DOLMANS INSURANCE BULLETIN

Welcome to the May 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

Back to Basics - The Claimant's Burden of Proof in Highways Claims

EB v Bridgend County Borough Council

It is important not to lose sight of the fact that the Claimant bears the burden of proof in claims against Defendant Local Authorities where breach of Section 41 of the Highways Act 1980 is alleged.

There are some exceptions, for example where contributory negligence on the Claimant's part is alleged or where the Defendant Local Authority intends to rely upon a Defence under Section 58 of the Highways Act 1980, in which cases the burden lies with the Defendant Local Authority.

However, before these exceptions are even contemplated by a Trial Judge, the Claimant must have firstly overcome the burdens of proving, on a balance of probabilities, that the accident occurred as alleged, that the alleged defect caused the Claimant's accident and that the alleged defect was dangerous.

This was illustrated in the recent case of *EB v Bridgend County Borough Council*, in which Dolmans represented the Defendant Local Authority.

Background / Allegations

The Claimant alleged that she was walking along an adopted carriageway close to her home, when she lost her footing in a pothole, causing her to fall and sustain personal injuries. The Claimant was walking her dog at the time of her alleged accident.

The Claimant alleged that the Defendant Local Authority was negligent and/or in breach of Section 41 of the Highways Act 1980. In addition, nuisance was pleaded.

Claimant's Evidence

The Claimant was cross-examined at Trial regarding the exact circumstances of her alleged accident and the pothole that had caused her alleged accident, but was somewhat vague under cross-examination. However, the Claimant was adamant that the alleged pothole had been in situ for some considerable time prior to her alleged accident and similar evidence was also adduced by the Claimant's other witnesses. However, none had reported the alleged pothole to the Defendant Local Authority prior to the Claimant's alleged accident.

The Claimant disclosed photographs of the alleged pothole that were said to have been taken on the day of her alleged accident, although it had been raining and the pothole shown was filled with rainwater. No measurements were shown in these alleged contemporaneous photographs. Additional photographs were however taken some time later, utilising a wooden block and a measuring tape. The Claimant did not call the photographer to give evidence, but argued that these were sufficient to prove that the alleged pothole was dangerous.

Factual Causation - Defendant's Arguments

The Defendant Local Authority argued that (in accordance with the Court of Appeal decision in *James & Thomas v Preseli Pembrokeshire District Council (1993) PIQR P114*), the Claimant needed to satisfy the Court as to exactly where she fell and the cause of her alleged accident. It was insufficient to simply say "there is a pot hole" and "someone fell".

Dangerousness – Caselaw and Defendant's Arguments

It is worth reminding readers of the relevant caselaw regarding dangerousness when dealing with alleged defects in the highway.

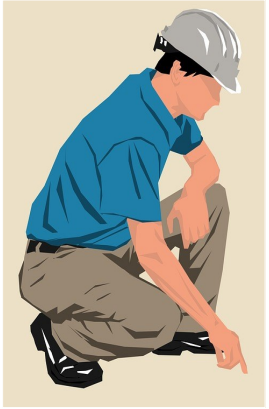
Lord Steyn held in *Mills v Barnsley (1992) PIQR 291* that the Claimant must prove that *"the highway was in such a condition that it was dangerous to traffic or pedestrians in the same sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public"*.

Lord Steyn also emphasised that *"in the same way as the public must expect minor obstructions on roads, such as cobblestones, cats eyes and pedestrian crossing studs, and so forth, the public must expect minor depressions"* and that *"it is important that our tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed"*.

Lord Dillon went further, stating that the *"liability is not to ensure a bowling green which is entirely free from irregularities or changes in levels at all. The question is whether a reasonable person would regard it as presenting a real source of danger. Obviously, in theory any irregularity, any hollow or any protrusion may cause danger, but that is not the standard that is required"*.

The appropriate two stage test when determining dangerousness in the highway was set out by Mr Justice Eady in *Galloway v The London Borough of Richmond Upon Thames (2003) EWHC 289 (QB)*: Firstly, it must be established that there is a reasonable foresight of harm to users of the highway. Secondly, the Court has to guard against setting a standard that would impose an unreasonable burden upon Highway Authorities in respect of minor depressions and holes in streets which, in a less than perfect world, the public must simply regard as a fact of life. The law of tort should not impose *"unreasonably high standards"* and there has to be *"a sensible balance or compromise between private and public interest"*.

