DOLMANS INSURANCE BULLETIN

Welcome to the December 2021 edition of the Dolmans Insurance Bulletin

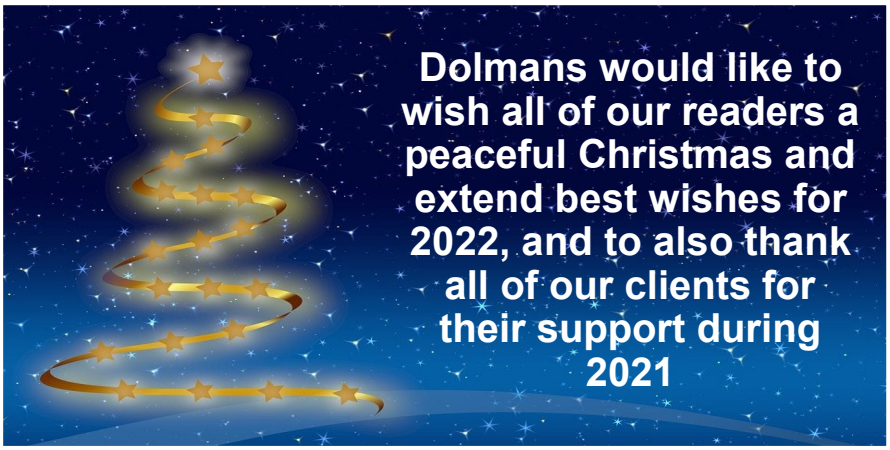
in this issue we cover:

REPORT ON

- Road markings, Sat Navs and the continued need to proceed with caution - *A W v Bridgend County Borough Council*

RECENT CASE UPDATES

- Additional Defendants - CPR 19 - applications to join additional Defendants
- Calderbank offers - split trial - costs
- Civil Procedure Rules - service of Particulars of Claim - time periods
- Negligence - pupil assault on teacher - causation



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

Road Markings, Sat Navs and the Continued Need to Proceed with Caution

AW v Bridgend County Borough Council

The use of Satellite Navigation (Sat Nav) devices in vehicles is widespread and reliance upon them by drivers is commonplace. Such reliance was raised in the recent case of *AW v Bridgend County Borough Council*, in which Dolmans represented the Defendant Authority.

Background

The Claimant alleged that he was driving through a junction/crossroads on a 'B' road, being an adopted carriageway within the Defendant Authority's control, when his vehicle was hit by an oncoming vehicle, causing his vehicle to spin out of control. As a result, the Claimant alleged that he sustained personal injuries.

The Claimant alleged that there were no road signs or markings to indicate that there was a junction/crossroads ahead, although signage was found in the area/hedge post-accident stating 'Slow – No Road Markings'.

At the time of the Claimant's alleged accident, the carriageway at the location was being resurfaced and the Claimant initially pursued his claim against four Defendants, including the Defendant Authority, the sub-contractor engaged to undertake the resurfacing works, the sub-contractors instructed to ensure there was appropriate signage in place and the contractor engaged to reinstate any road markings.

Following exchange of Witness Statements, the Claimant discontinued his claim against all Defendants but the Defendant Authority and the matter proceeded to Trial against the Defendant Authority only.

Claimant's Evidence

The Claimant was alone in his vehicle and called no witnesses to the alleged accident.

The Claimant gave evidence that he was not familiar with the road and had never driven there previously. He was relying upon his Sat Nav to guide him at the time. As resurfacing works were being undertaken, there were no road markings in place and the Claimant alleged that there was no signage visible. He did, however, subsequently notice a sign at the edge of the carriageway, which he alleged was not visible at the time, and that stated 'Slow – No Road Markings'. In any event, the Claimant alleged that this one sign was inadequate and that there should have been more warning signs in the vicinity to indicate the temporary road layout.

Cross-Examination

The Claimant admitted, under cross-examination, that his Sat Nav had announced on his approach to the junction/ crossroads that he should carry on for a number of miles, but did not apparently warn of the junction/crossroads ahead.

