

## DOLMANS INSURANCE BULLETIN

Welcome to the October 2025 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

### No Liability for Sap Falling on the Public Highway

*JL v Powys County Council*  
*Merthyr Tydfil County Court*

The Claimant's claim arose out of an accident which occurred while she was walking along the pavement at The Watton, Brecon, in October 2020. The Claimant alleged that she slipped on sap from aphids on lime trees which lined the pavement along The Watton, which is constructed of Yorkstone paving slabs. The Claimant alleged that the pavement should have been paved with tarmac or other material and should have been gritted and cleaned.

The Claimant's primary allegation was that the Defendant Local Authority caused and/or permitted the existence or continuation of, or otherwise failed to abate, a nuisance upon the highway. It was asserted that the Defendant Local Authority were, at all material times, aware of the presence of sap on the pavement, and had a reasonable opportunity and the means to abate it but failed to do so adequately or at all.



In the alternative, despite the fact that the Claimant's accident occurred on the public/adopted highway, the Claimant relied upon the provisions of the Occupiers' Liability Act 1957. The Claimant, quite rightly, accepted that this was not a case which would fall within the remit of Section 41 of the Highways Act 1980. Surface materials such as sap, moss or algae do not give rise to any duty pursuant to Section 41: *Valentine v TFL* [2010] EWCA Civ 1358 and *Rollinson v Dudley MBC* [2015] EWHC 3330 (QB), where the Court held that patches of moss or algae could not sensibly be said to have physically bonded to the pathway or to have become part of the fabric of the pathway such as to render it 'out of repair'.

#### **The Circumstances of the Claimant's Accident**

No admissions were made as to the circumstances of the Claimant's accident and the Claimant was put to strict proof.

The Claimant's evidence was that she was delivering a present to a friend along The Watton at the time of her accident. The Claimant stated that after visiting her friend, she started walking back to her car and, as she went to turn, she slipped on the pavement. Her left leg went from under her. The Claimant's evidence was that she could not see anything on the pavement at the time but that it was "really slippery".

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The Claimant notified the Defendant Local Authority of her accident immediately afterwards. The Claimant's accident occurred around 12:30pm. The Defendant Local Authority were contacted by the Claimant at approximately 13:50pm and the site was inspected by them at approximately 14:30pm on the same date. The records indicated that, upon attendance, the Defendant Local Authority's highways staff applied sand to the surface of the pavement *"to provide better grip until footway cleaning could be carried out"*.

A Claim Notification Form was subsequently submitted on behalf of the Claimant on 4 October 2020. The Claimant remained consistent in her account of the accident.

### Evidence



A letter of complaint was sent to the Defendant Local Authority by the Claimant's friend following the accident making four points:

- (1) That there were Lime trees on The Watton;
- (2) That aphids feed on the leaves of the trees exuding a sticky sap which falls and sticks to the pavement;
- (3) There were paving slabs on the pavement;
- (4) The surface of the slabs became slippery if it rained due to "honeydew".

The Claimant gave evidence that her friend had also told her that there had been protracted exchanges between local residents and the Defendant Local Authority about the complaints which had been made and accidents that had occurred as a result of the condition of the pavements and their 'dangerous condition' which was linked to the lime trees. The Claimant did not, however, adduce any evidence from her friend about this.

In support of her claim, the Claimant relied upon a series of complaints about the problem relating to the presence of sap on the pavement, which had been received by the Defendant Local Authority prior to the date of the Claimant's accident. The fact of complaints having been made was admitted. The Defendant Local Authority's records indicated the following in relation to the period prior to the Claimant's accident:

- A complaint was received on 8 July 2020 that the pavement was "extremely slippery" as it had not been cleaned and that the paving slabs were dangerous. It was reported that someone had slipped on the paving slabs and that *"within 10 minutes a man slipped over with his bike"*.

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- On 25 August 2020, a complaint was received which reported that every year the pavement along The Watton became *"very slippery when wet"* from the sap off the trees and that the pavement *"needs scrubbing again"*.
- On 2 September 2020, a complaint was received which reported that a lady had fallen after she *"felt her feet go from under her"*. It was reported that the pavement was *"very slippery from tree sap on lime trees"*.
- On 30 September 2020, a further complaint was received when it was reported that a resident had fallen on the pavement due to *"debris off trees"*.
- On 7 October 2020, a complaint was received which reported *"It was great to see that some of the pavement has been cleaned on The Watton. However ... under the tree is still black with sap and dirt which becomes extremely slippery when it rains. It is very dangerous as I have reported before. It really needs to be cleaned as soon as possible to stop people falling on it"*.