It was argued in the current matter that the Claimant's photographs were insufficient to prove that the relevant location was dangerous. The Defendant Local Authority had repaired a pothole in the vicinity of the Claimant's alleged accident following a complaint received on behalf of the Claimant, although no mention was made of the Claimant's alleged accident at that time and the complaint was received some time following the date of the Claimant's alleged accident.



The Highways Inspector for the area had picked up other defects for repair during his scheduled pre-accident inspection of the carriageway and was adamant, therefore, that he would not have missed the alleged pothole had it been present at the time of his scheduled pre-accident inspection.

REPORT ON

Judgment

The Trial Judge was satisfied that the Claimant had suffered a fall, but that she was distracted and concentrating on her dog that she was walking at the time of her alleged accident.

In dismissing the Claimant's claim, the Trial Judge held, however, that the Claimant had failed, on a balance of probabilities, to prove that her fall was caused by the alleged defect and also went on to consider dangerousness.

The Trial Judge found that the Claimant's photographs were unsatisfactory, with no contemporaneous measurements, and that her evidence regarding the alleged pothole was vague. The Trial Judge was not satisfied that the alleged pothole presented a real source of danger in any event.

The Trial Judge did not, therefore, need to consider the Defendant Local Authority's Section 58 Defence, the Defendant Local Authority having argued that it had scheduled and reactive systems of inspection/ maintenance in place, that the alleged defect was not noted during the scheduled pre-accident inspection of the carriageway and that it had received no previous complaints regarding the alleged pothole.

Comment

The above matter illustrates that without compelling evidence and faced with robust cross-examination, a Claimant can find it difficult to overcome even the first hurdle in proving that an accident occurred as alleged or that a particular defect had caused the alleged accident.

This, coupled with a strong Defence and evidence by the Defendant Local Authority in response to the Claimant's allegations regarding dangerousness, resulted in the Trial Judge dismissing the Claimant's claim in this matter and not needing to consider any additional arguments relating to the Defendant Local Authority's Section 58 Defence.

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RECENT CASE UPDATES

Bill of Costs - Certification - Compliance with CPR

AKC v Barking, Havering and Redbridge University Hospitals NHS Trust [2022] EWCA Civ 630

This was a clinical negligence case where the Defendant sought to strike out the Claimant's Bill of Costs (rather than the claim for costs) for non-compliance.

The Claimant's bill comprised a paper bill for the period up to 5 April 2018 and an electronic bill for work undertaken after that date. In Points of Dispute, the Defendant alleged that the Bill of Costs was not properly certified (the signatures of the Certificate were illegible and had the words "Partner in the firm of Irwin Mitchell LLP" underneath it, but they would not disclose whose signature it was), that the paper bill failed to provide the name and status (including qualification and years of post-qualification experience of each fee earner in respect of whom costs were claimed) and that the electronic bill failed to provide the name, status and Senior Courts Costs Office ("SCCO") grade of each fee earner. The Defendant applied for the Bill of Costs to be struck out and for the Claimant to serve a new bill.

At first instance, the Application was dismissed. On appeal, this was overturned by Steyn J who found that the Claimant's bill was not compliant with CPR and ordered the Claimant to serve a replacement bill. Whilst it was acknowledged that there was no express requirement, "*as a matter or ordinary interpretation, bearing in mind the purpose of certification*", it was held that it was implicit that the Solicitor who signs the Certificates must be readily identifiable on the face of those Certificates.

Steyn's decision, insofar as she held that the original bill was deficient in the information it gave about fee earners, was challenged by way of a further appeal. The certification issue was not pursued.

The Claimant's Bill of Costs simply identified categories of fee earners, such as Partners, Senior Solicitors, Trainees and Paralegals. A Part 18 Request was raised by the Defendant for the names and grades of the fee earners involved, to which the Claimant responded providing the names and description for the 33 fee earners that had worked on the file. The significance of the defects in the paper and electronic bill was reduced by the extra information which the Claimant gave about the fee earners, however it was still not possible to say which of the 33 fee earners named had carried out particular work.

