DOLMANS INSURANCE BULLETIN

Welcome to the November 2019 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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DOLMANS SOLICITORS

DOLMANS REPORT ON

SLIPS AROUND SWIMMING POOLS - IS THE FLOORING FIT FOR PURPOSE?

RT v Rhondda Cynon Taf County Borough Council

The importance of appropriate evidence to support the suitability and slip resistance of flooring in areas surrounding swimming pools was demonstrated in the recent case of *RT v Rhondda Cynon Taf County Borough Council*, in which Dolmans represented the Defendant Authority.

Background

The Claimant alleged that he was walking along the corridor at a leisure centre owned and controlled by the Defendant Authority, when he slipped and fell on water that had been deposited on the floor by other users of the swimming pool.

The usual wet side changing rooms were closed due to maintenance and the Claimant alleged that the location of the temporary dry side changing rooms resulted in his (and others) having to use the corridor in question.

The Claimant alleged that the Defendant Authority was in breach of Section 2(1) of the Occupiers' Liability Act 1957 and/or that it was negligent.

According to his Particulars of Claim, the Claimant was walking with the aid of a crutch at the time of his alleged accident and sustained serious injuries, including a compound fracture to his left femur, which required nailing. He also contracted MRSA while in hospital and developed a mild adjustment disorder. As such, the matter was allocated to the Multi Track and initially listed for a 2 day liability only trial before His Honour Judge Keyser sitting in the Cardiff County Court.

Witness Evidence

Although there were some inconsistencies in the Claimant's medical records, the Defendant's witnesses agreed that the Claimant was sitting on the corridor floor in a pool of water when they attended upon him immediately following his alleged accident. However, whereas the Claimant alleged that the floor was already wet when he entered the corridor, the Defendant's witnesses (who were all employees at the leisure centre) maintained that the pool of water had dripped from the Claimant as he had just come out of the swimming pool and had no towel.

The Defendant's witnesses went further, giving evidence that the rest of the floor in the corridor was not wet apart from a few footprints and that there was a cone present in the corridor at all times. Even at times when both changing rooms were open, the Defendant's witnesses averred that visitors to the swimming pool tended to use both in any event.

DOLMANS REPORT ON

The manager of the leisure centre gave evidence that approximately 2,000 people used the swimming pool every month around the time of the Claimant's alleged accident and would, therefore, use the corridor in question.

The corridor was inspected every 2 hours and cleaned daily using recommended cleaning products and methods, in addition to dry mopping any excess water if required. There was also a reactive system in place. No issues had previously been reported regarding the cleaning regime and no similar complaints and/or accidents had been reported either before or after the Claimant's alleged accident.

Appropriate risk assessments, including those relating to 'slip hazards associated with wet floor surfaces' were undertaken prior to the Claimant's alleged accident, with no issues arising in respect of the relevant corridor.

Interestingly, when searching for any previous accident records, it came to light that the Claimant had slipped in the same leisure centre, and on a crutch again, approximately 2 years earlier, albeit at a different location.

Expert Engineering Evidence

The Claimant had served an expert engineer's report with his Particulars of Claim, following a pre-action inspection when slip resistance testing was undertaken. As the matter was allocated to the Multi Track and given the potential value of the Claimant's claim, the Defendant Authority was also granted permission to obtain its own expert engineering evidence.

The floor surface in the corridor comprised of an anti-slip vinyl that had been in place for approximately 10 years and had not been changed following the Claimant's alleged accident. Some matting had been placed in the corridor, but visitors tended not to use this. In any event, matting could not have been placed under the doors where the Claimant's alleged accident occurred.

The Claimant's expert engineer maintained that a wet floor surface at the relevant location was a moderate risk and that a dry floor surface was a low risk. The Defendant's expert agreed with these findings.

