumstances surrounding the Claimant's accident, thereby justifying the concerns and suspicions which had been held.

The result in the case also enables Senior Managers to address the workforce generally about the importance of full disclosure being given during accident investigations, to ensure that the Authority, as their employer, can discharge its statutory duties to ensure their safety in the workplace.



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## DOLMANS REPORT ON

### TIME LIMITS ARE KEY IN DEFAMATION CLAIMS

#### P v Vale of Glamorgan Council

The Claimant in this case was a litigant in person who issued proceedings for damages for defamation against the Vale of Glamorgan Council.

The Claimant alleged that on or about 16 May 2008, he became aware of statements in his late mother's medical records which he considered to be extremely libellous. He alleged that some of the statements were made by a social worker who was employed by the Local Authority. He refuted the contents of the statements made and challenged the Local Authority to prove that they were true.



The Claimant alleged that his late mother was a patient at a hospital within the Local Authority's area during the summer of 2006 before she passed away in September 2006. It appears that the Claimant obtained access to his late mother's medical records on or about 16 May 2008. The Claimant considered the copy records provided to him and took issue with some of the statements made about him in the records.



The records revealed that in July and August 2006, there were discussions between employees of the Local Authority's Social Services Department and medical staff employed by the Cardiff and Vale University Health Board about the possibility of enabling the Claimant's mother to leave hospital and return to the home she shared with the Claimant. In particular, there appears to have been a Multi-Disciplinary Team Meeting on 31 July 2006, a Safe Discharge Planning Meeting on 11 August 2006, a further Discharge Planning Meeting occurring between 11 and 22 August 2006, and then another meeting on 22 August 2006. The Claimant was unhappy about some of the contents of the notes of those meetings.

The Claimant issued proceedings in Cardiff County Court on 18 February 2011 and served the proceedings upon the Local Authority on 25 February 2011. The Claim Form and Particulars of Claim had a number of serious defects, as a result of which the Local Authority was only able to file a brief Defence pointing out these defects. It was pleaded in the Defence that a limitation defence would be relied upon if, as appeared to be the case, the claim concerned statements which had been published prior to 18 February 2010. The Local Authority also filed and served a Part 18 Request aimed at understanding the precise nature and basis of the Claimant's claim. The Claimant attempted to answer the Part 18 Request by way of a letter which went some way to clarifying his case, although many aspects of it remained obscure and difficult to understand.

## DOLMANS REPORT ON

The Claimant also attempted to clarify his claim by way of a Reply to Defence. He further attempted to amend his Particulars of Claim by way of a letter to the Court, although he did not issue a formal application to amend.



The Claimant alleged that the Local Authority were guilty of both libel and slander in respect of the statements made in his late mother's records. The Part 18 Request asked the Claimant to clarify and provide further detail in respect of his allegations that the statements made in the records were libellous and slanderous. The Claimant alleged that he wished to sue the Local Authority for slander on the basis of the oral statements spoken at the meetings and which were recorded in the notes. He alleged that he wished to sue the Local Authority for libel in respect of the publication of the written notes. The Claimant had been involved in another piece of County Court litigation in which his opponents were represented by a Firm of Solicitors in Swansea. He alleged that the notes were published to the Firm of Solicitors in question during that litigation. He did not specify the date of that publication, but it appears that this must have been some time before 18 May 2008 when the Firm of Solicitors provided copies of the documents to him.

We advised the Local Authority to issue an application to strike out the claim on the basis that it did not disclose a reasonable cause of action pursuant to CPR 3.4 and/or that the Local Authority be granted Summary Judgement in respect of the claim pursuant to CPR 24.2. The application was made on a number of grounds.



The first, and most important, ground was that the claim against the Local Authority was statute barred pursuant to section 4A of the Limitation Act 1980. Section 4A states that the limitation period for libel and slander is one year from the date of publication of the words complained of. The libel claim was founded on publications pre-dating 18 May 2008 and the slander claim was founded on words spoken in July/August 2006. This meant that proceedings in respect of the slander claim should have been issued by no later than August 2007 and that proceedings in respect of the libel claim should have been issued by no later than 18 May 2009. The Claimant issued proceedings on 18 February 2011, which meant that the proceedings were issued significantly out of time.

## DOLMANS REPORT ON

The Limitation Act 1980 provides that the limitation period may be extended where a Claimant was under a disability at the time the cause of action accrued. Although the Claimant said that he had been extremely depressed, he did not produce any medical evidence in support of this assertion and did not seek to rely on this ground.



