DOLMANS INSURANCE BULLETIN

Welcome to the August 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

Needlestick Injuries - Some Interesting Arguments

R O v Rhondda Cynon Taf County Borough Council

Local authority employees involved in clearing waste can sometimes be exposed to various dangers, most notably discarded needles, that could result in injuries and subsequent claims against a local authority.

Some interesting arguments arose in such a case, *RO v Rhondda Cynon Taf County Borough Council*, in which Dolmans represented the Defendant Local Authority.

Background and Allegations

The Claimant alleged that, during the course of his employment with the Defendant Local Authority, he picked up a knotted blanket and was pricked by a needle that was inside the blanket. The Claimant had been tasked with clearing a relevant area of illegally or irregularly dumped waste in accordance with his normal duties.

The Claimant alleged that his accident was caused by the Defendant Local Authority's negligence and/or breach of duty. The Claimant specifically pleaded breach of various Workplace Regulations, including the Personal Protective Equipment at Work Regulations 1992 and the Management of Health and Safety at Work Regulations 1999.

The Claimant alleged that he was not provided with proper work equipment and specifically appropriate gloves at the time of his alleged accident. Although the Claimant accepted that gloves were provided, he argued that these were inadequate.

In addition, the Claimant alleged that the Defendant Local Authority had failed to adequately assess the risk of needle punctures and/or provide sufficient training/instruction on how gloves would avoid/ limit the risk.

Enterprise and Regulatory Reform Act 2013

The Claimant's alleged accident occurred after the introduction of the Enterprise and Regulatory Reform Act 2013, which came into force on 1 October 2013. The said Act removed a civil cause of action in respect of the health and safety regulations.

In relation to the current matter, it was argued on behalf of the Defendant Local Authority that any strict liability aspect of the alleged Regulations was no longer effective and, in order to succeed with his claim, the Claimant had to establish that the Defendant Local Authority had been guilty of negligence. It was argued, therefore, that the Claimant had to establish that the risk of needlestick injuries was foreseeable, that he was not provided with a safe system of work or equipment and that he was injured by reason of the same.

The Claimant, in this particular matter, referred to the decision in *Kennedy v Cordia (2016) UKSC*, arguing that this suggested that the Regulations create the context for the common law duties. However, the Defendant Local Authority maintained that the said decision needed to be approached with some caution in relation to the current matter. In *Kennedy* no protective equipment was provided in respect of what was found to be a foreseeable slipping risk. The Supreme Court did not appear to address the significance of the effect of Section 69 of the 2013 Act, having effectively removed the actionability of the PPE Regulations that had previously imposed strict liability duties. The Claimant also referred to the decision in *McPake v SRCL Ltd (2014) SCLR*, which again involved an alleged breach of the PPE Regulations that pre-dated introduction of the 2013 Act. The Defendant Local Authority argued that it is not authority for a proposition that the PPE Regulations continue to define common law duties post-introduction of the 2013 Act. Further, it was argued that cases must be decided on their own facts, and neither of the cases referred to by the Claimant assisted in determining the particular facts and issues of the current matter.

Foreseeability

The Defendant Local Authority argued that if the particular risk manifested itself in an unusual and unforeseeable way, then the Defendant Local Authority should not be liable for that occurrence if the Claimant would otherwise have been reasonably safe had it not been for that unusual occurrence.

If it was impossible to see or reasonably discover the needle, then the Defendant Local Authority maintained that no reasonably safe system would have accounted for the same and negligence was not made out, strict liability no longer applying. If, however, the needle was reasonably discoverable by the Claimant, had he complied with his training and knowledge of how to proceed, then it was argued that the fault was the Claimant's and that such failures are also unforeseeable.

Despite several thousand properties being attended by the Defendant Local Authority's employees in similar circumstances, the Defendant Local Authority was able to adduce evidence that hardly any needlestick injuries had occurred since 2006. It was argued that this was testament to the effectiveness and safety of the Defendant Local Authority's system of work, including the equipment provided. Even the Claimant's own witnesses had not suffered any such injuries previously and there was no evidence of any similar incidents/circumstances having been previously reported to the Defendant Local Authority.