However, the Defendant's expert saw nothing to suggest that the vinyl floor covering was unduly slippery and, in his opinion, there were no previous incidents that would have alerted the Defendant to an issue with the slip resistance of the vinyl. The Defendant's expert had researched the relevant vinyl floor covering and concluded that this was marketed as "the ideal solution for wet room areas".

The experts provided a Joint Statement, as ordered by the Court, and it was ultimately decided that there was no need for the expert engineers to be called to give oral evidence, although their written reports were adduced at Trial.

Case Dismissed

His Honour Judge Keyser dismissed the Claimant's claim. The Judge was not convinced that the Claimant had proved that he had slipped on water and preferred the Defendant's evidence that the pool of water in which the Claimant was found sitting had emanated from the Claimant himself, having just left the swimming pool.

However, the Judge went further and found that there would have been no breach of duty on the Defendant Authority's part anyway and that the flooring was suitable for wet areas in any event.

Conclusion

The success of this matter was dependent upon several factors.

A tightly pleaded Defence, followed by a detailed disclosure exercise and witness evidence ultimately assisted the Trial Judge in finding that the Claimant's accident had not occurred in the circumstances alleged.

The instruction of an appropriate engineering expert to not only test slip resistance, but also research the qualities of the vinyl flooring when it was marketed, then assisted the Judge in his finding that there would have been no breach of duty even if the Claimant had proved that his accident had occurred as alleged. This reassured the Defendant Authority, including the Defendant's witnesses.

The success of this matter resulted in a huge saving for the Defendant Authority. The Claimant's damages could easily have exceeded £50,000.00 at any subsequent quantum hearing and the Claimant's Costs Budget for liability costs alone exceeded £80,000.00. In addition, NHS charges exceeding £40,000.00 had been incurred, which the Defendant Authority would have been liable to pay had the Claimant succeeded on liability.

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DOLMANS RECENT CASE UPDATE

Causation - General Damages - Loss of Earnings - Multiplicands

Khuzan Irani v Oscar Duchon
[2019] EWCA Civ 1846

The Claimant sustained an accident in 2013, which caused injuries to his leg and elbow. He remained in hospital for a significant period. He had extensive scarring and ongoing leg pain. He gradually returned to work, but he was made redundant when the company he worked for shut down. He obtained different employment 6 months later.

The Claimant had entered the UK from India in 2010 on a visa sponsored by his employer. His leave to remain expired in 2020. It was common ground that the break in the continuity of his employment and his inability to find employment within 60 days had prevented his application for indefinite leave to remain.

At first instance, the Claimant was awarded £406,688. The Court awarded damages by way of a lump sum award on the approach in *Blamire v South Cumbria HA [1992] 10 WLIK 104* in respect of future loss of earnings and a *Smith v Manchester* award in respect of his disadvantage on the open labour market. The Claimant appealed and submitted that the Judge should have quantified damages for loss of earnings by the adoption of a multiplier and multiplicand which would have led to an award of £1,259,256. The Defendant cross appealed and submitted that the Judge had applied the wrong test of causation to the losses flowing from the apparent redundancy leading to the future loss of earnings *Blamire* award. The Defendant submitted the amount of damages should be £219,188.

The Court of Appeal held:

- Unless there was no alternative, the general method of assessment of future loss of earnings was to use a multiplier/multiplicand methodology, rather than the broad brush *Blamire* approach. However, the Judge in this case had been fully entitled to make a *Blamire* award as the only evidence of residual earnings was a letter from the Claimant's friend, a snapshot of unsuitable jobs currently available from one Indian website and various assertions made by the Claimant, a number of which had been specifically rejected.

- The Claimant's evidence was that he believed that he would earn £10,000 per annum if he returned to work in India. That was a statement of his belief, not a statement of fact, relating to residual earnings. It was apparent from the Judge's criticisms of that evidence that he had rejected the Claimant's argument that in the absence of challenge, his evidence should be accepted.

