DOLMANS INSURANCE BULLETIN

Welcome to the December 2023 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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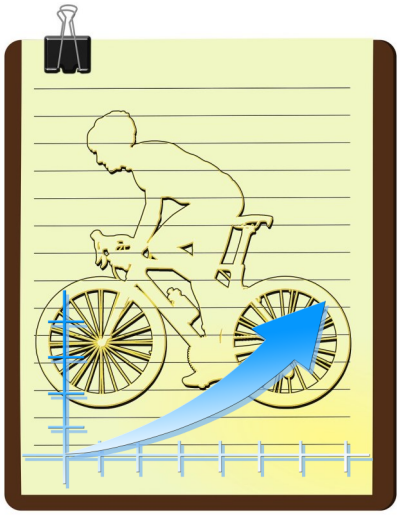
REPORT ON

Cycling Close to the Edge - Differentiating Carriageways from Verges

M O v Vale of Glamorgan



Readers will have undoubtedly noticed an increase in recent years of cyclists using various cycle paths and carriageways controlled by Local Authorities, especially during and since the pandemic.

With such increased cycle usage it follows statistically that there is likely to be more cycling accidents and, therefore, Local Authorities are also likely to face an increase in claims involving cyclists.

Indeed, the November edition of the Dolmans' Insurance Bulletin reported upon such a case – *D P v Rhondda Cynon Taf County Borough Council* – and Dolmans has again recently successfully defended another matter involving a cycling accident – *M O v Vale of Glamorgan Council* – in which arguments were raised as to the extent of the carriageway and verge at the location of the Claimant's alleged accident.

Facts and Allegations

The Claimant alleged that, whilst cycling and giving way to an oncoming vehicle, he was caused to steer his bicycle into a large defect at the edge of a carriageway which he could not avoid.

The Claimant alleged that the Defendant Local Authority was negligent and/or in breach of its duty under Section 41 of the Highways Act 1980. Nuisance was also pleaded.

The Claimant attended hospital on the day of his alleged accident, although no mention was made as to the circumstances of the Claimant's alleged accident in his medical records. Factual causation was, therefore, disputed and the Claimant put to strict proof as to the circumstances of his alleged accident.

The alleged defect appeared to be located at the very edge of the carriageway and, according to the Claimant's measurements, was in excess of the Defendant Local Authority's intervention level of 40mm for that particular carriageway. It was argued, however, that the Claimant's measurements were not accurate and had not been taken utilising proper measuring equipment/levels.

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Witness Evidence and Location of Alleged Defect

The Defendant Local Authority considered, however, that the alleged defect was not in the carriageway and, therefore, not on the adopted highway in any event. The Defendant Local Authority argued that the Claimant's alleged accident had occurred in the verge and not on the carriageway.

As well as exhibiting photographic evidence and measurements to his Witness Statement, the Claimant also produced various Google images captured on various dates. The Claimant suggested that these images illustrated that the edge of the carriageway had eroded, causing the pothole that caused his alleged accident.

Upon closer examination however, and after undertaking additional enquiries, the Defendant Local Authority's witness suggested that these images illustrated that there was a distinct edge to the carriageway bordering a verge and it was apparent that the adjacent vegetation had altered, rather than the carriageway itself. Indeed, the Claimant's photographs and images clearly showed tyre marks from agricultural vehicles in the verge and indicated that the edge of the carriageway appeared to follow the same curve further up the road, where there were no apparent defects. Rather than assisting the Claimant therefore, these photographs and Google images supported the Defendant Local Authority's stance that the Claimant's alleged accident had occurred in the verge and not the carriageway, subject of course to arguments regarding exact circumstances and factual causation.

The Defendant Local Authority's witness was confident in his evidence that there was no edge erosion or defects at the said location of the Claimant's alleged accident and he considered that the edge of the carriageway was still intact. It was stated that the Highway Authority was not responsible for anything beyond the metalled/tarmacadam surface, which was not part of the adopted highway.

