DOLMANS INSURANCE BULLETIN

Welcome to the October 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

Manholes and the Occupiers' Liability Act 1957

AG v Pembrokeshire County Council

Readers will be aware of the decision in *Samuel v Rhondda Cynon Taf County Borough Council and Dwr Cymru Welsh Water (LTL 30/01/2014*) in which it was held that the Defendant Local Authority was not required to physically inspect every stop tap cover in the locality and that a visual inspection is sufficient. Dolmans represented the Defendant Local Authority in *Samuel* which involved third party apparatus in the adopted highway.

In the more recent case of *AG v Pembrokeshire County Council*, in which the Defendant Local Authority was again represented by Dolmans, the circumstances were somewhat different in that the case involved a manhole cover that was owned by the Defendant Local Authority and situated on land owned and occupied by the same Authority, albeit not part of the adopted highway.

As such, various arguments needed to be highlighted on behalf of the Defendant Local Authority to account for these specific circumstances and these will be focused on below.

Background and Allegations

The Claimant alleged that he was walking his dog, on a grassed area located behind an industrial estate that was owned and occupied by the Defendant Local Authority, when he stood on a loose manhole cover that gave way, causing the Claimant to fall into the inspection chamber and sustain personal injuries. The manhole cover was also owned by the Defendant Local Authority.

The Claimant alleged that the said accident was caused by the Defendant Local Authority's negligence and/or breach of its duty under Section 2 of the Occupiers' Liability Act 1957 in having failed *"to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there"*.

In addition, the Claimant alleged that the Defendant Local Authority was guilty of nuisance.

REPORT ON

Reactive System

The Defendant Local Authority had a reactive system of inspection and maintenance in place at the location of the Claimant's alleged accident which was argued as being sufficient for the particular location. The Defendant Local Authority relied upon the decision in *Cook v Swansea City Council (2017) EWCA Civ 2142* in which a reactive system was deemed reasonable in respect of icy conditions in the Defendant Local Authority's unmanned car parks.

Balancing Act and Additional Inspections

Reference was made to the 'balancing act' to be undertaken when considering what amounts to *"such care as in all the circumstances of the case is reasonable".* The factors to be considered in undertaking this 'balancing act' were set out by Hoffman LJ in the case of *Tomlinson v Congleton BD (2004) UKHL 47* as follows:

(i) The likelihood that someone may be injured;

(ii) The seriousness of the injury that may occur;

(iii) The social value of the activity that gives rise to the risk; and

(iv) The cost of preventative measures.

Notwithstanding the reactive system in place at the time, the Defendant Local Authority in the current case employed grasscutters, who were on site at the relevant location every 2 to 3 weeks between April and September. They would undertake visual inspections of manhole covers in the vicinity as appropriate and report any issues regarding the same. There were, however, no such issues reported at the time of the last grass cutting visit prior to the date of the Claimant's alleged accident. Indeed, the Defendant Local Authority also had no record of any similar complaints/accidents relating to the location of the Claimant's alleged accident during the 12 month period prior to the date of the same and had repaired the manhole following the Claimant's alleged accident.

Taking the above into account, the fact that upon the Claimant's own admission the area was used infrequently and the seriousness or otherwise of the injuries that may occur, it was argued that to suggest that a system of regular inspection of such a grassed area is necessary would impose an impossibly onerous burden upon the Defendant Local Authority.

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REPORT ON

Visual Inspections

The Claimant alleged that the manhole cover collapsed without warning and that the alleged defect was not visible. The Defendant Local Authority argued, therefore, that an inspection would not have revealed the alleged defect in any event. In raising this argument the Defendant Local Authority sought to rely upon the decision in *Samuel*, reiterating that it is not required to physically inspect every manhole cover in the locality and that a visual inspection is sufficient. The said case of *Samuel* related, of course, to a stop tap cover on the adopted highway where it was argued that a higher duty is owed, unlike the current case where the Claimant's alleged accident occurred on a grassed area located behind an industrial estate that was used infrequently.