- Although the Judge admitted that he found it a difficult issue, he had clearly found that the injuries were an operative or effective cause of the Claimant's redundancy. The redundancy would not have occurred 'but for' the accident and it had, in turn, resulted in the Claimant being unable to renew his Tier 2 visa after March 2020. The Judge had not erred in reaching his conclusions on this issue.

The Claimant's appeal was dismissed. The Defendant's cross-appeal was also dismissed.

Costs - Fixed Costs - Recoverability of Disbursements - Protected Parties

Philip Aldred v Master Tyreese Sulay Alieu Cham
[2019] EWCA Civ 1780

The Court of Appeal has held that Counsel's Advice fee in relation to the merits of a proposed settlement in a claim involving a minor is not recoverable as a disbursement in addition to fixed costs.

The Claimant, aged 7 at the time of an RTA, submitted a claim under the RTA Pre-Action Protocol, but the claim exited the portal due to a liability dispute. Settlement was later agreed in the sum of £2,000 and the Claimant obtained an Advice from Counsel on the merits of the proposed settlement, as is required under PD21 paragraph 5.2. Counsel recommended acceptance of the offer.

The Claimant commenced Part 8 Proceedings to obtain Court approval. In addition to approving the settlement, the Court made an Order for the Defendant to pay the Claimant's costs, to be assessed if not agreed.

The Claimant's Solicitors served a Bill of Costs containing Counsel's fee of £150.00. The Defendant objected to Counsel's fee stating that it was outside the fixed costs regime provided by CPR 45 Section IIIA.

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At a Provisional Assessment Hearing, a District Judge allowed Counsel's fee to be recovered. The Defendant sought an oral review of that decision, but the decision was upheld on the basis that as the Claimant was a child, the disbursement had been "reasonably incurred due to a particular feature of the dispute" within the meaning of CPR r.45.29(2)(h).

The Defendant appealed, but the District Judge's decision was upheld. The Defendant appealed to the Court of Appeal.

The issues on appeal were:

- Was Counsel's Advice "due to a particular feature of the dispute"?
- If the Advice was due to a particular feature of the dispute, was the cost thereof a disbursement reasonably incurred which the Court should allow in addition to the fixed recoverable costs?

The Court of Appeal held:

- The fact that the Claimant was a child was nothing to do with the dispute itself. Age was a characteristic of the Claimant. It was not generated by or linked to the dispute. Being a child did not fall within the costs exception in r.45.29(2)(h). Such a construction was consistent to the overall purpose of the fixed recoverable costs regime.
- In order to be workable, Table 6B could not list each and every item deemed to be included in the fixed costs regime; it operated on the premise that all of the costs which might ordinarily be expected to be incurred would be deemed included. Counsel's fee in this case had to be deemed included because it was a routine step arising in all claims under Part 45 IIIA where the Claimant was a child. It was not, therefore, recoverable under r.45.29(2)(h).

The Defendant's appeal was allowed.

As a result of this decision, routine work that often arises in a claim must be deemed to be provided for in the fixed costs regime, as set out in Table 6B. The frequent use of Counsel in such claims to settle Particulars of Claim and provide an Advice should be argued as provided for within Table 6B and, therefore, not recoverable as an additional disbursement.

DOLMANS RECENT CASE UPDATE

Costs - Interim Payments - Part 36 Offers

Global Assets Advisory Services Limited & Another v Grandlane Developments Limited & Others
[2019] EWCA Civ 1764

The principal issue to be determined was whether a Court had jurisdiction to order an interim payment on account of costs pursuant to CPR r 44.2(8) where a Part 36 offer had been accepted within the relevant period.

Where a Part 36 offer has been accepted within the relevant period, CPR 36.13(1) entitles the Claimant to claim the costs of the proceedings up to the date on which the Notice of Acceptance is served. Costs are to be assessed on the standard basis if not agreed. A Costs Order to that effect is deemed to have been made pursuant to CPR 44.9.

