motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
In this edition we cover:

case summaries

- **application for summary judgment fails**

  Nina Durham v Cameron Wagstaff, Skyfire Insurance Company Limited, Abdul Khan and Haven Insurance [2023]

- **defective schedule of loss denies claimant recovery**

  Lal v Reeder [2023]

- **fundamental dishonesty**

  Denzil v Mohammed & Another [2023]

- **impecunious credit hire**

  Nicola Morgan-Rowe v Laura Woodgate [2023]

- **no MOT = non-recoverable credit hire charges**

  Ali v HSF Logistics Polska SP ZOO [2023]

- **solicitors acting for own benefit?**

  The Scout Association v Bolt Burdon Kemp [2023]

- **third party costs order in credit hire**

  Ionut Georgian Meirosu v (1) ERS Claims Limited (2) Crystal Car Hire Limited (third party) [2023]

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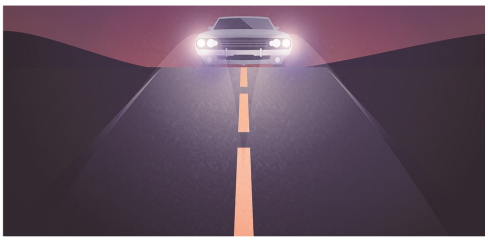
Nina Durham v Cameron Wagstaff, Skyfire Insurance Company Limited, Abdul Khan and Haven Insurance [2023]

This claim involved a claimant and three friends who had been driven in a taxi by Abdul Khan. The three friends exited the taxi into the road and the claimant was the fourth to exit. The claimant was in the road for three seconds when she was run over by a car driven by Cameron Wagstaff. The claimant suffered a serious brain injury as a result. Abdul Khan had his full beam headlamps on which affected Mr Wagstaff's view of the claimant in the road. The claimant's case was that Mr Wagstaff should have slowed down significantly once the headlamps impeded his vision. Mr Wagstaff had been driving in excess of the 30mph speed limit and was convicted of driving without due care and attention in the criminal proceedings.



In the civil proceedings, although Mr Wagstaff accepted that he had been negligent in driving too fast he denied that that had caused the accident. In reliance on police evidence, Mr Wagstaff's case was that even if he had been driving much slower the accident would have still occurred as he would not have seen the claimant until she was only a few metres away from him because he was dazzled by the taxi's full beam headlamps.

There was an issue as to whether those in the car who stepped into the road were intoxicated, but the claimant was vulnerable, lacked capacity and had extensive rehabilitation needs. Therefore, the defendants had made voluntary interim payments, but a trial date was yet to be fixed.

The claimant applied for summary judgment on the issue of primary liability against Mr Wagstaff and his insurer, Skyfire Insurance Company Limited. The application was refused as there were compelling issues that needed to be resolved with the benefit of expert evidence, which in itself was a compelling reason why a trial should occur. There were also live issues between Mr Wagstaff and Mr Khan in need of resolution and the significant issue of contributory negligence. Although there were good reasons why the claimant might have wanted a judgment quickly, it was important for the parties to advance to trial as soon as possible or to reach a settlement, but it was not appropriate to grant summary judgment.

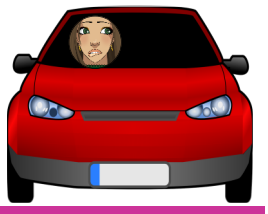
Lal v Reeder [2023]

This claim involved a claimant who sought damages for personal injuries resulting from a road traffic accident in which her stationary car was smashed into from the rear by the defendant who drove off after the accident without giving his details. Liability was admitted. The defendant was convicted of careless driving, failing to stop and of drunk driving.

In civil proceedings, the claimant's trial schedule claimed £105,154.39; the counter-schedule put the claim at £10,400. The first instance judge entered judgment for the claimant for £18,342.66 in damages plus costs up to 29.04.16, however the claimant was ordered to pay the defendant's costs thereafter on the standard basis, together with interest thereon at 8.75% and £30,000 on account of the defendant's costs by 13.01.20. There was no mention made in the order of any part 36 offer, but clearly one was made by the defendant and the claimant had failed to beat it, which led to the split costs order.

