DOLMANS INSURANCE BULLETIN

Welcome to the May 2023 edition of the Dolmans Insurance Bulletin

In this issue we cover:

REPORT ON

Costs Order made in a Small Claims Track matter - issues to be considered

LHP v Monmouthshire County Council

FOCUS ON

Failure to remove - Convention for the Protection of Human Rights & Fundamental Freedoms

AB v Worcestershire County Council and Birmingham City Council

Vicarious liability

Trustees of the Barry Congregation of Jehovah's Witnesses v BXB

CASE UPDATES

- **GDPR - misuse of private information - human rights**
- **Medical negligence - novus actus interveniens**
- **Police - duty of care - assumption of responsibility**
- **Private nuisance - limitation - continuing nuisance**

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:

Justin Harris, Partner, at **justinh@dolmans.co.uk**

DOLMANS
SOLICITORS

REPORT ON

Costs Order Made in a Small Claims Track Matter - Issues to be Considered

LHP v Monmouthshire County Council

Background

LHP owned a large house and had rented out rooms in the property for many years. LHP decided to evict their occupiers (hereafter referred to for the sake of simplicity as "tenants" but, rather obviously, the status of these persons was disputed in the litigation) and served purported notices to quit on three such tenants. The notices were served informally, by email, and were not statutory notices. They further did not provide the statutory notice period. The tenants contacted the Local Authority to seek advice on the status of the property and whether the property was a House in Multiple Occupation. The effect of one of the notices was that a tenant could have been rendered homeless on Christmas Eve.

The Local Authority indicated to the tenants that the property was a House in Multiple Occupation and the regulations for such a property had not been complied with. The Local Authority further indicated that the notice purportedly served by LHP was invalid because the tenants had the statutory protection afforded to tenants of assured shorthold tenancies and, moreover, notice pursuant to the relevant legislation had not been given. Further, it was clear that Rent Smart Wales Regulations for registration of landlords and for the depositing of the rental deposit monies had not been complied with. The Local Authority, thus, advised the tenants to seek their own independent advice.

The Local Authority at the same time wrote to LHP indicating their view and invited LHP to contact the Local Authority to discuss the matter further.

LHP refused to move from the view they had taken, maintaining a position that no tenancy had been created and that the emails they had served as notices to quit were sufficient. In fact, and rather bizarrely, LHP sought to advance an argument that the occupation of the property by the tenants was tantamount to a hotel.

REPORT ON

The Claim

LHP pursued three separately issued (but factually linked) claims against:

- the three individuals, asserting breach of contract in respect of their failure to vacate the property and;
- as against the Local Authority, seeking damages for inducing the breach of contract by the tenants in the advice provided to them.

Each claim, being issued at an amount of less than £10,000, would likely have been allocated to the Small Claims Track. Thus, as further discussed below, this would have resulted in legal costs not normally being subject to recovery between the parties.

The Defence

The position of the Local Authority was that they were not a party to the agreement to occupy the house and that its position as to the law was correct. The Local Authority denied any inducement, indicating that they were carrying out statutory duties.

By way of separate correspondence, we wrote to LHP inviting them to immediately discontinue the claims, indicating that we did not consider that there existed any legal grounds for a claim against the Local Authority. An Application to strike out the claim and for Summary Judgment was also indicated. We further indicated that we considered the conduct of LHP to be such that the Local Authority could seek recovery of their costs, despite the likely tracking of the claim to the Small Claims Track. Readers will readily appreciate that legal costs are not normally awarded in Small Claims Track matters unless a party can show that the other party had engaged in unreasonable conduct. Such an argument was, therefore, deployed in the present case, given the state of the matter in general and the law relating to the same.

Moreover, and rather obviously, significant legal costs had been engaged in getting to this stage which, otherwise, the Local Authority would be expected to bear itself.

We further sought consent to consolidate the three claims into one action.

LHP did not respond to any of our attempts to engage with them.

Strike Out of the Claim

As expected, the Court issued a Notice of Proposed Allocation indicating intended allocation to the Small Claims Track.

LHP did not, however, respond. Specifically, LHP did not file or serve Directions Questionnaires. After further extensive correspondence with the Court, the Court eventually struck out each claim based on non-compliance with an Order upon LHP to file Directions Questionnaires.

That, however, was not the end of the matter.

Application for Costs

Despite the strike out of each of the claims, we advised the Local Authority that we considered the conduct of LHP to be such that there were grounds to seek an Order for costs against LHP on the basis of unreasonable conduct. By this stage, LHP had been advised of the unmeritorious nature of their claim (s) both pre issue (by the Local Authority) and post issue (by Dolmans), but had still chosen to proceed with the claim (s).

The Local Authority authorised the making of an Application for costs. An Application was made to seek a Costs Order against LHP and the matter proceeded to a contested hearing, with Counsel appearing for both parties.

