

## Dolmans Insurance Bulletin

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

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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

### X v POWYS COUNTY COUNCIL

We recently represented the authority in this bullying/occupational stress claim which the claimant discontinued 2 months prior to trial, listed for 4 days, and successfully recovered £28,000 of the authority's legal costs from the Claimant's union which was funding the claim.



The case raised a number of interesting issues particularly in respect of the impact of disciplinary proceedings on the civil claim and of the contents of the pre-employment medical form completed by the Claimant.

#### Background

The Claimant started work with the authority in November 2004 as a support worker for vulnerable adults in Social Services.

The Claimant alleged that he was bullied by his immediate line manager and that this led to him suffering with anxiety and depression causing him to be off work for three separate periods of time.

On his return to work (at a different location) from his first absence he commenced a grievance against his line manager, in respect of the alleged bullying behaviour, who was suspended pending investigation into the allegations and a disciplinary procedure involving the manager was commenced.

The Claimant was then absent from work again suffering further anxiety and depression as although he had been moved to a different location away from the original line manager, he said that they still had to come into contact regularly. Further, he alleged he could not cope at work during the disciplinary process.

The Claimant then returned to work at another different location (as agreed with him) however the funding for that position ran out and he was left with uncertainty as to where he would be working. As a consequence he went absent with stress symptoms for a third time.

Subsequently he agreed to be redeployed in a different role in which he is still working.

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As a result the Claimant had no loss of earnings; the claim was comprised of general damages only.

### Claimant's successful grievance

The Claimant's grievance against his line manager (which was dealt with internally) succeeded and this may have had an influence upon his ultimate decision in terms of litigation.

There was of course a litigation risk presented by the fact that the disciplinary panel had accepted the claimant's evidence over that of his line manager. However we pleaded that the correctness of the decision of the disciplinary process was inadmissible in the civil proceedings and relied upon Three Rivers District Council and others v Bank of England (No 3) 2001 UKHL 16.

Further we sought to reduce the impact of the successful grievance by identifying significant relevant information that had not been available to the disciplinary panel. Further although the behaviour of the Claimant's line manager was considered to be 'inappropriate' by the disciplinary panel we submitted that it did not amount to bullying for the purpose of a civil negligence claim.

### Liability

The Claimant alleged that the line manager was aggressive, rude and hostile to him speaking to him loudly in a derisory manner with matters culminating when the line manager attended upon the Claimant's house when he was off sick banging on the door asking for the key for a minibus that the Claimant was upon rota to drive that day.



In respect of the bullying the allegations were in negligence only without any reference to breach of the Protection from Harassment Act 1997. We submitted that even if the Claimant could prove that the conduct complained of occurred; that conduct was not sufficiently serious or oppressive to be liable to cause injury to an employee of normal fortitude.

In respect of the return to work issues there were concerns for the authority's position as moving the Claimant to a different location was not ideal for him and the underlying

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security of his employment (despite the apparent uncertainty over funding for the role that he had at the particular location) was, arguably, not effectively communicated to him.

The case was by no means without risk to the authority especially as the defence was largely dependant upon the line manager being willing to give evidence on behalf of the authority (where previously a finding had been made against the line manager in the disciplinary proceedings.)

### Pre-employment medical form and psychiatric history

There was one issue that significantly changed the complexion of the whole claim and this was the Claimant's pre-employment psychiatric history.



His medical records identified that he had suffered a 10 year history of anxiety and depression prior to him starting his employment with the authority. Further the notes identified that he had on 3 previous occasions attended upon his GP complaining that 3 different employment supervisors had allegedly victimised him. A pattern had emerged.

We also ascertained that he had made a claim against his previous employers for constructive dismissal. On obtaining the relevant file (which entailed several applications against the claimant) we ascertained that he had, in fact, received a low level payment in settlement however it was clear that his conduct with that employer had been of a similar nature to that experienced by the authority.

The final piece of negative evidence as far as the Claimant was concerned was the pre-employment medical form that the Claimant had completed. He had answered 'no' to the question as to whether he had suffered from any previous depression/psychiatric problems. This was wholly inconsistent with the Claimant's medical records. Although the Claimant attempted to give an explanation for this answer, we identified that he had, in fact, the day before completing the form, attended upon his GP for anti-depressants. This, arguably, rendered such explanation valueless.