It was held:

In respect of the paper bill, paragraph 5.11(2) of PD 47 did not expressly require fee-earners' names and SCCO grade of years of post-qualification experience to be set out. However, it was implied, "*it is clear on the face of paragraph 5.11(2) that the hourly rate and 'status' of 'each' fee earner must be provided in the Bill of Costs*". It was held that in any case where costs are claimed in respect of a legal representative's employees, the effect of paragraph 5.11 is to require each employee's status and hourly rate to be included in the Bill of Costs.

In relation to the electronic bill, paragraph 5.A2 of PD 47 states that whatever spreadsheet format is used, the electronic bill must allow the user to identify 'the detail' of all the work undertaken in each phase in chronological order and must contain all calculations and reference formulae in a transparent manner so as to make its full functionality available to the Court and all other parties. Any electronic bill must, therefore, include the name, the SCCO grade and, insofar as it adds anything to the grade, the status of each fee earner. The electronic bill failed to do this and so failed to comply with paragraph 5.A2 of PD 47.

The decision to strike out the Claimant's existing Bill of Costs and for the Claimant to serve a replacement which complied with CPR was, therefore, upheld.

RECENT CASE UPDATES

Fatal Accidents Act 1974 - Trees Falling on Public Highway - Duty of Care - Negligence

Michael Hoyle v Hampshire County Council (1) Simon P Holmes Limited (t/a Tree Surveys) (2) Mr Ed Power (3) [2022] EWHC 934 (QB)

The Claimant brought a claim under the Fatal Accidents Act 1976 for damages arising out of a road traffic accident on 6 June 2017 involving his son who was killed when a cherry tree growing immediately adjacent to a dual carriageway fell onto his car. The claim was brought against the Local Authority both as owners of the land upon which the tree had been growing and in their capacity as the Highways Authority responsible for maintenance of the carriageway. The Local Authority's tree surveyor and individual arboriculturist were added as further Defendants.

It was common ground that the Local Authority owed a duty of care to act as a reasonable and prudent landowner, which included acting to avoid apparent danger and with a duty to undertake regular inspections. There was no dispute between the parties that a checking frequency of about once every three years by a trained arboriculturist was appropriate for the location and that the regime in place by the Local Authority exceeded this.

The Claimant's case rested entirely upon the evidence of an expert arboriculturist, Mr Barrell, who considered that the tree had a severely imbalanced crown towards the road and an asymmetrical root system that had no significant structural roots extending to and beyond a ditch that it bordered. Mr Barrell was of the opinion that any competent tree inspector should have noticed the lack of any root buttresses directly facing the ditch, which should have raised an alarm and led to further investigation.

Two tree inspectors had inspected the tree the year prior to the accident, one in February 2016 and one in November 2016. The inspection in February 2016 was criticised by the Claimant, who asserted that the tree would have been in the same condition as observed in November 2016 and the works recommended in November 2016 would have been completed prior to the accident. In addition, there was an urgent need for pruning, lopping or other work to reduce the size or weight of the tree and/or to highlight the extent to which the crown encroached upon the highway.

In an extensive Judgment, where the evidence adduced by the parties was reviewed in detail, it was held:

(1) The evidence did not support the Claimant's case that the tree was structurally defective at all prior to the road traffic accident. It had a healthy root system before it failed. There were no visible signs that the tree was at risk of failing. It would not have put a reasonably competent arboricultural inspector on notice that this tree would fail within the next 12 months or that more detailed investigations were required.

(2) The Claimant had not proved that there was a defect or combination of defects such that created a risk of the tree falling. There was no evidence of negligence in relation to the inspection carried out in February 2016. The tree may have died between February and November 2016.

(3) The evidence pointed strongly to the visual inspections carried out not only being competent, but also having been conducted with care. The tree had not exhibited signs of being at risk of failure.

(4) The Claimant had not proved that no competent tree inspector would have scored the tree as it was scored in November 2016. Even if the tree had been scored at a higher risk, the Judge was satisfied that work would not have started on the tree prior to the accident. In any event, the Claimant had not shown that this work would have prevented the failure of the tree. The inspectors relied upon by the Local Authority had used all care expected of reasonably competent tree inspectors.

