motoring news

Headlight

summer/autumn 2019

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
In this edition we cover:

case summaries

- **costs**

  Carl Ferri v Ian Gill [2019]

- **forcing testimony**

  Garibello v Hassan [2019]

- **fundamental dishonesty**

  Sudhirkumar Patel v Arriva Midlands Limited (2) Zurich Insurance plc [2019]

- **interim payments**

  (1) Joshua Folkes (by his Litigation Friend, Patrick Folkes) (2) Patrick Folkes (3) Ferrelyn Folkes (4) Cairo Folkes v Generali Assurances [2019]

- **life expectancy evidence**

  Carol Dodds (by her Litigation Friend, Janice Dodds) v (1) Mohammad Arif (2) Aviva Insurance Limited [2019]

- **meaning of use of vehicle**

  Linea Directa v Segurcaixa [2019]

- **motor accidents on private land**

  Motor Insurers Bureau v Michael Lewis (a Protected Party by his Litigation Friend, Janet Lewis) [2019]

- **speeding - split liability**

  Buster Angus Start v Tabitha Lyddon [2019]

DOLMANS
SOLICITORS

Carl Ferri v Ian Gill [2019]

The claimant, injured in a road traffic accident, brought his claim under the fast track portal, but, subsequently, instructed new solicitors, who confirmed that they did not consider the case to be a portal claim due to the severity of injuries suffered by the claimant. The claim was settled for £42,000 and the claimant's solicitors sought more than fixed recoverable costs under CPR Pt 45 and issued Part 8 proceedings. Rule 45.29J(1) provides that where there are exceptional circumstances making it appropriate to do so, the court would consider a claim for costs which was greater than the fixed recoverable costs.

At first instance, the costs judge found such circumstances existed in this case and that a 'low bar' should be set as the test for a finding of exceptional circumstances. The judge also added that exceptional circumstances were circumstances "which take [the case] out of the general run of the type of such a case" and held that costs were to be subject of a detailed assessment.

On appeal by the defendant, Mr Justice Stewart held otherwise and referenced *Hislop v Perde [2018] EWCA Civ 1726*; where the Court of Appeal stated that "a test requiring exceptional circumstances [was] already a high one". Furthermore, Mr Justice Stewart indicated the policies of the fixed costs regime are there to provide certainty, and while allowing for exceptional circumstances as a departure from the regime, it does so via a strict, not a "low bar", approach.

The case has been remitted back to the Senior Costs Office for reconsideration and for the correct test of exceptionality to be applied.

Garibello v Hassan [2019]

The claimant claimed damages after a road traffic accident in which he suffered serious injuries. The defendant was convicted of serious criminal offences in relation to the accident, liability was not in issue and the quantum trial was due to commence in July 2019. The claimant lacked capacity to litigate and manage his financial affairs so, as a protected party, was represented by a litigation friend. The claimant did not serve a witness statement and was not expected to give oral evidence at trial. There was a substantial amount of evidence as to what the claimant said about his condition and injuries, including in the expert evidence, which the claimant wished to rely on at trial. The defendant made an application to cross-examine the claimant, submitting that cross-examination was the only way in which the reliability and veracity of the hearsay evidence could be tested. The defendant sought to rely on *Brown v Mujibal [2017] 4 WLUK 42*.

It was held that the decision in *Brown* was distinguishable on its facts because the claimant's capacity had been in dispute in that case. Moreover, the judge in *Brown* had failed to consider s.4 of the Civil Evidence Act 1995 on the weight to be given to hearsay evidence, although that section adequately protected a defendant in that the trial judge could attach little or no weight to such evidence to the claimant's detriment. The court was not satisfied, either from a jurisdictional point of principle or as an exercise of its discretionary power, that it should grant permission to the defendant to cross-examine the claimant at trial and the defendant's application was refused.

Sudhirkumar Patel v (1) Arriva Midlands Limited (2) Zurich Insurance plc [2019]

The claimant was struck by the first defendant's bus and sustained a cardiac arrest and a brain haemorrhage at the scene. The claimant claimed he was significantly disabled and instructed an expert neuropsychiatrist to examine him.