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We subsequently obtained evidence from the authority's occupational health consultant that had the Claimant's true medical history been disclosed, the consultant would have advised against employing the claimant in the job he was applying for as it involved working with vulnerable adults. We therefore submitted that he would never have been employed in the material position had he been truthful and that he should not be able to recover damages arising out of his obtaining employment based upon on a misrepresentation.

In the defence we pleaded that the claimant therefore obtained a pecuniary advantage (his employment) by deception and contended that the claim should be struck out and that the claim should be debarred on grounds of public policy. We relied upon Hewison v Meridian Shipping Pte (2002) EWCA Civ 1821.

### Points to note

The two pertinent points that this case draws in to focus are:

1. The fact that a disciplinary hearing has been decided in the Claimant's favour arising out of the same facts does not necessarily mean that the civil claim cannot be defended. In this case it appeared that the Claimant had presented as a credible witness during the disciplinary process and without convincing or substantial documentary evidence to dispute his position, he was believed. This was not, however, going to be sufficient in the civil proceedings in which we collated all the documentary evidence which enabled us to show the complete picture.
2. Locating all relevant documentary evidence is vital – for instance we had to specifically seek out the pre-medical employment form as it was not retained on the personnel file. This document, we believe, was key in persuading the claimant to discontinue. The pre-employment medical records and his previous employers' file of papers in relation to his claim against them were of course essential also and, as can be seen from the above discussion, perseverance was essential in order to secure their disclosure.

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## DOLMANS REPORT ON

### JASON LEE O'NEILL v TORFAEN COUNTY BOROUGH COUNCIL

#### "AN UPHILL STRUGGLE"

The Claimant aged 34 at the date of his accident brought an action for personal injury, loss and damage sustained on 28<sup>th</sup> December 2004 when attending the Authority's Ski Centre. He claimed he lost control whilst descending the main slope whilst taking action to avoid children playing on the slope.



Breach of Section 2 of the Occupiers' Liability Act 1957 was alleged in permitting him to use the facility when he did not have the requisite experience and for failing to instruct/supervise users when it was reasonably foreseeable failure to do so could result in injury. Alternatively, that the accident was caused as a result of either providing faulty equipment or because the proper settings had not been applied.

Whilst admitting the Claimant attended the facility on the date in question and suffered an accident/ injury, liability and quantum were in dispute.

The letter of claim maintained the Claimant had been issued with skis and ski poles without being questioned about his physical characteristics i.e. height, weight, age or experience. Further, having used the facility only once previously, his inexperience should have been apparent to the Authority's staff. In failing to supervise users, children had been permitted to play on the slope contributing to the accident which occurred when the Claimant tried to avoid them. However, he lost his balance and fell sustaining injury.

Further to pre-action protocol enquiries/investigations the Authority denied liability relying upon its operating procedures. In particular, it was denied that the Claimant would not have been asked about his experience and physical characteristics because the answers would be required by the Authority's staff, to issue the appropriate Ski Pass/equipment and the proper settings to be applied. Furthermore, it was refuted that there was a failure to supervise users or that children would have been permitted to play in the area where the Claimant fell.

When proceedings were issued the Claimant further alleged the Authority failed to exercise reasonable care in management/control of the facility by not complying with its own operating procedures.

The Defence admitted the Claimant's attendance and his reporting an accident on that date but denied it had occurred in the manner pleaded.

Prior to being issued with a ski pass a safety briefing would have been undertaken further to which qualified binding technicians issue the appropriate equipment which is checked before issue and was rechecked following the accident when no fault was identified. Furthermore, users of the facility are monitored and inappropriate behaviour would not be condoned/ permitted.

We averred in the defence that the accident was caused as a result of the Claimant's failure to control the speed of his descent and incorrect exercise of the snowplough technique, which could not reasonably be guarded against by a Defendant exercising reasonable care to ensure the reasonable safety of the Claimant.