By notice of appeal issued on 21.01.20 the claimant sought, in 138 grounds, to overturn many aspects of the judgment. Permission to appeal was granted on the ground relating to the first instance judge's decision to refuse to award the claimant damages for her asserted loss of part-time earnings as an agency nursing assistant. Later, the claimant also applied for permission to rely on fresh evidence in the appeal, but this was rejected. When opening the appeal the claimant then abandoned all grounds of appeal save for 2. Firstly, that the first instance judge was wrong or irrational to fail to award the claimant damages for past part-time loss of earnings as an agency nursing assistant for 6 to 8 months after the accident. Secondly, that the first instance judge was wrong or irrational to fail to award to the claimant damages for pain, suffering and loss of amenity for travel anxiety after the accident.

In relation to ground 1, the claimant relied on her 2016 and 2018 filed witness statements in which she made it clear that she had worked 8 shifts between May and December 2013, submitting that the schedule was wrong to say 1 to 2 shifts. Counsel for the claimant also relied on the agency fees evidence in the documents which showed that the claimant had earned between £100 and £280 net per shift in 4 shifts worked in August 2012, before the accident, so submitted that the sums claimed as lost agency fees after the accident, at £278.77 per week, were modest and properly evidenced. Counsel for the claimant submitted that it was not fair to criticise the claimant for the inadequate pleading. The appeal judge held that whilst those submissions might have been persuasive before the first instance judge they did not justify this court, on appeal, finding that the first instance judge's findings were plainly wrong or irrational. The schedule of loss was signed by the claimant and she had failed to put evidence before the court that showed that she would have worked part-time but for the accident. Therefore, the first instance judge's decision not to award damages for past loss of earnings was upheld. In relation to ground 2, the first instance judge's decision not to award damages for travel anxiety was also upheld. The appeal judge held that the first instance judge was entitled to prefer and accept the evidence in the claimant's own contemporaneous GP expert report and reject the claimant's later self-reports. The reasons given by the first instance judge were not irrational or wrong.



Denzil v Mohammed & Another [2023]

This claim arose from a road traffic accident that occurred in January 2019 in which the claimant sought damages for losses which included a large credit hire claim and PSLA in respect of injuries to the neck and shoulder. The defendant had not accepted that there had been any accident. A head injury, which led to swelling over a period of three to four days, was mentioned in the claimant's evidence at trial and in the witness statement. However, the claimant did not claim anything in respect of the head injury and it was not referred to in the Particulars of Claim and did not feature in the medical expert's report.

The first instance judge said the claimant knew that he had not sustained a head injury and was fundamentally dishonest in relation to the primary claim, even though this represented a small element of the overall claim. The first instance judge held that the claimant was dishonest and had said in his judgment it was 'axiomatic' that the claimant's dishonesty over his head injury had been fundamental to the claim. The claimant appealed and submitted that there was no basis to find that dishonesty went to the root of the case, the allegation was not part of the pleaded claim and counsel for the claimant had not invited the judge to include it when assessing quantum of damages. The defendant maintained the head injury was 'not a passing concoction but a mercenary deception' and that the first instance judge had shown he understood the law on fundamental dishonesty.

It fell to be determined whether the first instance judge erred in his finding that the dishonesty in respect to the head injury was fundamental to the claimant's claim.

The King's Bench Division held, among other things, that there had been no scope to find that such a minor and very short-lived injury, not forming part of the pleaded claim, but referred to in written and oral evidence, could be properly characterised or understood as being fundamental or going to the root of the claim.

The King's Bench Division went further and stated that this was an 'objectionable' term as it made the assumption of fundamental dishonesty 'without grappling with the question of why it was fundamental to the claim'. The first instance judge's reasoning that the alleged dishonesty went to the root of the claim was 'no more than an expression that the dishonesty was fundamental'. The King's Bench Division found that the conclusion that the dishonesty was fundamental could not stand.

Nicola Morgan-Rowe v Laura Woodgate [2023]

This claim arose out of a road traffic accident in December 2019. At trial, the recorder found that the accident was caused by both drivers and liability was apportioned 50:50. Fortunately, neither party was injured.

The largest head of the claim for damages was in relation to credit hire charges for a replacement vehicle hired by the claimant whilst her own car was off the road being repaired. The claimant sought to recover £25,830.72. An additional £10,022.24 was claimed for repairs and other small items. At trial, the claimant sought to recover the full hire charges on the grounds of impecuniosity.