The argument deployed on behalf of the Local Authority can be summarised as follows:

- To prove tortious inducement, the Claimant needed to prove that the Defendant Local Authority knew that they were inducing a breach of contract – it was not enough to suppose that they might have been.
- If the breach was a natural consequence of the Defendant Local Authority's legitimate involvement, then the threshold for tortious conduct had not been met.
- The Defendant Local Authority was, properly considered, simply expressing a view as entitled to do as statutorily appointed prosecutor.
- Tortious conduct necessarily requires wrongdoing – it would be an affront to public policy to even entertain the idea that the statutorily appointed prosecutor Local Authority was tortiously inducing breaches of contract by expressing a view in line with their functions.

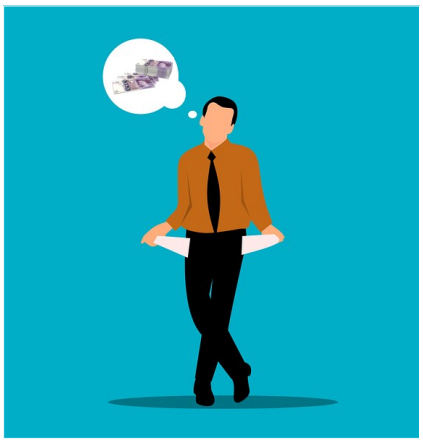
- The tenants were independently advised by Shelter (the housing charity) in any event.

- Even if, notwithstanding all of the above, the Court was satisfied that the Defendant Local Authority had induced the breach of contract, there was a general economic tort defence of 'reasonable justification' – it is impossible to conceive of a more reasonable justification than a statutorily appointed prosecutor fulfilling its statutory function. The claim against the Defendant Local Authority was, in that context, absurd.

After hearing the argument, the Court agreed fully with the position of the Local Authority. The Court found the claim against the Local Authority to be unmeritorious and made an Order for costs against LHP, with costs summarily assessed in the sum of £5,625.00.

Comment

Recovery of costs in a claim likely to be allocated to the Small Claims Track is very unusual. This case highlights the advisability of engaging with the other party early, setting out why you consider their conduct to be unreasonable and advising them of the likely outcome. In so doing, the argument as to unreasonable conduct is thereby enhanced since the opponent has been provided with an opportunity to consider the argument deployed and engage with the same. In that context, a refusal to do so is much easier to characterise as unreasonable (as here). Indeed, on one level, this refusal to engage is, in and of itself, unreasonable.



Ultimately, the Court agreed, very substantially, with the position of the Local Authority. The cost of defending three separately issued claims was avoided and a commercial Claimant, LHP, who, undoubtedly, felt that they would be protected against costs by a Small Claims allocation was exposed to costs, with the result being the making of a Costs Order against them. That has an obvious deterrent effect.

Claire Thomas
Associate
Dolmans Solicitors

For further information regarding this article, please contact:

Claire Thomas at **clairet@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

DOLMANS
SOLICITORS

FOCUS ON

Failure to Remove - Convention for the Protection of Human Rights and Fundamental Freedoms

AB v Worcestershire County Council and Birmingham City Council

Following a hearing on 25 and 26 April 2023, the Court of Appeal handed down its Judgment, on 17 May 2023, in *AB v Worcestershire County Council and Birmingham City Council*. The claim was a 'failure to remove' type claim in the context of allegations made under the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") The Claimant's Appeal was to set aside Summary Judgment entered by Deputy High Court Judge Obi back in January 2022. The Claimant's Appeal was dismissed.

We had previously reported upon the first instance decision of the case in the February 2022 edition of the Dolmans' Insurance Bulletin. We do not intend to reiterate in any detail the circumstances of the case here. However, essentially, the Claimant's case was that he had suffered ill-treatment and neglect by his mother which was of such severity that it evidenced a real and immediate risk that he would suffer further ill-treatment falling under Article 3 if he was left in the care of his mother, and the Respondents should have removed him from his mother's care to avoid that risk. The Claimant had relied upon referrals relating to squalid living conditions, not being fed properly, being locked in his room, being hit and pushed to the ground and emotionally abused by his mother. However, the two Local Authorities involved had investigated these referrals and their reports (which were before the Court) identified only poor caring and nurturing abilities of the mother, and no child protection concerns. The referrals which made reference to physical and emotional abuse, when investigated, were not borne out.

The issues considered by the Court of Appeal were narrower than those considered by the Deputy Judge.

Article 6: Readers may recall that the Deputy High Court Judge had struck out the claim under Article 6 of the Convention. This was not appealed by the Claimant. So the Deputy Judge's decision on Article 6 remains authoritative and binding on all Courts up to High Court level.

FOCUS ON

Article 3: Investigative duty. The Deputy High Court Judge also rejected an assertion that the investigative duty arising under Article 3 applied to Local Authorities investigating child protection concerns since that duty was concerned with criminal law investigations. This was not part of the Claimant's Appeal. So the Deputy Judge's decision remains authoritative and binding on all Courts up to High Court level.