The Claimant remained adamant that he did not see the sign at the edge of the carriageway and that by the time he realised that there was a junction/crossroads ahead it was too late.

The Claimant was an honest witness and made a number of admissions under cross-examination. He admitted that he should have seen the sign, especially as he had stated that he was not travelling too fast. The sign was not obscured and he could not offer an explanation as to why he had not seen the sign. He denied, however, that he was distracted by the Sat Nav and was merely following its instructions to proceed ahead. It was submitted, however, that even this instruction to carry on ahead should have indicated to the Claimant that there was some change in the road layout ahead and he should have been more cautious.

Judgment

Following the Claimant's evidence, the Defendant Authority invited the Court to make a finding that there was no case to answer, with which the Judge agreed.

The Judge found that there was a warning sign in place and that this was visible to road users. Even if the Claimant had not seen the road, the Judge held that the intersecting road was clearly visible. In addition, there was still a roadworks vehicle at the location which was also visible.

Whilst the Judge appreciated that the Claimant was unfamiliar with the road, he found that he should have been even more cautious and, therefore, dismissed his claim.

Defendant Authority's Evidence and Arguments

Although the Claimant's claim was dismissed at Trial, before the Judge heard any evidence on behalf of the Defendant Authority, a number of interesting issues and arguments were raised by the Defendant Authority within the Court proceedings.

The Defendant Authority submitted that the temporary sign to which the Claimant referred was clearly visible and sufficient to warn road users of the resurfacing works. Indeed, the Claimant had even disclosed a photograph that he had taken shortly after the alleged accident showing the sign in situ.

REPORT ON

The carriageways at the location of the Claimant's alleged accident were subject to regular systems of inspection and maintenance, as well as reactive inspection. The Defendant Authority was, of course, maintaining the highway at the time.

The Defendant Authority referred to extracts from The Traffic Signs Regulations and General Directions 2016, particularly those sections relating to temporary signage. These indicated that a temporary sign may remain in place for a period of 6 months, beginning with the day the sign is placed. During the various stages of the works, the contractor engaged to provide appropriate signage had installed signing and guarding to warn highway users of the roadworks, the temporary nature of such surfaces and lack of road markings, to include the sign to which the Claimant referred.

Prior to the date of the Claimant's alleged accident, the Defendant Authority had received a complaint regarding the ongoing resurfacing works, which was unrelated to the Claimant's alleged accident. This complaint was investigated at the time by the Defendant Authority and everything was found to be in order. There were no reported issues regarding signage or lack of signage.

The resurfacing works were actually completed the day before the Claimant's alleged accident and the resurfacing machinery was still in situ, waiting to be removed. This was visible to the Claimant.

Following completion of the resurfacing works, the junction markings were replaced by the relevant sub-contractor withing 2 weeks. Although there was nothing to say when the road markings should have been reinstated, the Defendant Authority argued that this was a reasonable timescale, especially when considering the other works that were being undertaken on the Defendant Authority's behalf at that time and the weather conditions.

The Defendant Authority argued, however, that the placement and maintenance of the temporary warning signs mitigated for just this scenario on existing highways.

There was no evidence that this temporary signage was missing at the time of the Claimant's alleged accident, as evidenced by the Claimant's own photograph.

There were no reported complaints regarding lack of signage between the date of the Claimant's alleged accident and the date when the road markings were replaced. The signage was not altered in the meantime.

It was argued that the Defendant Authority was not in breach and had done all it reasonably could to ensure that road users were safe, including engagement of reputable sub-contractors to undertake various works, as referred to above. Indeed, this is evident by the fact that the Claimant subsequently discontinued his claims against the said sub-contractors.

REPORT ON

Gorringe and Other Case Law

Although the Judge did not need to consider the Defendant Authority's alleged breach, he did very briefly mention the decision in *Gorringe v Calderdale Metropolitan Borough Council (2004) 1 WLR 1057* when giving his Judgment, albeit insofar as this related to the Claimant's duty to observe the road.

