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

Differing Duties of Care Owed to Users of Local Authority Land

G H v Monmouthshire County Council

The duties of care owed by Local Authorities to users of their land will vary, dependent upon the type of land and its use. For example, it is generally accepted that the duty of care owed by a Local Authority to a pedestrian walking along an adopted highway is greater than that owed to a pedestrian walking through a Local Authority's car park. The Highways Act 1980 sets the standard for adopted highways, whereas the Occupiers' Liability Act 1957 applies to car parks. Claimants in such cases usually also allege that a Defendant Local Authority has acted negligently and that nuisance sometimes applies.

These arguments and more were tested on appeal in the recent case of *G H v Monmouthshire County Council* in which Dolmans represented the Defendant Local Authority. The Claimant alleged that she had tripped as a result of a pothole/degraded tarmacadam in a car park that was owned and controlled by the Defendant Local Authority, thereby sustaining personal injuries. It was not disputed that the Defendant Local Authority was the occupier of the car park or that the Claimant was a lawful visitor for the purposes of the Occupiers' Liability Act 1957.

Defence

The car park where the Claimant's alleged accident occurred was subject to scheduled inspections on foot twice annually. No actionable defect was noted at the location of the Claimant's alleged accident during the last scheduled inspection prior to the date of the Claimant's alleged accident.

There was also a reactive system of inspection and maintenance in place. The Defendant Local Authority had no record of any complaints in relation to the alleged defect during the 12 month period prior to the date of the Claimant's alleged accident. The Defendant Local Authority also had no record of any other accident occurring at the location of the Claimant's alleged accident during the 12 month period prior to the date of the same.

The Defendant Local Authority maintained that the alleged accident had been caused and/or contributed to by the Claimant's own negligence.

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Decision at First Instance

The Deputy District Judge at first instance found in favour of the Claimant, but found 30% contributory negligence on the Claimant's part.

Permission to appeal was sought on behalf of the Defendant Local Authority at the said trial on four grounds as follows:

(1) The Deputy District Judge was wrong in fact to find that the Defendant Local Authority's witness had given evidence that the degraded tarmacadam which allegedly caused the Claimant's accident would be assessed as a 'Category 1 Urgent Repair' if located on an adopted footway.

(2) The Deputy District Judge had erred in law in applying the standard of care required of an adopted footway to a car park that was neither adopted as highway maintainable at public expense nor a footway.

(3) The Deputy District Judge had erred in law in finding that the degraded tarmac, as alleged, constituted a breach of the common duty of care under the Occupiers' Liability Act 1957 by the Defendant Local Authority.

(4) The Deputy District Judge had erred in law, by finding in the absence of any evidence, that the presence of warning signs in the area would have had any causative effect on the Claimant's alleged accident.

Permission to appeal was refused at first instance, necessitating a subsequent Application for permission to appeal to a Circuit Judge, which was successful; and appeal thereafter.

Grounds of Appeal

The arguments put forward on behalf of the Defendant Local Authority for each of the above four grounds will be considered in some detail, as follows:

Ground One: The Deputy District Judge was wrong in fact to find that the Defendant Local Authority's witness had given evidence that the degraded tarmacadam which allegedly caused the Claimant's accident would be assessed as a 'Category 1 Urgent Repair' if located on an adopted footway.

The Defendant Local Authority's Car Park Inspector explained at various points in his evidence that the alleged defect had no dangerous sharp edges so as to present a tripping hazard to pedestrians and was in contrast to the record referred to by the Deputy District Judge in her Judgment at first instance.

It was argued that this misapprehension of the Inspector's evidence influenced the Deputy District Judge in applying an inappropriately high standard when assessing the question of whether the defect in question constituted a breach of duty by the Defendant Local Authority.

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Ground Two: The Deputy District Judge had erred in law in applying the standard of care required of an adopted footway to a car park that was neither adopted as highway maintainable at public expense nor a footway.

It was argued that even if the Inspector's oral evidence had matched the Deputy District Judge's record of the same it would have been an error of law to apply the standard of care required in an adopted footway to the carriageway of the car park. This was an area of tarmac used by both pedestrians and motor vehicles and was not restricted in its width as a typical footway would be.

It was reasonable to expect that the condition of a tarmacadam surface in a car park will be different in nature to that of a normal footway.

It was also argued on behalf of the Defendant Local Authority that the duty to maintain highways maintainable at public expense is stricter than the duty to maintain unadopted highways and other public areas, such as car parks. To require the Defendant to maintain the surface of a public car park, neither a highway nor a highway maintainable at public expense, to the same standard as highways maintainable at public expense renders the statutory distinctions set out at sections 36 to 40 of the Highways Act 1980 meaningless. It was argued that the correct duty to apply is the common duty of care as prescribed by the Occupiers' Liability Act 1957. The common duty of care is less stringent than the statutory duty to maintain the highway contained within section 41 of the Highways Act 1980.

It was accepted that the area in which the Claimant's alleged accident occurred was neither a footway nor a highway maintainable at public expense. The car park in question did not have designated routes or indicated pathways for pedestrians. Indeed, pedestrians walking across the car park had ample room to walk around or otherwise avoid any minor defect in the tarmacadam surface.

