DOLMANS INSURANCE BULLETIN

Welcome to the July 2020 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,
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REPORT ON

Rural Footpaths and Dangerous Defects

SP (A Minor) v Pembrokeshire County Council

When dealing with highways cases for Local Authorities, it is essential to bear in mind the decision in *Mills v Barnsley Metropolitan Borough Council [1992 PIQR 291]* and the relevant test in that case. The three stage test laid down by the Court of Appeal in *Mills v Barnsley* provides that in order to succeed under Section 41 of the Highways Act 1980, a Claimant must effectively prove that:

(1) The highway was in such a condition that danger from its use might reasonably have been anticipated in the ordinary course of human affairs;

(2) The dangerous condition was caused by a failure to maintain or repair and;

(3) The injury or damage resulted from that failure.

It is also worth remembering the earlier case of *Littler v Liverpool Corporation [1968 2 All ER 343]*, where it was held that *"a highway is not to be judged by the standards of a bowling green"*.

Both these decisions were cited in the recent case of *SP (A Minor) v Pembrokeshire County Council*, in which Dolmans represented the Defendant Authority.

Background

In *SP (A Minor) v Pembrokeshire County Council*, the Claimant (who was a minor at the time of her accident) allegedly fell and sustained personal injuries as a result of a defect on the edge of the footway at Manobier Castle. The footway was part of the adopted highway. The Claimant alleged that the edge of the footway had deteriorated, which caused her to lose her footing and fall down an adjacent bank into brambles. The side of the footway where the Claimant fell was not edged adjacent to undergrowth, whereas the opposite side of the footway was edged, being adjacent to the carriageway.

It was alleged that the Defendant Authority was in breach of Section 41 of the Highways Act 1980 and/or that it was negligent. The Claimant also pleaded breach of the Occupiers' Liability Acts 1957 and/or 1984, although neither of these were relevant to the case.

The Claimant sustained injuries to her hands, knees and arms, lacerations to her right knee and a soft tissue ankle injury. The Claimant also suffered lacerations and scarring to her left knee, which were said to be permanent.

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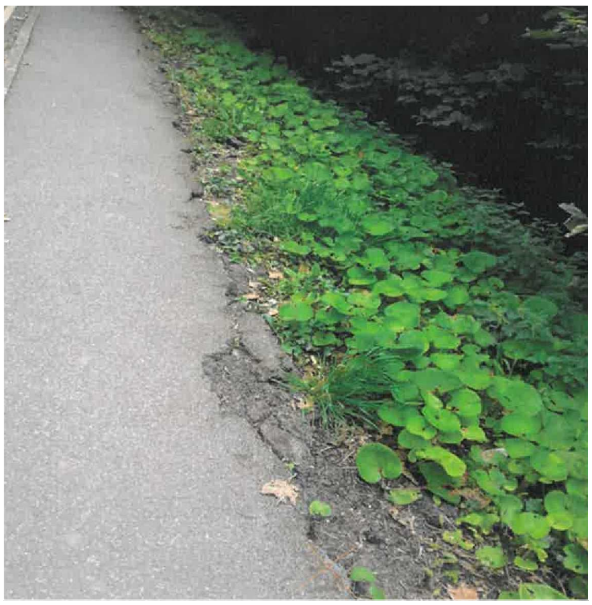
REPORT ON

Claimant's Evidence

There was no dispute that the Claimant had fallen, but she was put to proof as to where exactly she had fallen and what had caused her to fall.

The Claimant was walking with her younger sister and holding her hand at the time of the alleged accident. Her mother and brothers were walking in front of her and did not see her fall. The Claimant's father was walking behind her, but his evidence as to the exact cause was somewhat vague and disputed under cross-examination.

The Claimant gave evidence that she felt the path crumble under her foot, but it was apparent from cross-examination that both she and her father appeared to have assumed this to be the cause post-accident after noticing the edge erosion. Indeed, under cross-examination, the Claimant could not rule out that her foot may simply have turned following a misstep.



The edge of the footpath was not defined, not being edged at the side where the Claimant allegedly fell, and the Claimant conceded that there were other areas of similar edge erosion along the footpath. The Claimant was asked to mark the location on a photograph with a cross, but this presented yet further confusion as to exactly where the Claimant's alleged accident had occurred.

Defendant's Evidence

The Claimant conceded that the footpath did not appear to be dangerous at the time, notwithstanding the presence of some edge erosion along the footpath. The Defendant Authority had maintained throughout that the footway was not dangerous, asserting that this was an unremarkable rural footpath leading to a beach.

The footway was inspected on an annual basis and no defects were noted at the time of the Defendant Authority's pre-accident inspection.

The Defendant Authority had no record of any previous complaints and/or other accidents relating to the location of the Claimant's alleged accident during the 12 month period prior to the date of the same.