Although accepted that the facts in *Gorringe* regarding alleged breach were not identical to the current matter, it might be timely to remind readers of the relevant issues in that case.

In *Gorringe*, the Judge, at first instance, had found that the Defendant Authority's failure to re-paint a 'slow' road marking was a breach of the Defendant Authority's duty under Section 41 of the Highways Act 1980. In addition, the Defendant Authority was found to be in breach of Section 39 of the Road Traffic Act 1988, which provides that a Highway Authority must take measures as appear to be appropriate to prevent accidents.

However, the Court of Appeal found that the Judge's findings could not be upheld. It was found that a road marking was not part of the physical or structural fabric of the highway and, therefore, lay outside the Defendant Authority's duty to maintain under Section 41 of the Highways Act 1980. Likewise, there was no breach under Section 39 of the Road Traffic Act 1988, which the Claimant had submitted created a common law duty. Indeed, in the matter of *Stovin v Wise (1996) AC 923*, the House of Lords held that the Authority owed no private law duty to road users to do anything to improve visibility at an intersection. The Authority had statutory powers to enable the necessary works to be undertaken, but it was held that these statutory powers could not be converted into a common law duty in these particular circumstances.

Comment

The Claimant's reliance and/or lack of reliance upon his Sat Nav in the above matter clearly contributed to the alleged accident and must have assisted the Judge in making his finding that the Claimant should have been more cautious, the use of Sat Nav having been mentioned in his Judgment.

Notwithstanding this, it is also clear that the Defendant Authority was armed with a number of arguments in response to the Claimant's allegations. Indeed, with strong witness evidence obtained, the Defendant Authority was ready to robustly defend these allegations at Trial, had the matter proceeded that far.

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RECENT CASE UPDATES

Additional Defendants - CPR 19 - Applications to Join Additional Defendants

Pawley v Whitecross Dental Care Limited [2021] EWCA Civ 1827

The Claimant was a patient of the Defendants' Dental Practice between 2012 and 2018. During that time, she was treated by four different dentists. She issued proceedings against the Dental Practice, alleging that her treatment was negligent. She chose to sue the Defendants and not the individual dentists, alleging that the Defendants owed her a non-delegable duty of care and that they were to be held to be vicariously liable for the negligence of those individuals who treated her.

In their Defence, the Defendants denied the existence of a non-delegable duty and denied that they were vicariously liable for any negligence on the part of the individual dentists that the Claimant could prove.

The Defendants applied to the Court to join the individual dentists as additional Defendants to the claim, pursuant to CPR Part 19. That Application was granted, a decision which was upheld on appeal.

The Claimant appealed to the Court of Appeal on two grounds:

(1) That the Lower Courts had failed to give adequate weight to the fact that the Claimant could not be forced to bring proceedings against Defendants and potentially become liable for their costs; (*Milton Keynes Council v Viridor [2016] EWHC 2764*), and

(2) That the wrong test had been applied in respect of CPR 19.5(4). The Claimant argued that the issue of necessity should be the threshold for such decision and not the test of desirability.

The Claimant's appeal was successful.

The Court of Appeal held that the Claimant was entitled to succeed on Ground 1 because inadequate weight had been given by the Courts below to the principle expressed in *Viridor*. On a literal interpretation, the Rules were wide enough to create a power to add a party as a Defendant and do not exclude that power where the Claimant opposes joinder, but it was wrong in principle in such a case for the Court to exercise the power to join a party as a Defendant and to require the Claimant to pursue a claim against the newly joined party where the Claimant opposes that joinder.

RECENT CASE UPDATES

It was axiomatic that no one may be compelled to bring proceedings to claim damages for injury, loss or damage caused by another person's tort. A person who is competent to litigate is entitled to decide who they will sue. A person who is competent to litigate is entitled to decide what cause or causes of action they will pursue against those they have chosen to sue.

