

Dolmans Insurance Bulletin

Welcome to the September 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

DOLMANS REPORT ON

DON'T BE BULLIED INTO SETTLING CLAIMS

Dolmans have recently represented Torfaen County Borough Council (“the Authority”) in relation to a claim brought against them for damages for personal injuries and losses sustained arising out of alleged bullying at school.



The Claimant was a pupil at a junior school (“the school”) in the County Borough of Torfaen. She was 7 to 11 years old during this period.

The Claimant brought proceedings against the Authority in which her mother was acting as her litigation friend.

She claimed damages limited to £50,000.00.

The Claimant alleged that shortly after starting at the school she became the victim of bullying by fellow pupils. She alleged that this was possibly as a result of her quiet and shy personality or the fact that she was somewhat overweight for her age.

It was alleged that she was the subject of regular, repeated and unprovoked physical assaults and verbal insults and/or teasing carried out during break times by fellow pupils. She named four fellow pupils as the alleged bullies.

The Claimant said that she came home on several occasions with minor injuries consisting of bruising, scratching and cuts. She referred to one particular incident in which a pupil put his hands around her neck in an attempted or mock strangulation causing red marks around her neck and throat. She also referred to verbal insults or teasing which mainly related to her weight.

Further, it was alleged that she reported the bullying to her mother who in turn orally reported what had happened to her teachers and the Headteacher. It is alleged that staff at the school took no effective action to stop it happening and the bullying continued. The Claimant’s mother reported the bullying to the Board of Governors who allegedly also took no effective action to curtail it.

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The Claimant made one allegation of negligence against the Authority. She alleged that the Authority had been negligent in that the school staff and the Board of Governors repeatedly failed to take any or any effective steps to prevent the pupils from bullying the Claimant or from continuing to bully her after her mother had reported each episode of bullying to the teachers and the Board of Governors. The Claimant alleged that she developed a psychiatric illness as a result of the Authority's negligence.



The Claimant transferred to comprehensive school after leaving junior school. She attended the comprehensive school for approximately six weeks before ceasing to attend and being taught at home as a result of alleged bullying which took place by pupils at that school. Surprisingly, the Claimant did not make any allegations of negligence against the Authority in respect of the alleged bullying at the comprehensive school.

We served a Part 18 Request for Further Information upon the Claimant. The Claimant served Part 18 Replies in which she referred to incidents involving one of her teachers at the school. The Claimant alleged that this teacher showed insensitivity towards her by frequently picking on her, shouting at her and pointing in her face. As a result of this, the Claimant's mother made a formal written complaint to the Director of Education and the matter was resolved. The Claimant did not make any allegations of negligence against the Authority in respect of the behaviour of the teacher in question which was also rather surprising.

The claim was investigated thoroughly with all possible witnesses being interviewed. The Headteacher of the school was not available to be interviewed as he had passed away. We interviewed the Deputy Head/Acting Headteacher and the new Headteacher. We also interviewed 3 of her 4 teachers. We were unable to interview the teacher against whom she had made the allegations because that teacher had moved away from the area.

The witnesses all denied the allegations made by the Claimant and said that they were not aware of her being bullied by the named pupils or any other pupils. They were aware that one of the named pupils and another pupil had called the Claimant names

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but they were not aware of any incidents involving physical assault. The witnesses thought that the issues between the Claimant and the two pupils in question were family issues arising out of the fact that the Claimant and the two pupils were first cousins.

We also interviewed the Chair of the Board of Governors regarding the alleged complaints made by the Claimant's mother. She could not recall the Claimant's mother and could not recall her complaining to her either in writing or verbally.



We tried to interview the four alleged bullies and one other pupil but received a mixed response from these witnesses and their parents. We were able to interview one of the named pupils who denied the allegations. She expressed great shock and surprise at the allegations being made against her as she said that she and the Claimant had been friends since the Claimant had left school. We spoke to the parents of two other pupils who said that they had discussed the matter with their children and the allegations made against

them were denied. We were not able to speak to the other two pupils and/or their parents.

We obtained witness statements from the relevant witnesses and proceeded to exchange of witness statements. The Claimant disclosed statements from herself, her mother and her aunt (the mother of one of the alleged bullies). The statements were very vague and lacking in detail.

The Authority had produced a very detailed written Anti-Bullying Policy which was in place at the relevant time.

Our investigations in to the matter were hampered by the fact that the Claimant's school file could not be found. This meant that the documents that were available were limited.

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The Claimant adduced a medical report from a Consultant Psychologist and the Council obtained a report from a Consultant Psychiatrist. The Council's medical expert concluded that any symptoms suffered by the Claimant were unconnected to the alleged bullying. He also concluded that the Claimant was not suffering from any current symptoms, that she had put the matter behind her and that she had developed into a normal 18 year old girl.