Following allocation to the fast track, there was a directions order which included a requirement for a Reply to the Defence and for specific disclosure of documents within the claimant's control relevant to her financial position during the relevant period of hire.

The claimant gave disclosure of financial records which showed a payment into her bank account from another account and then a payment out to a credit card, in relation to neither of which had any disclosure been given.

At trial, the defendant submitted that the claimant had not given full disclosure and so should be debarred from relying on impecuniosity. The claimant's evidence was that the other account related to her husband and the credit card was also in his name.

Further, through evidence at trial, it became apparent that there was an ISA that was held by the claimant which held £12,000. The defendant submitted that the claimant could have used this money to pay for the hire of the replacement vehicle and, therefore, she was not impecunious. The claimant's evidence was that the money in the ISA was earmarked for mortgage payments.

At the conclusion of the trial, the recorder was satisfied that the claimant was impecunious and awarded the claimant £18,655.20 (subject to the 50% reduction). The defendant appealed.

When the Grounds of Appeal were filed and served in April 2021 this was on the basis that, in essence, the recorder's conclusion that the claimant had been impecunious in December 2019 was perverse and/or an error of law, given the £12,000 in her ISA and her own evidence showed the 'spot rate' would have been about £9,000 (which would have left the claimant with £3,000).

A Skeleton Argument subsequently filed and served on behalf of the defendant in June 2023, ahead of the appeal hearing, however, put the appeal on a different basis. Two new matters, in particular, were raised, neither of which had featured in the Grounds of Appeal, namely:

(1) The claimant should have been debarred from relying on impecuniosity 'by a combination of disclosure and statement failings'.

(2) It was no longer maintained that the claimant should only have been entitled to the spot rates for the full period. Instead, it was submitted that the repairs could have been done in a couple of weeks, during which the claimant would have been entitled to credit hire rates, it being accepted that she was not pecunious as to both repair and hire costs (importantly, at trial, the repair period of 72 days had been conceded).

On appeal, the following issues were considered/dealt with by the court:

Was the recorder wrong not to debar the claimant from relying on her asserted impecuniosity by reasons of a disclosure failure?

The appeal judge held that the recorder was right to reject the argument that the claimant should be debarred. The claimant's evidence was accepted that the accounts referenced in the claimant's disclosed statements were in her husband's sole name.

Accordingly, there was no basis for concluding that the associated statements fell within CPR r31.8 so that they should have formed part of standard disclosure. The associated statements were not in the claimant's control for this purpose, but were in the control of her husband to whom the directions/ disclosure order did not apply.

The defendant's other complaint about non-disclosure with regards to the earmarking of the ISA for mortgage payments and bills had 'fallen away' after it was acknowledged that this matter had been raised in the Reply to the Defence and it did not emerge for the first time at trial, as the defendant had alleged.

The Ground of Appeal was, therefore, dismissed.

The defendant's argument that the period of repair should be limited to 2 weeks and she should have funded the repair costs herself.

It was held that the defendant was not entitled/permitted to raise this argument on appeal because it was raised for the first time in the defendant's Skeleton Argument; it was not contained in the Grounds of Appeal and no application had been made to amend those grounds. It was, essentially, 'fundamentally at odds' with how the defendant ran the case at trial.

The appeal judge referred to *Singh v Dass [2019] EWCA Civ 360* as to whether the defendant could raise a new point on appeal that was not raised at the instant trial which might have changed the course of the evidence given at trial and/or which would require further factual inquiry. It was not accepted that the claimant was not (or would not be) prejudiced by this new basis for the defendant's case. The defendant also faced a further difficulty that there was no evidence to support the suggestion that the repair could have been done 'in a couple of weeks', as they alleged.

On a straightforward application of *Singh*, this Ground of Appeal was dismissed.

Was the recorder wrong to conclude that the claimant was impecunious?

The appeal court rejected the defendant's argument, in any event, on its merits and found that the conclusion reached by the recorder at trial was reasonably open to him.

The appeal court relied upon *Irving v Morgan Sindall plc [2018] EWHC (QB)* in which it was said that "it will only be in rare cases in which an appellate court will interfere with a judgment on the issue of impecuniosity reached at first instance" and the test of impecuniosity derived from *Lagden v O'Connor [2004] 1 AC 1067*.

An assessment of impecuniosity requires an assessment of what was reasonable for a claimant to do.

