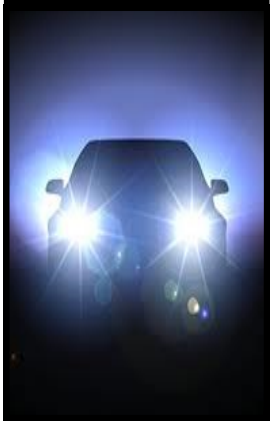
# motoring news

# Headlight



winter 2021 - 2022

## welcome

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

## case summaries

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  Campbell v Advantage [2021]

- **complex regional pain syndrome**

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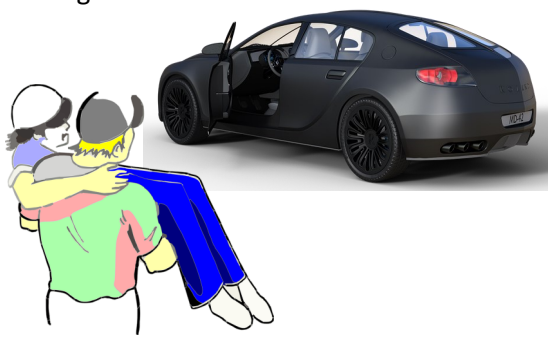
## Campbell v Advantage [2021]

The appellant was the rear seat passenger in a vehicle driven by his friend (insured by the respondent) when it was involved in a high speed collision with a lorry. The parties had been out drinking with friends for several hours and in the early hours of the morning the appellant was put into the front seat of the car. He was described as having "passed out". The friends, including the driver, had then returned to a nightclub to continue drinking.



The trial judge found that the driver had moved the appellant from the front seat to the rear seat prior to driving off and the appellant must have been awake when that happened. He concluded that the appellant's previous consumption of alcohol was not sufficient to displace the presumption of capacity and that if he had capacity to consent to a change of position in a car, then he also had capacity to being driven in the car. As such, the appellant's damages were reduced by 20% to reflect his contributory negligence. The judge was unable to conclude whether wearing a seatbelt would have made any difference to the outcome.

On appeal, the appellant's main argument was that the judge had erred in applying the objective test of the reasonable, prudent and competent passenger when the appellant was too intoxicated to be held responsible for his actions. The appeal court assessed contributory negligence with reference to a line of authorities and found that the judge had not erred in his judgment. The judge had been right to assess the appellant's actions by the standards of a reasonable, prudent and competent adult, and such a person in the appellant's position would have appreciated that the driver had drunk too much to drive safely. Accordingly, the appeal was dismissed.

## Lees v Davis-Potter [2021]

This case involved a claimant who had been injured in a road traffic accident which occurred on 10 December 2016. The defendant negligently failed to give way and forced the claimant's vehicle to mount a curb and roll onto its side. The claimant was trapped in the vehicle and suffered serious injuries as a result. The defendant had admitted liability for the accident and the case came before the court to deal with the issues of damages and causation. The main issue between the parties was whether the claimant had contracted Complex Regional Pain Syndrome (CRPS) as a result of the accident. The defendant challenged the validity of some of the claimant's evidence, however, although the court stated that the claimant had a tendency to exaggerate in her reports to her doctor, overall she was a truthful witness.

It was held that the claimant had proved and satisfied the criteria for CRPS and the provoking event of the CRPS was the accident. The claimant was awarded £35,000 for general damages as but for the accident the claimant would not have developed CRPS. In relation to special damages, it was confirmed that, on the balance of probabilities, the claimant would be able to return to doing most of the activities that she could previously do and return to the labour market, perhaps not full-time but part-time, in 12 to 18 months. However, given the parties' respective positions, the court has asked the parties to seek to agree a Schedule for special damages that flowed from the court's findings and any interim damages.

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**AXA Insurance plc v Batley [2021]**

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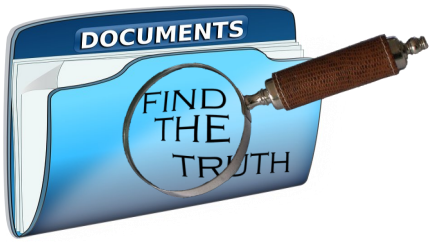
This claim involved the respondent (Batley) who was injured in a road traffic accident on 21 March 2013. Batley was a passenger in a Vauxhall Vectra being driven by his wife. Liability was admitted and Batley's wife received £4,500 in settlement of her claim for general damages. In 2016, Batley issued his own claim pleading a claim with a value of up to £300,000. The Particulars of Claim pleaded a number of injuries, which included a traumatic brain injury of mild severity, migraines and post-concussive syndrome. He also claimed a severe adjustment disorder and depression, and a soft tissue injury to his neck and contusion to his head. In 2018, Batley made a further Application pleading a claim with a value of up to £571,418, to include loss of earnings and future loss of earnings.