The decision in *Cenet v Wirral MBC [2008] EWHC 1407 (QB)* was cited in which Swift J found that the Court at first instance in that case had erred in applying the standards of a footway to the area of carriageway in which the Claimant's alleged accident had occurred in that particular matter. The Court below had not heard evidence of an *"abnormal amount of pedestrian traffic"* on the carriageway in question and was held by Swift J to have placed undue emphasis on pedestrian use of the carriageway. The defect in question at 35mm was greater than the Defendant Highway Authority's intervention level for the footway at 20mm in that matter, but not the carriageway at 40mm. It was located in an area without a footway and at a point where it was found pedestrians were likely to cross the road. After finding that the defect was low risk, Swift J commented that "*the cost of remedying all such defects in the carriageway would be wholly disproportionate*."

The Inspector in the current matter gave clear evidence that the alleged defect did not even meet the intervention criteria of a similar pothole if found in an adopted carriageway.

REPORT ON

Ground Three: The Deputy District Judge had erred in law in finding that the degraded tarmac, as alleged, constituted a breach of the common duty of care under the Occupiers' Liability Act 1957 by the Defendant Local Authority.

At first instance, the Deputy District Judge was referred to the decision in *Debell v Dean and Chapter of Rochester Cathedral [2016] EWCA Civ* 1094, and specifically to paragraph 15 of the Judgment which states:

"The authorities suggest that ultimately it is the test of reasonable foreseeability but recognising the particular meaning which that concept has in this context. The risk is reasonably foreseeable only where there is a real source of danger which a reasonable person would recognise as obliging the occupier to take remedial action. A visitor is reasonably safe notwithstanding that there may be visible minor defects on the road which carry a foreseeable risk of causing an accident and injury."

The Deputy District Judge at first instance in the current matter stated that both the Claimant's and Defendant's photographs "*show an unremarkable scene of the type you would see in any number of car parks up and down the country. In other words, a car park with a number of defects on the carriageway*." Following this, it was argued that the Deputy District Judge had misdirected herself on the appropriate way to apply the foreseeability test, contrary to the decision of the Court of Appeal in *Debell*, the Deputy District Judge having stated as follows:

"The duty, as I have already stated, under the Occupiers' Liability Act 1957 is to take such care as is reasonable to ensure a lawful visitor is reasonably safe. Here, the Defendant opens its premises, i.e. the car park, to the public inviting them to use the car park and necessarily to walk to and from their cars. It is foreseeable that defects could result in an accident."

It was argued on behalf of the Defendant Local Authority that this was extremely similar to the situation on appeal in *Debell*, in which Elias LJ explained the Court's reasoning for overturning the decision of the Trial Judge as follows:

"I do accept the submission that the Judge did not apply the foreseeability test in the appropriate way and that this amounts to a misdirection. There is no recognition in the Judgment that not all foreseeable risks give rise to the duty to take remedial action. The Judge had to apply the concept of reasonable foreseeability taking a practical and realistic approach to the kind of dangers which the Cathedral were obliged to remedy. Had he done that, I do not think that he could have reached the decision he did. The Judge's recital of the foreseeability mantra does not take the Claimant far enough."

It was argued on behalf of the Defendant Local Authority in the current matter that the Deputy District Judge did not apply the concept of reasonable foreseeability with a practical and realistic approach to the kind of dangers the Defendant Local Authority was obliged to remedy. As in *Debell*, it was argued, therefore, that this amounted to a misdirection and an error of law.

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The Deputy District Judge accepted the condition of the car park was unremarkable. The Defendant Local Authority argued the alleged defect was a depression caused by the degradation of tarmacadam of the level to be expected in an area used by motor vehicles. There were no dangerous sharp edges against which pedestrians could trip. The Claimant's alleged accident was caused by her shoe becoming stuck in the depression, an unlikely and quite unfortunate accident requiring a depression that sufficiently matches the dimensions of a particular pedestrian's shoe and not the kind of danger a reasonable person would recognise as obliging the Defendant Local Authority to guard against.

Finally, it was argued that the nature of the Claimant's alleged accident in the current matter was similar to that in the often cited highways case of *Mills v Barnsley MBC [1992] PIQR 291*; both accidents having been caused by shoes becoming stuck in minor defects. It was argued that the reasoning of Steyn LJ in that case was applicable to the current matter as follows:

"Finally, I add that, in drawing the inference of dangerousness in this case, the Judge impliedly set a standard which, if generally used in the thousands of tripping cases which come before the courts every year, would impose an unreasonable burden upon highway authorities in respect of minor depressions and holes in streets which in a less than perfect world the public must simply regard as a fact of life. It is important that our tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed. This branch of the law of tort ought to represent a sensible balance or compromise between private and public interest. The Judge's ruling in this case, if allowed to stand, would tilt the balance too far in favour of the woman who was unfortunately injured in this case. The risk was of a low order and the cost of remedying such minor defects all over the country would be enormous."

Ground Four: The Deputy District Judge had erred in law, by finding in the absence of any evidence, that the presence of warning signs in the area would have had any causative effect on the Claimant's alleged accident.

The Deputy District Judge at first instance held that:

"It would have been a cheap and simple remedy for the Defendant Local Authority to erect a sign or signs in the car park warning users of the uneven surface and if they had done so they would have had a valid defence to the claim."

It was argued on behalf of the Defendant Local Authority that if the defect in question did not constitute a breach of duty then it follows that there is no need for a remedy or valid defence to the same. If the defect in question is not dangerous then there cannot be a duty to warn about the presence of the same.

In any event, it was argued that there was no basis upon which such a finding could safely be made. The Court at first instance heard no evidence from the Claimant on the issue of warnings. In fact, the Claimant accepted that she was already aware that there were likely to be potholes in the car park.