The Defendant Authority argued, therefore, that it had an appropriate Section 58 Defence, even if the Claimant was able to prove her case.

Edging of Rural Footpaths

The Claimant submitted that the footway should have been edged, which might have prevented the edge erosion. The Defendant Authority maintained, however, that there were many similar footpaths in rural settings without any such edging and that this was an unremarkable rural footpath that did not require any such edging.

It transpired that a wooden edging was placed in situ some time following the Claimant's alleged accident, but only for the purposes of resurfacing that was unrelated to the alleged accident. Indeed, it was conceded that the wooden edging would eventually rot away and was, therefore, effectively a temporary feature in any event.

Judgment

The Judge was satisfied that, on the balance of probabilities the Claimant's foot did give way as a result of the footpath in question, which could well have been caused by edge erosion or loose tarmacadam.

After having considered the test in *Mills v Barnsley* however, the Judge was persuaded that the alleged defect was not dangerous. In considering this test, the Judge needed to be certain that the Claimant had proved her case and that the highway was in such a state that it was dangerous.

The Judge considered all the factors, finding that the level of duty is not as high on a minor country road in a rural setting leading to a beach as opposed to an urban setting.

In order to establish that this constituted a dangerous state of affairs, the Judge held that he would have to be satisfied that a reasonable person would regard this as dangerous. He was not able to conclude this given the nature of the footpath in question and cited Mr Justice Dylan in *Mills v Barnsley*, when he maintained that such an inference of dangerousness would impose an unreasonable burden on the Highway Authority in this particular matter. As such, the Judge dismissed the Claimant's claim.

Given his finding that the footway was not dangerous, the Judge did not need to consider the Defendant Authority's Section 58 Defence.

Conclusion

The above case is a useful reminder that the duty is upon the Claimant to prove his/her case and particularly that the relevant location was dangerous. The Judge will have regard to the surroundings, nature and use of the highway when assessing dangerousness.

In this particular matter, the Judge was alive to the fact that this was a rural footpath leading to a beach and that there had not been any previous complaints and/or accidents. He was also mindful of the decision in *Littler v Liverpool* Corporation and that the footway was not to be judged by the standards of a bowling green.

It is also worth noting that the Judge made no finding that the lack of edging adjacent to the undergrowth presented a danger in such a rural setting, or that the Defendant Authority was obliged to provide the same.

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RECENT CASE UPDATES

Civil Procedure - Covert Surveillance - Non-Compliance - Relief from Sanctions

Jason Tully v (1) Exertion Media (UK) Limited (2) London Underground Limited [2020] EWHC 1119 (QB)

The Claimant claimed to have sustained injuries as a result of an accident at work. The Defendant's position was either that the Claimant did not sustain the injuries as claimed or that they were not as serious as he alleged.

Following exchange of medical evidence, to include updated reports, in the fields of orthopaedics and psychiatry, the Defendants served surveillance footage and made clear their position that it showed the Claimant's injuries, if any, were not as portrayed in his Witness Statement.

The parties agreed to a Consent Order permitting the parties to serve new medical reports limited to the issues arising from the surveillance evidence and the Claimant was permitted to serve an explanatory statement to be seen by the experts.

Thereafter, however, the Claimant was re-examined by his orthopaedic expert, who produced a full updated report which addressed the diagnosis given by the Defendant's medical expert and the Claimant's current medical position. The report did also comment upon the surveillance evidence, but the new report was then provided to the psychiatric expert, who produced a further report.

The Claimant argued that the Consent Order was not breached and that it was right and proper to have instructed their expert to re-examine and produce a new updating report given the passage of time since the initial report. In the alternative, they made an Application for relief from sanctions.

It was held that there had clearly been a breach of the Consent Order agreed between the parties. The breach was held to be serious and significant. The report exceeded the permission allowed, meaning that the "*playing field was rendered uneven*" in favour of the Claimant. The correct approach would have been to obtain permission from the Court to serve the full updated report out of time.

The Defendants were entitled to have relied on the Claimant having made his evidential and expert case clear and final before the revealing of the surveillance footage, as was the plain purpose of the directions made.

There was no good reason for the breach.

As to whether relief should be granted, the impact upon fairness was substantial. The ultimate trial timetable would be delayed. Accordingly, the Application for relief was refused.

The Court, however, indicated that it was prepared to hear argument on whether to make an Order allowing only the paragraphs of the expert's report which covered the surveillance to stand and to consider allowing a new psychiatrist to be instructed without knowledge of the surveillance. The parties were invited to agree an Order in this regard.

RECENT CASE UPDATES

Effective Service of Claim Form - Default Judgment

There has been a slew of cases recently illustrating the perils involved in effecting service of Claim Forms, particularly where Claimants leave it to the last minute.