It was the recorder's task to determine whether it would have been unreasonable in December 2019, in the circumstances in which the claimant found herself, to have required her to use her ISA money to pay for a hire car for an uncertain period whilst her own car was undergoing major repairs. The flaw in the defendant's argument was that the claimant had to decide immediately following the accident on what to do and so the issue was what it was reasonable for her to have done at that time. At that point no one could have known how long her car would be off the road and what the hire charge for a replacement might be.

The recorder's decision was not one which no reasonable judge could have reached. If the claimant had used her ISA she would have nothing left if any other emergency arose. Given the inherent uncertainty of the necessary length of hire, it was reasonable to not expect her to spend the 'lion's share' or a very uncertain proportion of the totality of her savings on car hire.

Accordingly, the recorder asked himself the right question and gave an answer that was properly open to him.

This Ground of Appeal was, therefore, rejected.

Ali v HSF Logistics Polska SP ZOO [2023]

This case concerned an accident between the defendant's lorry and the claimant's parked and unattended Volvo. Both liability and the fact that the Volvo was not driveable after the accident were not in dispute. However, the recoverability of the credit hire charges that were incurred by the claimant was disputed on the basis that there was no valid MOT certification and the claimant had no intention to obtain this. It transpired that the Volvo did not have a valid MOT certificate at the time of the accident, the previous certificate having expired 4 ½ months prior.

At first instance, the defendant pleaded in its Defence that the absence of such a certificate and the possible impact on the claimant's insurance meant that the claim for hire charges failed in accordance with the doctrine of illegality (ex turpi causa). The defendant supplemented this position with a causation argument: that in circumstances where the claimant's pre-accident use of the vehicle was illegal, the accident could not be said to have caused any loss of use to be mitigated by hire charges. The first instance judge rejected the ex turpi causa argument weighing up the public policy of ensuring that cars have valid MOT certificates against the fact that tortfeasors should compensate those damaged by their tortious conduct.

It was held that it would be disproportionate to deny the claim by reason of not having an MOT certificate. The fact that the vehicle was parked and otherwise in roadworthy condition were referenced as factors in reaching the conclusion.

However, the hire charges were dismissed on grounds of causation on the basis there was no loss of use claim by reason of not having a vehicle which he was entitled to use on the public highway at the time of the accident by reason of absence of an MOT certificate, and the claimant had not established that he could and would have obtained a valid certificate during the hire period.

The claimant appealed to the high court, in essence arguing that it was wrong to separate out what is in reality the same illegality argument into two distinct strands. Having found that the illegality did not invoke ex turpi causa, the claimant sought to argue that it was not open to the court to find that the same illegality rendered the hire charges separately irrecoverable. The high court commented that this was "a difficult issue to resolve", but after careful consideration it was held that these are two different forms of illegality and, therefore, the first instance judge was correct to disallow the claim for credit hire charges alone on a separate ground of causation. Thus, the appeal was dismissed. A distinction was drawn in the judgment between "the meritorious claimant" – i.e. where there may be a more innocent lapse of perhaps a few days – and the "unmeritorious claimant" – such as in the present case where there was a long period of illegal driving which was 'careless' and where there was no evidence of any intention to MOT the vehicle.

The Scout Association v Bolt Burdon Kemp [2023]

This case concerned a substantive personal injury claim which had settled in 2017 for £29,500, but a subsequent offer to settle the claim for costs at £22,500 was rejected by the claimant's solicitors, Bolt Burdon Kemp (BBK). The claimant was ordered to pay detailed assessment costs over the next two years, but the Scout Association stated it had no intention of attempting enforcement and instead sought an order that BBK pay all of those costs. The Scout Association averred that as BBK acted on a conditional fee agreement where any client contributions had been exhausted by the success fee deduction, the firm was now the only party with an interest in the costs proceedings and, therefore, the 'real party'. It was submitted that BBK had funded the assessment proceedings, controlled them and stood to benefit from them. On the other hand, BBK said it was 'fundamental' that in successful claims these costs may be recovered from the opponent. The firm had worked on something close to a 'CFA lite' where there were no circumstances in which the client would have to draw upon their own resources to meet fees and expenses. It was argued these arrangements would be 'simply unworkable' if the judge agreed to the defendant's application.

The costs judge refused the application. He held that a solicitor could not be said to be acting outside the role of a solicitor, and therefore at risk of a costs order, if they were doing no more than the legislation pertaining to CFAs rendered lawful and that in those circumstances the solicitor could not be "the real party" or "a real party".