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The Defendant Local Authority argued that it did not breach its duty of care to the Claimant by not erecting signs warning of any alleged uneven tarmacadam in the car park, as the same, if present, would have been obvious to any visitor. Any person who was able to see and comprehend a sign warning of uneven tarmacadam would have been able to see and comprehend the uneven tarmacadam itself.

Reference was made to the decision in *Staples v West Dorset District Council [1995] P.I.Q.R. P439* in which the Court of Appeal considered whether a Defendant occupier had breached its duty of care by failing to erect signs warning that a harbour wall would become slippery when wet and covered in algae. Kennedy LJ, giving the Judgment of the Court, stated as follows:

> *"It is, in my judgment, of significance that the duty is a duty owed by the occupier to the individual visitor, so that it can only be said that there was a duty to warn if without a warning the visitor in question would have been unaware of the nature and extent of the risk. As the statute makes clear, there may be circumstances in which even an explicit warning will not absolve the occupier from liability; but if the danger is obvious, the visitor is able to appreciate it, he is not under any kind of pressure and he is free to do what is necessary for his own safety, then no warning is required."*

It was argued that the Respondent in the current matter was able to appreciate the low risk of walking over any alleged patches of uneven tarmacadam and was free to avoid the same.

Appeal Allowed – Claim Dismissed

After considering the above arguments, the Circuit Judge hearing the appeal granted the same and dismissed the Claimant's claim. Indeed, the Circuit Judge held that he did not need to go back to lower Court and was content to dismiss the Claimant's claim at the appeal hearing.

The appeal succeeded on Grounds One, Two and Three above; the Circuit Judge finding that the Deputy District Judge at first instance had made an error of fact in considering the Defendant Local Authority's evidence, an error in law by applying adopted highways standards to the car park and failed to make a proper assessment on dangerousness.

The Circuit Judge on appeal did not, therefore, need to deal with Ground Four, although he did state that the finding on signage was not relevant.

REPORT ON

Comment

The decision by the Circuit Judge on appeal in the above matter emphasises that the duty of care owed by Local Authorities differs between adopted highways, where the Highways Act 1980 applies, and other land, where for example the Occupiers' Liability Act 1957 may apply, as in this particular matter.

The Defence and witness evidence served on behalf of the Defendant Local Authority in the said matter supported this stance, which was emphasised before the Court at first instance and on appeal. However, whereas the District Judge at first instance had misdirected and erred in law following consideration of such evidence, the Circuit Judge on appeal rectified this by allowing the Defendant Local Authority's appeal and dismissing the Claimant's claim, with resultant savings to the Defendant Local Authority in damages and costs.

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REPORT ON

The Ministry of Justice Launches the Call for Evidence in relation to the Second Review of the Personal Injury Discount Rate - Responses due by 9 April 2024

"The underlying principle of personal injury claims is that when damages are paid they should, as far as possible, put the claimant in the same position as they would have been in if the accident had not happened – no more and no less …"

Lord Christopher Bellamy KC, Parliamentary Under Secretary of State for Justice, foreword to the Ministry of Justice's Call for Evidence

On 16 January 2024, the Ministry of Justice launched a call for evidence in relation to the long awaited second review of the Personal Injury Discount Rate, which now needs to be commenced by 15 July 2024.

Responses to this call for evidence must be submitted to the Ministry of Justice by 9 April 2024 – within a 12 week turnaround period. Following this, a summary of responses from the various interested parties (see below) will be published before the Lord Chancellor decides upon any action or amendment in relation to the Personal Injury Discount Rate (PIDR). The call for evidence is encapsulated in a 43 page document produced by the Ministry of Justice which provides background information in regard to a range of issues and then questions posed to interested parties. Detailed consideration of this document is beyond the scope of a highlighting article such as this and, in any event, any such article is, realistically, no substitute for considering the document itself, which is of considerable interest. The issues to be grappled with, by all, are far from easy or straightforward. This is an unenviable task for all concerned, whichever side of the perennial claimant/defendant divide within the market they reside.

Practitioners in the field of personal injury claims are constantly alive to the relevant PIDR since it is one of the most important, if not the most important, touchstones by which personal injury multipliers are arrived upon by reference to the Ogden Tables. Thus, the relevant PIDR at any given moment is of great importance to all parties in the personal injury market, but, obviously, its greatest significance is in the context of catastrophic claims' litigation and, from the defendant perspective, the setting of appropriate reserves by both insurers and reinsurers regarding various heads of loss intrinsic to such claims. The PIDR is now periodically reviewed pursuant to the mechanism set out in Part 2 of the Civil Liability Act 2018.

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REPORT ON

Historically, readers will be aware that the PIDR remained static at +2.5% for the period 2001 to 2017, when it was changed to -0.75%, before being increased to -0.25% following the first review under the new 2018 Act mechanism, in the period March to July 2019, which followed a call for evidence from the Ministry of Justice in the period December 2018 to January 2019. In this second review pursuant to the Act, for the first time, an independent expert panel will provide advice to the Lord Chancellor ahead of any new rate(s) being set. As to the significance of the term "rate(s)" (plural), see later comments. The independent expert panel will be made up of experts with experience in actuarial matters, the management of investments, economists and in consumer matters as related to investments.