Article 3: Engagement of the operational duty. The Deputy High Court Judge had also considered that so far as the Article 3 claim was concerned, the operational duty did not apply at all in relation to children living in the community on the basis that the Local Authorities would have needed to have 'care and control' of them, which they did not. This was part of the Claimant's Appeal. However, the Respondents conceded this point prior to the hearing. Counsel for the Respondents submitted that a requirement for the Appellant to be in the care and control of the Respondents was not consistent with the established case law or the scheme of the 1989 Act. Lewis HJ agreed that the concession was properly made in the context of this case.

Article 3: Threshold. The only issue before the Court of Appeal was whether, on the facts pleaded, the claim met the threshold for treatment or punishment which falls within the scope of Article 3. Lewis HJ reaffirmed that the obligation under Article 3 has 4 components – there needs to be:

"*(1) a real and immediate risk (2) of the individual being subjected to ill-treatment of such severity as to fall within the scope of Article 3 of the Convention (3) that the Public Authority knew or ought to have known of that risk and (4) the Public Authority failed to take measures within their powers which, judged reasonably, might have been expected to avoid the risk*".

Lewis HJ identified that it was important that the Court should not conduct a 'mini-trial', but there may be cases where there is no real substance in factual assertions, particularly where contradicted by contemporaneous documents. In this case, the reports following the Local Authorities' investigations of the referrals were accepted to set out the position. The Court must take into account not only the evidence actually placed before it, but also the evidence that can reasonably be expected to be available at trial. Of relevance was that, unusually in this case, there was an agreed Statement of Facts and there was no other documentary evidence that could reasonably be expected to be available at trial.

Lewis HJ considered that, on the basis of those agreed facts, the Judge was entitled to conclude that the evidence showed that the mother's ability to protect the Appellant from physical chastisement from others was inconsistent and there were occasions when she demonstrated poor caring and nurturing abilities, however none of the reported incidents, taken at their highest, either individually or cumulatively, involved actual bodily injury, intense physical or mental suffering, or humiliation of the severity required to amount to Article 3 ill-treatment. The reports did not, therefore, provide a basis for concluding that there would be a risk of real and immediate treatment (or punishment) which would fall within the scope of Article 3 of the Convention. There was no other basis for concluding that there was such a risk.

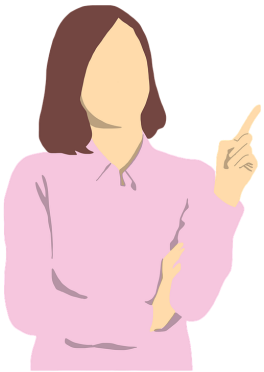
In addition, neither Birmingham nor Worcestershire failed to take appropriate measures to address any risk that might exist by adopting measures which were less intrusive than seeking a Care Order. Notwithstanding Local Authorities' obligations under the Children Act, the aim is to ensure, so far as possible, that children can remain with their family. An Application for a Care Order, with a view to removing the child from the care of the child's parents, is the last resort where the child is suffering, or is likely to suffer, significant harm.

Lewis HJ does not attempt to provide a comprehensive account of the circumstances in which ill-treatment falls within the meaning of Article 3, but makes it clear that *"serious and prolonged ill-treatment and neglect, giving rise to physical or psychological suffering"* can fall within Article 3. The duty focuses *"on a risk which exists at the time of the allegation violation and not a risk which may arise at some stage in the future"*. Hindsight is to be avoided.

Comment

In summary, the impact of this case on Convention claims of this nature is:

- The Article 6 and Article 3 investigative duty points made by the first instance Judge remain intact. So such claims should not proceed.
- The Article 3 'care and control' point was conceded by the Defendant and agreed with by HJ Lewis.
- The threshold test relating to Article 3 operational duty breaches remains as previously identified and has been restated.
- The circumstances under which the Court will decide where threshold is met under Article 3 will be specific to the facts of each case. It is clear that not all cases of parental neglect amount to mistreatment contrary to Article 3.



On a slightly separate point, which will be of interest to Defendants, Lewis HJ identified that the issue of Article 3 threshold was a question for the Court and not for expert evidence. So whilst in a 'failure to remove' type claim expert liability evidence might be considered necessary to cover off any negligence allegations, it should not be necessary in an Article 3 claim.

Clare Hoskins
Partner
Dolmans Solicitors

For further information regarding this article, please contact:

Clare Hoskins at **clareh@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

DOLMANS
SOLICITORS

FOCUS ON

Vicarious Liability

Trustees of the Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC 15

The Supreme Court has overturned the decision that the Defendant Jehovah's Witness organisation was vicariously liable for a rape committed by one of its elders on a member of its congregation as the Supreme Court found that the rape was not so closely connected with the acts that the elder was authorised to do that it could fairly and properly be regarded as committed by the elder while acting in the course of his quasi-employment as an elder.

The first instance decision was reported in the February 2020 edition of the Dolmans' Insurance Bulletin and the Court of Appeal's decision reported in the March 2021 edition.