We advised the Authority and its insurers that this was a case which should be contested to trial. The question of settlement was considered but it was decided that settlement was inappropriate and that the matter should be contested to trial.

The case was listed for trial in Cardiff County Court. The Claimant discontinued her claim against the Authority two weeks before trial. This was a very good result from the Authority's point of view and vindicated the robust approach that they had taken to the case.

During the course of dealing with the claim, it was apparent that there was very little reported case law in relation to the issue of bullying. One of the leading authorities is the Court of Appeal decision in **Bradford-Smart –v- West Sussex County Council**.

In that case, the Claimant alleged that she was bullied on her way to and from school, that the school was aware of this and failed to take adequate action. The Court of Appeal upheld the first instance decision that a school cannot be held responsible for bullying which takes place away from the school's premises.

Another reported decision is the case of **Faulkner –v- London Borough of Enfield and Lea Valley High School**. This was a decision of His Honour Judge Wilkie, Q.C., sitting as a High Court Judge. In this case, the Claimants alleged that they were bullied in January and February 1996. The Judge found that there had been instances of bullying but not to the extent claimed by the Claimants. However, he also held that other incidents, including an admitted assault on the Claimants, were not bullying incidents but were individual 'one off' incidents. The disputes as to the extent of the reporting of the bullying by the Claimants and their parents were resolved in the Defendants' favour.



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Comment

The word “*bullying*” is a word that is used often in modern society and it is often used out of context. The Claimant in this case alleged that she was bullied by fellow pupils but we concluded that the incidents in question did not amount to bullying. It would appear that the Claimant and her legal advisers eventually came to the same conclusion.

This was only possible following a detailed investigation into the Claimant’s allegations, which was compounded by the lack of contemporaneous documents, and the time that had elapsed in the matter. However, notwithstanding such evidential difficulties, by interviewing numerous witnesses it was possible to undermine the Claimant’s allegations by obtaining statements that challenged particular incidents, which cumulatively undermined the Claimant’s case, leading directly to her discontinuing the action. Such a forensic approach is essential in such cases for the purpose of developing and building a defence against often vague and general allegations, which make such cases difficult to investigate and defend.

We hope that this article will be of assistance to our readers when faced with bullying claims.

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DOLMANS FOCUS ON

McGEOWN – AN EFFECTIVE WEAPON IN THE DEFENDANT’S ARMOURY

The importance of the rule in *McGeown –v- Northern Ireland Housing Executive* was emphasised in the recent case of *Rachel Young –v- Merthyr Tydfil County Borough Council and Another*. The case was heard before His Honour Judge Patrick Curran QC sitting in the Cardiff County Court on 27th and 28th April 2009, although judgment was not handed down until July 2009. Dolmans represented the First Defendant Authority, Merthyr Tydfil County Borough Council.

Background to the Case

The Claimant pursued her claim against the Authority and the Second Defendant for personal injury sustained when – on 4th February 2005 - she slipped on the worn surface of a footbridge in the Taff Bargoed Millennium Community Park in Trelewis, near Merthyr Tydfil. There were no real issues regarding factual causation and it was



obvious that the surface of the bridge was in a state of disrepair at the time of the Claimant’s accident.

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The Authority owned the park and the Second Defendant was a company limited by guarantee, responsible for investing lottery funds into projects for the public benefit. The Second Defendant suggested and constructed the park by agreement with the Authority.

For the purposes of this action only, the Defendants reached an agreement prior to trial as to the apportionment between them of any liability found.

The Legal Arguments

The Claimant contended for three distinct causes of action: Liability as occupiers under the Occupiers’ Liability Act 1957, common law negligence and nuisance.

The Claimant had previously alleged that the Authority was in breach of Section 41 of the Highways Act 1980. However, these allegations were abandoned following the

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Authority's assertion that the bridge where the Claimant's alleged accident occurred was not part of the adopted highway.

The Authority asserted that the bridge on which the Claimant fell was part of an un-adopted highway. As such, it was contended that the Authority had no duty to maintain the bridge under the Highways Act 1980 – as the bridge not being maintainable at public expense – and that it was only liable for any negligent malfeasance as owners of the land. In addition, it was contended that the rule in *McGeown –v- Northern Ireland Housing Executive [1995] AC 233* excluded any occupiers' liability, as the user of a highway needs no permission and is not a visitor or licensee. In addition, it was asserted that there was no cause of action in common law negligence or nuisance.