As above, the review must commence by 15 July 2024 and, judging by previous performance, the review period generally lasts circa 3 to 4 months. It remains to be seen if the involvement of an independent panel of experts reduces or extends that period. However, in essence, by year end, a review of the PIDR rate should likely have been undertaken and a new rate (or rates) potentially implemented. Thus, for those involved in the personal injury market, this call for evidence represents the "starting pistol" to a period of explicit uncertainty and possible change, necessitating a possible review of reserves in some detail by year end.

Many readers will be aware of the impact of changes to the PIDR and, therefore, the importance of the outcome of this process. However, even in that context it is perhaps worth reiterating the text of paragraphs 11 and 12 from the call for evidence document:

"The PIDR is intended to reflect the real rate of return that a recipient of relevant damages could reasonably expect to receive if they invested their award. It reflects the expected nominal investment returns, adjusted for the expected future rate of inflation applied to claimants' damages and reflects the effects of expenses and taxation."

"A lower PIDR means a lower real rate of return is expected on the claimants' investments and therefore, all other things being equal, a higher initial lump sum is required to meet the claimants' needs – and vice versa."

In a wider context, changes to the PIDR will impact offers (CPR Part 36 or otherwise) and settlement strategies in general, together with Schedules and Counter-Schedules of Loss, at trial and before. The ripples from this review process will, therefore, spread wide in the coming months. In the longer term, changes to damages payments and reserves inevitably impact the setting of policy premiums for the market.

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The call for evidence takes the form of a range of questions on various topics which can be summarised as follows:

- The size and length of personal injury awards.
- The differing heads of loss and the inflationary increases applied to the same.
- Shape of damages.
- Mortality experience.
- Claimant investment experiences, in particular:
  - Typical investment strategies employed by claimants and factors influencing variations from those strategies for different claimant groups.
  - How investment strategies change or are expected to change over 'claimant time horizons' and how they manage risk inherent in investment strategies over time.
- Expenses and tax payable by claimants on their investments.
- Changes in general since the 2018 call for evidence.
- Impact and practicalities of adopting a dual/multiple PIDR driven by duration of award or by heads of loss.
- Context around which lump sum payments are awarded, including the factors which influence the award of lump sum payments rather than Periodical Payments Orders.

A full impact assessment is (explicitly) to be conducted later, once the review itself has been concluded, and to support the Lord Chancellor's decision re the PIDR changes.

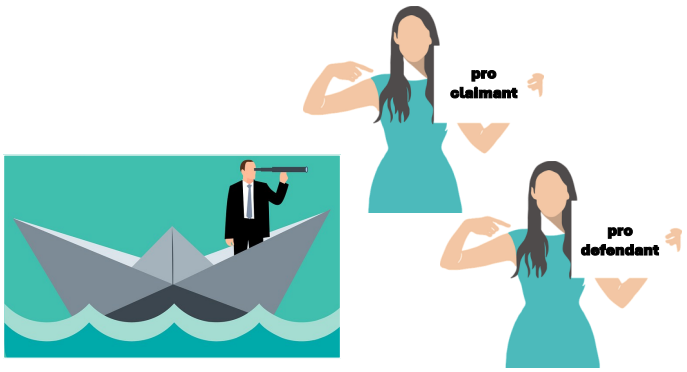
Stakeholders explicitly canvassed in relation to the PIDR call for evidence are predictable and include:

- Major insurers (both motor and in other lines of business).
- The Association of British Insurers.
- The Association of Personal Injury Lawyers (APIL).
- The Forum of Insurance Lawyers (FOIL).
- The Forum of Complex Injury Solicitors.
- The Bar Council.
- Law Firms (on both sides of the claimant/defendant divide) involved in personal injury litigation.

As above, it is in the context of complex and life changing injury that the impact of this debate and fluctuations in the PIDR becomes most impactful. Changes to the discount rate, and, therefore, multipliers to be applied in each case, particularly regarding lifetime or near lifetime losses, can have a massive impact on damages returns (on the claimant side of the debate) and/or reserves (on the defendant side of the debate). Moreover, issues such as investor behaviour in the context of this universe will always attain a degree of controversy.

Historically, the view from the claimant side has been that seriously injured claimants are naturally cautious in their investment strategy; they have to be since their damages represent their single and precious source of income for life. However, on the defendant side, concern has been expressed that investment advice provided to claimants, as part of the sophisticated market which has grown up to support seriously injured claimants in the personal injury sphere, is now very mature and proactive, undermining the view that personal injury damages are simply "put in the bank" and nothing more sophisticated or lucrative is done with them.

It is the Lord Chancellor's unenviable task to seek to sail a straight course between these opposing views. Thus, the call for evidence, from relevant stakeholders is a vital part of that process.



Inflation is an obvious aspect of the consultation process which is illustrative of this multifactorial situation. The 2018 review of the PIDR assumed that inflation would be CPI +1% on average. It is clearly difficult, in the context of the present cost of living crisis (so called), to see that view as persisting. One might suggest that inflation has cooled or is certainly showing signs of cooling recently, but the sense that inflation in the G20 could be regarded as completely stable for long historical periods has been exploded by recent world events and this is, obviously, a factor to be considered. The other side of the same coin, so to speak, is the need, within the call for evidence process, to consider claimant investment behaviours. There are explicit questions within the document around investment strategies in the context of higher rates of return due to higher inflation generally.