Appropriate System and Section 58 Defence if Required

Even if it was accepted by the Court that the alleged defect was in the carriageway, it was argued that the Defendant Local Authority had an appropriate Section 58 Defence (under the Highways Act 1980) anyway. The said carriageway was the subject of a regular system of maintenance and inspection on a 6 monthly basis. No defects were noted at/in the immediate vicinity of the carriageway adjacent to the location of the Claimant's alleged accident during the Defendant Local Authority's last scheduled inspection prior to the date of the Claimant's alleged accident. However, the relevant Highways Inspector had noted other defects for repair along the carriageway (illustrating that he was vigilant during inspections) according to the Defendant Local Authority and would not have missed any actionable defects.

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The carriageway was also maintained and inspected on a reactive basis at the time of the Claimant's alleged accident. The Defendant Local Authority had no record of any complaints in relation to the alleged defect during the 12 month period prior to the date of the Claimant's alleged accident and had no record of any other accident occurring at/in the immediate vicinity of the location of the Claimant's alleged accident during the said period.

The Defendant Local Authority argued, therefore, that it had an appropriate system in place dealing with highway inspection and maintenance, assuming of course that it was accepted that the Claimant's alleged accident had occurred on the carriageway and not the adjacent verge.

The Defendant Local Authority emphasised that Highways Inspectors apply reasoned professional judgement during highway inspections. Where the Highways Inspector considers that a possible defect may potentially surpass relevant intervention levels prior to the next scheduled inspection, then the Highways Inspector will mark any such defects for repair at the earliest opportunity and irrespective of the fact that it is below/within the relevant intervention level at the time of inspection. It was also stated that it was the Defendant Local Authority's policy to conduct necessary repairs of actionable defects, without being constrained by financial considerations.

Post-Accident Inspection and Action

Following notification of the Claimant's alleged accident and claim, the Defendant Local Authority again inspected the relevant area. The edge of the carriageway was not repaired and did not warrant any repair according to the Defendant Local Authority. However, a puddled area at the edge of the carriageway/in the verge was filled with plannings/chippings. This was merely as a matter of prudence, because of the Claimant's alleged accident, to reduce any puddling and did not form any intrinsic part of the surface of the carriageway.

This evidence supported the Defendant Local Authority's argument that the Claimant's alleged accident occurred in the verge and not the carriageway.

The Defendant Local Authority's witness reiterated that the location of the Claimant's alleged accident was not defective or dangerous. There were no similar complaints and/or accidents during the 12 month period prior to the date of the Claimant's alleged accident and there had also been none since.

Judgment

The Trial Judge was satisfied that the Claimant had proved that he had fallen from his bicycle and that he was not cycling irresponsibly. The Trial Judge was also satisfied that the Claimant had fallen from his bicycle due to a change in levels in the surface upon which he was cycling and that he needed to consider if this change in levels constituted an actionable defect.

The Trial Judge was assisted by the various photographs/Google images and the Defendant Local Authority's witness evidence, particularly in finding that the Claimant's alleged accident had indeed occurred in the verge and not on the carriageway.

The Trial Judge went on to consider whether the alleged defect was dangerous and constituted a real source of danger. Having found that the Claimant's alleged accident had not occurred on the carriageway, the Trial Judge held that it was not appropriate to apply intervention levels to the verge. After considering all of the evidence and photographs/Google images, the Trial Judge found that the alleged defect in the verge was not dangerous.

Even if he was wrong and the alleged defect was in the carriageway, the Trial Judge was satisfied that the Defendant Local Authority had an appropriate Section 58 Defence anyway.

The Trial Judge, therefore, dismissed the Claimant's claim accordingly.

Conclusion

Injuries suffered in cycling accidents, especially where the cyclist is travelling at some speed, can result in serious injuries and relatively high value claims. It is imperative, therefore, to the success of these claims that a robust Defence is maintained, with strong witness evidence adduced in support of the same covering all possible eventualities, as in the above matter, and thereby saving Local Authorities having to pay potentially significant damages and costs.

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FOCUS ON

Guideline Hourly Rates

from 1 January 2024

The Master of the Rolls has announced that the 2021 Guideline Hourly Rates will be uplifted for inflation from 1 January 2024 in accordance with the Services Producer Price Index (SPPI).

The New Guideline Hourly Rates are listed below with previous rates in brackets. They will be uplifted annually by the SPPI.