The Judge found no breach of duty of care on the part of any of the Defendants. Whilst the Claimant's desire to seek compensation was understandable, the Judge held that to find in favour of the Claimant would have required the Defendants to have done more than was reasonable to ensure safe tree lined roads. Requiring a greater risk averse approach would result in unnecessary removal of trees and accompanying destruction of habitats. The road traffic accident was a tragedy where no one was to blame.

In light of the findings made, it was not necessary for the Judge to consider whether Section 41 of the Highways Act applied to this case, although the Judge found that it was likely that she would have found that it did not apply. The Judge held that the fallen tree was not part of the fabric of the highway and it was transitory. It was cleared from the road within a short time of its failure and its failure was not due to lack of maintenance. The Judge observed that extending Section 41 to relate to trees or branches which fall on highways and then are urgently removed would have the effect of repeatedly placing Local Authorities in breach. That was not consistent with *Hayden v Kent County Council [1978] QB 343*.

Part 36 Offer - Late Acceptance - Costs Consequences

MRA v The Education Fellowship Limited
[2022] EWHC 1069 (QB)

The Claimant ('C'), who had ASD and ADHD, claimed damages for historic child abuse by a teacher. The abuser was convicted and imprisoned. Breach of duty was admitted pre-action. Proceedings were issued in June 2017 and served in September 2017. The injury pleaded was a Moderate Depressive Episode and PTSD. C's psychiatric evidence at that time recommended antidepressants, CBT and counselling. The prognosis was uncertain and depended on how C's symptoms responded to the recommended treatment. The Statement of Value on the Claim Form was £100,000.

On 19 January 2018, the Defendant ('D') made a Part 36 offer of £80,000. During the relevant period for acceptance of the offer, C's psychiatrist provided an addendum report indicating that the symptoms of PTSD had worsened and expressed a pessimistic view. On 2 February 2018, C's solicitors requested an extension of the offer validity until 20 February 2018 to enable them to take instructions. D did not respond. On 20 February 2018, C's solicitors sought an extension of time in which to accept the offer on the ground that the prognosis was so uncertain that the value of the claim could not yet be ascertained. The offer was expressly 'neither accepted nor rejected'. C's solicitors indicated that a Judge would not be able to approve a settlement in such circumstances and advised that an updated report would be obtained in October 2018, by which time the prognosis might be clear. Again, D did not respond. Accordingly, no extension was ever agreed nor a stay of proceedings agreed or applied for by C.

In March 2020, D served psychiatric evidence disagreeing with the diagnosis of PTSD. The expert's view was that whilst there had been a deterioration in C's symptoms for a few months from January 2018, these had improved.

On 2 April 2020, C accepted D's Part 36 offer. Notwithstanding the late acceptance, C requested that D agree to pay C's costs to acceptance on the standard basis. D refused. In the circumstances, the liability for costs had to be determined by the Court.

CPR 36.13 (5) provides that in such circumstances the Court must, unless it considers it unjust to do so, order that C be awarded costs up to the date on which the relevant period expired; and the offeree (in this case C) pay the offeror's (in this case D) costs from the date of expiry of the relevant period to the date of acceptance. The issue before the Court was, therefore, whether it would be unjust for C to pay D's costs after the expiry of the relevant period for acceptance of D's offer.

The Judge confirmed that the burden was on C to establish that it was 'unjust'. C's position was that it was unjust because until the recommended treatment took place, the prognosis (and, therefore, quantum) could not be assessed by either side and this had been recognised by D in correspondence; a Court could not approve a settlement in the absence of prognosis evidence; the costs would come out of and significantly impact C's damages (it was suggested that D's post offer costs were in the region of £45,000); there was an additional injustice in relation to QOCS operating in relation to protected persons as in the absence of requiring Court approval, there would be no order for damages enabling set off; and C had requested an extension.

The Judge observed that Part 36 exists to ensure that a party can ordinarily obtain some degree of costs protection by making a well judged (and ideally early) offer to settle. This was all the more important nowadays, with the caseloads before the Court, as a way to encourage settlement and, since the invention of QOCS, as a significant tool for Defendants and insurers who otherwise face the burden of paying their own costs come what may.

The issue was not whether C had acted reasonably. C had to discharge the heavy burden of showing injustice.