The Facts

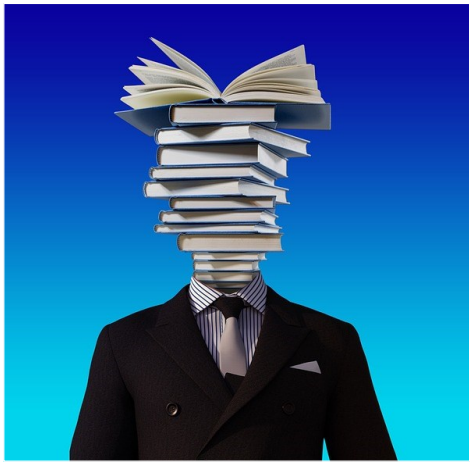
By way of a brief recap of the facts, the Claimant ('BXB') and her husband were members of the Barry Congregation of Jehovah's Witnesses. They became friendly with another couple within the congregation, Mr and Mrs S. Mr S was a 'ministerial servant', a member of the congregation with special responsibilities, who became an 'elder', one of the spiritual leaders of the congregation, in 1989. The two couples had children the same age; the families went on holiday together, visited each other's houses for tea and went on days out together. In late 1989, BXB and her husband noticed a change in Mr S's behaviour. He began to abuse alcohol, appeared depressed and frequently argued with his wife. Around the same time, Mr S began flirting with BXB. BXB and her husband discussed their concerns with Mr S's father, a senior elder, who responded that Mr S was suffering from depression. He requested that they provide Mr S with extra support.

In April 1990, the two couples went door-to-door evangelising. Afterwards they went to a pub for lunch, where Mr and Mrs S argued. Mr S told BXB's husband that he wanted to divorce his wife, but BXB's husband told him that would not be possible as divorce is only permitted within the community of Jehovah's Witnesses on the grounds of adultery. Later that afternoon the two couples returned to Mr and Mrs S's house. Mr S went into a back room. BXB went to speak to Mr S, whereupon Mr S pushed BXB to the floor, held her down and raped her.

BXB issued proceedings claiming damages for the psychiatric harm caused by the rape. The Judge at first instance found that the Defendants were vicariously liable for the rape committed by Mr S. This was upheld by the Court of Appeal. The Defendants appealed to the Supreme Court.

Supreme Court's Decision

A single Judgment was given by Lord Burrows, with whom all the other Judges agreed.



Lord Burrows reviewed the history of the development of the law on vicarious liability and summarised the legal principles applicable to vicarious liability in tort derived from the main 21st century decisions on vicarious liability of the Supreme Court / House of Lords. In doing so, Lord Burrows confirmed the 2 stage test to consider in determining vicarious liability which he set out as:

(1) Whether the relationship between the Defendant and the tortfeasor was one of employment or akin to employment; and

(2) Whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor whilst acting in the course of the tortfeasor's employment or quasi-employment (the 'close connection' test).

Lord Burrows confirmed that these tests invoke legal principles which in the vast majority of cases can be applied without considering the underlying policy justification for vicarious liability. However, in difficult cases, "*having applied the tests to reach a provisional outcome on vicarious liability, it can be a useful final check on the justice of the outcome to stand back and consider whether that outcome is consistent with the underlying policy*". Lord Burrows appreciated that what the underlying policy is has been 'hotly debated' and he summarised that the core idea "*appears to be that the employer or quasi-employer, who is taking the benefit of the activities carried on by a person integrated into its organisation, should bear the cost (or, one might say, should bear the risk) of the wrong committed by that person in the course of those activities*".

Notably, Lord Burrows stated "*the same two stages, and the same two tests, apply to cases of sexual abuse as they do to other cases on vicarious liability … the idea that the law still needs tailoring to deal with sexual abuse cases is misleading …*".

Applying this to the facts of the case:

Stage 1

The Supreme Court upheld the decisions of the Lower Courts on the stage 1 test that the relationship between the Jehovah's Witness organisation and Mr S, in his role as elder, was akin to employment.

In reaching this decision it was noted that whilst the fact that there is no payment for work is an indicator that the relationship is not akin to employment, it is far from decisive. The important features rendering the relationship in this case akin to employment were that:

- as an elder Mr S was carrying out work on behalf of, and assigned to him by, the Jehovah's Witness organisation;
- he was performing duties which were in furtherance of, and integral to, the aims and objectives of the Jehovah's Witness organisation;
- there was an appointments process to be made an elder and a process by which a person could be removed as an elder; and
- there was a hierarchical structure into which the role of an elder fitted.

Whilst upholding the decision and most of the reasoning of the Judges below on stage 1, Lord Burrows considered that they mistakenly included within the criteria for deciding whether the relationship was akin to employment the creation of the risk of rape by the elder being assigned the activities he was given. That incorrectly confused the criteria for satisfying the stage 1 test with the underlying policy justification for vicarious liability.