Safe System of Work and Equipment

In the circumstances, the Defendant Local Authority argued that the injury did not render such a widely operated system unsafe.

It was submitted on behalf of the Defendant Local Authority that in order to determine employee safety and equipment suitability the Court needed to consider the job undertaken. The Claimant had to check the waste in order to identify the culprit who had illegally or irregularly dumped the same, followed by a warning to the said culprit. The work, as foreseen, therefore, involved placing the waste on the rear of a truck bed and sorting through any papers within the waste to obtain a name/address. It was in that context that it was argued that the equipment provided had to be suitable for the dexterous demands of the task and the main risks, mostly skin contaminants.

It was the Defendant Local Authority's case that the Claimant was never supposed to handle needles by hand if encountered and the Claimant accepted that he had been instructed in this regard.

The Claimant also accepted that three different types of gloves of varying thickness and puncture resistance were available for him to use. In addition, the Defendant Local Authority provided tongs/ grabbers and chainmail gloves if needed, although these gloves were very specific for specialist tasks, offered no dexterity/were virtually fixed in position and were used for tasks such as scooping waste the contents of which could not be seen. The Defendant Local Authority argued that these chainmail gloves would not, therefore, have been suitable for the task undertaken by the Claimant on the day of his alleged accident.

The Defendant Local Authority argued that none of the gloves provided would have protected against a needle grabbed at 90 degrees, as appeared to be the case from the Claimant's description of his alleged accident, and that the Claimant had used the same equipment for many years prior to the date of his alleged accident.

It was argued, therefore, that if the devised system of work was followed correctly, the Claimant would have avoided the handling of the needle in any event and the provision of gloves needed to be viewed in light of the system devised as a whole.

The Claimant had not provided any expert evidence regarding the alleged unsuitability of the gloves provided by the Defendant local Authority.

Risk Assessments and Training

The Claimant sought to rely upon the decision in *McCafferty v Metropolitan Police District Receiver (1977) 2 All ER 756 CA*, in which it was found that the employer should have itself risk assessed a new temporary workplace in terms of noise risk and precautions, rather than leave it to the employee. It was argued on behalf of the Defendant Local Authority in the current matter that this was, however, wholly inapplicable to the facts of this case where employees are sent out to various different sites and are consequently trained to undertake their own careful dynamic assessment before handling items. It could not be suggested that the Defendant Local Authority should have attended every site to risk assess before allowing the Claimant to attend those sites.

The Defendant Local Authority in the current matter had appropriate Risk Assessments in place at the time of the Claimant's alleged accident. Risks from discarded syringes had been specifically identified and assessed.

The relevant Risk Assessment contained the essential aspects of training that the Claimant had received, including induction training and on-the-job training. The Clamant accepted that he had been told never to handle needles by hand and it was evident that the Claimant had been trained to use appropriate gloves in tandem with tongs/grabbers when needed.

The Claimant admitted that he was also instructed to dynamically assess any risks in order to avoid the handling of a harmful object inadvertently. The Claimant knew that he should visually check and assess any waste contents before using his hands. Had he looked sufficiently it was argued that the needle was likely there to be seen. Had he used tongs/grabbers to check the blanket/knot likewise the accident would not have happened. The Claimant was also aware that he should seek assistance if needles were found.

Claim Dismissed

Having argued on behalf of the Defendant Local Authority that following introduction of the Enterprise and Regulatory Reform Act 2013 breach of the Workplace Regulations was not evidence of negligence in itself and that the legal and evidential burden was on the Claimant to prove negligence, the Trial Judge in this particular matter was satisfied that the Claimant had not proved his case and, therefore, dismissed his claim.

REPORT ON

Comment

The common law duty of employers is to provide their employees with a safe place and system of work by taking reasonable care to protect employees from the risks of foreseeable injury, disease or death. The Defendant Local Authority in the above matter was able to provide evidence in support of its contention that such a safe system of work was in place at the time of the Claimant's alleged accident.

Following introduction of the Enterprise and Regulatory Reform Act 2013, the duty upon a defendant employer is no longer strict and the burden is on the claimant to prove negligence.

Despite the Claimant's estimated damages being relatively modest, the potential CRU exposure of the Defendant Local Authority exceeded £50,000.00. Hence, the successful defence of the Claimant's claim in this particular matter resulted in substantial savings for the Defendant Local Authority.