The Claimant relied upon medical evidence from a Consultant Trauma & Orthopaedic Surgeon in whose report the account of the accident was for the most part consistent with the claim put forward. However, whilst it referred to children on the slope there was no mention of misbehaviour on their part.



The case initially limited to £15,000.00 was allocated to the Fast Track, proceeding through all stages including disclosure/inspection and exchange of witness evidence. However, whilst a trial date was awaited, the Claimant applied for permission to amend the Statement of Value up to £50,000.00 thereby appropriate for re-allocation to the Multi Track and a second Application for permission to rely upon expert evidence from a Winter Sports Consultant.

Permission was given to both parties to obtain their own expert evidence. It was agreed the Claimant's report would be served unilaterally and thereafter instructions obtained as to whether the Authority wished to challenge the report and instruct its own expert.

By the date of the expert's instruction the equipment was not available for inspection, having been checked following the accident investigation in the absence of a defect being identified, it had been replaced into stock.

The expert therefore prepared the report further to consideration of the witness evidence of the parties concluding that if the Claimant's evidence was accepted, he should succeed, whereas if the Authority's evidence was preferred it was indicative of a perfectly conscientiously run Ski Centre.



The expert set out the possibilities to be considered by the Court including that the Authority's staff were misled unintentionally and/or misunderstood what they were told raising a potential flaw in procedures either because the questions were not sufficiently clear to elicit appropriate responses or the replies were not checked. Alternatively, if intentionally misled then allowing the Claimant access to the facility should not be criticised.

A third possibility was that the Authority's evidence was correct insofar as it had a system where questions were asked and/or truthful responses received but that inappropriate actions were taken by the Authority's staff.

We advised the Authority against instructing its own expert in view of his conclusion that if the Authority's witness evidence was accepted the defence should succeed.

The matter was listed for Trial on the 1<sup>st</sup> and 2<sup>nd</sup> September 2009 before Recorder Andrew Keyser QC.

A matter of weeks before Trial the Claimant served a medical report from a Consultant Psychiatrist together with a further application for permission to rely on the report at Trial, claiming as a result of his physical injuries, psychiatric injury had been sustained, with ongoing psychological problems five years post accident impacting upon his claim for Special Damages.

The Claimant's Solicitors indicated an intention to apply for a split trial for the matter to proceed on liability only, to which the Trial Judge reluctantly agreed.

Oral evidence was heard from the Claimant and witness in support who was present when the accident occurred.

Whilst the Claimant conceded he was asked questions about his height, weight and age, he denied questions were asked about his experience or that lessons had been suggested. He stated the accident occurred during his second visit to the facility.

During his first visit he stayed in the “green area” (indicated by the colour of the matting) designated for the less proficient where he also commenced on his second visit. However, due to his improvement he felt confident enough to use the main slope area and the Poma ski lift which he managed to operate without assistance/instruction which provided access to the main slope.



He negotiated the main slope/Poma lift on six or seven occasions adopting the snowplough technique, without incident.

Due to children using the facility (as opposed to misbehaving, which was his case until Trial) he had to take avoiding action because the children had not cleared the bottom of the slope in advance of his descent. He lost his balance, fell and sustained injury.

His witness in support maintained he remained in the green area because of his ineptitude. Whilst initially denying they had been asked about their skiing ability when purchasing tickets, this was abandoned in oral evidence. He could not recall being asked questions about his physical characteristics but claimed the Authority was aware they were novices.

The Authority’s witness evidence consisted of a statement from the Ski Centre Manager outlining operating procedures and accident reporting/investigation procedures consistent with the pre-action denial of liability and Defence.

The statements included the eyewitness account of the Attendant monitoring/supervising the slope when the accident occurred. Oral evidence on behalf of the Authority was given by the Senior Duty Officer on 28<sup>th</sup> December 2004. Although not a

witness to the accident he assisted the injured Claimant, arranged for an ambulance and preservation of the equipment, checked as part of the accident investigation.

He detailed the operating systems/procedures and assisted the Court explaining there was no possibility of tickets being issued and/or equipment provided in the absence of those systems/procedures being employed.