Section 32A of the Limitation Act 1980 allows the Court, in its discretion, to disapply the limitation period. The Claimant did not make a formal application asking the Court to exercise its discretion under section 32A of the Act, but appeared to invite the Court to do so in correspondence.

Section 32A sets out the factors which the Court shall take into account in deciding whether or not to exercise its discretion to disapply the limitation period. It states that the Court shall have regard to all the circumstances of the case, and in particular, to the following matters:-

- (1) The length of, and the reasons for, the delay on the part of the Claimant.
- (2) Where the reason, or one of the reasons, for the delay was that all or any of the facts relevant to the cause of action did not become known to be Claimant until after the expiration of the period in question, the date on which the facts became known to him and the extent to which he acted promptly and reasonably once he knew whether or not the facts might be capable of giving rise to an action.
- (3) The extent to which relevant evidence is likely to be unavailable or to be less cogent than if the action had been brought within the one year period.

The Claimant sought to argue that he had not issued proceedings within the limitation period because he was unwell and/or engaged in other proceedings in Swansea County Court during the same period. However, the Claimant did not produce any medical evidence in support of his assertion that he was unwell.



## DOLMANS REPORT ON



It was also interesting and significant that the Claimant had issued separate proceedings for damages for defamation against a local Health Board. The issues arising in that claim are very similar to the issues arising in the claim against the Local Authority. The Claimant issued proceedings against the Health Board in October 2010. He was unable to offer any explanation as to how he was able to issue proceedings against the Health Board in October 2010, but failed to issue proceedings against the Local Authority until February 2011.

The application to strike out the claim was also made on the grounds that (1) the alleged standards complained of were not actionable per se and there was no claim for special damage; (2) the Claimant had failed to identify properly, or at all, the speaker of some of the slanders and/or the words alleged to have been spoken and/or had no real prospect of establishing that the words identified were spoken and; (3) proceedings had been wrongly issued in the County Court and not the High Court.

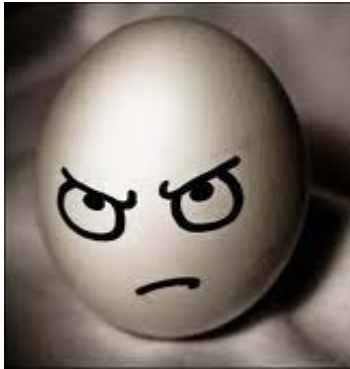
The application to strike out the claim was heard before the District Judge in Cardiff County Court on 27 September 2011. The District Judge reserved Judgement and delivered his Reserved Judgement on 10 November 2011.



The District Judge decided that the claim against the Local Authority should be struck out on the basis that it was statute-barred. He concluded that the proceedings had been issued significantly out of time and that there was no good reason for this. He also decided that there was no good reason for him to exercise his discretion to extend the limitation period, notwithstanding the fact that the Claimant had not made a formal application to that effect.

The District Judge also indicated that he thought that the claim should be struck out as disclosing no reasonable grounds for bringing a claim under CPR 3.4 (2) (a), and, in the alternative, that there should be Summary Judgement in favour of the Local Authority pursuant to CPR 24.2 (a) (i). He concluded that even if the Claimant could establish that the statements made were defamatory, the Local Authority would be able to rely upon the defence of qualified privilege. He further indicated that there were many parts of the claim which had not been sufficiently particularised by the Claimant.

## DOLMANS REPORT ON



The Claimant was unhappy with the District Judge's decision. He made an oral application for permission to appeal the Order, but his application was refused. The Claimant has since made a written application for permission to appeal the Order, but his application has been refused in writing by the Circuit Judge. We anticipate that the Claimant will request an oral hearing before the Circuit Judge, although we anticipate that any such application will be unsuccessful.

Readers will no doubt be interested to hear that the Claimant's claim against the Health Board was also struck out on similar grounds. The Claimant has sought permission to appeal the decision in that case, but his application has been refused by the Circuit Judge.

This case highlights the very specialised and technical nature of the law of defamation. The Claimant is a litigant in person and has encountered difficulty in presenting his claim and complying with the requirements laid down in the Civil Procedure Rules. This is not surprising in the circumstances.