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CASE UPDATES

Civil Procedure - Default Judgments - Setting Aside

FXF v (1) English Karate Federation Limited (2) The Ishinryu Karate Association [2023] EWCA Civ 891

In determining whether the three stage test in *Denton v TH White Ltd [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926, [2014] 7 WLUK 202* applied, the Court of Appeal held that an Application to set aside a Default Judgment under CPR r.13.3 was an Application for relief from sanction and the three stage test in *Denton* fully applied to such Applications.

The Claimant's claim arose out of alleged serious sexual abuse by her karate coach over an extended period between 2008 and 2014. She sought damages against the Second Defendant association alleging that they were vicariously liable for the abuse and directly liable for breaching its duty of care to her.

The claim was issued prior to any pre-action correspondence between the parties. Accordingly, an agreement was reached between the parties for an extension of time for the Defence until 21 July 2020. The Second Defendant failed to file a Defence in time and the Claimant obtained Default Judgment on 22 September 2020. An Application to set aside the Judgment was made on 17 November 2020. The hearing was heard in December 2021.

The Second Defendant's Application was heard by a Master who queried why the Application had been made so late, why the hearing had been delayed by a year and why no draft Defence had been filed. Despite the explanations provided by the Defendant, the Master found that the set aside Application had not been made promptly and there was no good reason for the delay. However, he also found that the criteria in *Denton* were qualified by the express criteria under r.13.3, particularly the Second Defendant's prospects of success (the Master found that there was a real prospect of the vicarious liability claim being defended). He found that the unexplained delay did not eclipse the merits of the proposed defect and granted the Second Defendant's Application.

The Claimant appealed, relying upon *Gentry v Miller [2016] EWCA Civ 131, [2016] 1 W.L.R. 2696, [2016] 3 WLUK 270* and submitted that the Second Defendant's Application had been for relief from sanctions so that after consideration of the express requirements of r.13.3. the *Denton* tests should have come into play, but the Master had failed to apply them.

CASE UPDATES

In dismissing the Claimant's appeal, the Court of Appeal held:

- The *Denton* tests applied to Applications to set aside Default Judgments under r13.3.
- The circumstances of the case and the overriding objective were directly relevant at the third stage of the *Denton* analysis.
- The *Denton* tests were peculiarly appropriate to the exercise of the discretion required once the two specific matters, namely merits and delay, in r.13.3 had been considered.

- *Gentry* actually provides an example of how the exercise of CPR Part 13.1 and the Application of the *Denton* tests ought to be undertaken. What is critical is the need to focus on whether the breach has prevented the Court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate costs, and the need to enforce compliance with Rules and Orders.
- The Master had applied the right tests. He had not gone through the *Denton* tests in detail but he had stated that *Denton* permeated every action relating to a breach of Rules, and that while r.13.3 had its own self-contained Rules that did not mitigate *Denton*.
- The Second Defendant had a real prospect of successfully defending the claim and while it had not applied to set aside promptly that had not inconvenienced other Court users.
- The delay in filing the Defence had been serious and significant and not adequately explained. The three-stage test allowed the Court to consider the justice of the case. Whilst the delay militated against setting aside the Judgment, the Second Defendant's unusual situation and its somewhat tenuous connection to the tortfeasor reinforced the fact that it seemed to have a real case on the merits that deserved to be tried.

Appeal dismissed.

It is for a Judge to exercise their reasonable discretion when considering any Application to set aside Default Judgment – balancing the merits of the case against the length of the delay(s), i.e. which will involve consideration of the *Denton* criteria.

CASE UPDATES

Costs - Split Trial - Part 36 Offer

Chapman v Mid and South Essex NHS Foundation Trust [2023] EWHC 1871 (KB)

The Judge was required to determine costs following the Claimant's success at a liability only clinical negligence trial, including whether a Part 36 offer to settle her claim for 90% of damages assessed on a 100% liability basis was an effective Part 36 offer.