The Judge noted that the bleak picture set out in the medical evidence at the end of January 2018 was the starting point from which C might improve. An assessment of the reasonable range and 'best case' quantum was possible based on what was known at that time. The uncertainty in this case was focussed on whether and to what extent C might improve, with some possible scope for deterioration. In the event, C did improve. D made a 'high end' offer early on. This case was distinguishable from ***SG v Hewitt*** where diagnosis could not be reached until majority, and both sides' experts were agreed upon that. In this case, there was a clear and unchanging diagnosis at the start and a degree of uncertainty (mostly in the 'may improve') direction. That was a risk of litigation seen in many cases. If this sort of uncertainty of prognosis was sufficient, it would undermine a key aspect of balance in the QOCS regime.

The fact that C lacked capacity was not a basis for departing from the usual rule.

Whilst the argument that a Court would not have approved the settlement unless the prognosis was clear was, at face value, an enticing one, the Judge commented that Masters are experienced in knowing the practical realities of litigation and injury quantification, and a Judge in her position would have approved it.

Whilst an extension had been requested, no agreement was reached; a flag that the offer may well be relied upon.

As regards the impact of the deduction on C's damages, the Judge considered that to take into account the impact of costs on damages would be to 'place the cart before the horse'. Damages will always be impacted in such cases, that is the presumed 'just' outcome unless other factors make it unjust for that to be the case. It was necessary to follow her 'head' rather than her 'heart'.

The Judge, thus, concluded that it was not permissible to take into account the degree of reduction (or the fact of reduction) of damages which arise from the operation of the default rule. Detailed assessment exists to ensure that excessive sums are not deducted, and that was the route to avoid injustice in this respect.

Accordingly, it was held that it was not unjust to allow the usual costs rule to apply in this case and D, subject to assessment, could make the relevant deductions from damages under Part 36.

It should be noted that the issue regarding the operation of QOCS in relation to protected parties was not fully argued and the Judge confirmed that she was not going to decide it, but if it was thought that the argument might change the position in this case, it could be heard in due course. Similarly the Judge did not make a determination regarding C's suggestion that it would be possible to approve a settlement in a manner that avoided making an order for damages, which it was noted would be opposed by D as tantamount to being an improper device to avoid the rule.

Setting Aside Default Judgment - Application of *Denton* Criteria

Ince Gordon Dadds LLP v Mellitah Oil and Gas BV [2022] EWHC 997 (Ch)

C v D [2022] 5 WLUK 99

There have been two Judgments this month regarding Applications to set aside a Default Judgment under CPR 13.3. The facts of the individual cases are not set out herein. The Judgments are notable for the differing conclusions they came to on the issue of whether the *Denton v TH White Ltd [2014]* criteria in relation to relief from sanctions applies to such Applications.

In ***Ince Gordon Dadds LLP v Mellitah Oil and Gas BV [2022] EWHC 997 (Ch)***, the Judge held that an Application under CPR 13.3 to set aside Judgment entered in default of defence was an Application for 'relief from any sanction' within the meaning of CPR 3.9. Accordingly, the exercise of discretion required consideration of the three-stage test laid down in *Denton*. There was no reason why a different, and perhaps less strict, approach should apply to Applications to set aside Default Judgments compared with other types of default. The Application under CPR 13.3 in this case was dismissed.

However, the Judge in ***C v D [2022] 5 WLUK 99*** held that an Application under CPR 13.3 did not engage the regime for relief from sanctions and the three-stage test in *Denton*. The Judge noted that in *Regione Piemonte v Dexia Crediop SpA [2014]* and *Gentry v Miller [2016]*, the Court of Appeal had suggested in obiter dicta, and where the point had been agreed between the parties, that setting aside a Default Judgment was an Application for relief from sanctions. The Judge further noted that suggestion had been applied in first instance authorities and in the recent decision of *Ince* (above). However, the contrary view had been advanced by Andrew Baker J in *Cunico Resources NV v Daskalakis [2018]*. The decision in *Ince* was not binding, but was persuasive. The Judge was not persuaded, preferring the line of authority in *Cunico* and the reasoning of Lord Dyson in *Attorney General of Trinidad and Tobago v Matthews [2011]*, in which the Privy Council had analysed similar procedural rules. It could not have been intended that if the requirements of CPR 13.3 were satisfied an Application could nevertheless be refused on grounds not set out in that rule, save for the operation of the overriding objective. The Application under CPR 13.3 in this case was successful.

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

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