The claim involved granting a final injunction restraining the Defendants from using confidential information. The Claimants accepted the Defendant's Part 36 offer within the relevant period, therefore, the Claimants were deemed to be entitled to the costs of the proceedings up to the date of acceptance.

They applied for an interim payment on account under CPR 44.2(8) which provides:

"Where the Court orders a party to pay costs subject to Detailed Assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

In determining whether it was able to allow such a payment, the Court followed the High Court decision in *Finnegan v Spiers [2018]*, which found that the Court lacked jurisdiction to award an interim costs payment where a Part 36 offer had been accepted in time on the basis that Part 36 was a complete code and did not provide any mechanism by which the Court could make such an Order; CPR 44.2 was only relevant in circumstances where the Court was making a Costs Order as opposed to a Deemed Order. Accordingly, the Court refused to allow an interim payment of costs.

The Claimants appealed.

The Court of Appeal allowed the Appeal and confirmed that a Court can make an interim Order for costs in circumstances such as this. It found there was no reason to restrict the power to make an Order for a payment on account of costs under CPR 44.2(8) solely to circumstances in which the Court has physically made a Costs Order and not to allow such payments where Costs Orders were deemed to be made. The rationale for ordering a payment on account of costs was the same whether the Order for costs was deemed to have been made or not, namely to enable a receiving party to recover part of his expenditure before the possibly protracted process of Detailed Assessment. The Judge in *Finnegan* had wrongly concluded that an interim payment of costs could only be granted if the terms within Part 36 allowed for it (which it found it did not); *Finnegan* disapproved. Whilst being described as a self-contained procedural code, express reference was made in CPR 36.16 to CPR 44.2(2) and CPR 44.9, which suggested CPR 44 could be considered in the context of Part 36. Further, there was no conflict between Part 36 and CPR 44.2(8).

Appeal allowed.

Non-Party Costs Orders - Liability Insurers

Travelers Insurance Co Limited v XYZ
[2019] UKSC 48

In group litigation, 623 Claimants brought an action against Transform Medical Group Ltd ('Transform') in relation to defective silicone breast implants. Transform was insured by the Appellant ('T'). This insurance only covered the claims brought by 197 of the Claimants. The other claims were uninsured. T funded the Defence of all the claims. On the advice of the Defence Solicitors, it was not disclosed until a relatively late stage in the litigation that some of the claims were uninsured. Transform went into administration during the litigation. The insured claims were settled. The uninsured Claimants obtained Judgment, but were unable to recover any costs or damages due to Transform's insolvency. They applied for a Non-Party Costs Order against T under s.51 of the Senior Courts Act 1981.

At first instance, the Claimants were successful. The Judge held that the case was exceptional as the fact that T insured some of the claims did not entitle it to be involved in and influence the conduct of the uninsured claims and, but for T's interest, Transform would have disclosed the lack of insurance and, if it had done so, the uninsured claims would not have been pursued and the costs would not have been incurred. The Court of Appeal upheld the decision, but on the more broad brush basis of the asymmetry in costs risk, that is if T were successful in defending the uninsured claims, they would have had a full costs recovery.

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The Supreme Court allowed T's appeal. The authorities identified two separate bases upon which a liability insurer might become exposed to a non-party costs liability; (1) where the third party took control of the litigation and became the 'real defendant'; and (2) unjustified intermeddling. The 'real Defendant' test was inappropriate in this case where the claims were wholly uninsured. The issue was, therefore, whether there had been unjustified intermeddling.