A Defence was filed in which a breach of duty was admitted, but causation and quantum were denied. However, the Applicant (AXA) relied on evidence which showed that Batley had acted fraudulently and had relied on doctored documentary evidence as part of his claim.




At a hearing in 2019, Batley failed to attend and his claim was struck out. Prior to this hearing, Batley apologised for the misrepresentations made in his Part 18 Replies and sought permission from the court to withdraw certain heads of loss. He was ordered to repay all interim payments and ordered to pay AXA's costs in full after the Qualified One-Way Costs Shifting provisions were reversed on the basis that Batley was found to be fundamentally dishonest. Following the Order, Batley declared himself bankrupt and transferred the Title of his home to his wife. On 6 April 2021, AXA applied to commit Batley for contempt of court, stating that Batley made, or caused to be made, false Statements of Truth in a claim for damages and other losses. The evidence initially put forward by Batley was that he had previously worked for the 2 Sisters Food Group and with A&P Land Rover. Batley had claimed he had been in continuous work as a machine operator at the 2 Sisters Food Group between 2000 and 2013, however, his criminal record highlighted this was false as he had been in prison between November 2008 and March 2013.

Batley also told how he returned to work in 2015, when he commenced self-employment in setting up a window cleaning business known as Eco Pro Clean, however, he said his window cleaning business failed because of his on-going injuries. Investigations proved this was dishonest and the failure of the business was entirely unrelated to Batley's health. In fact, he had never stopped working and dates on invoices produced by Batley had been altered.

The judge accepted the collision had happened and there had been injuries, but it was a minor collision. There was also no doubt that Batley forged, or caused to be forged, documents to support his case and although Batley admitted contempt of court by making the false claims for damages, the judge concluded that Batley's conduct was so serious that an immediate sentence of seven months imprisonment was handed down.

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**Collins v Gotz [2021]**

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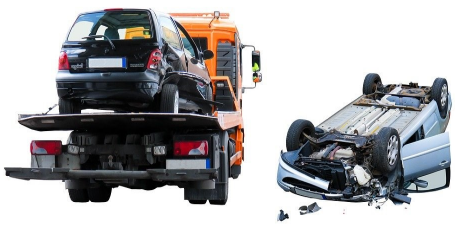
The claimant was a passenger in a car driven by the third defendant. The first defendant turned right from a side road onto a major road with a speed limit of 60mph and into the path of the third defendant. There was a significant collision and the claimant sustained lifechanging injuries.



The first defendant's evidence was that prior to pulling out into the main road, she had looked right, left and right again, and saw no vehicles approaching. She entered the junction and realised that the third defendant was approaching at considerable speed and they collided. It was accepted that visibility to the first defendant's right was better than to the left. The third defendant did not give evidence in person due to ill health, but said he had seen the first defendant's vehicle stationary at the side road and assumed it would wait until he passed before pulling out. He said he could not avoid the collision. The third defendant's evidence was inconsistent as to speed, but he consistently maintained he was not going over the speed limit.

The court looked at the fault of both defendants generally. The greater responsibility lay with the first defendant as she was the driver coming out from a side road and into the path of an oncoming vehicle, which she should have seen on the main road. The third defendant could have taken evasive action, but he would not have had to do anything if the first defendant had not driven out when she did in the first place. The court placed 70% apportionment of blame on the first defendant and 30% on the third defendant.

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**Ho v Adelekun [2021]**

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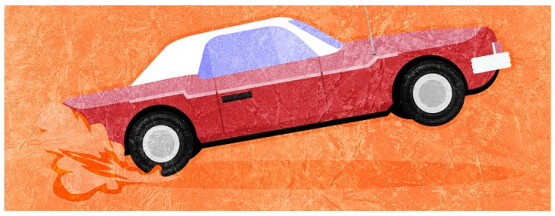
This claim involved a personal injury dispute which settled for £30,000 by way of acceptance of a Part 36 offer, with the defendant liable to pay the claimant's costs.

The defendant then argued the claimant was entitled to no more than fixed recoverable costs, rather than assessed costs on the standard basis. However, the claimant argued she was protected from paying any of the defendant's costs pursuant to the Qualified One-Way Costs Shifting regime, which precluded enforcement of the defendant's costs beyond the level of damages and interest payable to her. Following the decision in *Cartwright v Venduct Engineering Limited [2018]*, which had already made clear that neither a Tomlin Order or a Part 36 settlement could be considered to be a Court Order for damages and interest, and which would trigger a successful defendant's right to enforce an Order for costs against damages paid, the defendant argued that it was possible to setoff the two Costs Orders against each other, with the net effect that the costs payable to the claimant would be wiped out by those payable to the defendant.

