DOLMANS INSURANCE BULLETIN

Welcome to the June 2022 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

Historical Features on Local Authority Land Revisited

RB v Dorset Council

The February 2022 edition of the Dolmans' Insurance Bulletin considered historical features on land owned by a Local Authority and their impact upon the outcome of litigation involving personal injuries sustained on such land. In the case reported in that edition, the relevant historical feature incorporated characteristics that could not be altered for various reasons and reliance was placed upon appropriate documents that ultimately resulted in the successful defence of the said claim.

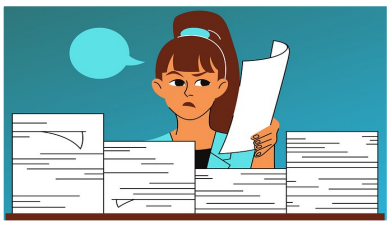
Similar arguments were raised in the more recent case of *RB v Dorset Council*, in which Dolmans represented the Defendant Local Authority.

Background

The Claimant was walking down a steep path when he tripped over a low stone bollard immediately adjacent to a stone wall next to the path, causing him to fall and suffer personal injuries.

The Claimant alleged that the Defendant Local Authority was negligent. It was also alleged that the bollard constituted a nuisance, which the Defendant Local Authority caused and/or permitted to remain in place.

Although the Claimant alleged that the Defendant Local Authority was the Highway Authority responsible for the path in question, it was not alleged that there had been any breach of Section 41 of the Highways Act 1980 and no allegations were made under the Occupiers' Liability Act 1957.



Issues

From his contemporaneous documents, including medical records, it appeared likely that the Claimant would prove that his accident occurred in the circumstances alleged.

The bollard which was said to have caused the Claimant's accident was one of many such historical bollards that were situated in the locality, none of which had been reported as being defective prior to the date of the Claimant's alleged accident.

The path at the location of the Claimant's alleged accident was inspected on a monthly basis and again the bollard was not identified as an issue.

Although the Claimant stated that the lighting in the area was poor, he did not make any specific allegations in relation to lighting. In any event, there was a street lamp relatively nearby and an illuminated sign. It appeared, therefore, that there would at least be some light to see the bollard. It was argued that there is no duty on a Highway Authority to provide street lighting in any event, pursuant to *McCabe v Cheshire West and Chester Borough Council and BAM Nuttall Ltd [2014]*.

Caselaw

It is worth reminding readers at this juncture of caselaw relating to street furniture and the Highways Act 1980.

The leading case in relation to a Highway Authority's liability for street furniture is *Shine v Tower Hamlets London Borough Council [2006]*, where the Court of Appeal found that there was no liability for bollards/street furniture under Sections 41 and/or 66 of the Highways Act 1980. In that case, the insecure bollard did not amount to a failure to maintain the highway under Section 41 and that decision echoed what the House of Lords had previously said in *Gorringe v Calderdale Metropolitan Borough Council [2004]*: *"it is only where the alleged liability arises out of a failure to maintain the highway that the Section 41(1) duty and the Section 58(1) Defence comes into play".* Section 66 of the Highways Act 1980 deals with the provision of guards and rails for publicly maintainable highways, but the Court of Appeal found that section to be permissive and does not impose a statutory duty.

However, the Claimant in the current matter did not make any allegations pursuant to the Highways Act 1980 in any event, so the claim needed to be considered in negligence.

In *Shine,* the Court of Appeal considered whether the Local Authority was negligent by not repairing the bollard at the time when it became aware that the bollard was insecure. The Appeal Judge found that the Local Authority should have done something about it before the accident. The Local Authority had a policy of inspecting the bollards and a policy of making them safe if they were found to be insecure, and were negligent in failing to act.

A key distinction between *Shine* and the Claimant's claim in this matter is that the bollard in Shine was defective and the Local Authority had prior notice of the same. In this claim, the bollard was not defective, the Defendant Local Authority had received no complaints in relation to the same and there was no history of any similar accidents.