Furthermore, whilst the Attendant supervising the slope was unavailable, the Senior Duty Officer had been outside earlier and was able to give evidence that the Attendant had been undertaking his supervisory duties.

Despite proceeding as a split trial the Claimant was cross-examined at length on his alleged losses and damage in view of the inconsistencies in his evidence to further challenge his credibility.

In his Judgment, Recorder Keyser rejected the evidence of the Claimant and witness in support deeming them wholly inconsistent and unreliable preferring the evidence on behalf of the Authority in its entirety.

It was found as fact that the Authority had managed its facility in line with its operating procedures. The Claimant had been asked the requisite questions to which he had provided responses, reasonably acted upon by the Authority's staff not only in issuing him with the appropriate ticket but also applying the proper settings to the equipment.

The Claimant's skiing inexperience outlined before the Court was not accepted. Even on his own evidence he performed the snowplough technique without incident despite being a particularly difficult manoeuvre as described by the Authority's Senior Duty Officer which was accepted by the Court.

Similarly, he had descended the main slope and operated the Poma ski lift without incident which Recorder Keyser determined would not have been possible had he



been as inexperienced as he was claiming. Furthermore, the Claimant's witness in support had conceded questions had been asked about their ability. Whilst the Authority's witnesses were only able to give evidence on the system as it was operated Recorder Keyser found he could not properly place reliance upon the Claimant's evidence or that of his witness in support and did not find the Authority's system had been departed from on either occasion the Claimant attended. There was a system in place which was operating and there was nothing about the manner in which the Claimant or his witness had used the facility to indicate a need for intervention by the Attendant deemed to be supervising the slope.

Further, the Claimant had abandoned the allegation that children had been misbehaving conceding they had used it in the appropriate manner and there was no evidence before the Court that the equipment provided was in any way defective.

In conclusion Recorder Keyser advised in those circumstances he was not persuaded that there had been any breach of duty and/or negligence and dismissed the claim.

### **Comment**

This is an important case for Defendants rarely in a position to put forward direct oral evidence as to the facts and circumstances of an accident. Generally, the Defendant has to document its operating systems and procedures to persuade the Court not only that such systems and procedures are reasonable to ensure the reasonable safety of the user of its facility but also that such systems and procedures have been complied with. By working closely with the Authority's witnesses and preparing detailed and structured statements to reflect such matters, we were able to assist the Authority in satisfying the Court upon such matters, so ensuring that a leisure facility provided for the whole community could continue to operate confident in its operative systems.

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## DOLMANS FOCUS ON

### CPR 50<sup>th</sup> UPDATE – PART 35 CHANGES

On the 1<sup>st</sup> October 2009, the 50<sup>th</sup> amendment to the Civil Procedure Rules came into force which amongst amendments to other rules, incorporated changes to Part 35 which deals with Experts and Assessors.



Whilst not a fundamental change, the amended Rule 35 and accompanying Practice Direction, is important to all lawyers and experts, and has essentially 'tidied up' some of the previous not so 'black and white' areas.

At a glance: -

- Rule 35.2 provides a new definition of 'expert' [a person who has been instructed to give or prepare expert evidence for the purpose of proceedings] and 'single joint expert' [an expert instructed to prepare a report for the court on behalf of two or more of the parties to the proceedings];
- Rule 35.4(2)(a) and (b) have also been amended slightly. Previously the sections stated that where a party was applying for permission to rely upon expert evidence, he needed to (a) identify the field in which he wishes to rely on expert evidence and (b) where practicable, he needed to identify the expert in that field on whose evidence he wishes to rely. The amended rule 35.4(2)(a) now states that the party applying for permission must identify the field in which the expert evidence is required and (b) where practicable, identify the name of the proposed expert. This should help to prevent a situation where a party can instruct more than one expert and then select to disclose and rely upon the expert who gives the best or most favourable evidence for the case.
- Rule 35.4 which deals with the Court's powers to restrict expert evidence is now expanded upon with a new paragraph '3A' which states that in a small claim or fast track matter, permission will normally only be given to call expert evidence on a particular issue from one expert;
- Rule 35.4(4) now enables the Court to "*limit the amount of a party's expert's fees and expenses that may be recovered from any other party*";