Grade	Fee Earner	London 1	London 2	London 3	National 1	National 2
A	Solicitors and Legal Executives with over 8 years' experience	£546 (£512)	£398 (£373)	£301 (£282)	£278 (£261)	£272 (£255)
B	Solicitors and Legal Executives with over 4 years' experience	£371 (£348)	£308 (£289)	£247 (£232)	£233 (£218)	£233 (£218)
C	Other Solicitors or Legal Executives and Fee Earners of equivalent experience	£288 (£270)	£260 (£244)	£197 (£185)	£190 (£178)	£189 (£177)
D	Trainee Solicitors, Paralegals and other Fee Earners	£198 (£186)	£148 (£139)	£138 (£129)	£134 (£126)	£134 (£126)

A small working group will work separately to examine the methodology underpinning Guideline Hourly Rates.

CASE UPDATES

Abuse - Human Rights - Article 3

AB v Worcestershire County Council and Birmingham City Council UKSC 2023/0099

The Supreme Court has refused the Claimant's application for permission to appeal the decision of the Court of Appeal because the appeal does not raise an arguable point of law.

Briefly, this was a 'failure to remove' type claim in which the Claimant, AB, alleged that he was abused and neglected whilst in the care of his mother. AB initially brought a claim in negligence and for breach of his Article 3, 6 and 8 ECHR rights. The claims in negligence and under Article 8 were abandoned. At first instance, the claim under Article 6 was struck out as disclosing no reasonable cause of action and summary judgment was granted to both Defendants in relation to the claims under Article 3 as they had no realistic prospect of success.

The Claimant appealed the decision in respect of Article 3. The Court of Appeal upheld the granting of summary judgment.

The first instance decision was reported upon in the February 2022 edition of Dolmans' Insurance Bulletin and the Court of Appeal decision in the May 2023 edition.

Causation - Material Contribution - Indivisible Disease

Holmes v Poeton Holdings Limited [2023] EWCA Civ 1377

The Claimant, 'C', was an employee of the Defendant, 'D', between 1982 and 2020. In 2014 C was diagnosed with Parkinson's disease. C claimed damages against D alleging that it acted in breach of its common law and statutory duty from 1982 to 1997 by exposing him to unsafe levels of Trichloroethylene ('TCE') in the course of his employment.

The causation of Parkinson's disease is poorly understood. It is common ground that it probably involves the loss or damage of dopaminergic neurons in the brain. The Trial Judge found that TCE is neurotoxic and can act upon the dopaminergic neurons. The Trial Judge rejected D's submission that 'material contribution' did not apply to cases involving an indivisible disease. The Trial Judge concluded that C was exposed to levels of TCE in the course of his employment with D that amounted to a breach of duty and that such exposure made a material contribution in fact to C's development of Parkinson's disease. D was, therefore, held liable to C for all the consequences of his having contracted Parkinson's disease. There was no appeal against the findings of breach of duty. However, D appealed on the issue of causation.

CASE UPDATES

On appeal, D submitted that the Judge adopted the wrong legal test for establishing causation of what was acknowledged to be an 'indivisible disease'. Specifically, the Judge erred in failing to address the question of whether C's development of Parkinson's disease would have happened in any event, so that the exposure to TCE made no difference. Further, the evidence available to the Judge showed no more than that TCE may have caused an elevation of the risk of contracting Parkinson's disease; it did not demonstrate that exposure to TCE was capable of causing Parkinson's disease or that C's exposure had caused his contraction of this disease.

On the first issue, that of whether the 'material contribution' test of causation applies to cases of indivisible injury, the Court of Appeal reviewed the development of the law since *Bonnington Castings v Wardlaw [1956].* The Court noted that the terms 'divisible' and 'indivisible' disease or injury have been a source of confusion in case law authorities and set out the following definition: '*It is a characteristic of divisible diseases that, once initiated, their severity will be influenced by the total amount of the agent that has caused the disease. By contrast, once an indivisible disease is contracted, its severity will not be influenced by the total amount of the agent that caused it'*.

The Court rejected D's submission that the material contribution test only applies to cases of divisible injury, concluding that, in the light of the decision in *Bailey v MOD [2009],* it was bound '*to find that the Bonnington 'material contribution' principle applies to cases of indivisible injury and that, where the principle applies, the claimant does not have to show that the injury would not have happened but for the tortious exposure for which the defendant is responsible*'.