On that basis, it was considered that the Defendant Local Authority had good prospects of establishing that it was not negligent and that the bollard did not represent a danger to pedestrians.

Nuisance

It was argued that the decision in *Shine* could also be relied upon in relation to nuisance, where it was held that issues relating to street furniture are to be determined according to the law of negligence. In any event, it was also argued that the bollard was not a nuisance.

REPORT ON

Evidence

Witness Statements were provided by the Defendant Local Authority's relevant personnel in support of the above arguments and the matter proceeded to exchange of Witness Statements.

The Claimant's Witness Statement identified the specific bollard that had allegedly caused his accident and the Defendant Local Authority's witness evidence exhibited various documents in support of the historical nature of the specific bollard.

Historical Documents

Various documents were searched in order to ascertain any historical relevance of the bollards at the location of the Claimant's alleged accident, including the National Heritage List for England. The said bollards were listed as Boundary Stones and Grade Two Listed Structures. As such, there were specific restrictions as to what could be done regarding the bollards and, obviously, they could not just be altered or removed.

Discontinuance

Following exchange of Witness Statements, the Claimant made various offers in an attempt to settle the claim, but these were rejected and the Claimant eventually agreed to discontinue his claim prior to trial.

Conclusion

Clearly, after having considered the strength of the Defendant Local Authority's witness evidence, coupled with equally strong documents and relevant caselaw put forward on behalf of the Defendant Local Authority, the Claimant concluded that the Defendant Local Authority's Defence was likely to be successful at trial, thereby discontinuing his claim without having to incur the additional costs of proceeding to trial, in turn producing a significant saving in costs to the Council.

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RECENT CASE UPDATES

Fundamental Dishonesty - Substantial Injustice

Woodger v Hallas
[2022] EWHC 1561 (QB)

The Claimant ('C') brought a claim for damages arising out of a road traffic accident in July 2014. Liability was admitted. At Trial, in June 2021, C was awarded damages of £49,415. The Trial Judge found that C had been fundamentally dishonest in relation to his claim within the meaning of s.57(1) of the Criminal Justice and Courts Act 2015, but did not dismiss the claim, finding that it would be substantially unjust to do so. The Defendant ('D') had made a Part 36 offer in March 2015 of £80,000, which D withdrew in September 2018. C had made a Part 36 offer of £40,000 in March 2020. The Trial Judge awarded C his costs up to September 2018 and made no order for costs thereafter.

D appealed on the grounds that the Trial Judge was wrong not to dismiss the claim. There was no proper basis for a finding of substantial injustice. Further, even on the Trial Judge's approach to s.57, the award of costs was wrong.

First Instance Decision

C had sustained serious injuries in the accident, comprising a compression fracture of the 4th thoracic vertebra and a minimally displaced open book fracture of the pelvis - both of which required surgery, a fracture of the scapula and upper left ribs and a minor pneumothorax. Such injuries would be expected to result in substantial disability initially, with gradual improvement over the first 6 to 12 months after injury. C complained of continuing pain and limitation in his right hip which affected his daily activities and his ability to undertake his pre-accident work.

C alleged that in the years following his accident, he had done unpaid work for a firm called NRCS and tried to obtain witness evidence from NRCS to that effect. D obtained surveillance evidence. Following disclosure of the surveillance evidence, C had effectively abandoned parts of his Schedule of Loss, including loss of future earnings (£481,000), future care (£15,000), future treatment costs (£3,000) and future DIY (c. £26,000). A representative of NRCS was called to give evidence at Trial by D and said that C did paid work for NRCS between March 2015 and March 2017, cash in hand, amounting to c. £12,000 per year. C then went to work for another firm. C accepted he was paid by that firm, but the Trial Judge found that he had been paid significantly more than the invoices disclosed.