Gallagher v Hallows Associates [2020] EW Misc 7 (CC)

The Claimant ('C') had instructed the Defendant ('D'), a firm of solicitors, to bring a personal injury claim. Limitation was missed and C instructed new solicitors to bring a professional negligence claim against D. In August 2018, C's solicitors asked D's solicitors if they had instructions to accept service of proceedings. D's solicitors did not reply. A Claim Form was issued on 4 June 2019. Limitation expired in July 2019. On 19 September 2019, C's solicitors sent the Claim Form to D's solicitors. The 4 month period for service of the Claim Form expired on 4 October 2019. On 7 October 2019, D's solicitors wrote to C's solicitors advising they had no instructions to accept service. D's solicitors made an Application, pursuant to CPR 11, to contest the jurisdiction of the Court in respect of the claim on the grounds that there had been no valid service.

C's solicitors discovered that D had been made bankrupt in 2018. Pursuant to s.285 of the Insolvency Act 1986, leave of the Court is required to commence a claim against a bankrupt. C, therefore, applied for permission to continue the claim against D. C's solicitors submitted that as the Claim Form could not be served unless or until the Court granted permission, the issue of service should be dealt with via Directions in the bankruptcy proceedings.

C's solicitors had not been aware of the bankruptcy at the time of service and that was not the reason why there had been no valid service. The Judge held the power under the 1986 Act to grant retrospective permission to bring proceedings against a bankrupt which relates only to the commencement of proceedings. Whilst the Court can impose conditions, it would be inappropriate to do so in a way that retrospectively validated invalid service. Accordingly, the Judge granted retrospective permission to commence the claim, but then made an Order under CPR 11 that the Court should not exercise jurisdiction in respect of it.

RECENT CASE UPDATES

Piepenbrock v Associated Newspapers Limited (DMG Media) of Daily Mail General Trust Plc & Others [2020] EWHC 1708 (QB)

C wrote to D complaining that an article was defamatory and he wanted damages and a public apology, failing which he would sue. D's solicitors replied stating that C had not complied with the defamation pre-action protocol. As C was unrepresented and limitation was about to expire, D's solicitors offered a standstill agreement on limitation so C could comply with the protocol. C ignored this, issued proceedings for defamation on 11 October 2019 and emailed D to say he had done so. D's solicitors wrote to C requesting that C correspond with them rather than D. On 10 February 2020, the penultimate day for service of the Claim Form, C purported to serve the claim by email on D and D's solicitors, and sent it to D's solicitors by post on 11 February 2020. However, none of the parties had agreed in writing to accept service by email, D had not provided their solicitor's address for service and D's solicitors were not instructed to accept service. Accordingly, service was invalid.

C applied for a retrospective extension of time for service of the claim under CPR 7.6(3) – an Order retrospectively permitting the alternative method or place of service under CPR 6.15 – on the grounds that he had been misled by D's solicitor's correspondence asking that he communicate with them, an Order that service be dispensed with under CPR 6.16, relief from sanctions under CPR 3.9 or rectification of his error under CPR 3.10.

The Judge refused a retrospective extension. C had not taken all reasonable steps to serve the Claim Form within its period of validity. The delay was C's choice. There was no good reason for validating service under CPR 6.15. C had not been misled by D's solicitor's correspondence. C had consulted the CPR and had emailed D as well as D's solicitors. His error was that he thought service by email was acceptable, when it was not. The failure to effect valid service was C's alone. There were no exceptional circumstances justifying an Order under CPR 6.16. In light of the refusal of C's Applications under CPR 7.6, 6.15 and 6.16, there was no residual self-standing power available to assist C under CPR 3.9 or 3.10. Accordingly, C's Applications were refused and D's Application for an Order that service was ineffective and the Court had no jurisdiction to hear the claim was granted.

BEC Construction Limited v Melt Hythe Limited [2020] EWHC 970 (TCC)

The Defendant ('D') carried on business as a property developer, whose registered offices was an address known as 'Sunnyside'. This was also the address of a dental practice. On 9 December 2019, C took proceedings to 'Sunnyside', went to the reception desk and gave the name of D. The person on reception, M, who was an employee of the dental practice, said something inconclusive. C left the documents on the reception desk and offered M a document to sign, which she did. By the time the documents were passed to D and then to D's solicitors, the time for acknowledging service had passed. C applied for Judgment in default, which was granted at about the same time as an Acknowledgement of Service was filed. D applied to set aside the Default Judgment on the sole ground that service of the proceedings was invalid.

RECENT CASE UPDATES

D submitted that the documents were not left at a permitted place, but were instead handed directly to M, which constituted personal service on somebody who was not connected with D and was, thus, invalid service. The Judge found that the documents had not been handed to M, but had been left on the reception desk. However, this was irrelevant. The method of service was delivery of the document to or leaving it at the relevant place. All that was required to effect good service could be as little as leaving it at the address. C could have simply entered the address and dropped the documents on the floor. C should not be prejudiced for attempting to take better steps to alert D to the documents. The fact that there was more than one business being run out of 'Sunnyside' was a matter for the way D managed its business and the employer of the receptionist was immaterial.