Stage 2

In relation to stage 2, the Supreme Court held that a number of errors were made by the Judges below. The correct 'close connection' test was not set out and incorrect factors were relied upon. The correct test that should have been applied was "*whether the wrongful conduct, the rape, was so closely connected with acts that the tortfeasor, Mr S, was authorised to do, that the rape can fairly and properly be regarded as committed by him while acting in the court of his quasi-employment as an elder*".

Applying this correct test, BXB failed to satisfy the test for the following reasons:

- The rape was not committed whilst Mr S was carrying out any activities as an elder on behalf of the Jehovah's Witnesses. He was at his own home and was not at the time engaged in performing any work connected with his role as an elder.
- In contrast to child sexual abuse cases, at the time of the rape, Mr S was not exercising control over BXB because of his position as an elder. The rape took place not because Mr S was abusing his position as an elder but because he was abusing his position as a close friend of BXB when she was trying to help him.
- Mr S was not '*wearing his metaphorical uniform as an elder*' at the time the tort was committed.
- Whilst Mr S's role as an elder was a 'but for' cause of BXB's continued friendship with Mr S and hence of her being with him in the back room where the rape occurred, 'but for' causation is insufficient to satisfy the close connection test.
- What happened in this case was not equivalent to the gradual grooming of a child for sexual gratification by a person in authority over that child. The violent and appalling rape was not an objective obvious progression from what had gone before but was rather a shocking one-off attack.
- There was no relevance in considering this test, except as background, to factors such as Mr S's father's role or the fact that Mr S's inappropriate prior conduct of kissing female members on the lips when welcoming them had not been condemned.

Accordingly, the Supreme Court concluded that the close connection test was not satisfied.

As a final check, Lord Burrows considered what he termed "*the policy of enterprise liability or risk*" underpinning vicarious liability which confirmed there was no convincing justification for the Jehovah's Witness organisation to bear the costs or risk of the rape committed by Mr S. Whilst the organisation had deeper pockets than Mr S, that was *"not a justification for extending vicarious liability beyond its principled boundaries"*.

The Defendant's appeal was, therefore, allowed.

Comment

The Supreme Court's Judgment sets out a clear summary of the law in relation to vicarious liability as it currently stands following the clarification previously provided by the Supreme Court in *Various Claimants v WM Morrison Supermarkets plc [2020]* and *Various Claimants v Barclays Bank plc [2020]* and provides a helpful illustration of the correct application of the two stage test.

In previous decisions there has been a suggestion that a tailored or refined test applies in sexual abuse cases. That approach was rejected by Lord Reed in *Cox v Ministry of Justice [2016],* albeit that was not a sexual abuse case. This decision, therefore, provides welcome confirmation that sexual abuse cases are not in a special category of cases and no different test is applied. However, Lord Burrows distinguished what occurred on the facts of this case from the facts of institutional sex abuse cases involving abuse on institutional premises, child sexual abuse after a period of grooming by a person in authority over the child (*A v Trustees of the Watchtower Bible and Tract Society [2015]*) and child sexual abuse cases involving exercise of control. Accordingly, there remains scope for claimants to seek to distinguish their cases from this decision and inevitably each case will need to be carefully considered on its own facts.

Amanda Evans
Partner
Dolmans Solicitors

For further information regarding this article, please contact:

Amanda Evans at **amandae@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

CASE UPDATES

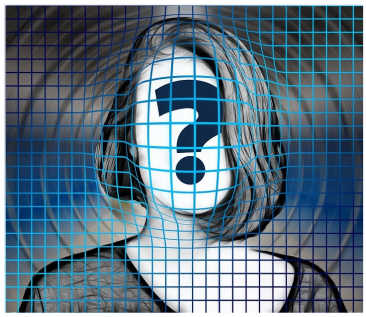
GDPR - Misuse of Private Information - Human Rights

Ali v The Chief Constable of Bedfordshire Police
[2023] EWHC 938 (KB)

The Claimant, 'C', passed information to Bedfordshire Police about her ex-husband, who she believed was dealing drugs. C made clear that she did not want to be identified as the source of the information, was scared of her ex-husband and frightened of repercussions. The information included C's ex-husband keeping large quantities of cocaine at the family home, his possible consumption of drugs, risks of drug related crime at the home and possible access to firearms. The report was passed by the Police to the Social Services Department of Luton Borough Council due to concerns regarding the risks to the children. Ms B, an employee of that Department, who was in a relationship with C's ex-husband, unlawfully accessed and downloaded the report and passed it to him.

C brought a claim against Luton Borough Council alleging that it was vicariously liable for the conduct of its employee. That claim was dismissed. (We reported on that decision in the February 2022 edition of the Dolmans' Insurance Bulletin). C brought this claim against the Police alleging that in passing on to Social Services the fact that C was the source of the information, the Police had breached her rights under Articles 5 and 6 of the General Data Protection Regulation (GDPR), misused her private information, breached her confidence and acted incompatibly with her Article 8 ECHR right to respect for her private life.