The Trial Judge found that C did suffer from hip pain, but had exaggerated the level of disability it caused. The Trial Judge calculated damages at £74,460, comprising £40,000 PSLA, £12,545 loss of earnings, £7,650 past care, £1,765 travel and clothing and £12,500 handicap on the open labour market. The Trial Judge found that C's claim that he was not capable of earning as a mechanic was central to his claim and his concealment of earnings which would undermine or fundamentally destroy that element of the claim went to the root of the claim. A finding of fundamental dishonesty was made. However, the Trial Judge held it would be unjust to dismiss the whole claim. There were elements of the claim which remained sound and uncontaminated by the findings on earnings and there was an element of the claim on behalf of innocent third parties who had given care. The Trial Judge, therefore, dismissed only the past loss of earnings and handicap on the open market claim and awarded C the adjusted sum of £49,415.

RECENT CASE UPDATES

Appeal Decision

The Judge held that the Trial Judge was wrong not to have dismissed the entire claim once he had found C to have been fundamentally dishonest. There was no proper or adequate basis for the finding that it would be substantially unjust to dismiss the entire claim. Substantial injustice meant something more than C losing their genuine damages. As regards to the finding that others had provided past care, s.57 (2) makes it clear it must be the Claimant, and not anyone else, who would suffer injustice. Further grounds advanced by C's Counsel were also not made out. C had suffered serious injuries, but they were not the most serious and C had made a substantial recovery. The need for a liable D to be seen to pay damages had been rejected in *Iddon v Warner [2021]*.

Adopting the approach to substantial injustice in *Iddon* of balancing, on the one hand, the nature and extent of C's dishonesty and, on the other, the injustice to C of dismissing the whole claim, the balance was in favour of dismissal. Even on the assumption that there was some injustice to C, which the Judge found there was not, the sustained nature of the dishonesty, the length of time for which it was sustained and his involvement of others made C's dishonesty so serious that it would have outweighed any injustice to him. The Trial Judge should have dismissed the entire claim and awarded D its costs of the action, subject to s. 57(4) and (5).

Pursuant to s. 57(4) and (5), the Court is required, when dismissing the claim, to (a) record the amount of damages that it would have awarded C in respect of the primary claim but for the dismissal of the claim and (b) when assessing costs, to deduct the amount so recorded from the amount which it would otherwise order C to pay in respect of costs incurred by D.

In relation to the damages figure, it was held that because the claim should have been dismissed under s.57(2), the appropriate figure for the purposes of s.57(4) was the Trial Judge's initial figure of £74,460, the figure he would have awarded C but for his fundamental dishonesty. That was the figure to be deducted from any costs award against C pursuant to s.57(5).

Public Policy - Illegality - Ex Turpi Causa

Lewis-Ranwell v G4S Health Services (UK) Limited, The Chief Constable of Devon & Cornwall Police, Devon Partnership NHS Trust and Devon County Council [2022] EWHC 1213 (QB)

The Claimant, who had a history of mental health problems and had been arrested on several occasions for various offences, attacked and killed three elderly men in their homes in Exeter in February 2019. In November 2019, following a Trial before a Jury at Exeter Crown Court, he was acquitted of murder by reason of insanity. He was ordered to be detained at Broadmoor Hospital, pursuant to Section 37 and 41 of the Mental Health Act 1983.

RECENT CASE UPDATES

In February 2020, the Claimant commenced civil proceedings against the Defendants, alleging that all four were negligent in their treatment of him in the days preceding the killings and that they acted in breach of his rights under Articles 3 and 8 of the ECHR. The Claimant sought damages for personal injury, loss of liberty, loss of reputation and loss of dignity and indemnity in respect of any claim brought against him as a consequence of his violence towards others.

The First, Third and Fourth Defendants applied to strike out the Claimant's claim on the grounds of illegality or "ex turpi causa non oritur action" (out of a dishonourable cause no action arises).

The Judge dismissed the strike out Applications. The fact of insanity meant that there was no criminal act on behalf of the Claimant. The verdict of "*not guilty by reason of insanity*" was unequivocally a verdict that a Defendant is not guilty of an offence charged. It follows that given such a verdict that Defendant bears no criminal responsibility. The doctrine of illegality did not, therefore, apply to the facts of this case.