Another area of particular interest is the series of questions around dual or multiple PIDRs. This approach was at least considered as part of the first review of the PIDR, in Government actuarial advice, but not actually taken up by the then Lord Chancellor. At that stage there was a commitment to further consider the issue of dual PIDRs as part of the next review process. Thus, this aspect is now under scrutiny once again and it will be interesting to see if dual PIDRs (like the so called 'Ontario model' – considered in 2019) will be further considered in 2024.

Finally, in terms of this article, the call for evidence also considers the ongoing debate around periodical payments and their continued perceived underrepresentation in personal injury settlements. Efforts, once again, to understand this underrepresentation are suitably engaged.

Comment

The main purpose of this article is to highlight to readers that this process is formally underway: the 'starting pistol' has now been fired. There has been a great deal of expectation and informal speculation as to when the process of the inevitable review of the PIDR would commence. It has now commenced and the review itself will need to begin by 15 July 2024.

Those defendants and insurers with significant interest in the catastrophic claims market will have been awaiting the firing of this starting pistol for some time and will now move long planned response mechanisms into action in terms of engaging with the consultation process. In a similar manner, on the claimant side, bodies like APIL and PIBA will engage a similar process. The world in 2019 suddenly seems a very long way away from the world we all inhabit now. The impact of a pandemic, the realities of Brexit, the first war in Europe in decades and now significant instability in the Middle East all conspire to create a climate of uncertainty in the context of this important touchstone regarding claims assessment in personal injury litigation.

Against that background it will be very interesting to see how this consultation process develops in the coming months. Dolmans will seek to ensure that our readers are kept suitably informed as matters move forward.

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FOCUS ON

Psychiatric Injury - Secondary Victims

Paul v Royal Wolverhampton NHS Trust; Polmear v Royal Cornwall Hospitals NHS Trust; Purchase v Ahmed [2024] UKSC 1

In these three appeals heard and decided together, the Supreme Court held that a person who suffered psychiatric injury from witnessing the death of a close relative, or its immediate aftermath, from a medical condition which a doctor or health authority had negligently failed to diagnose and treat was not entitled to claim damages as a secondary victim. In reaching its conclusions the Court clarified the law in relation to secondary victim claims.

In *Paul*, the Claimants were two daughters who witnessed their father's sudden death from a heart attack whilst out shopping. They alleged the Defendant had negligently failed to diagnose and treat their father's significant coronary artery disease some 14 months earlier.

In *Polmear*, the Claimants were parents who witnessed the death of their 6 year old child from the distressing effects of a lung condition which they alleged the Defendant had negligently failed to diagnose and treat 6 months earlier.

In *Purchase*, the Claimant's daughter died from severe pneumonia which it was alleged the Defendant had negligently failed to diagnose and treat 3 days previously. The Claimant found her daughter moments after her death and heard a voicemail message which recorded her daughter's dying breaths.

All three cases were the subject of strike out Applications on the basis that the claims could not, as a matter of law, succeed. Accordingly, for the purposes of determining this, it was necessary to assume that the facts alleged would be proved to be true. Appeals in the three cases were heard and decided together by the Court of Appeal which held the claims could not succeed because the Court was bound by an earlier Court of Appeal decision in *Taylor v A Novo (UK) Ltd [2013]*. However, the Court of Appeal expressed reservations about whether that earlier decision was correct and granted permission to appeal to the Supreme Court.

FOCUS ON

The Supreme Court noted that the critical question on which the validity of the claims depended was whether a doctor, in providing medical services to a patient, not only owes a duty to the patient to take care to protect the patient from harm but also owes a duty to close members of the patient's family to take care to protect them against the risk of injury that they might suffer from the experience of witnessing the death or injury of their relative from an illness caused by the doctor's negligence.

There were two ways of approaching this question. One, by considering the basic legal principles which determine the scope of the duty of care owed by a doctor and the persons to whom it is owed. Two, to examine the cases in which the courts have previously decided whether damages could be recovered by claimants who suffered injury in connection with the death or injury of another person and decide whether the rules developed in those cases either apply already or can be extended to apply to claims of the present kind by way of permissible incremental development.

The Claimants focussed on the second approach. The Supreme Court considered the issues could not be decided on that basis alone and decided to start by examining the relevant case law and then test their provisional conclusions by reference to the general principles relating to a doctor's duty of care.

In considering the relevant case law, the Supreme Court clarified the same, and this clarification has wider relevance to claims outside of the clinical negligence sphere.

The Court reviewed the previous authorities, including *Alcock v Chief Constable of South Yorkshire Police [1992]*, which gave rise to the distinction between 'primary' and 'secondary' victims, and the requirements which must be satisfied for a claim by a secondary victim to succeed. These were summarised in *Frost v Chief Constable of South Yorkshire [1999]* as being (i) that the claimant had a close tie of love and affection with the person killed, injured or imperilled; (ii) that he was close to the incident in time and space (or put another way present at the accident or its immediate aftermath); (iii) that he directly perceived the incident (or its immediate aftermath) rather than, for example, hearing about it from a third person.

It was common ground in these appeals that all of the Claimants were 'secondary victims'.

The previous authorities involved injuries to the primary victim sustained as a result of an 'accident' – i.e. an unexpected and unintended event which caused injury (or a risk of injury) by violent external means to one or more primary victims. In these appeals the event (or its aftermath) witnessed by the secondary victim was not an accident; it was the suffering or death of their relative from illness which the Court referred to as a 'medical crisis'. The question to be determined was whether witnessing a negligently caused medical crisis (or its aftermath) could, in principle, found a claim for damages by a secondary victim or whether such a claim can lie only where the triggering event is an accident.