This applies even (or particularly) where the choice that the Claimant makes may expose them to a greater risk of failure than would be the case if every conceivable basis for a claim is pursued. The overriding objective encourages Claimants to streamline proceedings where possible and to generate litigation that is proportionate to the amount of money involved, the importance of the case, the (necessary) complexity of the issues and the financial position of the parties.

There were obvious and sound reasons why the Claimant might choose to adopt the route that she had. There was nothing abnormal about the circumstances of her claim that required her decision to be overruled or justify compelling her to serve the individual dentists. The reasons for not requiring a Claimant to sue a party against their wishes became even more compelling where the proposed Defendant has (or may have) either a partial or a complete defence to a claim, such as limitation as in the present case. There may be exceptional cases where different considerations apply, but there was nothing exceptional about this case.

As the appeal in respect of Ground 1 had succeeded, it was not necessary for the Court to reach a concluded view on where the threshold should be set for a case falling within CPR 19.5 (4). However, it was held that a threshold test of desirability (which would bring into play all the circumstances and the application of the overriding objective) would not be satisfied in the present case.

Calderbank Offers - Split Trial - Costs

McKeown v Langer
[2021] EWHC 451 (Ch)

The Respondent, L, brought a petition for unfair prejudice pursuant to s.994 of the Companies Act 2006. A split trial was ordered with liability to precede valuation. At the liability trial, the Judge found in L's favour. At a hearing in relation to the costs of the liability hearing, the Judge ordered the Appellant, 'M', to pay L's costs of the proceedings up to and including, and consequential upon, the liability trial, including in relation to the hearing for costs, and ordered a payment on account of costs in the sum of £450,000. M appealed against the Costs Order on the ground that the Judge was wrong in the circumstances of this case in concluding that he should not treat a Without Prejudice Save as to Costs ("WPSATC") offer made by M in the same way as a Part 36 offer for the purposes of CPR r.36.16(3)(d) and (4) and r.44.2. M contended that by proceeding to determine costs, having been made aware of the *Calderbank* offer, the Judge created a significant risk of injustice to M.

The Court of Appeal was, thus, required to determine, in particular, the issue of whether, where the Judge is aware of the existence of a *Calderbank* offer, but unaware of the date it was made, or its terms, the Judge, is in effect, bound to treat such an offer as equivalent to an offer under CPR 36 and defer a ruling on costs until the conclusion of all stages of the litigation.

The Court of Appeal dismissed the Appeal. The Court agreed with the Judge's analysis that the *Calderbank* offer was not admissible because it had not been placed before the Court; M could not have it both ways by withholding 'admission', but nonetheless requiring the Court to take account of the offer; the offer was incapable of being analysed and it was wrong to speculate about its terms; a 'read across' between CPR Part 36 and CPR 44.2 was rejected; and M could have obtained protection from interim costs by making a CPR Part 36 offer or by the making of an "*O'Neill* offer".

The Court of Appeal stated that CPR 44.2 is, by its very nature, different to CPR 36, which is a self-contained set of rules which departs from the more general rules in CPR 44.2. The special rules in CPR Part 36 do not, therefore, govern or limit the broader discretion which arises under CPR 44.2 where there is no CPR Part 36 offer in play. Further, the Judge's approach was consistent with the policy considerations, underpinning the costs regime, including that costs follow the issue rather than the event and the making of discrete issue based Costs Orders encourages professionalism in the conduct of litigation.

Civil Procedure Rules - Service of Particulars of Claim - Time Periods

Ellis v Chief Constable of Avon and Somerset Constabulary 16.11.21

The Claimant brought a civil action against the Defendant, which accrued on 10 May 2013 and became time barred on 10 May 2019. The Claim Form was issued just in time, on 9 May 2019. The Claim Form indicated that the Particulars of Claim were *"to follow"*.

The Claimant's Solicitors sought to serve the Claim Form and the Particulars of Claim by putting them in the first class post on 9 September 2019 properly addressed to the Defendant's Legal Services Department. The Particulars of Claim were in a separate document, but accompanied the Claim Form within the same envelope. The Defendant contended that although the Claim Form was served in time, the Particulars of Claim were served out of time, and applied to strike out the Claimant's claim.