The Judge found, on the facts of this case, that C had repeatedly asked for assurances her identity as the source of the information would not be revealed, and although there was no specific discussion about disclosure of her identity to Luton Borough Council, it should have been obvious that C had not consented to that. There was no dispute that the information had to be passed to Luton Borough Council, the question was whether the Police were justified in also passing on C's identity. The key issue was, therefore, whether the disclosure of C's identity was 'necessary' for one of the purposes identified in Article 6(1) of the GDPR. The burden of establishing this was on the Police. The Judge found they had failed to do so.



Inter alia, the Judge did not accept the Police's submission that the identity of the source was necessary to provide accurate information to Luton Borough Council as to the credibility of the report. The referral could have said that the information came from a reliable source with direct knowledge of the facts without identifying the source. The Police could have prepared an anonymised report and there was no evidence that doing so would have materially affected the speed of the referral. The Judge rejected the argument that even if the report had been anonymised the source would have been obvious.

CASE UPDATES

Accordingly, the Judge found that the Police breached Article 5(1)(a) and (b) of the GDPR by passing C's identity on to Luton Borough Council. Further, there had been a misuse of her private information, breach of confidence and a breach of her Article 8 ECHR Rights.

The Judge found that C had suffered considerable distress. The distress arose when family and friends started asking her questions about whether she had gone to the Police after, and because of, the disclosure by Ms B. The Police were not responsible for Ms B's criminal conduct, which broke the chain of causation. However, the Judge considered it would not be fair for the Police to escape liability altogether and C would have suffered some distress even if there had been no disclosure by Ms B. The Judge awarded compensation of £3,000.

Medical Negligence - Novus Actus Interveniens

Jenkinson v Hertfordshire County Council
[2023] EWHC 872 (KB)

The Defendant Local Authority appealed against a decision refusing their Application to amend their Defence in a personal injury action.

The Claimant suffered a severe fracture to his right ankle after stepping into an uncovered manhole. The Defendant admitted liability for breaching the Highways Act 1980. However, a dispute arose over the subsequent surgical treatment of the Claimant's injury. The fixation of the Claimant's fracture failed within a few days. The Defendant's medical expert argued that the surgery was performed negligently.

The Defendant sought to amend their Defence to include the novus actus interveniens treatment, contending that the chain of causation was broken by negligent medical treatment, and sought to join the relevant NHS Trust into the proceedings for any negligence in the surgery.

The Defendant's Application to amend their Defence was refused. The Judge relied *on Webb v Barclays Bank Plc [2001] EWCA Civ 1141* in refusing permission, namely that medical treatment of an injury caused by a defendant's tort could not break the chain of causation unless it was *grossly negligent* treatment so as to be a completely inappropriate response to the injury.

In any event, it was held that if the Court had to exercise its discretion, it would nevertheless have refused permission as granting permission would have caused prejudice to the Claimant and likely lead to the loss of the trial date; but refusing permission would result in little prejudice to the Defendant.

The appeal against this decision was allowed and the amendment of the Defence permitted.

Held

Baker J challenged the existence of a statement of law (referred to as a 'Specific Rule' in the Judgment) as to medical treatment being so 'grossly negligent' as to constitute novus actus interveniens. Notwithstanding the apparently unqualified endorsement of the Specific Rule in *Webb*, the Court of Appeal did not apply it to that case. There was no logical justification or policy reason for creating a specific rule of law in the context of negligent medical intervention.

Baker J considered that the normal rules of causation should apply to clinical negligence and that the chain of causation also applies according to standard principles. Otherwise, such a rule would lead to 'litigation within litigation' over when treatment otherwise proper in kind was so poorly executed as to become an inappropriate medical response.

Within the constraints of the Specific Rule, there was a real prospect, based on the expert's opinion, that the Claimant's injury was so badly treated in his initial surgery that the Defendant ought not to be responsible for the consequences of that mistreatment.

The Judge's analysis on discretion was flawed. The starting point for any exercise of discretion would be that the proposed amendment had a real prospect of success. Only then would the question arise as to whether, as a matter of discretion, permission should be granted. The Judge's reliance on the need for different case management directions and a new trial date as a reason to refuse permission to amend was misplaced. The case turned on whether the Judge's conclusion that the causation defence had no prospect of success was correct.

Police - Duty of Care - Assumption of Responsibility

Woodcock v The Chief Constable of Northamptonshire Police [2023] EWHC 1062 (KB)

This was an Appeal from a decision dismissing the Claimant's claim against The Chief Constable of Northamptonshire Police at a 5-day trial in January 2021.

CASE UPDATES

On 19 March 2015, the Claimant was leaving her home with her son, daughter and ex-husband, and was getting into her car, when she was viciously attacked by her ex-partner 'RG' and stabbed at least 7 times. She was very seriously injured. RH was convicted of attempted murder and sentenced to life imprisonment. The Claimant sued the Police for failing to warn her that RG was outside her house that morning and many other asserted failings (failing to protect her; failing to arrest RG; failing to cocoon her; failing to put Police Officers outside her house all night; etc).