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- Under amended Rule 35.6 (1), questions posed to experts must be 'proportionate';
- With regards instruction of a single joint expert, there is guidance in amended Rules 35.7 and 35.8 which seek to reduce any inconsistency in the appointment of single joint experts. For example, 35.7 (1) provides that where two parties wish to submit expert evidence on a certain issue, the court may direct that the evidence on that issue is to be given by a single joint expert.....and 35.7 (2) where the parties cannot agree who should be the single joint expert, the court may select the expert.
- Reports must contain statements to confirm (i) that they understand their duty to the court and have complied with and will continue to comply with it, and (ii) that they are aware of the requirements of Part 35 and the protocol for the instruction of experts (Rule 35.10).



There is also a new mandatory statement of truth for experts which states “*I confirm that I have made clear which facts and matters in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer*”. This new wording is set out in the protocol for the instruction of experts which is found in the annex to the new Practice Direction to Part 35.

The Practice Direction to Part 35 has been substituted entirely. Arguably one of the most important changes deals with **Single Joint experts** (previously paragraph 6, now paragraph 7) as there is now guidance on what the Court will consider when deciding whether a single joint expert is appropriate : -

- Paragraph 7 states that when considering, under Rule 35.4, whether to give permission for the parties to rely upon expert evidence and whether that evidence should be in the form of a single joint expert, the court will take into account all the circumstances, in particular the nine circumstances which are listed in paragraph 7.

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Not exhaustively, these include whether it is proportionate to have separate experts for each party on a particular issue; whether the instruction of a single joint expert will assist the court and the parties to resolve issues more speedily and in a more cost-effective way and whether questions put to a single joint expert may not conclusively deal with all issues that may require testing prior to trial.



The amended rules may be viewed on the Court Service website:

([www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk) – link Legal/Professional)

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## DOLMANS RECENT CASE UPDATE

### Disclosure Orders in Respect of Costs – Against Third Parties

#### Thomson v Berkhamsted Collegiate School and Thomson (interested parties) (2009) EWHC 2374

The claimant had claimed damages against the school for failure to take proper steps to prevent him from being bullied. The claim was discontinued 2 weeks into the trial and the defendant obtained a costs order against the claimant. The claimant's costs had been met by his parents and the school sought its costs from the parents under S51 Supreme Court Act 1981 and CPR 48.2 and they were joined into the proceedings as interested parties. The defendant applied for orders requiring disclosure statements from the parents including correspondence between the parents and the claimant's solicitors and his experts.



Before considering the disclosure application the court needed to consider when a third party costs order was likely to be made (as if such a costs order was unlikely then the ancillary order for disclosure would be inherently improbable) and referred to the relevant principles set out in Dymocks v Todd (2004) 1 WLR 2807.

Here as required by Dymocks the parents were not merely the funders of the claimed but were directly concerned with the facts of the claim and played an active role in the litigation. The parents wanted the action to be taken and threatened the school at an early stage with legal action themselves. It was doubtful that the claim would have been otherwise funded as the claim was somewhat speculative due to evidential weaknesses. Consequently the Judge considered that the application for third party costs had reasonable prospects of success.

However the defendant would have to also show that the parents had gained a benefit from the litigation and had control over it. The only way of showing that would be if the communications were disclosed. The correspondence sought was likely to be probative and not privileged in its entirety and it was not disproportionate. So the application was granted in part.

## **DOLMANS RECENT CASE UPDATE**

### **Setting Aside Default Judgment**

**Mullock v Price**  
**Court of Appeal**  
**15/10/09**

The claimant issued proceedings against the defendant for damages for personal injuries. The defendant passed all the documents to its insurance brokers who were to deal with the matter but nothing was done. The claimant obtained judgment in default and obtained an order for an interim payment which the defendant passed to its insurers and was paid. Damages were awarded to the claimant at the disposal hearing.

The defendant applied to set aside judgment when it was informed by the police that the insurance brokers were being investigated for fraudulent policies.

The defendant's appeal was successful on the basis that there was a real prospect of successfully defending the claim and the application had been made promptly.

The Court of Appeal however restored the judgment.