The Judicial Findings

His Honour Judge Curran QC in dismissing the Claimant's claim dealt with each of the Claimant's causes of action in turn, as follows:

Liability under the Occupiers' Liability Act 1957

A highway is – according to Halsbury's Laws of England (Volume 21, Fourth Edition) – “a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and re-pass without let or hindrance”.

After hearing arguments and evidence as to whether the bridge where the Claimant's accident occurred fell within the said definition, His Honour Judge Curran QC held that the bridge was indeed part of the highway, but had never been adopted by the Authority as maintainable at public expense. It was held that the combined effect of the cases of *Gautret –v- Egerton (1867) LR 2 CP 371* and *McGeown –v- Northern Ireland Housing Executive* is that the owner of land over which a highway passes owes a duty of care to its users for negligent malfeasance, but not for negligent nonfeasance.

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It was held that the Authority's conduct amounted to no more than nonfeasance. The occupiers' liability claim was caught by the rule in *McGeown*, the Claimant being on the bridge as of right, not as a visitor.

Counsel for the Claimant attempted to rely upon the dicta of Lord Browne-Wilkinson in *McGeown* (at pages 247H to 248B), whereby he was "very reluctant to reach a conclusion which will leave unprotected those who, for purposes linked to the business of the owners of the soil, are encouraged, expressly or impliedly, to use facilities which the owner has provided". However, His Honour Judge Curran QC held that the dicta of Lord Browne-Wilkinson was insufficient to find in law some cause of action for damages by the Claimant, or any other person in her circumstances – ie. when simply using the way as a member of the public, without any "business reason" connected with the Authority's undertaking.



Negligence at Common Law

Counsel for the Claimant accepted the Authority's argument that a tarmac road left untended and so gradually deteriorating through wear and weathering, cannot amount to misfeasance and conceded that he could find no authority to the contrary. However, Counsel for the Claimant attempted to rely upon the dicta of Lord Browne-Wilkinson in *X –v- Bedfordshire CC and Others [1995] AC 633* (at page 739), who states that if the Claimant's

complaint concerns negligence on behalf of a public body in the exercise of its statutory duty - not in the taking of a decision to act but in the practical manner in which that act is performed - the question of whether there is a common law duty of care falls to be considered under usual common law principles. In addition, Counsel for the Claimant referred to Lord Hoffman's obiter comments in *Gorringe –v- Calderdale MBC [2004] 1 WLR 1057* (at paragraph 38) that acting pursuant to a statutory power did not necessarily negate the existence of a common law duty.

Whilst "admiring the ingenuity of the argument", His Honour Judge Curran QC held that Lord Browne-Wilkinson's dicta and Lord Hoffman's obiter comments could not be used to create causes of action that did not exist and found that the Authority was under no duty at law to repair the surface of the bridge.

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Nuisance

The claim in nuisance was (“understandably” in His Honour Judge Curran QC’s opinion) not pursued in oral argument and it was held that it would be impossible on the facts to conclude that the wear on the surface of the bridge amounted to a nuisance in law.

Conclusion

The Authority’s witness evidence was kept succinct: that the park (including the bridges) was opened – with some degree of public fanfare - for the public’s unfettered use. The park and the bridges were not gated and the public had a right to use the park and the bridges at any time.

His Honour Judge Curran QC preferred the Authority’s arguments and evidence, finding that the bridge fell within the definition of a ‘highway’ (but not a highway maintainable at public expense) and as such, the case fell squarely within the parameters of *McGeown*.

This was a potentially high value case, which was listed for trial over a two day period. Notwithstanding this, the Claimant’s claim was defeated – with resultant substantial savings for the Authority - by keeping the Defence relatively simple and reliance upon the decision in *McGeown*, supported by appropriate and concise witness evidence.

This matter has been reported and can be found on Lawtel at LTL 24/8/2009.

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DOLMANS RECENT CASE UPDATE

Costs

Corby Group Litigation v Corby District Council (2009) EWHC 2109 (TCC)

Following resolution of the group litigation in favour of the claimants (which we reported on in last month's Dolmans Insurance Bulletin) the court was required to determine costs issues. 16 of the claimants had been allowed to advance their individual claims against the local authority and they submitted that they were entitled to an interim costs order of just over £3 million having put forward a costs figure of £4 million.

As the group litigation had been substantively won by the claimants it was appropriate to order the local authority to pay the claimants' costs to be assessed if not agreed. No offers or admissions had been made by the defendants.

Indemnity costs were not appropriate as the local authority had not acted improperly in defending the proceedings and had not been unreasonable in refusing to mediate. The court did not accept that there should be a presumption in favour of mediation. The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case.

The claimants had adopted a scattergun approach and there was some time wasted at trial attributable to the claimants and therefore they were entitled to 90 % of their costs to be assessed on a standard basis.