In the liability Judgment, the Judge held that the Claimant's ('C') clinical negligence claim in respect of two examinations by a Pain Consultant in 2009 and 2010 succeeded with no finding of contributory negligence. A further claim arising out of an assessment by an Emergency Nurse Practitioner in 2017 was dismissed, but the Judge found that if the claim had succeeded the Claimant would have made out her case on causation and there would have been no finding of contributory negligence.

C had made a Part 36 offer to settle on 22 December 2022 and the relevant period for acceptance expired on 13 January 2023.

In respect of costs prior to 13 January 2023, the Judge found that there was in substance one claim and C was the successful party. The starting point was that the Defendant Trust ('D') should pay C's costs and there were no reasons to depart from that in this case.

With regard to costs after 13 January 2023, the Part 36 offer had been worded as follows, "*an offer to settle the liability and causation issues in this action for 90% of damages assessed on a 100% liability basis, that is with a deduction of 10% from the full value of the claim".* D submitted, relying on *Mundy v TUI UK Ltd [2023]* (which was reported upon in the March 2023 edition of the Dolmans' Insurance Bulletin) that this was not an effective Part 36 offer. D contended that it was held therein that an offer in this form is not an offer to settle the claim or a quantifiable part of or issue in the claim.

The Judge held that the reasoning in *Mundy* was not applicable. The factual context of *Mundy* was different, with two separate Part 36 offers having been made in that case; one based on a 90/10 liability split and the other an offer to accept £20,000. The Claimant in *Mundy* succeeded on liability but was awarded only £3,805.60, however still sought (unsuccessfully) to rely on the 90/10 Part 36 offer. The Judge herein did not consider that the decision in *Mundy* purported to hold that Part 36 consequences cannot flow from such offers in different factual circumstances and any such finding would be obiter in any event. The Judge considered that the analysis in *Mundy* did not apply in this case where a split trial had been ordered and the only substantive offer was C's liability split offer.

Further, it was acknowledged in *Mundy* that a 90/10 liability offer could be effective where there was a genuine question of issues-based liability. That was the case here where there was a genuine prospect of a finding on split liability as contributory negligence was maintained and heavily contested.

Accordingly, the Judge found that C's offer was a valid Part 36 offer. C had obtained Judgment that was at least as advantageous to her as the proposals contained in her offer. D failed to establish that it would be unjust to order the Part 36 consequences under CPR 36.17. D was ordered to pay the Claimant's costs after 13 January 2023 on an indemnity basis, together with interest on those costs at 5% above base rate.

Family Foster Carers - Sexual Abuse - Vicarious Liability

DJ v Barnsley Metropolitan Borough Council and AG
[2023] EWHC 1815 (KB)

The Claimant ('C') appealed against the strike out of his claim for damages for personal injury arising from abuse perpetrated by the Part 20 Defendant, Mr G. The first instance decision was reported upon in the September 2021 edition of the Dolmans' Insurance Bulletin.

In January 1980, at the age of 9, C was placed by the Defendant Council ('the Council') in voluntary care with his uncle and aunt, Mr and Mrs G. They applied to become, and later became, C's foster parents. C remained with them until his late teens. C alleged that during this period he was sexually assaulted by Mr G and made a claim for damages for personal injury alleging that the Council were vicarious liability for the tortious actions of Mr G.

It was common ground between the parties that following *Armes v Nottingham CC [2017],* in general, the relationship between a local authority and an 'ordinary', or unrelated, foster carer is sufficiently closely akin to the relationship between an employer and an employee to justify the imposition of vicarious liability on a local authority for tortious acts by the foster carer which are closely connected with that relationship. However, the Council's case was that Mr and Mrs G, as maternal relatives of C, did not stand in a similar relationship with the Council as other non-related foster carers. At first instance the Judge found that the relationship between the Council and Mr and Mrs G was not akin to one of employer and employee and, consequently, the Council was not vicariously liable for the alleged abuse perpetrated by Mr G and the action was struck out. C appealed.

The Appeal Judge considered that it was necessary to consider the 'details of the relationship' in this case to see whether it was one akin to employment. In considering the existence, or otherwise, of features typical of a relationship of employment there were factors pointing in both directions. Accordingly, it was necessary to consider the 5 'incidents' identified in *Various Claimants v Catholic Child Welfare Society [2012] (the Christian Brothers case)* – which usually make it fair, just and reasonable to impose vicarious liability – and, in particular, in the context of the facts of this case – whether the Gs' care for C was integral to the business of the Council or whether it was sufficiently distinct from the activity of the Council to avoid the imposition of vicarious liability.