CPR 13.2 required the applicant to make the application to set aside promptly. The defendant knew that judgment had been entered, knew of the interim payment and the final order against him but did not take action for 2 years. He should have acted from the time he was aware of the judgment. The error by the appeal judge to take into account irrelevant factors namely the reliance on the insurance brokers as explaining the delay entitled the Court of Appeal to interfere with the exercise of the judge's discretion.



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### Service of Proceedings

**Relfo Limited (In Liquidation) .v. Bhimji Velji Jadva Varsani  
[2009] EWHC 2297 (Ch)**

### **High Court - Chancery Division**



The Claimant served proceedings, pursuant to CPR 6.9(2), on the Defendant's father at an address in London. CPR 6.9 (2) requires service at an individual's "*usual or last known residence*". The Defendant applied to set aside service on the grounds that the London address was not, and never had been, his residence. The Defendant alleged that he was an habitual and permanent resident of Nairobi. He asserted that he only travelled to the UK for a holiday once a year where he stayed for a period not exceeding one month.

The London property was vested in the Defendant and his wife. His wife and three children lived there. It was also occupied as a residence by the Defendant's mother, father and sister.

The Judge confirmed that one can reside in more than one place. The issue in this case was whether the quality of the Defendant's occupation of the London address was as a home. The Judge held that it was. It was where the Defendant's immediate (and wider) family lived. The family was united. For business reasons the Defendant had to live for most of the year apart from his family. Further, the term "*usual residence*" meant, in its ordinary signification, that which was in ordinary use. There was a notion of regularity about it but not necessarily comparative intensity of use. On the evidence, the Claimant had a much better case in establishing that the London address was a usual residence of the Defendant than the Defendant had of establishing the contrary. Accordingly, the Defendant's Application failed.



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### Public Funding

**R (On the Application of E) .v. (1) JFS Governing Body (2) Admissions Panel of JFS and Others**

**[2009] UKSC 1**

**Supreme Court**

The Appellants, “JFS”, appealed against The Court of Appeal’s decision that the refusal to admit “E”’s son to a Jewish School because he was not regarded as matrilineally Jewish constituted discrimination on racial grounds. “E” had had the benefit throughout the proceedings of funding from The Legal Services Commission. “E” sought the benefit of public funding for the substantive hearing of the Appeal. The Legal Services Commission were not prepared to provide him with that benefit unless he took steps to protect The Legal Services Commission against an Order in “JFS”’s favour for the costs of the Appeal. Accordingly, “E” applied to the Court for a Protective Costs Order.



The Court noted that “E” would not have made the Application had he not been forced to do so by The Legal Services Commission. It was clear that without the support of public funding “E” would not be able, as he wished to do, to continue to resist the Appeal. It was essential that there should be representation for both sides. The case raised issues of considerable public importance. The date for the hearing of the Appeal had already been fixed and time was now too short for effective alternative arrangements to be made for

the Court to be provided with an amicus to argue the case in “E”’s place. Accordingly, the Court considered that the real issue that had to be addressed was not whether the case was suitable for a Protective Costs Order but whether the decision of The Legal Services Commission to refuse funding in the case unless it had the benefit of a Protective Costs Order was compatible with its own Funding Code, made under Section 8 of The Access to Justice Act 1999, and open to attack on traditional *Wednesbury* grounds.

The Court held that compelling reasons would have to be shown for withdrawing public funding from a litigant who had been publicly funded in the Court below, had been

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successful in that Court and wished to resist an Appeal to a higher Court by the unsuccessful party. No such reasons have been shown in this case. It should be understood, as a principle of general application, that if The Legal Services Commission decided to fund a litigant, whether by way of claim or a defence, who was successful in his cause, that decision should ordinarily be seen to carry with it something close to an assurance that The Legal Services Commission would continue to support him in any subsequent Appeal by the unsuccessful party while he remained financially eligible. That would particularly be so where:-

- a) the withdrawal of support would expose the publicly funded litigant to a substantial risk for future costs,
- b) he retained a significant interest, quite apart from his interest in resisting any future costs liability, in maintaining his success in the litigation, and
- c) the issues raised on the Appeal were of general public importance which it was in the public interest to resolve and his case on those issues was unlikely to be properly argued unless he continued to be funded by The Legal Services Commission.