At first instance, the Claimant's claim was struck out. The Claimant's Application for a retrospective extension of time to serve the Particulars of Claim was refused.

The Claimant appealed.

RECENT CASE UPDATES

The date for service of a Claim Form is the date that it is placed in the post. CPR 7.5 provides a bespoke method of service of a Claim Form. It reads, *"Where the Claim Form is served within the jurisdiction, the Claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12:00 midnight on the calendar day 4 months after the date of issue of the Claim Form"*.

There is no express rule in relation to service of Particulars of Claim. Unlike a Claim Form, Particulars of Claim are not issued by a Court; the obligation is on the Claimant to file them in accordance with CPR 7.4(3).

CPR 7.4(2) provides, "*Particulars of Claim must be served on the Defendant no later than the latest time for serving a Claim Form*". The Particulars of Claim, therefore, have to be *served* within the 4 month period for service.

The issue for which the Court had to determine, therefore, was whether the Particulars of Claim were served in the relevant period.

CPR 6.26 addresses the deemed service of a document other than a Claim Form. It provides, *"A document, other than a Claim Form, served within the United Kingdom, in accordance with these Rules, or any relevant Practice Direction, is deemed to be served on the day shown in the following table …",* and pursuant to that table, if first class post is used, the deemed date of service is *"the second day after it was posted …".*

In this case, the process of serving the Claim Form had been taken on the last possible day (9 September 2019) when it was dispatched, and so the Particulars of Claim were deemed served on 11 September 2019 (after the 4 month period for service had expired).

In allowing the Claimant's appeal however, HHJ Ralton held that it did seem to be *"quite extraordinary"* that a Claimant can set out his Particulars of Claim within a Claim Form, put the latter in the post and be in time, but if he chooses instead to put his Particulars of Claim in the same envelope as the Claim Form, but as a separate document, and posts the envelope, the claim can be in time, but not the Particulars of Claim.

In applying the correct reading and context to the Rules, it was apparent that distinction needed to be drawn at times between service meaning dispatch and service meaning delivery.

Service of Particulars of Claim within the meaning of CPR 7.4 means the process of serving as applied to a Claim Form, namely dispatch, and does not mean a deemed service date. The deemed service date (delivery) remains important for setting further procedural deadline, but the Particulars of Claim had been served in time. HHJ Ralton held that the authorities of *T&L Sugars Ltd v Tate & Lyle Industries Ltd [2014] EWHC 1066*, *Paxton Jones v Chichester Harbour Conservancy & Others [2017] EWHC 2270* and *Oran Environmental Solutions Limited & Another v QBE Insurance (Europe) Limited & Another [2020] EWHC* supported the Claimant's argument. This ground for the Claimant's appeal was allowed.

Although not relevant, given that the Claimant succeeded in his appeal on the basis of the above, HHJ Ralton held that the decision of the District Judge not to extend time for service of the Particulars of Claim was correct. He had carried out the correct exercise in a careful and correct way and reached a decision that he was entitled to reach on the material before him.

Negligence - Pupil Assault on Teacher - Causation

Cunningham v Rochdale Metropolitan Borough Council [2021] EWCA Civ 1719

The Claimant, 'C', was the Assistant Head Teacher at a school for pupils who exhibited challenging emotional and behavioural difficulties. On 3 November 2015, C was punched in the face by a pupil, 'P', as a consequence of which C suffered a fractured cheekbone and psychiatric injuries. P had been at the school since 2012. In 2015, P's behaviour deteriorated. P attacked C on 22 September 2015 and was excluded for 3½ days. On 5 October 2015, P attacked another teacher and was excluded for 1 day. The 3 November 2015 was the first day back in school after the half term break. There were a number of incidents during which P took out his frustration on school property. When C arrived on the scene, P was banging a door which C properly prevented. P then, suddenly and without warning, hit C.