The case also highlights the very strict rules relating to limitation in defamation claims. The limitation period of one year was introduced with a view to ensuring that such claims are presented and dealt with promptly. This will avoid the need for Defendants to have to investigate old claims where there might be difficulties in locating documents and witnesses. The Courts have a discretion to extend the limitation period on certain limited grounds. However, a Claimant who issues proceedings out of time will need to have very compelling reasons for doing so in order to persuade the Court that it should exercise its discretion to extend the limitation period.



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## DOLMANS FOCUS ON

### RECENT CASE LAW REIGNITES THE DEFENSIBILITY ISSUE IN MESOTHELIOMA CLAIMS

Julie Williams v University of Birmingham and Lilian Rose Asmussen v Filtrona UK



Readers of this publication will be aware of the "excitement" caused by the Sienkiewicz and Willmore Appeals in the Supreme Court earlier this year with regard to defensibility in mesothelioma claims. Ultimately, however, the issue of de minimis exposure has failed to fulfil the promise (for Defendants) which it was originally assumed to hold. Two more recent Judgements, however, one first instance and one from the Court of Appeal, have threatened to reignite the issue of defensibility and, potentially, are of considerable importance in the context of mesothelioma litigation on behalf of Defendants.

The source of the argument in these two cases centres upon the issue of knowledge of foreseeability of injury having regard to the historical era during which exposure took place; a principle "borrowed" from the House of Lords' Judgement in the case of Baker v Quantum Clothing.

The first of these two cases (Asmussen v Filtrona UK Limited) was decided at the beginning of July 2011 by Simon J in the Newcastle High Court and although, understandably, focus has since shifted to the Court of Appeal Judgement in the later case of Julie Williams v University of Birmingham, it is perhaps useful to consider the Asmussen Judgement in the context of seeking to understand the mechanics and importance of the later Williams Judgement, particularly since their Lordships were referred to the Asmussen Judgement in the Williams case.

In Asmussen, the Claimant was employed during two periods, 1955 to 1960 and 1962 to 1972, comprising 15 years in total. Her exposure to asbestos was largely "environmental" in nature, arising from asbestos lagged steam pipes located approximately 20 feet above ground level in the factory where she worked and from being in the vicinity of those pipes. The Claimant alleged that she was working when very brief repairs were carried out to the lagging on the steam pipes, albeit it was unclear whether this event took place during the first period of employment or the second period of employment. There was also some evidence before the Court as to the initial installation of the asbestos lagging, allegedly, during the currency of the Claimant's employment, albeit this evidence was not accepted by the Court.

## DOLMANS FOCUS ON

In his Judgement, Simon J noted the relaxation of the normal rules as to causation imported by the Fairchild decision<sup>1</sup> with regard to mesothelioma claims, however, he went on to state that:-

“In all other respects, however, cases of mesothelioma do not generate special legal rules, see Sienkiewicz v Grief ..... where the Supreme Court gave no encouragement to Judges to make findings of exposure on a ‘slender and speculative’ basis ..... However, much the Court’s sympathy may be engaged in a particular case, there are clear lines which distinguish those cases in which a claim may succeed and those where it must fail. To blur or ignore those lines is to create confusion and uncertainty .....”.

Simon J went on to state that in the context of a Defendant’s knowledge of foreseeability of harm, the standard of knowledge was not that of “omniscient hindsight”. He went on to apply the dictum of Baker v Quantum which, he observed, emphasises recognised and established practice as being sufficient and/or the standard to be applied regarding the construction of regulations and/or guidance in the specific context of the interpretation of the meaning of “likely to cause danger”.

Simon J accepted, ultimately, that the Claimant’s disease arose as a result of a single incident of inhalation of asbestos fibres, when the Claimant walked beneath lagged steam pipes being repaired by one Lenny Howden.

Thus, it was found, the Defendant could not have foreseen the injury to the Claimant and although the Defendant had failed to take steps to prevent or reduce the risk of disease, its failure “must be judged by (reference to) the imperfect standards of the time and not by hindsight”.



Simon J went on to state that:-

“The Defendant is entitled to rely on the recognised and established practices of the time ..... If the Defendant had sought authoritative advice as to the risk arising from asbestos lagging on the pipes in the factory, it is unlikely it would have been advised to take any particular precautions to eliminate all lagging from the factory or to change its practices for cleaning or carrying out such limited repairs as were carried out .....”.

Upon the basis of those findings, Simon J dismissed the claim.