The Defendant denied liability, asserting that the Police owed the Claimant no duty of care, did not breach any duty which they might be found to have owed and did not cause the injury in any event.

The Trial Judge dismissed the Claimant's claim finding that (1) there was no duty of care owed to the Claimant; (2) there was no breach of duty in any event, and; (3) the burden of proof on causation was not fulfilled by the Claimant on the evidence.

The main issue on Appeal was whether the Police had a duty to warn the Claimant after a neighbour had made a 999 call and informed them that RG was loitering outside the Claimant's house 12 to 13 minutes before the attack.

Duty of Care

It was held that the duty of care issue turned on the events of the morning of the attack and whether, either through special or exceptional circumstances, or through an assumption of responsibility, having received the 999 calls, the Defendant had a duty of care to the Claimant to warn her by phone that RG was loitering outside her house and that the Police were on their way to arrest him.

The Police knew that the Claimant had suffered a long history, involving domestic abuse by RG. The Police also knew that RG had very recently threatened to kill the Claimant and her family and had threatened to rape her children and that, during the afternoon of the day before the attack, he had twice trespassed on the Claimant's property and caused criminal damage. Further, by late evening the night before the attack, the Police had decided to arrest RG. It was known that the Claimant was "petrified" and in fear of her life, and it was accepted that the Police should have risk assessed the situation as being a "high" risk, but in error they had written "medium".

A Safety Plan had been constructed with the Claimant which rested on keeping RG out of the house; the Claimant telling neighbours of the risk and asking them to assist in spotting RG; in keeping her mobile phone charged to make and receive calls and having her family stay over.

In taking each of the relevant factors in turn for considering whether a duty of care on the Police to warn the Claimant may arise the Judge found:

(a) *Foreseeability of harm* – It was reasonably foreseeable to the Police, after the 999 call from the neighbour and the history between RG and the Claimant, that the Claimant was at high risk of serious injury from RG within a very short space of time. This set the case apart from *Hill v The Chief Constable of West Yorkshire [1989] A.C.53*.

(b) *The reported or known actions of the alleged protagonist* – The facts set out identified a specific protagonist and, quite clearly, undisputed threats to kill, threats to rape children, repeated breaches of bail conditions, repeated criminal damage and intimate Police involvement in constructing safety plans for the Claimant against an obvious risk.

(c) *The course of dealing between the potential victim, the Police and the alleged protagonist focussing on proximity* – The key factors were the repeated failure of RG to comply with protective bail conditions and the substantially increased frequency of his attempts to get close to the Claimant. The facts were clear and undisputed and, as a result, the Police were clear in their desire to arrest RG urgently. The Police had provided the Claimant with safety plans prior to the arrest. The danger to the Claimant, when the 999 call was received from the neighbour, was immediate and obvious.

(d) *The express or implied words or actions of the Police in relation to protecting the victim from attack and the reliance of the victim on the Police for protection* – The Police visited the Claimant twice in the two days leading up to the attack. The Claimant had asked for protection the night before the attack and she was given comfort protection by the Officers she spoke to. The evidence indicated that there was a very close tripartite nexus in which the Claimant was relying on the Police Officers' advice and the safety plan.

(e) *Whether the public policy reasons for refusing to impose a duty of care for omissions and failures to prevent outweigh the common law rules on providing compensation for tortiously caused damage or injury* – The public policy reasons and the refusal of the common law to impose a general duty of care in civil law on the Police to protect the public from the crimes of third parties should not stand as a bar to a limited and precise duty to warn on the facts of this case. The Police were given knowledge by a neighbour who was unable to contact the Claimant themselves and wanted to warn her about RG loitering outside her house at the time she was due to leave for work. The cost of passing on this vital information was infinitesimal. There were very good reasons to inform the Claimant. Where a neighbour had provided key information to the Police which she could not pass on herself, if the civil law supported or sanctioned the Police refusing or failing to pass on such vital information to the victim, that could undermine public confidence in reporting to the Police.

CASE UPDATES

Special or Exceptional Circumstances

Taking the circumstances of the case into account, special or exceptional circumstance did exist. The Police were given knowledge of an imminent and risk laden event with pretty precise timing, a specific victim, a specific address, a perpetrator who was already the subject of a large manhunt and a vulnerable victim who was going to walk into a dangerous trap. They had advised the Claimant to set up an early warning system specifically to provide the Police and the Claimant with advance warning of RG approaching her house.

The Claimant needed to know that she would be walking out into a confrontation with RG.

The circumstances of the case gave rise to a common law duty on the Police to call the Claimant once they had been informed by the neighbour that RG was loitering outside her property. That duty arose immediately after the neighbour's phone call.

There was, however, no civil law duty to protect the Claimant physically, beyond providing the warning, despite the clear operational objective to arrest RG.