On examination, the expert found the claimant almost entirely unresponsive. The expert gave a diagnosis of a severe conversion disorder. The defendant's expert examined the claimant about a year and a half later and found the claimant in essentially the same state. He could not confirm whether the claimant was suffering with a severe conversion disorder or was faking it. Both experts did concede that a necessary condition to support the opinion that the Claimant was suffering with a severe conversion disorder would be the consistency of the claimant's state, and the claimant's son confirmed that this was his consistent state and he did not communicate with anyone.

However, the defendants carried out surveillance, which displayed the claimant in a normal manner, walking, talking and communicating with others, and claimed from the footage that the claimant was faking it and pleaded that the claim should be struck out pursuant to s. 57 of the Criminal Justice Act 2015 on the basis of fundamental dishonesty. The claimant's family and friends stated that his condition was variable and he was less independent and talkative than before the collision, which supported the defendants' case. The court held the issue was not whether the claimant was ill, but whether he had been fundamentally dishonest in relation to the claim as pleaded. The claimant should have corrected the wrong information about his disabilities that he presented to the experts. The court accepted the defendants' post-surveillance conclusion that there was no conversion disorder and the case was not one of exaggerating disability, but of faking it.

(1) Joshua Folkes (by his litigation friend, Patrick Folkes) (2) Patrick Folkes (3) Ferrelyn Folkes (4) Cairo Folkes v Generali Assurances [2019]

The claimant brought a claim for personal injury following a road traffic collision that occurred in 2016 in which he sustained a severe brain injury. The accident occurred in France and whilst liability and quantum were to be determined under French law, it was English law (CPR r.25.7(4)) that would govern the request for interim payments. Liability was admitted by the driver's insurer, but due to the claimant being seriously cognitively impaired and an uncertain prognosis ahead, any trial on quantum could not take place until 2020. At the time of the hearing, the claimant was undergoing a trial of independent living, which included a 24 hour support worker. After 9 months, the claimant's medical experts indicated that the accommodation would need to continue for at least another year. The claimant could not afford to fund this and requested a further interim payment of £240,000 from the insurer, which would bring interim payments to a total of £591,788.

The insurer argued that a further interim payment was inappropriate because the precise assessment of the claimant's prognosis could not be finalised until the date on which the claimant's recovery stage was complete and the state of his health was considered definitive and permanent.

The question the court had to ask was would the total interim payments exceed a reasonable proportion of the likely final award?

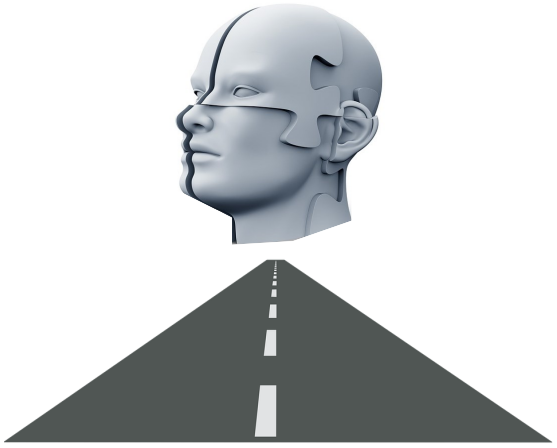
Evidence and joint expert reports in the case were incomplete, so the likely final award was uncertain. Furthermore, English law required the court to take a cautious approach. The insurer conceded that a 3 to 4 month trial of independent living was appropriate, but whether the claimant's medical experts could establish that a longer period was necessary was a matter of debate at the quantum trial. The court held that they could not be sure that a sum covering more than 3 to 4 months was likely to be included in the final award, and, adopting the required cautious approach, the final award was likely to be around £370,378. The court agreed with the insurer that it would be inappropriate to order the further interim payment.