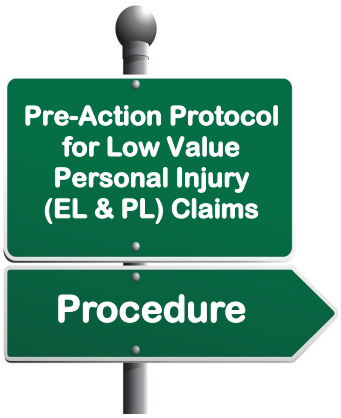
The Judge at first instance had been wrong to hold that the uninsured and insured claims were separate and no business of the insurer. All the claims were pursued within a single group action by common solicitors. They raised common issues which were ordered to be tried together by way of sample test cases. T had a legitimate interest in the defence of the insured claims and, consequently, in the defence of the test cases and common issues. T's involvement was the natural result of its status as an insurer and did not amount to unjustified intermeddling.

The specific instances of conduct relied upon by the Lower Courts did not amount to unjustified intermeddling. The reliance upon the asymmetry in costs risk to justify a s.51 Order was misplaced. The asymmetry arose because the Claimants sued an uninsured and insolvent Defendant and incurred several only costs liability in group litigation. In relation to the non-disclosure of the limits of cover, as the law stands, parties are not legally obliged to disclose details of insurance cover. Whilst T was involved in decision making about offers and admissions in the uninsured claims, this had no relevant causative consequences. By 2015, the uninsured Claimants were pursuing their claims to Judgment with costs in order to obtain a s.51 Costs Order. The offer of an admission of liability, still less a drop hands offer, would not have dissuaded them from continuing to incur the costs of obtaining Judgment once the insured claims had been settled.

Pre-Action Protocols - Stage 3 Procedure - Late Service

Wickes Building Supplies Limited v William Gerarde Blair
[2019] EWCA Civ 1934

The Court of Appeal considered the procedure to be followed under the Pre-Action Protocol for Low Value Personal Injury (EL and PL) Claims where a Claimant sought to rely on a Witness Statement served out of time at a stage 3 hearing.



The Claimant employee suffered an accident at work when a plank of wood fell on his head. He submitted a CNF under the Protocol against the Defendant employer, who admitted liability at Stage 1. The parties entered Stage 2 of the Protocol, but despite various offers being put forward, settlement could not be reached. Accordingly, the Claimant issued proceedings pursuant to Practice Direction 8B (ie – the stage 3 procedure). The matter was listed for a stage 3 hearing.

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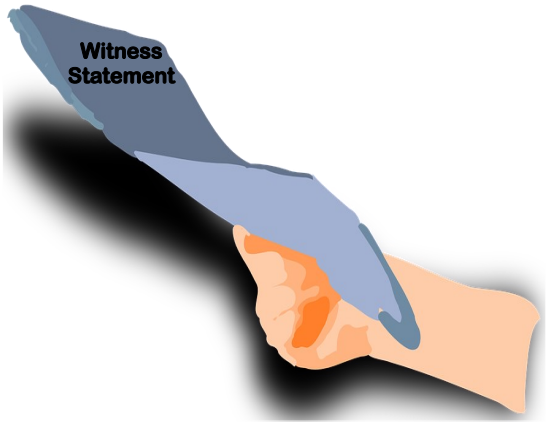
In issuing proceedings, the Claimant had filed a Claim Form and attached the documents required by paragraph 6.1 of PD8B. The Defendant filed an Acknowledgment of Service, in which it said that it intended to contest the claim.

At the stage 3 hearing, the Claimant adduced a Witness Statement, which had not been served with the Claim Form. Accordingly, this Witness Statement, which referred to his symptoms, had not been seen by the Defendant prior to this hearing.

The Defendant argued that as this Witness Statement had not been served in accordance with the Protocol, it could not be considered by the Court in assessing damages. The District Judge agreed and assessed damages at £2,000 in damages and £1,080 in costs.



The Claimant sought to appeal this decision on the basis that once the Judge had found that the Claimant had filed and served additional evidence late and not in accordance with the Protocol, he had to dismiss the claim in accordance with paragraph 9.1 of PD8B (ie – where the Defendant opposes the claim because the Claimant has not followed the procedure set out in the Protocol). The Circuit Judge allowed the Appeal and dismissed the claim. This had the effect of allowing the Claimant to start proceedings under CPR Part 7, which, in turn, allowed him to adduce his Witness Statement again in support of his damages claim.