The Court of Appeal held itself bound by the earlier decision of *Howe* and accepted the defendant's interpretation of the rules. The claimant appealed on this issue to the Supreme Court. The Supreme Court unanimously allowed the claimant's appeal. It held that Costs Orders made in a claimant's favour should not be taken into account when determining the limit up to which a defendant may enforce an Order for costs in its favour. Accordingly, it is not possible to offset a defendant's costs against a claimant's costs. Strictly speaking, setoff remains available, but only up to the amount of damages and interest in a claimant's favour.

**Gul v McDonagh [2021]**

The appellant, at the age of 13, suffered very serious injuries when he was struck by a car while crossing the road. The first respondent had been driving at a speed of approximately 40mph on a residential road subject to a 20mph speed limit. Shortly before the incident, the first respondent had been approached by the police in relation to a suspected criminal enterprise and had driven off at speed, before hitting the appellant. Despite the collision and sustaining considerable damage to his car windscreen, the first respondent drove away.



The first respondent was uninsured, and the MIB were joined as the second defendant and had admitted primary liability. The issue before the trial judge was limited to the question of contributory negligence, and he found that a reasonable 13 year old making a careful assessment would have realised that the car was being driven much faster than usual and would have waited for it to pass. Even if the appellant had set off across the road and noticed the car approaching at speed, he could have got across the road in time. On that basis, the judge found that the appellant had been contributory negligent and that it was just and equitable to reduce his damages by 10%.

The appeal judge upheld the trial judge's finding. 10% was an unusually low reduction, but it took account of the egregious conduct of the car driver and was not outside the range of reasonable determinations. The Law Reform (Contributory Negligence) Act 1945 conferred an open-ended discretion and there was nothing in the Act or in any authority which suggested that a 10% reduction was not permissible. The appeal was dismissed.

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**Parker v McClaren [2021]**

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This claim involved a claimant who ran out from a pavement crowded with pedestrians in front of a taxi on a Saturday night. The defendant collided with the claimant, which resulted in the claimant suffering significant injuries. The speed limit was 30mph. The claimant alleged the defendant was travelling too fast and that he failed to keep an adequate lookout. The defendant argued he was an experienced taxi driver and that because of the road layout, he would not have been driving at more than 15mph. The defendant also did not remember seeing the claimant on the pavement before she entered the road, only seeing her when she was in the road, in front of his car and his headlights lit up her face. He then braked immediately.


However, based upon accident reconstruction evidence, the judge found, on the balance of probabilities, that the defendant was travelling at 20mph at the point of impact and slightly more before impact.

The judge held that the defendant was travelling too fast in the circumstances and should have been travelling at only 15mph, at which speed the accident might have been avoided. However, the claimant's contributory negligence was assessed at 50% and her damages were reduced to this effect on the basis that she created the dangerous situation by stepping out into the carriageway without looking and there were no other cars travelling in either direction, so she could have easily waited for the vehicle to pass before crossing.

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**Giovanni Scumaci v Barry Martin [2021]**

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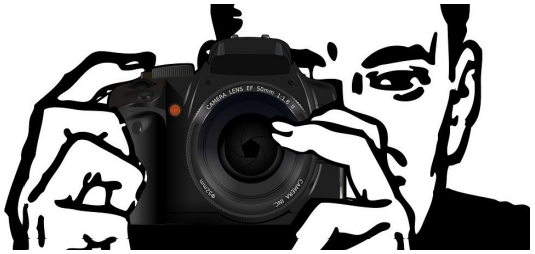
This case involved a claimant/pedestrian who alleged that whilst bending down to inspect something on the front of his hire car, the defendant's vehicle was driving too close and caught the claimant's left foot, causing the rear wheel to drive over the claimant's foot/ankle resulting in serious debilitating injuries. Initially, the claimant told a police officer he had stumbled and it was a freak accident. The defendant said he saw the claimant bending down in front of his vehicle, but that he gave enough room to pass safely and he did not drive too close. Liability was denied by the defendant's insurer and was tried as a preliminary issue at first instance.