The court used its discretion to order an interim payment in respect of the claimants' costs in the sum of £1.6 million taking into account various matters including the reduction that would probably be taken on a costs assessment.



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Costs – BTE Insurance

Tranter -v- Hansons (Wordsley) Limited [2009] EWHC 90145 (Costs) SCCO

The Claimant was a passenger on a bus, who was injured by the negligent driving of the bus driver. The Claimant's Solicitors took initial instructions and discussed funding options with the Claimant. A Conditional Fee Agreement, with ATE Insurance, was entered into on 14 April 2005.

Upon Detailed Assessment of the Claimant's costs, the Defendant contended that the Claimant's Solicitors were in breach of regulation 4 (2) (c) of the CFA Regulations 2000 for failing to give proper consideration to the availability of BTE Insurance because the Defendant's motor policy included BTE Insurance that was available to the Claimant at the time of the accident.

The Claimant's Solicitor made a Witness Statement, in which she confirmed that she had specialised in personal injury cases since 1995 and was extremely familiar with the CFA Regulations and the practice relating thereto. She further confirmed that as at the date when the CFA was signed, 14 April 2005, based on her experience in the personal injury field, it was not common knowledge in the industry that a bus company would have applied legal expenses insurance to the passengers on a bus to sue itself.

Master Wright, Costs Judge, found that the Defendant had raised a genuine issue and the Claimant's Solicitors had breached regulation 4 (2) (c). Whether or not it was common knowledge in the industry at the date that the CFA was signed that a



bus company would have applied legal expenses insurance to the passengers on a bus to sue itself, it certainly was common knowledge that motor insurance policies

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frequently provide insurance cover for passengers to enable them to sue the driver. This is clear from Sarwar -v- Alam, where the Judgment of the Court of Appeal was given in 2001. Master Wright considered there to be no justification for making a distinction between private motor insurance policies and insurance policies taken out by the operators of public vehicles, such as buses.

Regulation 4 (2) (c) requires the legal representative to consider whether the Client's risk of incurring a liability for costs is insured against under an existing contract of insurance. The regulation does not confine the enquiry to policies of insurance taken out by the client and Master Wright confirmed that the enquiries should include the possibility that there may be a policy taken out by the proposed Defendant which may protect the client. The Solicitor is required to do no more than take reasonable steps, and what is reasonable will depend on the circumstances of the case. Master Wright held that in the present case, the Claimant's Solicitors knew, or ought to have known because of the decision in Sarwar, that private motor insurance policies often contained provisions which protect passengers. They ought also to have anticipated that in the case of public vehicles, there could be similar provisions in the insurance policies taken out by the operators of such vehicles. They should have taken reasonable steps, a letter or two would have sufficed, to enquire. They did not do so and this had led them to be in breach of regulation 4 (2) (c).

Master Wright held that the breach of regulation 4 (2) (c) was a material breach because the Claimant was denied the opportunity of deciding, with the benefit of her Solicitor's advice, whether or not to rely on any policy which the Defendant might have had. It did not matter that the Claimant may well have decided not to rely on such a policy.

Accordingly, the CFA was unenforceable.

Security for Costs

Spy Academy Limited -v- Sakar International Inc [2009] Court of Appeal (Civ Div)

The Claimant brought a claim against Sakar International Inc for failure to honour an agreement between the parties. The Claimant had no assets, save for the rights under the agreement which was the subject of the litigation. The Defendant defended the claim and sought security for costs. The Claimant did not receive notification of the hearing for determination of the issue of security for costs and, therefore, the Claimant

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company's director's statement as to why security for costs would be inappropriate was not served on time. The High Court held, at first instance, that the claim had little merit and ordered the Claimant to pay £20,000.00 security for costs.

On appeal, the Court held that it was incorrect to assess the claim as having little merit and it was clear that the claim was genuine and had a perfectly reasonable chance of success. It was evident that the High Court had not considered the director's statement as there was no reference to it in the Judgment. This was considered to be incorrect as the statement was only served late as a result of a procedural error which was no fault of the Claimant. It was, therefore, held that the decision to make the Order for security for costs without consideration of the director's statement was flawed and unjust. Further, the Court held that it was inappropriate to make the Order for security for costs as although the criteria was met as the Claimant had no assets, there were other factors to be taken into account, including the fact that it was a genuine claim, the director of the Claimant's company would not be able to raise the security and it was at least arguable that the Claimant's lack of funds was due to the failure of the Defendant to honour the agreement, the subject of the litigation. The Court, therefore, held that the Order for security for costs was unjust.



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

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 or visit our website at www.dolmans.co.uk.



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