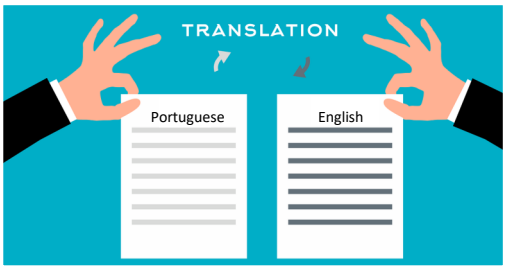
The Judge found that there was a sufficiently sharp line between what the Gs were doing and the activity and business of the Council. It was the circumstances in which the Gs came to be involved in fostering C that was the most revealing evidence that they were carrying on their own activity distinct from the statutory obligations of the Council. The Gs had taken C when other parts of the family were unable or unwilling to do so and the Judge was satisfied that the Gs would not have considered fostering, or taken C into their family, had he not been their nephew. This strongly suggested that the Gs were intending to and, in fact did, raise C because he was their nephew and that their purpose was to raise him as part of the family of which he was a member and in the interests of the family, including C.

Accordingly, the Judge agreed with the conclusion of the first instance Judge that the Council was not vicariously liable for the sexual abuse perpetrated by Mr G and C's appeal was dismissed.

Fixed Costs - Disbursements - Recoverability of Translator's Fees

Santiago v Motor Insurers' Bureau
[2023] EWCA Civ 838

The Appellant appealed against a decision that the fees for engaging an independent interpreter in a claim against the respondent MIB were not recoverable.



The Appellant spoke Portuguese and had a poor grasp of English. Within personal injury proceedings against an uninsured driver and the MIB, the Appellant's Witness Statement was prepared in Portuguese and translated into English by his solicitors' employees. The solicitors booked the services of an independent interpreter at Trial. Following settlement of the claim, a District Judge disallowed the interpreter's fee as a disbursement, in addition to the fixed fees recoverable, on the basis of *Aldred v Cham [2019] EWCA Civ 1780*, and ruled that a person's lack of linguistic ability did not fall within CPR r.45.29I(h). The Appellant appealed.

The Court of Appeal allowed the appeal. It was held that the fixed costs regime distinguished between the recovery of fixed costs and disbursements. Lord Justice Stuart Smith ruled that the interpreter's fee should be regarded as a disbursement and was, therefore, recoverable.

In February 2020, after the Judgment in *Cham*, the Civil Justice Council published a report entitled 'Vulnerable Witnesses and Parties within Civil Proceedings/Current Position and Recommendations for Change', which recommended the need to ensure fair access to justice for witnesses who were vulnerable such that their ability to participate in proceedings or to give their best evidence might be impaired. An inability to speak or understand the language of the proceedings fell within that approach to 'vulnerability'.

Denying the recoverability of an interpreter's fees would not be in accordance with the overriding objective *"because it would tend to hinder access to justice by preventing a vulnerable party or witness from participating fully in proceedings and giving their best evidence"*.

Moreover, the fact that independent interpreting services were not provided by a party's solicitors or counsel as part of the provision of their legal services strongly supported the proposition that they had to be recovered, if at all, under r. 45.29I(h).

The fees of the independent interpreter were an additional expense that fell upon the vulnerable party or their solicitor. Allowing the interpreter's fees to be recovered under r.45.20I(h) was consistent with the inclusion of the disbursements allowed under r.45.29I(f) and r.45.29I(g). The application of the normal principles of construction strongly supported the Appellant's proposed interpretation of r.45.29I(h).

The fact that the Court in *Cham* might have concluded that counsel's opinion was not required in order for the child to have access to the Court was not a conclusion open to the instant Court when considering the interpreter's fee. That distinction permitted the conclusion that the Court was not bound by *Cham* to adopt an interpretation which was not in accordance with the overriding objective. Where considerations of access to justice arose, a broader interpretation of that provision was necessary.

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

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- 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
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- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

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