Claim Dismissed

The Deputy District Judge who heard evidence on behalf of both parties at Trial dismissed the Claimant's claim on the basis that the system in place demonstrated that the Defendant Local Authority had taken reasonable steps to ensure the reasonable safety of the Claimant. The Judge considered that a reactive system in such an area where there was not heavy footfall was reasonable. There had been no previous complaints and/or similar accidents during the 12 month period prior to the date of the Claimant's alleged accident and the alleged defect had been repaired promptly following the same. The Judge also noted that the grasscutters provided an additional safeguard in the summer months as they would report any issues arising in the relevant area.

Comment

With the assistance of a carefully drafted Defence, supported by witness evidence and appropriate case authorities, the Judge in this particular case was able to focus upon the relevant issues relating specifically to the extent of the Defendant Local Authority's duty under the Occupiers' Liability Act 1957 and the adequacy of a reactive system in those circumstances.

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CASE UPDATES

Animals Act 1971 - Negligence - Horses and Dogs

Koetsier v (1) Thomas (2) LJP Owen Limited (t/a Nolton Stables) [2023] EWHC 2483 (KB)

The High Court dismissed a claim in negligence and pursuant to s.2(2) of the Animals Act 1971 by a Claimant who suffered severe injury after the horse he was riding reacted to a dog.

In June 2018, the Claimant ('C'), whilst on holiday, was riding a horse, which he had obtained from the Second Defendant's ('D2') stables, along Druidstone Haven beach in Pembrokeshire. C was part of a group of capable and competent riders who were being led on the ride by an employee of the stables. During the ride a small West Highland Terrier, owned by the First Defendant ('D1') and who was not on a lead, ran after the horse. The horse reacted and C fell from the horse sustaining severe injury to his spinal cord. C brought a claim in negligence against both Defendants and a claim under the Animals Act 1971 against the D2.

Before the ride C completed a form which was used to help identify his ability as a rider and which included the words, '*I understand that riding at any standard has inherent risks and that all horses may react unpredictably on occasions. I may fall off and I could be injured. I accept that risk'*. A short briefing was given before the ride, including standard practices of keeping a safe distance and slowing when the trek leader raised her hand. These were all matters that C, as an accomplished rider, was already aware of.

The beach is a public beach open to dogs with no requirement for them to be on leads. This had been taken into account by D2's risk assessment process, which included control measures that '*any loose dogs on the beach who take an interest in horses are requested by a staff member to be put on a lead by their owners'* and that '*if a dog approaches a ride then that particular ride will come to a halt until the dog is back under control'*. The trek leader's evidence was that staff would make a judgment call as to whether a dog was interested in the horses and take action if they thought it might be. On the day in question, the trek leader noted dogs on the beach but considered that none were showing any interest in her ride. The trek leader was responsible for choosing the line taken when riding on the beach and ensuring that dogs were avoided.

C's evidence was that as the group turned to canter back across the beach he heard a warning about a loose dog from another larger group. No other witness recalled such a warning or the need for such a warning.

CASE UPDATES

The group began cantering back. Video footage showed that as they approached a larger trotting group the dog became visible and was not particularly engaged with the horses. As C's cantering group came level with the dog it suddenly took an interest and ran towards the cantering group. At this point, it was agreed, there was a warning shout from the trotting group. C's trek leader heard this and raised her hand to slow down bringing C's group to a stop. The dog ran up to C's horse yapping at its heels. The horse reacted and C went over the front of the horse landing head first on the hard sand.

D1 regularly walked the dog on the beach off the lead. The dog had encountered horses previously and not reacted in this way. The dog was of good temperament. D1's evidence was that he felt able to recall the dog if required, but the events on the day took place so quickly he had no time to react.

On the evidence, the Judge was not satisfied that there was an earlier warning as alleged by C. The Judge found that the trek leader did not see the dog during the last canter nor could it be said that she should have seen the dog. It was a violent buck by the horse that caused C to fall from the horse.

C's case was that D1 was negligent because he should have been aware of the cantering group and should have taken action to restrain or control his dog. The Judge held that D1 had not been negligent. There was no background of similar behaviour by the dog. Prior to the incident the dog had shown nothing more than mild interest in the horses. In the circumstances, D1's failure to take action was not a breach of duty.