At the trial, the claimant denied he had told the police officer he had stumbled and/or that he had apologised to the defendant, and considered this statement must have come from the defendant, however, this was not accepted by the judge owing to inconsistencies in the claimant's evidence and the oral account from the police officer was accepted. Although the defendant's evidence was also unreliable as he could not provide an accurate estimate as to the distance he left between his car and the claimant, the judge relied on the contemporaneous account given by the claimant and also on a photograph taken by the police officer at the scene showing the claimant on the floor and the position of the defendant's vehicle immediately post-accident. The photograph depicted that the defendant had left enough space to pass safely. The case was subsequently dismissed at first instance and it was held that the defendant's driving did not fall below the standard of a reasonable driver and was, therefore, not negligent.

The claimant appealed on the basis that the judge erred in dismissing the defendant's oral evidence at trial and instead used the sole photograph of the accident aftermath to reconstruct the accident. The defendant's legal representative argued that the defendant was a lay individual who had been wholly inconsistent in his evidence concerning distances and the judge, at first instance, was right to dismiss both his and the claimant's evidence and to put sole focus on the photograph which was the one piece of objective evidence.

It was held that the judge, at first instance, was correct in using the photograph to make a judgement call on the positioning of the defendant's car and the relative position of the claimant to establish whether the defendant's car was in a safe range so as to not have been driving so close to have been negligent. The appeal was dismissed.



**Brown v Fisk [2021]**

This claim involved a claimant who was injured in a collision with the driver's vehicle while members of a bonfire society were collecting jumble in a gated/fenced off yard in a country lane. The driver's insurer had refused to indemnify the driver and avoided their policy, but remained potentially liable as Article 75 insurer if the yard was a 'public place' as defined by RTA 1988, s 143(1)(a). The claimant brought an action against the driver, the insurer, the MIB and the government. The insurer considered that it was not a public place and applied for Summary Judgment of the case against it, arguing that there was no prospect of the claimant succeeding on the argument that the yard was a public place. If it was a public place, then the insurer was liable to pay under s.151 of the Road Traffic Act.

The judge held that his strong impression was that the yard, which belonged to a private members club, was very much private parking and/or a private meeting area, and his conclusion was that there was a distinction between a place where an owner allowed only visitors coming for the owner's private purposes and a place where the owner permitted access to the public generally. In the case of the bonfire society, access to the yard was permitted only for the purpose of its own operations, and for this reason it was not considered a 'public place'.

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**Parry v Johnson [2021]**

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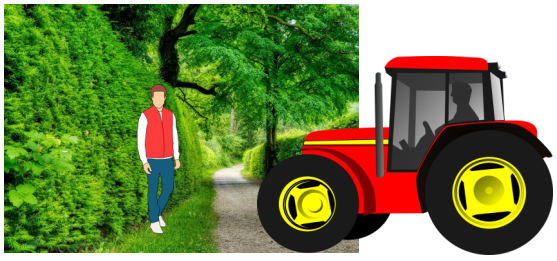
In August 2019, the first defendant was driving a tractor down a narrow lane. The claimant and his wife had been walking down the same lane and at no stage had the first defendant seen the claimant. On noting the approaching tractor, the claimant tried to get away from the carriageway and towards a hedge at the side of the lane. The tractor passed the claimant, but a piece of machinery it was carrying struck him and he sustained a brain injury. The first defendant maintained that he had kept a proper look out for pedestrians, he had lights on his tractor (it was twilight), he was travelling at a reasonable speed and the reason he had not seen the claimant prior to the accident was that he was hidden in a hedge.



The first defendant also alleged contributory negligence. The claimant said he had been left with significant organic and cognitive sequelae from the head injury, and was suffering from other symptoms. It was conceded that the case was at a relatively early stage in terms of the quantification of damages, and in October 2021 the court refused to grant the claimant an interim payment of £250,000. The court was not satisfied, on the balance of probabilities, that the claimant would succeed, and also indicated that the case was suitable for a split trial. The parties were unable to reach an agreement on that, so the matter came back before the court.

The first defendant submitted that a split trial was not appropriate as it was a case in which settlement was possible and a split trial would delay any potential settlement. The court disagreed. The problem with the first defendant's submission was it was assumed that he was prepared to make an acceptable offer on the issue of liability and proceed with quantum. However, the first defendant's stance in relation to the interim payment Application was based on a belief that the first defendant was going to win on liability. The court held that it was a straightforward issue and that determining liability first, as a preliminary issue, would avoid delay. The claimant had suffered serious injury and if the matter proceeded to a liability trial, it could do so in a matter of months. If the first defendant succeeded and liability was not established, he would make a huge saving on costs. Moreover, the claimant's brain injury was still in the early stages and the timeframe put forward in relation to a roundtable meeting was optimistic. There case required a speedy determination of liability and a split trial was ordered.

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:

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**Dolmans would like to extend to our readers of Headlight best wishes for 2022**