In considering causation, the Court applied a two stage approach.

Firstly, considering generic causation, '*The generic causation question is therefore whether exposure to TCE can cause (or materially contribute to the causing of) Parkinson's disease, the mechanism of interest being the destruction of the patient's dopaminergic neurons'*. The Court considered that the evidence relied upon by the Trial Judge to support that it could was weak. A central element of the Trial Judge's reasoning was that TCE is neurotoxic and has been shown in studies to damage dopaminergic cells in animals. The Court considered that whilst these studies showed that a causative link between TCE and Parkinson's disease could not be disproved, that is it was possible that TCE was a cause of the condition, the evidence had significant limitations and did not justify a finding of generic causation.

Secondly, the Court then considered individual causation. The Court noted that given the finding on generic causation, C could not prove that his tortious exposure to TCE caused or materially contributed to his developing Parkinson's disease unless there were features of his case that were not reflected in the generic evidence that compelled a finding of causation. There were no such features in this case.

The Court concluded that although it was established that exposure to TCE is a risk factor for the development of Parkinson's disease, the Judge's finding that tortious exposure to TCE caused or materially contributed to C's disease was not sustainable on the evidence and was wrong.

Accordingly, D's appeal was allowed.

CASE UPDATES

Civil Evidence - Burden of Proof - Causation

Griffiths v TUI UK Limited
[2023] UKSC 48

The Claimant appealed against a decision that he had not proved his case that his gastroenteritis had been caused by food and drink served at a hotel he was staying at on a package holiday.

The Claimant had obtained an expert report from a microbiologist which dealt with causation. The travel company did not rely on expert evidence and did not seek to have the Claimant's expert attend trial for cross-examination. His evidence was, therefore, 'uncontroverted' in the sense that it was not in conflict with other evidence and not challenged by cross-examination.

The Defendant travel company had asked questions of the expert under CPR r.35.6 and the expert had expanded upon his reasoning in his answers. At Trial, Counsel for the Defendant criticised the expert report as poorly reasoned and unreliable in a Skeleton Argument filed and in closing submissions.

The Judge accepted the Defendant's criticisms of the Claimant's expert evidence and held that the Claimant had not proved his case on the balance of probabilities.

On appeal, the High Court overturned the Trial Judge.

The Defendant appealed and the Court of Appeal (by a 2-1 majority) restored the Trial Judge's ruling. The Claimant appealed.

Held

The Supreme Court unanimously rejected the approach taken by the Court of Appeal, reasserting the right to a fair trial – the rule in *Browne v Dunn (1893) 6 R.67*.

Lord Hodge explained that a decision by a Judge not to follow an opinion expressed by an expert who has not been cross-examined (an "uncontroverted" opinion) will usually render a trial unfair. The rule in *Browne v Dunn* applies to both witnesses of fact and expert witnesses. It is not restricted to attacks on the reliability of a witness' recollection or credibility, but is a wider rule based on essential procedural fairness.

The status and application of the rule in *Browne v Dunn* was as follows:

- Generally, a party in civil cases was required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which they wished to submit should not be accepted. That rule extended to both witnesses as to fact and expert witnesses.
- The purpose of the rule was to make sure the trial was fair.
- That rationale of the rule included fairness to the party who adduced the evidence of the impugned witness.
- Maintaining fairness included fairness to the witness whose evidence was impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy.
- Maintaining fairness also included enabling a Judge to make the proper assessment of all the evidence.
- Cross-examination gave the witness opportunity to explain or clarify their evidence. That opportunity was particularly important regarding accusations of dishonesty, but there was no principled basis for confining the rule to cases of dishonesty.
- The rule should not be applied rigidly. Its application depended upon the circumstances of the case as the criterion was the overall fairness of the trial.

The expert's report was terse and should have included more expansive reasoning. However, it was far from a mere assertion. In the context of a relatively low value claim, the expert could have thought that his full reasoning was implicit. Further, he had explained an important part of his reasoning in his answers to the Part 35 questions. His assessment was not irrational and might have been proportionate in the circumstances of the claim.