There were a number of authorities which supported a conclusion that the illegality defence only applies where the Claimant knew that he was acting unlawfully: *Adamson v Jarvis (1827) 4 Bing 66 130 ER 693*, *James v British General Insurance Co Ltd [1927 2 KB 311]*, *Hardy v Motor Insurers' Bureau [1964] 2 QB 745*, *Grey v Barr [1971] 2 AB 554* and *Pitts v Hunt [1991] 2 QB 24*. The Defendants had not established that the Claimant knew that what he was doing was wrong. Whilst the illegality defence could apply in situations where there was no criminal responsibility, to do so there would have to be quasi-criminality, conduct that raises similar public interest objections to those prompted by criminality.

To permit the Claimant's claim to proceed would not enable the Claimant to profit from his own wrongdoing. The law would not be condoning wrongdoing because the Jury's verdict meant that there was none.

It will be a question for the Court hearing the substantive action whether it was the Claimant's underlying illness that made his detention in hospital necessary or whether the negligence of the Defendants, if such negligence is proved, aggravated that illness or provided the occasion for that illness to manifest itself as it did in February 2019. There was nothing incoherent in permitting a claim founded on a third party's negligence if that negligence was the substantial cause of injury or loss and the Claimant's insanity meant no blameworthiness attached to him.

Refusal to Mediate - Indemnity Costs - Unreasonable Conduct

Richards v Speechly Bircham LLP
[2022] EWHC 1512

The Claimants applied for an Order that the Defendant pay their costs of a successful professional negligence claim on the indemnity basis, due to the Defendant's unreasonable conduct in refusing to mediate.

RECENT CASE UPDATES

The Claimants relied upon the fact that, prior to proceedings being issued, they had made three offers to mediate, which the Defendants had initially rejected on the ground that they did not consider that mediation would be productive or cost effective. The Defendant then suggested that there was no point in engaging in mediation as the claim was *"doomed to fail"*. A fourth offer, made after the service of the Defence and before a Costs and Case Management Conference, was also rejected, although in one response they did suggest that they would consider ADR once disclosure had taken place.

Two Part 36 Offers made by the Claimants were also not accepted.

At Trial, Judgment was awarded against the Defendant, but for significantly less than either of the two Part 36 Offers made by the Claimants.

The High Court held that the Defendant's failure to engage with the Claimants' proposals for mediation was unreasonable (*Garritt-Critchley v Ronnan [2014] EWHC 1774 3 Costs L.R. 453* considered) and that there had been 'general passivity on the ADR process' over a period of almost 3 years.

However, that was only one aspect of the conduct to be considered in the exercise of the costs discretion under CPR r 44.2. Further, the *"conduct of all the parties"*, together with any measure of qualified success that a party might have achieved, was just one factor amongst all the circumstances to be considered alongside the general rule favouring the overall successful party. A failure to engage in mediation did not carry the clearly defined costs consequences of an unaccepted but effective Part 36 Offer.

The Defendant's failure to engage constructively with the mediation proposals did not justify an order for costs against them on the indemnity basis. There were other important factors in the Defendant's favour – they had successfully resisted a significant part of the claim (put at around £4.3m) and had done significantly better than either of the Claimants' Part 36 Offers (thereby avoiding the consequences of CPR 36.17(1)(b)). In such circumstances, it was held that the Defendant's unreasonable conduct in relation to mediation was sufficiently marked by an Order that they pay the Claimants' costs up to and including Trial on the standard basis. This was considered to be an appropriate "sanction" for the Defendant not engaging in a process of ADR which might have curtailed those costs in a significantly lower sum at an earlier stage of the proceedings.

Universities - Student Mental Health - Disability Discrimination - Negligence

Abrahart v University of Bristol
[2022] 5 WLUK 260

The Claimant's daughter ('N') was an undergraduate student reading physics at the University of Bristol ('the University'). During her second year, N was required to give oral interviews after conducting laboratory experiments upon which she was assessed and marked. N could not cope with the interviews and her mental health declined. In April 2018, as part of her course, N was expected to participate in a conference, presenting with fellow students. On the day of the conference, N took her own life. N's father brought a claim for damages on behalf of N's estate under the Equality Act 2010 and in common law negligence.