The Defendant appealed the Circuit Judge's decision.

The Court of Appeal agreed with the Defendant's submissions and held that when the Defendant had objected to the District Judge reading the Claimant's additional Witness Statement, it was not opposing the claim because the employee had filed and served that Witness Statement, rather, it was objecting to the Court considering that new evidence pursuant to Paragraph 7.1 PDB (ie – the parties may not rely on evidence unless it has been served with the Claim Form). Raising an objection about the late service of a Witness Statement of evidence was not the same as opposing the claim on the ground that the Claimant had failed to follow the EL/PL protocol. Paragraph 9.1 PD8B was not triggered in that situation at all. The District Judge had correctly dealt with the matter by reference to Paragraph 7 PD8B. Situations where a Claimant had failed to serve evidence in accordance with the Protocol were likely to arise frequently in a process used by Litigants in Person. If all claims in those circumstances were removed from the process, it would deprive litigants of the benefits of the relatively inexpensive and speedy resolution of their claims that the Protocol provided. A Defendant served with an additional Witness Statement not included in the material served under Stage 2 had the choice of opposing the claim proceeding under the Protocol or continuing with the process, but objecting to the evidence being considered by the Court. In the instant case, it was clear that the Defendant had chosen the second option.

In those circumstances, the issue to be considered by a Judge was the application of Paragraph 7 PD8B. The District Judge had simply decided that the Witness Statement should be disregarded, and proceeded to assess damages on that basis. If the Circuit Judge's interpretation of Paragraph 9.1 PD8B were right, it would mean that whenever a Defendant objected to the late filing of evidence, the claim would be automatically removed from the Stage 3 procedure and the Court would essentially be deprived of any discretion to deal with the late service of evidence. This might unfairly disadvantage the Defendant.

Appeal allowed.

Qualified One-Way Costs Shifting (QOCS) - Mixed Claims

Brown v Commissioner of Police of the Metropolis & Another
[2019] EWCA Civ 1724

The Claimant, 'C', brought various claims against the Defendants, 'D', arising out of the wrongful obtaining and use of private information about her. D admitted liability for the data protection and human rights claims. C succeeded at Trial on a claim for misuse of private information, but her claims for damages for misfeasance and personal injury were rejected. The damages awarded were less than a Part 36 offer C had rejected. C was ordered to pay D's costs after the offer, but the first instance Judge held that as C had made a claim for personal injury, she was entitled to QOCS protection and the Costs Order could only be enforced to the extent of the damages awarded. D successfully appealed on the basis that this was a mixed claim and fell within the exception under CPR 44.16(2)(b). C appealed.

The Court of Appeal dismissed C's Appeal. The exception in CPR 44.16(2)(b) was designed to deal with the situation where a claim for damages for personal injury was only one of the claims being made in the proceedings. In those circumstances, as here, the automatic nature of the QOCS protection fell away and it became a matter of the Judge's discretion.

The Court gave general guidance on the QOCS regime in ordinary personal injury cases. The starting point is that QOCS protection only applies to claims for damages in respect of personal injury. Such claims encompass all claims consequential upon that personal injury, for example, medical treatment, costs of adapting accommodation and loss of earnings. Claims which are not consequential or dependent upon the incurring of personal injury, for example, the cost of vehicle repairs as a result of a road traffic accident, fell within the mixed claim exception. However, that did not mean that the QOCS regime was irrelevant. If the proceedings could fairly be described in the round as a personal injury case then, unless there were exceptional features of the non-personal injury claims, the Judge deciding costs would be expected to endeavour to achieve a costs neutral result through the exercise of discretion. However, it was important that flexibility was preserved, and it would be wrong in principle to conclude that all mixed claims required discretion to be exercised in favour of the claimant.

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

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- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

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