Carol Dodds (by her litigation friend, Janice Dodds) v (1) Mohammed Arif (2) Aviva Insurance Limited [2019]

The claimant, aged 73, was struck by a car driven by the first defendant and insured by the second defendant. She sustained a traumatic brain injury with substantial cognitive impairment. A neurologist, who was instructed by the claimant, stated that unless she developed epilepsy her life expectancy was "unlikely to be significantly reduced".

The defendants disclosed a report from a professor who was an expert on life expectancy and who concluded that the effect of the accident was to reduce the claimant's life expectancy by 5 years. The claimant objected to that report being produced and the court was required to determine whether expert evidence on life expectancy was required in the case.

The guidance on evidence concerning life expectancy, taken from the explanatory notes to the Ogden Tables, confirmed that where the claimant's injury had not itself impacted on life expectancy, then that category of evidence would be given unless "there was clear evidence … to support the view that the individual is atypical and will enjoy longer or shorter expectation of life". It was held that the claimant was not "atypical" within the meaning of the explanatory notes. The expert evidence implied that the claimant's head injury had some potential impact on her life expectancy (if she developed epilepsy), but that expert opinion needed to be expanded and clarified. The normal route for doing so would be a supplemental report and/or Part 35 questions.



The court found that bespoke life expectancy evidence from an expert in that particular field was not required because life expectancy was a medical or clinical issue and considered to be only a "useful starting point" on the way to a "inter-disciplinary approach". Also, in practical terms, it was much more convenient and cost-effective to ask the clinical experts for their opinion of life expectancy given they were already instructed and could deal with life expectancy as well as the other matters they were concerned with. As such, permission to rely on the professor's report was refused. The court confirmed that it would be good practice for opposing parties to engage in a discussion where the instruction of an expert might be controversial.

Linea Directa v Segurcaixa [2019]

In August 2013, a vehicle that had not been driven for more than 24 hours and which was parked in a private garage of a building caught fire and caused damage. The fire originated in the vehicle's electrical system. The owner of the vehicle had taken our insurance with Linea Directa in respect of the use of motor vehicles and the building was insured by Segurcaixa. The company that owned the building was paid €44,4704.34 by Segurcaixa for the damage caused to the building. Segurcaixa brought proceedings against Linea Directa in March 2014 seeking an order that they reimburse the compensation paid on the grounds that the incident had originated in an event covered by the vehicle's motor insurance.

Segurcaixa's claim was rejected at first instance, but Linea Directa were successful in appeal proceedings and were ordered to pay the compensation sought by Segurcaixa. The court ruled that a 'use of vehicles', for the purposes of Spanish law, covered 'a situation in which a vehicle parked in a private garage on a non-permanent basis has caught fire, when this fire was started by causes specific to the vehicle and without the intervention of third parties'. Linea Directa lodged an appeal before the Tribunal Supremo (the Supreme Court in Spain). There were doubts about the interpretation to be given to the concept of 'use of vehicles' so the matter was referred to the Court of Justice of the European Union.

The European Court of Justice ruled that the concept of 'use of vehicles' includes a situation in which a vehicle parked in a private garage of a building has caught fire, causing a fire whose origin is in the vehicle's electrical system, despite the vehicle having not moved for 24 hours before the fire occurred. According to case law, the concept of 'use of vehicle' in the directive is not limited to road use and that concept covers any use of a vehicle that is consistent with the normal function of that vehicle, in particular as a means of transport. It was found that the parking and the period of immobilisation of the vehicle are natural and necessary steps which form an integral part of the use of that vehicle as a mode of transport. That conclusion was not affected by the fact that the vehicle was parked for more than 24 hours in that garage, since parking a vehicle presupposes that it remains stationary until its next trip, sometimes for a long period of time.