D further submitted that for there to be valid service the documents had to taken to the right address and that by going to the reception of the dental practice C had gone to the wrong address. The Judge did not consider this argument had merit as D's address did not have any floor designation within the building. Further, there was no evidence by D as to how the premises operated to show that there was a distinction at 'Sunnyside' between the wrong address and the right address. Accordingly, D's Application to set aside Judgment failed.

Ivanchev v Velli
[2020] EWHC 1917

The Claimant ('C') issued proceedings on 6 April 2019. A process server attended at the Defendant's ('D's') building (a multi-occupancy building) on 8 April 2019 and posted the documents into the mailbox for flat 1607. A second attempt at service was made when the process server spoke to a security guard and his manager at the building. The manager stated that D did not live in flat 1607, but did reside in another flat in the building. He was not prepared to disclose the address, but agreed to serve the documents. The process server observed the security guard put the documents into a mailbox, but could not see which one. No Acknowledgement of Service was received and C applied for Default Judgment. D contested this on the grounds that he had not been served.

The Judge held that the first attempt at service was ineffective as D had never lived at flat 1607. There was no evidence that the second attempt had constituted good service. C did not know that the correct address had been served as the process server could not see the mailbox number. Accordingly, C's Application for Default Judgment was dismissed.

As the next case illustrates, even where service is effective, a Claimant is not necessarily 'home and dry' on a Default Judgment, especially in these extraordinary times.

RECENT CASE UPDATES

Stanley v Tower Hamlets London Borough Council
[2020] EWHC 1622 (QB)

The Defendant Local Authority ('D') did not respond to the Claimant's ('C') pre-action correspondence. On 13 February 2020, C's solicitor spoke to D's Legal Department who advised that service of proceedings had to be by post. On 25 March 2020, C's solicitor posted the proceedings to D. No Acknowledgement of Service was received and, on 15 April 2020, C applied for Judgment in default, which was granted. D applied to set aside Judgment under both limbs of CPR 13.3(1); that is because it had a real prospect of successfully defending the claim and/or there was some other good reason as it had closed its offices on 23 March 2020 in accordance with the Covid-19 lockdown and it was unreasonable in the circumstances for C's solicitors to have effected service by post when they knew the offices would be closed, and for relief from sanctions.

The Judge held that both limbs of CPR 13.3(1) were made out. There were real prospects of successfully defending the claim as C had not served medical evidence establishing that she had suffered an actionable loss. As to the second limb, it was not fair or reasonable for C's solicitor to simply place the papers in the post to an office that he knew, or should have known, had been closed for 2 days because of a national emergency. It was incumbent on him, as a responsible solicitor and an Officer of the Court, to contact D to acknowledge that the situation had changed and discuss how proceedings could be best and most effectively served. As regards to relief from sanctions, whilst there had been a serious and significant default by D in failing to serve an Acknowledgment of Service, the circumstances which led to that default were unique and the Court was bound to take into account the impact of the Covid-19 pandemic pursuant to CPR PD 51ZA. Accordingly, the Judgment in default was set aside and relief from sanctions granted.

Human Rights - Police - Just Satisfaction - Award of Damages

Glenys Goodenough & Another v Chief Constable of Thames Valley
[2020] EWHC 1428 (QB)

The Court was required to consider consequential matters following its decision that the Defendant Police Force had breached the Claimant's Human Rights under Article 2 of the ECHR.

The Claimants were the mother and sister of a man (G) who died in custody after he was extracted from his car by force. The Claimants brought claims in respect of an alleged breach of Article 2 arising from flaws in the investigation into G's death. The Claimants were successful in their claims.

RECENT CASE UPDATES

In determining the appropriate award, the Court held that the HRA 1998 S.8 provided for the power to award damages and referenced Article 41 of the ECHR, which provided that if domestic law only allowed for partial reparation, the Court would, if necessary, afford just satisfaction to the parties. The approach to the causal link between the harm complained of and the human rights violation was less stringent than the approach applied in tort; *D v Commissioner of Police of the Metropolis [2014] EWHC 2493* applied.

The serious shortcomings of the investigation probably added to the considerable distress and anxiety suffered by the Claimants after G's death. There was, therefore, a sufficient causal connection as required by Section 8. The Claimants had not benefited from any other common law award. Whilst investigations served the public interest and were not solely for the family's benefit, that did not displace the family's legitimate interest.

Although there had been no collusion between the officers, the shortfalls had been sufficiently serious even for standards at that time.

The Court awarded each of the Claimants £5,000.

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

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