None of the exceptions to the rule in *Browne v Dunn* applied. In the absence of a proper challenge on cross-examination, it had not been fair for the travel company to criticise the expert's report in its submissions or for the Judge to accept those submissions.

The Court made its own assessment of the evidence. The expert's report was uncontroverted. Having regard to that and the Judge's findings of fact, the Claimant had established his case on the balance of probabilities.

Appeal allowed.

CASE UPDATES

Increase in Strike Out Applications? - Could Supreme Court Decision Trigger Such?

HXA v Surrey County Council and YXA v Wolverhampton County Council [2023] UKSC 52 20 December 2023

This was a hearing by the Supreme Court in relation to conjoined appeals brought by two Local Authorities in separate claims.

HXA and YXA alleged they suffered sexual or physical abuse by a parent or parent's partner. Both Claimants alleged that the respective Local Authorities, via their Social Services Departments, owed them a common law duty of care because, by their conduct, they had assumed responsibility to protect them from harm caused by third parties.

In HXA, the conduct relied upon was that the Local Authority had resolved to take care proceedings and, much later, to carry out 'keeping safe' work with the Claimant, and had not done so.

In YXA's case, the Claimant relied on the fact that the Local Authority provided "respite care" by placing him in foster care for roughly one night every fortnight and one weekend every two months, with his parents' agreement.

The respective Local Authorities applied to strike out the claims on the basis that they contained no arguable duty of care and, therefore, should not proceed to trial. The first instance Judges and, on appeal, the High Court Judges struck out the claims. However, the Court of Appeal allowed the appeals and the Local Authorities appealed to the Supreme Court.

The Supreme Court unanimously allowed each appeal, finding that the Claimants' Particulars of Claim disclosed no basis upon which a relevant assumption of responsibility (and, therefore, a duty of care) by the Local Authorities could be made out at trial.

The Supreme Court applied the reasoning in *N v Poole Borough Council [2019] UKSC 25, [2020] AC 780* and found that in the case of HXA and YXA, each Claimant had to establish that their Local Authority had assumed responsibility to use reasonable care to protect them from the alleged abuse. The Court reiterated that an alleged duty of care is assessed by applying the same principles to the Local Authority as would be applied to a private individual. The fact that a Local Authority has statutory duties or powers does not automatically create a common law duty of care.

CASE UPDATES

In HXA's claim, an assumption of responsibility did not arise from carrying out or failing to carry out decisions to investigate, seek legal advice or undertake keeping safe work. These were merely preparatory steps ahead of potentially applying for a care order and fell significantly short of creating an assumption of responsibility to use reasonable care to protect HXA from the alleged abuse.

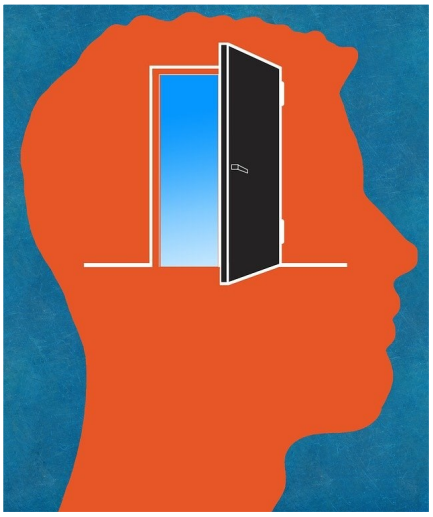
Regarding YXA, the provision of temporary respite care did not mean that the Local Authority assumed responsibility to use reasonable care to protect YXA from abuse in his family home. Whilst there was some delegation of parental responsibility for the time during which YXA was accommodated in respite care by the Local Authority, YXA's parents retained parental responsibility for him and the Local Authority had a statutory duty to return YXA to his parents. As there was no duty of care (assumption of responsibility) whilst the Claimant was within the family home before he went into respite care, there could be no assumption of responsibility when YXA was returned home (there being no alleged change in the circumstances in the family home).