The claims under the 2010 Act comprised failure to make reasonable adjustments (s.20), indirect discrimination by application to N of a discriminatory provision, criterion or practice (s.19) and direct discrimination in the form of unfavourable treatment (s.15).

Factual Background

N had been quiet and shy at school, but had not been considered to have any special needs. No relevant disability or characteristic was disclosed to the University when she started her course in October 2016. N completed her first year successfully. During the first laboratory interview in October 2017, N did not respond at all to any questions and was marked down. She was advised to contact a member of staff to discuss any issues she was facing. N did not respond to staff emails to get in touch. At a re-arranged interview on 31 October 2017, N did not engage well and she was given links to counselling. A counselling assessment was offered, but declined by N. N did not attend the next interview in November 2017. N met with a member of staff on 5 December 2017 who noted a possible panic and anxiety issue with the interview assessment format and that N had been advised to see her GP and/or counsellor to see if a particular issue could be diagnosed and then get a Disability Support Summary if necessary.

N did not attend the next interview in January 2018. In February 2018, staff met with N and noted she had not sought help or support. Staff contacted Disability Services regarding N's possible social anxiety and the need for recommendations regarding reasonable adjustments.

In February 2018, N attended a GP with a friend and a member of the University's staff ('P'). The GP recorded 'mixed anxiety and depressive disorder chronic social anxiety with suicidal ideation' and made a referral to mental health services, who saw N in late February 2018. A few days later, N had a panic attack and attempted to take her own life.

At a follow-up appointment with mental health services on 5 March 2018, generalised anxiety with emotional difficulties and low mood was recorded and antidepressants prescribed.

N spoke with P on 6 March 2018 and P suggested alternative strategies to oral assessments, such as scripted discussion. P provided N with an extenuating circumstances form to complete and asked her to obtain a GP's letter.

On 20 March 2018, N attempted to take her own life and was seen by mental health services.

N went home for the Easter holidays and returned to University on 15 April 2018. On 17 April 2018, students were informed by email of their groups for the forthcoming presentation on 30 April 2018. On 26 April 2018, N attended an oral interview, but performed poorly. P informed N that she did not have to speak at the presentation provided her contribution was clear. However, N did not attend the presentation and took her own life.

RECENT CASE UPDATES

Equality Act 2010 Claims

The Defendant accepted that, as of October 2017, N had a disability within the meaning of s.6(1) of the Equality Act 2010 by reason of depression. The Defendant further accepted at Trial that the oral assessments materially contributed to N's depression.

The Claimant had to prove that the University had actual or constructive notice of N's disability. The Judge found this could have been seen by the University staff from October 2017.

Once on notice, the onus was on the University to make reasonable adjustments.

The Defendant accepted that the requirement to attend oral assessments put N at a substantial disadvantage, but argued that the oral assessments comprised the application of a competence standard and, thus, fell within the exception at paragraph 4(2) of Schedule 13 of the 2010 Act. The Judge rejected this argument, finding that the fundamental purpose of the oral assessment was to elicit from N answers to questions and it was obvious such a process did not automatically require face to face oral interaction.

The Judge held that the University failed to make reasonable adjustments, which it had not justified, and the claim under s.20 was made out. The claims for direct and indirect discrimination were also made out.

Negligence

In relation to the claim in negligence, it was pleaded that the University owed a general duty to take reasonable care for the wellbeing, health and safety of its students, in particular to take reasonable steps to avoid and not to cause injury, including psychiatric injury and harm. The University denied that it owed any duty of care as a matter of law. The Judge found that this was an omissions case – it was alleged that the University had failed to take action rather than inflicted injury. The Judge found that N was not in the care or control of the University in contrast to, for example, a school child in the care of a school. On the facts, there had been no assumption of responsibility. No duty of care was owed.

The Judge indicated that if he was wrong on the existence of a duty of care, the University would have been in breach for the reasons the claims under the 2010 Act succeeded.

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

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