The Scout Association appealed and submitted that the proper test was the or "a real party" test, not whether the solicitor had acted beyond or outside his role as a solicitor, and that the court should look at the particular application and ask itself for whose benefit it was made: if it was about the recovery of costs in circumstances where the application would not affect the amount of damages received by the client then it was for the benefit solely of the solicitors, who were, therefore, the or "a real party" in the application.

The appeal was dismissed. The association's submission did not look at the application in its proper context. The CFA or CFA lite arrangement was to be seen as a whole. A solicitor who funded disbursements on the basis that they would be recovered only from the other side in the event of the success of the claim was thereby facilitating access to justice for a client. The action as a whole was to be seen as for the benefit of the client, albeit one in which the solicitors were rewarded in a way that was not beyond or outside their role as solicitors. The solicitors did not then become the real party because the case had succeeded and the disbursements were to be recovered.

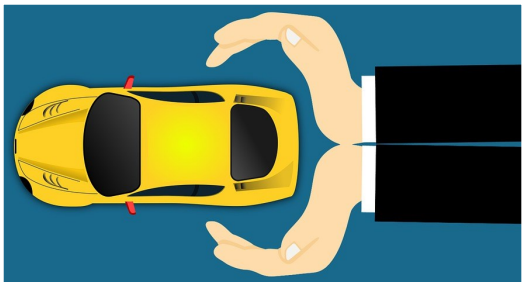
Ionut Georgian Meirosu v (1) ERS Claims Limited (2) Crystal Car Hire Limited (third party) [2023]

This claim arose out of a road traffic accident that occurred in June 2021. It was alleged that a passenger in the defendant's insured's vehicle had opened a door which collided with the claimant's vehicle. The claimant claimed £26,730 for credit hire, storage and recovery charges, all of which were owed to Crystal Car Hire. The defendant denied liability on the basis that its insured had not opened the door, but a passenger in that vehicle had. The defendant stated that any liability for the accident should rest with the passenger who opened the door, not their insured.

The matter reached trial in November 2022, but the claimant did not attend. His legal representative informed the court that "it is not the claimant's case that the defendant's insured was negligent".

The defendant made an oral application for Crystal Car Hire (the credit hire company that supplied the claimant with a hire car) to be added to the proceedings for the purposes of costs only. The application was accepted and directions were given, and the application for a non-party costs order against Crystal Car Hire reached a hearing on 08.09.23.

The defendant argued that a non-party costs order should be made against Crystal Car Hire for the following main reasons: Firstly, the case was outside the ordinary run of cases which parties pursue or defend for their own benefit and at their own expense. Secondly, Crystal Car Hire stood to benefit from the proceedings as, essentially, 100% of the damages claimed were payable to it. Thirdly, Crystal Car Hire substantially controlled the proceedings.



Crystal Car Hire argued that it had acted professionally throughout, they were not a party, they did not fund the litigation, and the solicitors were the claimant's solicitors and not Crystal Car Hire's. Crystal Car Hire further argued that the "Statement of Facts" (part of the hire agreement signed by the claimant) meant that Crystal Car Hire could not be liable for the defendant's costs. Crystal Car Hire submitted that all hire charges were recoverable from the claimant, as were any recovery/storage charges, and they did not seek payment of those charges from any other party. Finally, Crystal Car Hire said they had received no financial benefit from the claim and that it would be unjust for them to be ordered to pay the costs.

District Judge Ross granted the application for a non-party costs order against Crystal Car Hire for the following reasons: There was no benefit for the claimant as Crystal Car Hire stood to benefit to the tune of 100% of the damages claimed and the evidence showed that Crystal Car Hire had substantially controlled the proceedings due to a contract clause in the hire agreement authorising Crystal Car Hire to act on the claimant's behalf.

District Judge Ross concluded that it was just to make the order because the facts were stark. There was no personal injury claim or repair claim and the litigation was an essential part of the business model as Crystal Car Hire could not recover charges from the impecunious claimant. The authority to control the litigation, granted by the hire agreement, was a substantive tool.

If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

Simon Evans at simone@dolmans.co.uk

Capital Tower, Greyfriars Road, Cardiff, CF10 3AG

Tel : 029 2034 5531

www.dolmans.co.uk