<sup>1</sup> The now infamous “material increase of risk” test, as opposed to the conventional “proof of causation” test. It was this test which gave rise to the initial attempts by Defendants to measure relative contributions to the material increase of risk (and, therefore, apportion relative contributions against one another – Barker v Corus) and, thereafter, following the abolition of the Barker principle, seek to argue a threshold for material/immaterial increase of risk (in Sienkiewicz and Willmore).

## DOLMANS FOCUS ON

In the case of *Williams v University of Birmingham*, similar trivial or environmental exposure arose (see below), albeit, at first instance, the Trial Judge (HHJ Belcher) found in favour of the Claimant (in 2009) and the matter then proceeded to the Court of Appeal for further consideration.

Very briefly, the facts in the *Williams* case were that the deceased was exposed to asbestos dust as a result of undertaking certain experiments as an undergraduate at Birmingham University in 1974. These “speed of light” experiments were conducted in a tunnel underneath the university which contained a number of heating pipes lagged with (it was subsequently confirmed in 2006 and 2007) insulation containing all three types of asbestos (particularly in this context, crocidolite asbestos). This insulation had probably been installed in the 1930s or 1940s and it was said (and accepted as a fact by the Judge at first instance) to be in poor condition by the material time.



The deceased spent some hours in the tunnel in question (approximately between 50 and 80 hours) and it was accepted that as a result of his presence in this environment, some of his exposure to asbestos dust arose.

However, subsequently, the deceased spent a number of years working in an aircraft hanger at an airport which allegedly contained a significant quantity of crocidolite asbestos. Further, at post mortem, the extent of asbestos fibre identified within his lung tissue (particularly crocidolite fibres) was such that the evidence of the histopathologist concerned (Dr Allen Gibbs of Llandough Hospital, South Wales) was that this fibre burden could never have arisen simply as a result of (only) the transient exposure which may have taken place at university in 1974. In summary, the deceased’s mineral fibre burden at post mortem was out of all proportion to the exposure identified in the context of the university experiments discussed above.

Curiously, proceedings were initially brought against the subsequent employer (as Second Defendant), but were discontinued. The claim was only pursued to Trial against the University of Birmingham.



## DOLMANS FOCUS ON

The importance of this case arises out of the fact that the Defendants/Appellants were successful in the Court of Appeal and the relevant findings have been made upon the basis of reference to both the Asmussen v Filtrona UK decision and the earlier Baker v Quantum decision : upon the basis that a Defendant's state of knowledge in the context of foreseeability of harm should be judged by reference to the standard of knowledge at the time in question.

In the Williams case, their Lordships were satisfied that a Defendant would not have reasonably foreseen a risk of harm from allowing an undergraduate (or, by logical extension, an employee) into a tunnel which contained asbestos lagged pipe work (**NB** - in poor condition) for a relatively short period in 1974. Whilst subsequent events have shown that such an enterprise might well entail a risk of the contraction of mesothelioma, no such knowledge or foresight could reasonably be imputed to a Defendant in 1974.



Accordingly, although the first instance Judge in the Williams case had found that sufficient exposure to asbestos had taken place (pursuant to Fairchild) to materially increase the risk of eventuation of mesothelioma<sup>2</sup>, the additional finding that this exposure had taken place in breach of duty could not stand in the context of the appropriate test of foreseeability of harm pursuant to Baker v Quantum and as specifically applied in Asmussen v Filtrona UK. Accordingly, the appeal of the Defendants was allowed and albeit only allowed in part<sup>3</sup>, this led to the dismissal of the claim and/or its successful defence.

### **Comment**

It is, once again, ironic that a principle established in industrial deafness litigation has now been applied (successfully) in mesothelioma claims. A cynic might suggest that running the argument "directly" (ie - in a mesothelioma case) may well not have succeeded!

The principle established in Williams v University of Birmingham is a welcome clarification of the position, albeit, in some senses, merely a re-statement of the law as it was understood previously; that is that a Claimant must show that a Defendant had knowledge (actual or constructive, but more often than not in occupational disease claims, the latter) that his conduct would give rise to the Claimant being placed at risk of serious harm.

<sup>2</sup> There was, it should be noted, some criticism of this finding in the Court of Appeal, albeit, ultimately, it was not interfered with by their Lordships.

<sup>3</sup> The Defendants had also appealed the finding as to exposure sufficient to materially increase the risk of disease upon the basis of a de minimis argument.