The Court noted that some cases after *Alcock* had focused on whether the psychiatric illness was caused by a '*sudden shock'*. The Court considered this to be based on an outdated theory of the aetiology of psychiatric illness and the requirements established in *Alcock* (and summarised in *Frost*) do not include a requirement that a claimant's psychiatric injury must have been caused by a '*sudden shock to the nervous system'*.

Further, whilst it was necessary for a claimant to show that it was reasonably foreseeable that a defendant's negligence might cause them injury, there was no justification for superimposing an additional separate requirement that the event witnessed by a claimant was '*horrifying*' as some cases post *Alcock* had indicated.

The Court considered that the law had taken an unfortunate wrong turn by engrafting onto the requirements established by *Alcock* additional requirements for a claimant to prove that injury was caused by the mechanism of a '*sudden shock to the nervous system'* and was a sufficiently '*horrifying event*', which these appeals had enabled the Court to correct.

The Supreme Court agreed that these claims could not succeed unless *Novo* was wrongly decided. The Court considered that the Courts below had misinterpreted that case. The claim in that case could not succeed because the Claimant was not present at the scene of the accident or its immediate aftermath and the event which she witnessed (her mother's death from injuries sustained in an accident at work 3 weeks earlier) was not an accident. The Court concluded that *Novo* was correctly decided.

The Court considered that the occurrence of an accident (as described above) is integral both to the reasons for recognising the category of claims by secondary victims arising from an accident and in defining the limits of this category. An analogy could not reasonably be drawn between previous case law authorities involving an accident and the situation in these appeals where the Claimants did not witness an accident but suffered illness as a result of witnessing a person with whom they had a close tie of love and affection suffering a medical crisis. To extend the scope of allowable claims by secondary victims to such situations would give rise to unacceptable and unfair differences in treatment between different categories of claimant.

Having reached the conclusion that a claimant cannot recover damages for personal injury as a secondary victim unless a claimant witnessed an accident (or its immediate aftermath), the Court concluded that the case of *North Glamorgan NHS Trust v Walters [2002]* was wrongly decided on its facts and should not be followed.

Testing its conclusions by examining the general principles governing the existence and scope of duties of care owed by medical practitioners, the Court noted that there was nothing in the previous authorities to suggest that the general principles of the law of negligence that determine when the relationship between the parties is such as to give rise to a duty of care can be ignored or bypassed. The question was whether a doctor, who owed a duty of care to a patient, also owed a duty to members of the patient's close family to take care to protect them against the risk of illness from the experience of witnessing the medical crisis of their relative arising from the doctor's negligence. The Court found that the necessary proximity in the relationship between the parties in those circumstances to give rise to a duty of care did not exist.

In summarising its conclusions, the Court noted that the general policy of the law is opposed to granting remedies to third parties for the effects of injuries to other people. A line must be drawn somewhere. There was a rough and ready logic in limiting recovery by secondary victims to individuals who were present at the scene, witnessed the accident and have a close tie of love and affection with the primary victim. The category of cases presented by these appeals was not analogous. This conclusion was reinforced by the view that there did not exist the proximity in the relationship between the parties necessary to give rise to a duty of care.

Comment

The law with regard to secondary victims has been in a state of flux for several years and, in some senses, this tranche of appeals, moving to the Supreme Court over that timescale, represents both the state of flux and the range of factual bases giving rise to the contradictions inherent in the law as it stood. The law is now clarified – particularly in the context of medical negligence secondary victims. In short, it will be extremely difficult to bring such claims in future. In contrast, in the sphere of personal injury claims (as distinct from medical negligence claims), one might argue that the removal of the "horrifying" criterion imposed (erroneously, as the Supreme Court has now found) following *Alcock* widens (slightly) the potential cohort of successful claimants in a personal injury situation.

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CASE UPDATES

Fraud - Conduct - Disclosure - Statements of Case - Relief from Sanctions

AXA Insurance UK plc v Kryeziu & Others
EWHC 3233 (KB)

The Appellant Insurer (AXA) paid out on insurance claims made by the Respondents for a road traffic accident. It subsequently decided there had been no genuine accident and the claims were fraudulent. It brought proceedings in deceit and conspiracy against the Respondents. When it pleaded its case the Appellant deliberately 'held back' part of the allegations being made (after internet searches revealed the drivers of each of the vehicles involved in the collision were 'Facebook Friends') as it did not wish to 'show its hand' on that issue at that stage.

After exchange of Witness Statements, the Appellant applied for permission to amend its case. The application to amend was dismissed and an appeal against that refusal was lodged.

On appeal, the Court was required to determine:

(1) What is required to plead an allegation of fraud?

(2) Was the Appellant entitled to 'hold back' details of its case until after the Respondents had committed themselves to an account in their Witness Statements?

(3) Did the settlement agreement restrict the findings that the Appellant could seek in its action against the Respondent?

What is required to plead an allegation of fraud?

The Appellant submitted that it was only necessary to plead the 'ingredients' of the tort and it was not necessary to plead the facts relied on to establish fraud. That submission was rejected and the Court found that where a party alleges fraud that party must plead the facts on which reliance is placed.

CPR 16.4(1) requires that Particulars of Claim include a concise statement of the facts on which the Claimant relies. That, in itself, provided a sufficient basis to reject the Appellant's submission: *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3) [2003] 2AC 1.*

The Kings Bench Guide (2023) states at paragraph 5.32 that allegations of fraud will require to be particularised, meaning that the relevant allegations are set out (which may include listing the facts from which the Court is asked to infer dishonesty).