Motor Insurers Bureau v Michael Lewis (a Protected Party by his Litigation Friend, Janet Lewis) [2019]

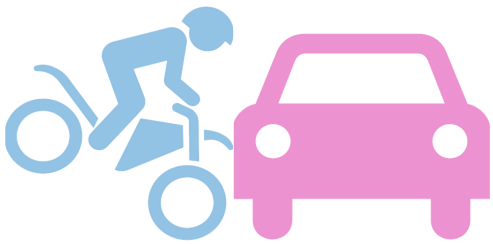
Mr Lewis suffered a serious injury after a farmer had pursued him in his uninsured 4x4 vehicle whilst walking on private land. The MIB argued that it had no liability to Mr Lewis pursuant to the Uninsured Drivers Agreement 1999 because driving vehicles off-road was not the same as driving on the road or in a public place under section 145 of the Road Traffic Act 1988. At first instance, it was found that the MIB were liable to indemnify Mr Lewis due to the MIB being an emanation of the state within the UK which resulted in the Motor Insurance Directive having a direct effect against the MIB. The MIB appealed and argued that the art. 3 obligation contained within the MID was unconditional as it required member states to take all suitable measures to make sure that civil liability in respect of the use of vehicles was covered by insurance and furthermore, art. 10 did not extend to offer compensation for situations where the national legislation had not provided for compulsory motor insurance.

The court was critical of the UK government in that it had failed to legislate for compulsory motor insurance in respect of the use of motor vehicles on private land, but the appeal was dismissed as the court held that art. 3 and 10 did, indeed, create directly effective rights which could be enforced against the MIB as an emanation of the state. The court added that where the insurance requirement had not been met, it was the guarantee body (which art. 10 of the directive required each member state to establish) who would be liable to meet the claim. This task had been delegated to the MIB and the task was clear that it includes remedying the failure of the government to institute in full a compulsory insurance regime. The court described this as a breakdown in the system put in place by the UK government, but conceded that the compensation body was intended to protect and compensate victims.

Buster Angus Start v Tabitha Lyddon [2019]

The claimant, aged 21, was riding his motorcycle and the defendant, in her car, was leaving the car park of a restaurant. The defendant intended to turn right and, in doing so, she would cross the eastbound lane, hatched markings (between the eastbound and westbound lanes) and join the westbound lane. The claimant motorcyclist was travelling along the eastbound lane, which had a 30mph speed limit, towards the car park exit.

The defendant said that she looked to her right, as she approached the give way lines at the car park exit, before travelling across the eastbound lane. The defendant's account was that she did not see anyone in the eastbound lane (to her right). The defendant crossed the lane towards the hatched markings and the defendant, who was travelling near the centre of the eastbound lane, struck the rear passenger side of her vehicle. The claimant was thrown over the top of the car, landing on the road and sustaining injuries which included the loss of all function to his right dominant arm.



There was a dispute of fact as to the claimant's speed before the collision and the point at which the defendant looked to her right. The court had CCTV evidence from the car park and evidence from two accident reconstruction experts who were broadly in agreement.

Based on the CCTV and the point at which the claimant must have been able to see the defendant's car, it was found that his reaction time indicated his speed before braking was around 70mph. That was more than double the speed limit. The defendant's front bumper was still 2 metres from the give way lines when the defendant looked to her right.

There was an overgrown hedge and advertising billboard which intruded into her line of sight, so the defendant's view of the centre of the eastbound lane was around 75 metres. That view would have been 120 metres had the front bumper been 1 metre from the give way lines. At 75 metres, a vehicle observing the speed limit would have reached her in 4.86 seconds, and that was not long enough to cover the 14 metres that the defendant had to cross to be clear of the eastbound lane.

It was held that both parties were to blame for the accident. The defendant had not looked properly to her right before commencing her right turn and had not stopped at all. The defendant had also looked to her right when her front bumper was 2 metres from the give way line and gave herself a restricted view. However, the claimant had been travelling at over twice the legal speed limit and had been racing in a dangerous and irresponsible way. It was held that the claimant bore a much heavier share of the blameworthiness because his speed was grossly excessive for the circumstances and deliberate. Liability was apportioned 70:30 in favour of the defendant.

If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

Simon Evans at **simone@dolmans.co.uk**

Capital Tower, Greyfriars Road, Cardiff, CF10 3AG

Tel : 029 2034 5531
Fax : 029 2039 8206

www.dolmans.co.uk

This update is for guidance only and should not be regarded as a substitute for taking legal advice

© Dolmans