Decision at First Instance

There was no written risk assessment relating to P. Witnesses gave evidence regarding dynamic risk assessments whereby staff used their experience and knowledge of individual pupils to make their own assessments of a pupil's behaviour and acted accordingly. Whilst there was criticism of the lack of a risk assessment, the Judge was not persuaded that this would have altered the approach to P and his difficulties. There was no record of the incident on 5 October 2015, but the Judge was satisfied on the witness evidence that the incident was dealt with via a successful restorative meeting between the teacher and P.

The Judge recorded that senior staff were aware of P's difficulties, the deterioration in his behaviour and the incidents of 22 September and 5 October 2015. There were references to various bodies, including CAMHS, Early Help and Family Support, Resolve, Hype, The Youth Offending Team, Crisis Intervention, the school counsellor, Outreach Intervention, one to one youth work, Early Break and Strengthening Families. There was some evidence of improvement before the 3 November 2015. The Judge found it was reasonable not to exclude P before 3 November 2015 and dismissed the claim on the basis that C had not shown his serious injury was foreseeable or that it was as a result of any breach of duty on the part of his employers.

Court of Appeal Decision

At the Appeal Hearing, the essence of C's case was that the Judge should have found that there was a breach of duty by failing to have a return to school interview and a restorative justice meeting with C after P's earlier attack on C, and the Judge, following the approach in *Vaile v Havering LBC [2011]*, should have found that such an interview and meeting would have prevented the assault on 3 November 2015.

The Court of Appeal found that it was reasonably foreseeable to the school and Council that C might be attacked by P. The failure to complete a risk assessment, and the failure to have a return to school interview and restorative justice meeting, as required by the school's behaviour policy, were breaches of duty.

In relation to causation, in order for C to succeed on the Appeal he would need to show that there was a relevant breach of duty which caused loss. As this was a case where the breach of duty was an omission to act, it might be more accurate to say that C needed to satisfy the Court, on the balance of probabilities, that the failure to complete the risk assessment, or the failures to have the return to school interview or restorative justice meeting, caused the attack in the sense that if the action had taken place, the assault would not have taken place.

C's Counsel submitted that the decision in *Vaile* showed that causation could be established in a situation such as this because that Court approved the approach that *"Where a Claimant proves both that a Defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a Court to infer that it was probably so caused, even if the Claimant is unable to prove positively the precise mechanism"*.

RECENT CASE UPDATES

The Court of Appeal agreed with the Defendant that *Vaile* did not establish any new principles of law in relation to the issue of causation in general or causation in particular relating to attacks on teachers by pupils. *Vaile* was a case where the Court of Appeal considered that if a teacher had been warned about a pupil's ASD and had been trained in how to manage a pupil with ASD, the attack would, on the balance of probabilities, have been avoided, even though the mechanism by which that would have occurred could not be shown. By contrast, in this case, the Trial Judge found that the senior staff at the school were aware of P's deterioration generally and the events that manifested it. The evidence also established that C was experienced and trained. The situation in this Appeal was different from that in *Vaile*.

The Court of Appeal considered that nothing had been identified on behalf of C which might have been raised by a written risk assessment which would have prevented the assault on C. Therefore, this breach of duty did not cause the attack and C's loss.

The incident itself was a sustained incident, lasting well in excess of 30 minutes. It was apparent that P's behaviour fluctuated during the incident. The situation on the day was, as the Trial Judge found, appropriately handled by the school. The prospect that P would, in the final event, not have assaulted C because he had had a return to school interview and a restorative justice interview with C was possible, but it was not probable, and more likely than not to have prevented the attack. P had had the benefit of extensive interventions over the course of the year as his behaviour deteriorated which did not prevent the assault.

Accordingly, the Appeal was dismissed, as although C had proved breaches of the duty of care owed by the school to him in that the school failed to carry out risk assessments, failed to arrange a return to school interview and failed to arrange a restorative justice meeting, C was unable to show that if the risk assessments had been carried out, or if the return to school interview and restorative justice meeting had taken place, the attack on 3 November 2015 would not have taken place.

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

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