A party is not prevented from alleging fraud if it does not know the true underlying factual position (other than that the representation was false). If a party can establish the ingredients of a legal recognised wrong it is, in principle, entitled to judgment, even though it does not know the details of the underlying facts.

CASE UPDATES

Was the Appellant entitled to hold back details of its case until after the Respondent had committed himself to an account in his Witness Statement?

This was a primary fact on which the Appellant sought to rely. Because this was a fact on which it relied to support its claim, it was required to plead this fact (albeit not, necessarily, the underlying evidence): CPR 16.4(1). The Appellant had failed to do so.

The document which showed that the two drivers were Facebook Friends was relied upon by the Appellant and the Appellant's case was that this adversely affected the Respondent's case. It was, therefore, a document that fell within the ambit of standard disclosure: CPR 31.6(a), CPR31.6(b)(ii). It had always been the Appellant's intention to rely upon the document.

The Appellant accepted that the document fell within the ambit of standard disclosure and that it knowingly and deliberately breached the Court's Order. However, it advanced three justifications: (1) that the document was "the Respondent's document"; (2) that the Courts permit late disclosure of surveillance evidence and this was analogous to that and; (3) that this was "asymmetric litigation" where there was a strong public interest in enabling insurers to fully investigate allegations of fraud.

All of these 'justifications' and the Appellant's assertion that it was entitled to deliberately breach a Court Order and rules of the Court was rejected. The Judge was categorical in his view that it was not proper for the Appellant to hold back documents upon which it was going to rely. The situation here was not analogous to holding back surveillance evidence.

Did the settlement agreement restrict the findings that the Appellant could seek in its action against the Respondent?

The meaning of the settlement agreement depended on what a reasonable person (with all the background knowledge which would reasonably have been available to the parties) would have understood the words to have meant: *Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900.*

Having regard to the background of the claim, the Court held that it was highly unlikely that the parties would have intended to fetter the Appellant's prosecution of its claim against the Respondent or its defence of the Respondent's counterclaim.

Overall, however, there were flaws in the underlying assumptions on which the original Judge had exercised his discretion in relation to the Appellant's Application and their refusal to allow the amendments to the pleaded case. Accordingly, the appeal was allowed in part and the Appellant was granted permission to amend its claim. However, the Court marked its disapproval of the Appellant's conduct by refusing it permission to claim exemplary damages and forecasting "significant costs sanctions".

CASE UPDATES

Occupiers' Liability Act 1957 - Duty of Care - Car Parks

Juj v John Lewis Partnership
[2023] EWCA Civ 1507

This was the Claimant's appeal to the Court of Appeal following the dismissal of his original claim and subsequent appeal in the High Court which was covered in Dolmans' Insurance Bulletin in October 2022.

To recap, the Claimant's claim was for personal injuries sustained in a supermarket car park. At trial, the Trial Judge found that the Claimant, who was 83 years old at the time of the incident, had misjudged his manoeuvre when getting into his car, which was parked in a disabled bay, by not lifting his foot sufficiently. The parking bay had a kerb on both sides and was owned by the Local Authority. The Trial Judge found the supermarket was the occupier (although its duty was limited by the extent of its control). The Claimant's appeal to the High Court against this decision was dismissed.

The Claimant's grounds of appeal to the Court of Appeal were:

(1) The Trial Judge erred by limiting the scope of the supermarket's duty under Section 2(2) of the Occupiers Liability Act, addressing only what she described as "immediate hazards" within the car park and reporting any other issues to the owner. Whilst the High Court correctly extended the Trial Judge's definition to include a requirement to put up warning signs as well as reporting its concerns to the owner, she erred by limiting the scope of the duty in other ways (e.g. by stating that the duty did not extend to painting the kerb).

(2) The High Court Judge erred by interfering with a finding of fact properly made by the Trial Judge that the supermarket should have known that the disabled parking bay represented an unreasonable danger to its intended users.

(3) Having made a finding of fact that the supermarket should have known that the disabled parking bay represented an unreasonable danger to its intended users, the Trial Judge erred in law by concluding that the supermarket was not expected to take any steps to address the hazard other than to report the matter to the owner. Whilst the High Court Judge properly extended the scope of the supermarket's duty to include a requirement to put up warning signs, she then concluded that no action was in fact required due to the obviousness of the hazard.

(4) The Trial Judge concluded that the supermarket was in breach of its duty to report the presence of the relevant hazard to the owner in 2012, 2013 and 2014, but erred by finding that proper compliance with this duty would not have made any difference to the outcome. The High Court failed to address this issue.

(5) Both Judges erred in law by concluding that the Claimant's accident was "an accident in the true sense of the word", thereby disregarding any contribution of the supermarket's breach of duty to the occurrence of the accident.

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The Court of Appeal held:

The Trial Judge's finding, upheld on appeal, that the supermarket had no responsibility for the design, construction and layout of the parking bay was unchallenged on appeal. Further, the Trial Judge's unchallenged finding, upheld on appeal, that the kerb was not defective countered any allegations relating to the repair or maintenance of the kerb.

The Trial Judge had correctly concluded that the supermarket had sufficient control to be an occupier of the car park. Having carefully examined the evidence, the Trial Judge determined that the control exercised by the supermarket was limited in its nature, confined to dealing with immediate hazards, instituting interim measures and thereafter reporting matters to the Local Authority. The Trial Judge's conclusions as to the limits of the supermarket's control, and hence its duty of care, were not only reasonable but realistically reflected in the evidence before the Court.