The Supreme Court was clear that a Local Authority did assume responsibility for a child when a care order was in place; *Barrett v Enfield London Borough Council [2001] 2 AC 550*. However, it was incorrect to say that there can only be an assumption of responsibility where a Local Authority has obtained a care order. There may be other examples of an assumption of responsibility arising on particular facts. For example, it is possible for a Local Authority to assume responsibility to protect a child from harm, in respect of its social work function, when, as in YXA, a child is accommodated for respite care under section 20 of the Children Act 1989 Act. The duty of care will subsist during the time that the child is in respite care, including the mechanics of return, but that did not extend to the period after the child has been returned to his family. From the Judgment there appears to be no requirement for a Claimant to show reliance on the Local Authority in establishing an assumption of responsibility in these circumstances.

The Court found the cases of YXA and HXA to be indistinguishable from *N v Poole Borough Council*. Whilst there were some distinctions on the facts, most obviously that the harm was from neighbours rather than from inside the family, essentially the decision in *N v Poole* was indistinguishable. The actions of the Defendant Local Authority in *N v Poole* included the carrying out of initial and core assessments, child protection enquiries and convening strategy meetings and child protection conferences, but these did not involve the provision of a service or benefit by the Local Authority. The position was similar in the instant cases, in particular, HXA.

Further, the Court of Appeal was found to be incorrect in averring that cases should not be struck out because this is an unclear, developing area of the law. The Supreme Court was clear that these cases turn on applying the ratio in *N v Poole*. It rejected the notion that these cases are better dealt with by focusing on breach of duty or causation. The Court commented that where it is clear that the pleadings do not disclose circumstances giving rise to a duty of care, the waste of costs inherent in an unnecessary full trial on breach and causation can be sensibly avoided.

CASE UPDATES



Comment

Defendants in Social Services negligence cases will be pleased to note that this case goes some way to addressing arguments often raised by Claimant Solicitors since *N v Poole Borough Council* – e.g. that cases can be distinguished on the facts. Claimant Solicitors should be cautious about incurring the costs of obtaining expert liability evidence in relation to breach of duty when their case on duty of care is weak. We are likely to see an increase in Defendants applying to strike out claims where pleadings in relation to assumption of responsibility are unclear. The Supreme Court has, however, left the door open for future challenges by acknowledging that there may be other cases where an assumption of responsibility arises on a particular set of facts. Therefore, litigation may continue to run.

Nuisance - Alternative Dispute Resolution - Rules of Court - Stay of Proceedings

James Churchill v Merthyr Tydfil County Borough Council
[2023] EWCA Civ 1416

The Claimant brought a claim against the Local Authority in nuisance on the basis that his property was affected by Japanese knotweed as a result of it encroaching from the adjacent land owned by the Local Authority.

After issue of the claim, the Local Authority applied for a one month stay to allow the parties to engage in its complaints procedure. The Deputy District Judge refused this on the ground that he was bound by Dyson LJ's statement in *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002, [2004] 5 WLUK 215* that to oblige unwilling parties to refer their disputes to mediation would unacceptably obstruct their right of access to the court.

However, the Judge also held that the Claimant had acted unreasonably in failing to engage with the complaints procedure and that that conduct was contrary to the relevant pre-action Practice Direction which provided that, before issuing proceedings, the parties should have considered a form of Alternative Dispute Resolution and that litigation should be a last resort.

On appeal, the Court of Appeal was required to determine whether the decision in *Halsey* was still binding or should be disregarded, such that the Court does now have the power to compel ADR. If so, the Court was required to determine what forms of ADR should be undertaken.

Held

The decision in *Halsey* was not binding. Notwithstanding Dyson LJ's statement, a power existed to order parties to engage in a non-court based dispute resolution process. Directing the parties to engage in ADR would not be regarded by the European Court of Human Rights as an unacceptable restraint on the right of access to the court. It was compatible with Article 6 for a court or a set of procedural rules to require ADR.

Whether the court should order or facilitate any particular method of dispute resolution was a matter for its discretion; it could regulate its own procedure when deciding whether to make such an order. Any order made in the court's exercise of its discretion should not impair the essence of the right to proceed to a judicial hearing and should be proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost. The court should not lay down fixed principles as to what was relevant to determining those questions, although the court did cite factors which would be relevant to the exercise of the court's discretion.

On the specific facts of this case, the Court of Appeal remitted the question to the County Court to decide the merits of the Local Authority's internal complaints procedure and whether it would be open or appropriate to compel the Claimant to engage.

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

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- 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:

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