Assumed Responsibility

The Police's words and actions gave rise to the Claimant having a reasonable expectation that they would inform her that RG was loitering outside her house in circumstances where she was likely soon to leave her house. The Claimant was relying on the Police to pass on the neighbour's message. The Defendant assumed a responsibility to warn the Claimant.

Breach of Duty

The Police were in breach of their duty to warn by failing to call the Claimant after the neighbour's 999 call.

Causation

The Court's finding on causation was considered to be unjust under CPR r.52.21(2)(b).

Therefore, the matter was to be remitted to the Trial Judge to hear evidence on causation.

Subject to causation being remitted to the Trial Judge, the Claimant's Appeal was allowed.

CASE UPDATES

Private Nuisance - Limitation - Continuing Nuisance

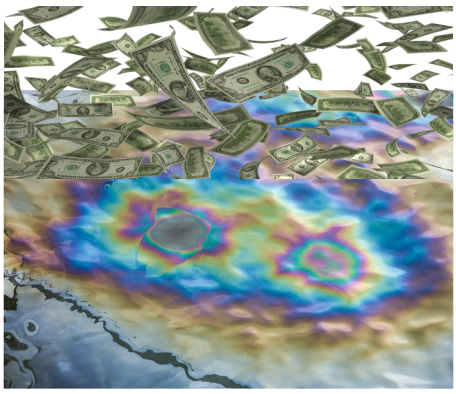
Jalla & Another v Shell International Trading and Shipping Co Ltd [2023] UKSC 16

The claim arose from an oil spill off the coast of Nigeria on 20 December 2011 caused by a leak during a cargo operation at an offshore installation in the Bonga oil field. The leak was stopped after 6 hours. An estimated equivalent of 40,000 barrels of crude oil leaked into the ocean. The Claimants, ('C'), 2 Nigerian citizens, alleged that the oil reached the Nigerian Atlantic shoreline and unduly interfered with the use and enjoyment of their land. C issued a claim just under 6 years after the oil spill. They subsequently sought to substantially amend their claim, including changing one of the parties sued to the English domiciled Defendant, ('D'). D submitted that as the amendments were being sought after the expiry of the 6 year limitation period, C had to satisfy the requirements of CPR 17.4 and/or 19.5 (now 19.6), which they could not do. C submitted that there was a continuing nuisance and they were within the limitation period. C argued that, on the facts assumed for the purposes of this Appeal, that the oil from the spills were still present on C's land and there was a continuing cause of action for the tort of private nuisance accruing afresh from day to day. C were unsuccessful on this issue at first instance and before the Court of Appeal. They appealed to the Supreme Court.

The Supreme Court dismissed the Appeal. The Court clarified that, in general terms, a continuing nuisance is one where, outside a claimant's land and usually on a defendant's land, there is a repeated activity by a defendant or an ongoing state of affairs for which a defendant is responsible which causes continuing undue interference with the use and enjoyment of a claimant's land.

If C's submissions were accepted, the limitation period would be extended indefinitely until the land was restored. It would impliedly mean that the tort of private nuisance would be converted into a failure by the Defendant to restore the Claimant's land. C's submission was contrary to principle and would undermine the law of limitation.

There was no continuing nuisance in this case because outside C's land there was no repeated activity by D or an ongoing state of affairs for which D were responsible that was causing continuing undue interference with the use and enjoyment of C's land. The leak was a one-off event or an isolated escape. The cause of action accrued and was complete once C's land had been affected by the oil; there was no continuing cause of action for as long as the oil remained on the land.



Appeal dismissed.

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

Amanda Evans at **amandae@dolmans.co.uk** or
Judith Blades at **judithb@dolmans.co.uk**

TRAINING OPPORTUNITIES

At Dolmans, we want to ensure that you are kept informed and up-to-date about any changes and developments in the law.

To assist you in this, we can offer a whole range of training seminars which are aimed at Local Authorities, their Brokers, Claims Handlers and Insurers.

All seminars will be tailored to make sure that they cover the points relevant to your needs.

Seminars we can offer include:

- Apportionment in HAVS cases
- Bullying, harassment, intimidation and victimisation in the workplace – personal injury claims
- Conditional Fee Agreements and costs issues
- Corporate manslaughter
- Data Protection
- Defending claims – the approach to risk management
- Display Screen Regulations – duties on employers
- Employers' liability update
- Employers' liability claims – investigation for managers and supervisors
- Flooding and drainage – duties and powers of landowners and Local Authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage
- Flooding and drainage – duties and powers of Highway Authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the Highway Authority in respect of highway waters
- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
- The Jackson Reforms (to include : costs budgeting; disclosure of funding arrangements; disclosure of medical records; non party costs orders; part 36/Calderbank offers; qualified one way costs shifting (QWOCS); strikeout/fundamental dishonesty/fraud; 10% increase in General Damages)
- Liability of Local Education Authority for accidents involving children
- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

If you would like any further information in relation to any of our training seminars, or wish to have an informal chat regarding any of the above, please contact our Training Partner:

Melanie Standley at **melanies@dolmans.co.uk**