All three of those circumstances prevailed in this case. The decision to refuse public funding at the current stage appeared to the Court in all the circumstances to be so unreasonable as to be unlawful.

The Court held that “E” was entitled to an immediate declaration that the only reasonable decision open to The Legal Services Commission was to continue to provide him with public funding for the Appeal.

“E” had not sought an Order that each side should be liable for its own costs in any event because, amongst other reasons, the level of remuneration for the Lawyers was different between a legal aid and an inter-partes determination of costs. The Court commented that a Court should be very slow to impose an Order that each side had to be liable for its own costs in a high costs case where either or both sides were publicly funded. Had such an Order been asked for in this case the Court would have refused to make it.

Accordingly, “E”'s Application for a Protective Costs Order was refused and a declaration made that the only reasonable decision open to The Legal Services Commission was to continue public funding without a Protective Costs Order.

## DOLMANS RECENT CASE UPDATE

### Costs - Fixed Recoverable Costs Regime

#### **Aurangzeb v Walker (12.10.09)**

The Claimant, a child, had brought proceedings through his litigation friend and mother in relation to a road traffic accident. The Claimant's injuries were relatively minor and settlement was agreed in the sum of £500 with an agreement for payment of the claimant's reasonable and proportionate costs.



Notwithstanding this wording, the Claimant's Solicitors agreed to deal with the Claimant's costs on the predictable basis pursuant to CPR Part 45. The Claimant's Solicitors then agreed to deal with the case by way of Parental Indemnity rather than the Part 8 procedure to obtain the Court's approval of the agreed settlement.

The Claimant's Solicitors then sought costs, calculated on the predictable basis in the sum of £1,822.19. The Defendant's Solicitors disagreed and stated that although the claim had never been allocated to a track, had the claim been issued for the amount of the settlement, it would have been allocated to the small claims track and therefore, only costs permitted under that regime should be allowed.

The Claimant argued that as this was a road traffic accident with a value of under £10,000 which, under CPR Part 21.10 required Part 8 proceedings, the Claimant should be entitled to costs calculated on the predictable costs regime pursuant to CPR Part 45.

It was held that the predictable costs regime did not apply because of CPR Part 45.7(2) (d) which states that one of the criteria for the predictable costs regime to apply is that the Claim would not have been allocated to the small claims track if it had been issued. Given the amount of the settlement in this case it was accepted that this matter would have been allocated to the small claims track.

The Court applied the decision in Coles .v. Ketlik. Pursuant to CPR Part 8.9, any Part 8 proceedings are treated as being allocated to the multi track as the Part 26 Allocation

## DOLMANS RECENT CASE UPDATE

Rules do not apply to Part 8 proceedings. The Court in that case therefore held that the costs should be assessed on the standard basis using the Court's discretion under CPR Part 44.3. On this basis and pursuant to CPR Part 44.5, the only costs which should be allowed are those which are reasonable and proportionate. Taking this approach, the Court in *Coles .v. Ketlik* held that if proceedings had been issued for the settlement amount and, leaving aside the fact that the Claimant was a child, then the matter would have been allocated to the small claims track and therefore, although the costs should be assessed by Detailed Assessment, the costs to be allowed should be those which would be allowed under the small claims track regime.

The Court in the instant case therefore applied that decision to the current facts and stated that even if the Part 8 procedure had been followed as opposed to the Parental Indemnity, the District Judge would have had to have ordered, at the Infant Approval Hearing, that the Claimant's costs be assessed on the standard basis as the predictable costs regime did not apply and those costs would have been assessed as if the claim had been brought under the small claims procedure.

### **Evidence - Court's Failure to Provide Adequate Reasons**

#### **Taleb v Trina Coaches Limited (2009) Court of Appeal**

The Claimant claimed for injuries sustained when she was cycling along the road when a coach overtook her, clipped the handlebars of her bike and caused her to fall. There was CCTV footage showing the Claimant and the coach both before and after the accident but not the actual cause of the accident itself.