## DOLMANS FOCUS ON



Accordingly, in the context of trivial or environmental exposures to asbestos, particularly in historical periods when knowledge of the harm presented by asbestos dust was, at the very least, very different from our perception of the position today, establishing breach of duty on the part of a specific Defendant remains a burden to be discharged by the Claimant and such burden must be discharged by reference to the extent of knowledge available at the time in question. Proof of causative exposure (by reference to *Fairchild*) is insufficient in isolation, exposure must also have been culpable.

Thus, there is some reason to suppose that claims where relevant exposure is low will be rather more difficult to prove for a Claimant (absent an allegation of “special” or specific knowledge on the part of the Defendants). Accordingly, claims of the type seen in the *Sienkiewicz* and *Willmore* cases might well have entailed a different result “post *Williams*”.



It should be emphasised, however, that defensibility in such claims is likely to be a very fact sensitive issue, reflective of an inter-relationship between the historical period(s) involved, the extent of exposure (**NB** - on the evidence available in the case) which, on balance of probabilities, took place and the guidance available to a particular Defendant. Any variability in any of these three factors is likely to have a potentially significant effect upon the viability of the claim or the defence of the same, as the case may be. Thus, claims of this type will still require very careful evaluation and, in most instances, the assistance of an expert to evaluate the extent and effect of guidance issued by the relevant industry bodies at the material time.

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## DOLMANS RECENT CASE UPDATE

### Civil Procedure - Appeals - Court Attendance

#### *Howard v Stanton [2011] EWCA Civ 1481*

Where a Judge had disposed of an application for permission to appeal as a substantive appeal in the absence of the Respondent to the application and had allowed the appeal, that disposition was a serious procedural irregularity that vitiated his decision.

The Court of Appeal held that under CPR Part 52, a Respondent party notified of an application for permission to appeal was not required to attend Court unless the Court requested him to, and no such request had been made in the instant case. The Judge's hearing of the case, in the Respondent's absence, had caused injustice as it deprived the Respondent of the opportunity of arguing her case. That error was compounded as the Judge had not stated where the original Judge had erred and had also taken points not raised by the parties. Accordingly, it was appropriate to allow the appeal and remit the matter to a different Judge as it was only appropriate for the Appellant to be allowed, having been granted permission to appeal, to argue that appeal on its merits and as the Court of Appeal had refused permission to adjourn the instant appeal on the basis that the real point of the appeal was procedural rather than on its own merits.



### CFA - Level of Success Fee When Liability Admitted

#### *Fortune v Roe [2011] EWHC 2953 (QB)*



The Claimant claimed damages for injuries arising from a RTA. Liability was admitted. The Claimant then entered into a CFA with a 2 staged success fee, whereby there was a 25% success fee if the Claimant won 3 months before Trial or a 100% success fee if the Claimant won at any later date. Quantum was eventually agreed and the case was settled a month before the Trial.

At first instance, the success fee allowed was 20%, on the basis that in relation to recovery of costs, the Claimant was risk free as the Claimant had 'won' the claim when Judgement was entered and any risk in assessing quantum could not justify a 100% uplift.

## DOLMANS RECENT CASE UPDATE



On appeal, it was identified that the Judge had misconstrued the meaning of 'win' as the Claimant was not considered to have 'won' until the litigation had been concluded by a decision or agreement in favour of the Claimant. However, a success fee of 20% was reasonable in the circumstances as the admission meant that the Claimant would recover her costs up to that date and it was inevitable that the Claimant would recover a substantial sum. There was a risk in relation to a Part 36 Offer, but that was unlikely to arise until close to Trial once all of the expert evidence was to hand when most of the costs would have been incurred. The fact of a 2 staged success fee did not mean that the second stage could always be justified and it was difficult to see how the first stage of 25% was justified as there was no significant risk to the Claimant until a Part 36 Offer was made.

### Credit Hire

#### ***Pattni v First Leicester Buses Ltd : Bent v (1) Highways & Utilities Construction (2) Allianz Insurance [2011] EWCA Civ 1384***

In these two appeals, the Court of Appeal summarised the principles relating to the recovery of car hire costs. Both Claimants had hired replacement cars on credit hire terms, although they could have afforded to hire cars without using credit hire.

Under the terms of 'P's' credit hire agreement, he was obliged to pay interest on the credit hire charges for the period between the end of the hire of the replacement vehicle and the date when the claim against the Defendant driver was finalised. The Judge awarded a sum for hire charges, but held that interest was not recoverable. 'P' appealed. The Court of Appeal upheld the finding that 'P' could not recover interest. The additional benefits obtained by hiring a replacement car on credit terms were not recoverable as damages for loss of use of a car. The interest charge constituted the cost of such an additional benefit, namely the benefit of delayed payment of the credit hire charges until the conclusion of the claim. It was, therefore, not a recoverable loss in the case of a hirer who was not impecunious.