An Appellate Court will not interfere with findings of fact by a Trial Judge unless compelled to do so. This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them: *Staechelin & Others v ACLBDD Holdings Ltd [2019] EWCA Civ 817.*

An Appellate Court should not interfere with the Trial Judge's conclusions on primary facts unless it is satisfied the Judge was plainly wrong: *McGraddie v McGraddie [2013] UKSC 58.*

It was undisputed that the design of the disabled parking bay was unique within the car park. Considerable emphasis was placed by the Claimant on the need for an occupier of a car park to provide a bay with level access. However, no expert evidence was relied upon by the Claimant at trial to support this allegation. In any event, the fact that there was no level access within the parking bay was known to the Claimant and his wife. Further, the unchallenged findings of the Trial Judge were that the kerb was clearly visible.

The Trial Judge was correct to conclude that there was no requirement on the supermarket to place a warning of the kerbs in the bay. Further, a notice stating that the bay was not suitable for disabled customers would have gone beyond what the supermarket could reasonably have been expected to do. The Trial Judge's finding of fact that the supermarket did not have sufficient control of the car park to enable it to close the bay was properly founded upon the evidence. All of the findings made by the Trial Judge were reasonably open to the Judge.

The critical issue for the Claimant was the finding that he had misjudged his manoeuvre by not lifting his foot sufficiently. This was not a case of someone tripping over a difference in height where they would not expect one to be. This was not a trap. It was not unseen. The Claimant's clear evidence was that he knew of the presence of the kerb, he saw it and was trying to step onto it. The finding that the Claimant simply misjudged that manoeuvre by not lifting his foot sufficiently was clearly founded following a careful evaluation of the Claimant's evidence. That finding was fatal to the claim.

The Court of Appeal, accordingly, dismissed the Claimant's claim.

CASE UPDATES

QOCS Protection - Claims for £1 Nominal Damages

Clark & Others v (1) Adams (2) The Provisional Irish Republican Army [2024] EWHC 62 (KB)

The Claimants, 'C', suffered injuries as a result of bombing incidents attributed to the PIRA. They claimed damages limited to *'£1 for vindicatory purposes'* against Mr Gerry Adams and the PIRA. They alleged Mr Adams was a leading member of the PIRA at all material times, including membership of its Army Council, which Mr Adams denied. The claim against Mr Adams was brought both personally and in a representative capacity. The claim was framed in the torts of assault and battery.

Pursuant to Applications made by Mr Adams, the claim against the PIRA and the claim against him in a representative capacity were struck out. The claim against Mr Adams in a personal capacity, however, proceeds.

Mr Adams applied in addition for a declaration that the claims did not enjoy QOCS protection on costs because they did not include a claim for damages for personal injuries within the meaning of CPR 44.13(1)(a). The arguments in support of this Application included that the pleaded causes of action were in the torts of assault and battery which are actionable per se – i.e. without proof of damage; the absence of a claim for substantial (as opposed to nominal) damages meant that this was not a claim for compensation; the statement that the nominal sum was claimed 'for vindicatory purposes' showed that the Claimants were not seeking damages for personal injury but vindicatory damages in a fixed nominal sum; and that the basis of the claim was in substance a claim for declaratory relief only – i.e. a declaration that Mr Adams was liable for the torts alleged.

The Judge considered that the issue should, in principle, be determined by reference to the pleaded claim. The Claim Form herein alleged that each of the Claimants had suffered assault/battery and injury as a result of the respective bombing incident and claimed nominal vindicatory damages for assault/battery in respect of loss and damage caused as a result of bomb attacks nominally valued at £1 for vindicatory purposes. The Particulars of Claim alleged assault and battery causing personal injury, loss and damage. Particulars of Injury were provided and damages claimed '*in respect of their pain, suffering and loss of amenity*' limited to £1 for vindicatory purposes. The Judge found that these pleadings set out the necessary ingredients of a claim for damages for personal injury within the meaning of the rule. The characterisation of the claim as such was not defeated by the Defendant's arguments.

Whilst the Judge accepted that if the Statements of Case had contained no reference to personal injury and C succeeded in establishing liability at trial, they would be entitled to nominal damages in any event and their remedy would be no different; it did not follow from this that the claim was to be characterised as one for non-injurious assault/ battery. That submission excised a material part of the pleaded claim – i.e. the injuries had confused the nature of the claim with the causes of action (contrary to *Brown v Commissioner of Police for the Metropolis [2019]* which established that the focus must be on whether it is a claim for damages for personal injuries, rather than the particular causes of action which support the claim). The causes of action were in assault and battery; the claim was for damages for personal injury.

The express averment of pain, suffering and loss of amenity and Particulars of Injury were a sufficient pleading of a claim for general damages for PSLA, but limited in amount to a nominal £1.

The status of the claim as one for damages for personal injury within the meaning of the rule was in no way diminished by the words 'for vindicatory purposes only'. A claimant may properly decide to limit the amount of damages claimed for personal injury to a sum which does not reflect the full compensation which the law would otherwise provide and there was no difference of principle where such a claim was limited to an award of £1 nominal damages.

Accordingly, a declaration was made that the claim was for damages for personal injury within the meaning of CPR 44.13(1)(a) and, accordingly, enjoys QOCS protection on costs.

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