The Claimant gave witness evidence and oral evidence and her daughter provided hearsay evidence which was inconsistent with the evidence of the Claimant. The Judge disregarded the daughter's hearsay evidence as inaccurate and then disregarded the Claimant's evidence saying that it was wrong as well. The Judge therefore based his decision that the Claimant had not made out her case solely on the CCTV footage.

## **DOLMANS RECENT CASE UPDATE**

The Claimant appealed the decision on the basis that the Judge had given insufficient reasons for disregarding her evidence in its entirety.

### **Held**

The Court of Appeal agreed that the Judge had given no reasons for his assessment of the Claimant's evidence as wrong or for disregarding it. The only error that could be found in the Claimant's evidence was that it was stated that she was cycling in a bus lane when in fact she was not. In any event, it was not clear whether this was in fact the Claimant's error or rather simply her daughter's error. The Court of Appeal did not consider that such a minor error was sufficient to reject the whole of the Claimant's evidence. If the Judge had rejected the Claimant's evidence for other reasons, he failed to express it.

The Court of Appeal held that it was not correct for the Judge to base his findings entirely on the CCTV footage as the same did not show the actual accident, only what happened immediately before and immediately after. There was clear evidence on the CCTV footage to show that immediately before the accident; the coach was on a collision course with the Claimant. The footage immediately after showed the coach some way out from the kerb and the Claimant falling from her bicycle but crucially, there was no footage of what caused the Claimant to fall.

On the basis that the Court had already held that it was not appropriate for the Judge to reject the whole of the Claimant's evidence; The Court of Appeal held that the Judge should have assessed the Claimant's evidence in conjunction with the CCTV footage when coming to his conclusions. It was not correct for the Judge to rely entirely on the CCTV footage. Although usually The Court of Appeal would be slow to interfere with findings of fact from the Lower Court, in this particular case, The Court of Appeal had the benefit of seeing the CCTV footage and were therefore able to assess its quality and limitations themselves.

The Court of Appeal therefore held that the Judge was wrong to rule only on the basis of the CCTV footage and ordered that a re-Trial should take place.

For further information on any of the above cases, please contact **Clare Hoskins** at [clareh@dolmans.co.uk](mailto:clareh@dolmans.co.uk) or **Amanda Evans** at [amandae@dolmans.co.uk](mailto:amandae@dolmans.co.uk) or **Anna Hind** at [annah@dolmans.co.uk](mailto:annah@dolmans.co.uk)

## COMING UP

### **Notice of Highways Flooding and Land Drainage Seminar**

**Tuesday 10th November 2009**

**The Pavilions, Llandrindod Wells at 10:00 a.m.**

We are pleased to give notice of the forgoing event in which David Boobier (Partner) will introduce the provisions of the Land Drainage Act 1991. David will talk about the duties and powers of land owners, including Local Authorities, under the Act. This will include looking at what steps land owners should take to comply with their duties and when they should exercise their powers. He will look at how the Act applies in Wales and the role of Local Authorities under the Act.

David will then go on to examine the common law rights and duties of land owners in the context of flooding claims. This will involve an analysis of the law of nuisance including a consideration of several well known cases. He will look at how the law of nuisance has developed over the years and how the degree of control will define the existence of a duty.



Simon Evans (Partner) will look at flooding and drainage issues specifically with regard to highways. He will initially consider a Highway Authority's powers and duties under the Highways Act 1980 and then move on to analyse the position with regard to both historical and current case law thereby providing a rounded knowledge of highway related flooding issues to delegates and enhancing their abilities to deal with planning, operational and claim specific issues.

This event is free to attend but with numbers limited to the first 70 delegates, you should register your interest as soon as possible.

Booking is via the Alarm website and can be accessed via the following link:

<https://reg.istrations.com/delegate/events/ALMHIGHWAYSNOV2009>

## 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](mailto: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 **Jen Dolan** at [jend@dolmans.co.uk](mailto:jend@dolmans.co.uk) or **Neil Dite** at [neild@dolmans.co.uk](mailto:neild@dolmans.co.uk) or visit our website at [www.dolmans.co.uk](http://www.dolmans.co.uk).



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