## DOLMANS RECENT CASE UPDATE



In 'B's' case, the issue was the calculation of the hire rate. The Court of Appeal confirmed that if a Claimant could afford to hire a replacement car, without credit terms, the damages recoverable for loss of use would be the sum attributable to the basic hire rate of the replacement car. A Judge must ascertain the basic hire rate for the model of car the Claimant actually hired as the Claimant is entitled to recover the actual cost of hire, not an average cost of hire. In doing so, the Court should consider actual locally available figures. The Judge had erred in her approach and on the evidence the Defendant, had not proved that the basic hire rate for the replacement car was less than the credit hire rate.

### Interim Payments

#### ***TTT v Kingston Hospital NHS Trust QBD 25/01/2011***

Liability was admitted for a clinical negligence claim and interim payments of £300,000.00 and £800,000.00 had been made for the purpose of purchasing suitable accommodation. A property had been purchased, but a further interim payment of £280,000.00 was sought in order to adapt it for the Claimant's needs and £120,000.00 was sought for his interim care and therapy regime.

The Court applied CPR r 25.7(4) and *Eeles v Cobham Hire Services Ltd* and allowed the application as it was satisfied that on a conservative approach, the total of the interim payments would not exceed 90% of the amount he was likely to recover as a capital sum. Based on the Parties' Schedules, the Claimant was likely to recover over £2 million.



### **Personal Injury - Road Traffic Accident - Apportionment of Liability/ Contributory Negligence**

#### ***Ali v D'Brass CA (Civ Div) Lawtel 23/11/2011***

The Claimant brought a claim for personal injury and consequential losses arising out of a road traffic accident. The Claimant had been driving on a dual carriageway. Just prior to the collision, the Defendant was approximately half a car length behind the Claimant. The Claimant applied their brakes sharply, for which the Defendant was unprepared, and the Defendant drove into the rear of the Claimant's vehicle.

## DOLMANS RECENT CASE UPDATE



At first instance, the Judge described the Defendant's positioning as inadequate, but found the responsibility for the accident lay with the Claimant for braking negligently or recklessly when there was no hazard. It was held that as the Claimant had applied their brakes for no good reason and without warning, the Defendant should bear no liability for the accident. The Claimant appealed.

The Court of Appeal held the collision could have been avoided if the Defendant had driven with more care and distance from the Claimants vehicle. The Judge erred in not finding the Defendant at fault. The Claimant was at fault in braking sharply, but the Defendant was also at fault. The test in Section 1 of the Law Reform (Contributory Negligence) Act 1945 had been met. It was clear that the Defendant had been driving too close to the rear of the Claimant's vehicle and was more to blame than the Claimant for the accident, Stapley v Gypsum Mines Ltd (1953) AC 663 HL applied.

Accordingly, the Claimant was found to be 40% liable and the Defendant was 60% liable.

### Service of Claim Form

#### ***Bethell Construction Ltd & Bethell Group plc v Deloitte & Touche [2011] EWCA Civ 1321***

In February 2007, 'B' issued a protective claim form against 'D'. The Claim Form was sent to 'D', but was expressly not by way of service. Various extensions of time were agreed for service of the Claim Form and Particulars of Claim, the last of which comprised a general extension determinable on 14 days notice by either Party. In October 2010, 'B' sent the Particulars of Claim to 'D' by way of service, but did not enclose the Claim Form. 'D' then wrote to 'B' giving 14 days notice to determine the general extension. The Claim Form was not served by the expiry of the 14 day period and 'D' asserted that the claim was time barred.

## DOLMANS RECENT CASE UPDATE

'B' submitted that the Claim Form had been validly served because the letter serving the Particulars of Claim constituted constructive service of the Claim Form which 'D' was already in possession of or 'D' had waived its entitlement to require proper service. Alternatively, service should be dispensed with under CPR r.6.16.



The Court of Appeal held that the Claim Form had not been validly served. The rules were there to be complied with. 'D' had not waived entitlement to require proper service. Further, there were no exceptional circumstances sufficient to justify dispensing with service.

For further information on any of the above cases, please contact  
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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](mailto:clareh@dolmans.co.uk)

## DOLMANS COMING UP

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