C alleged that D2's trek leader was negligent as she should have stopped or slowed the ride, addressed the issue of loose dogs and/or taken a different line on the beach. Given his findings of fact, the Judge held that the trek leader had not been negligent.

In relation to the claim against D2 under section 2(2) of the Animals Act 1971, which imposes strict liability for damage caused by animals of a non-dangerous species in certain circumstances, D2 submitted that this section was not intended to apply to riding accidents. It was intended to cover an 'attack' by an animal. Where a rider falls from a horse the injury is not '*caused by an animal*' as required by section 2(2) but by contact with the ground. The Judge was not persuaded by this argument on the particular facts of this case. The Judge found that C fell from the horse due to an act by the horse, a violent buck, and, therefore, section 2(2) applied.

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On the issue of whether the damage was of a kind which, if caused by the animal, was likely to be severe, (section 2(2)(a)), '*likely*' meant 'reasonably to be expected'. The Judge, having found that there was a violent buck, also found that severe injury was reasonably to be expected and this sub-section was, accordingly, satisfied. It was accepted, in the circumstances, that s.2(2)(b) was also satisfied and there was no issue that s.2(2)(c) applied.

Section 5(2) of the Act provides a defence to the strict liability imposed by s.2 '*for any damage suffered by a person who has voluntarily accepted the risk thereof*'. The Judge concluded, on the facts of this case, that the defence was made out. The horse was an entirely unremarkable horse in terms of behaviour. It did not, as far as anyone knew, have any characteristic that was unusual. The horse reacted to a particular external stimulus in a way that horses do sometimes react to such stimuli. C readily understood that riding came with risks and that horses can act unpredictably. C accepted that in undertaking the ride they might come across dogs. The Judge was satisfied that C, as an experienced rider, went on the beach ride with sufficient knowledge of the risks to voluntarily accept the same.

Accordingly, C's claim failed.

Credit Hire - Impecuniosity - Disclosure - Amended Grounds of Appeal

Nicola Morgan-Rowe v Laura Woodgate
[2023] EWHC 2375 (KB)

The 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.

CASE UPDATES

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.

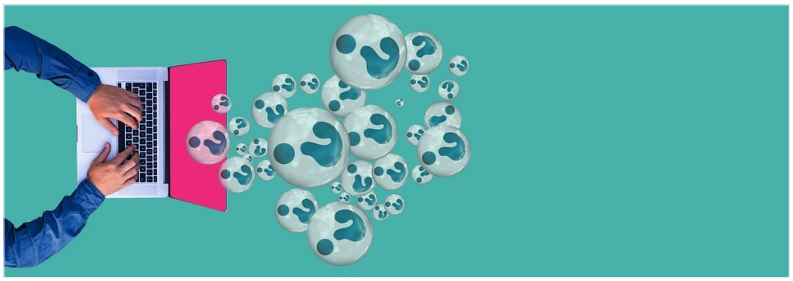
When the Grounds of Appeal were filed and served in April 2021, this was on the basis that, in essence, the Recorder's conclusion that the Claimant had been impecunious in December 2019 was perverse and/or an error of law, given the £12,000 in her ISA and her own evidence showed the 'spot rate' would 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).

CASE UPDATES



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 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 which 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.

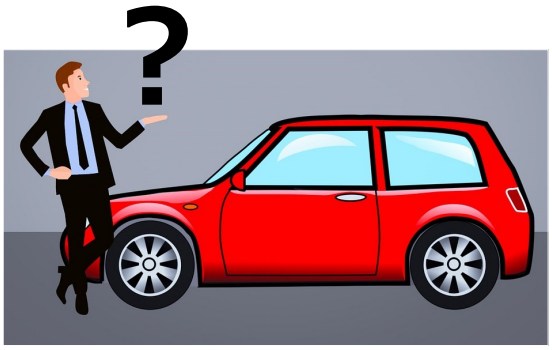
On a straightforward application of *Singh,* this Ground of Appeal was dismissed.

- ***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.

Conclusion

The Defendant's appeal was dismissed in its entirety.

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

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