Following the Claimant's accident, two more complaints were received (in addition to the complaint raised by the Claimant):

- On 30 October 2020, there was a complaint indicating that the pavements on both sides of The Watton were very slippery under the trees.
- On 9 November 2020, a complaint was received which recorded that the pavement was *"treacherous"*. It was reported that someone had slipped on the pavement when leaving their house and that there was an *"ongoing issue"* with the surface of the pavement.



The Defendant Local Authority's Senior Highways Manager gave evidence that the lime trees along The Watton commemorated the battle of Rourke's Drift and had been in place for 55 years. The Yorkstone paving slabs had been present since 1994 and were laid at the request of Brecon Town Council and the Brecon Beacons National Park. It was acknowledged that concerns were expressed by the Defendant Local Authority at the time of installation about the suitability of the Yorkstone slabs, but only in relation to the future maintenance costs of the same. In any event, the Town Council had insisted on the Yorkstone slabs being installed. The same paving slabs had also been used in other parts of the county and were said to be popular in town centres.

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It was acknowledged by the Defendant Local Authority that the combination of the Yorkstone paving slabs and the lime trees did lead to a problem with sap forming on the pavements of The Watton, making them slippery, as documented. However, their position was that this did not become a real problem until late 2019/2020. Further, whilst there were numerous complaints received by the Defendant Local Authority leading up to October 2020, the number of complaints received was not regarded as *that* significant as compared to the number of pedestrians who would have been using the footway in this period, The Watton being a very busy area. Evidence was obtained from the Defendant Local Authority that when complaints were received they were dealt with, and, whilst not always immediately, the Defendant Local Authority's officers had been out to the location on many occasions taking steps to sweep/clean the pavement prior to the Claimant's accident.

Monthly inspections of the pavement were undertaken by the Defendant Local Authority's Highways Department, with a walked inspection having been carried out on 16 October 2020 prior to the Claimant's accident. In addition, monthly safety inspections of The Watton had been carried out between April and September 2020, and the evidence indicated that none of these safety inspections identified any issues with sap on the pavements or of the pavements being slippery.

In addition to the monthly inspection regime was the reactive system, which was adopted in response to the complaints received. As a result, prior to the Claimant's accident, the pavements along The Watton were cleaned/scrubbed on 24, 25 and 26 August 2020, 3 September 2020 and 7, 8, 9, 12, 13 and 19 October 2020. Further, to try and reduce the problems caused by the sap, the Senior Highways Manager gave evidence that additional steps were taken to deal with the complaints regarding the sap, which included:

- (1) Responding to complaints as and when they were received by arranging for the pavement to be cleaned.
- (2) Arranging for the lime trees to be pollarded every 3 years instead of every 5 years.
- (3) The application of amacite to kill any remaining algae and mould on the paving slabs (it was accepted that this was not a fool-proof method for resolving the problem).

Steps 2 and 3, however, were implemented *after* the Claimant's accident.

It was accepted by the Senior Highways Manager that the Defendant Local Authority were restricted by the resources which were available at the material time. The position taken by the Senior Highways Manager was that there was nothing more they could do above and beyond what was being done at the time to resolve the problem of the sap. The estimated cost of replacing the slabs (with tarmac) along The Watton alone was £50,000.00 and the cost for that area, including other locations, would be "extortionate".

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### **Liability**

The allegations of negligence/breach of duty were vigorously denied. In relation to the allegations under the Occupiers Liability Act, it was asserted that it was trite law that a Highways Authority cannot be the occupier of a public highway. The success of the Claimant's claim, therefore, depended on the allegations of nuisance.

Any nuisance is a public nuisance where it materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross section of the class has been so affected. In general, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances.

In this case, the lime trees and Yorkstone paving slabs were in place for decades without serious consequences. There was no evidence that the Yorkstone slabs, in and of themselves, were dangerous for pedestrians, and they are used in many contexts by the Defendant Local Authority and are commonly used for pavements across the country, suggesting they are perfectly suitable for high street paving.

It was also asserted on behalf of the Defendant Local Authority that the sap was neither present by means of an act of the Defendant Local Authority or by any omission to discharge a legal duty on its part (there being no statutory or common law duty in respect of the same).

It was submitted that were the Court to determine local authorities are responsible for natural biological hazards on the highway, the cost to local authorities across the country and to the taxpayer would be extortionate, as defensive actions such as the removal of trees/pavements costing very large sums indeed would doubtless follow such decisions. The impact on public amenity and the environment would also be disproportionate.



### **Trial**

The Claimant's claim proceeded to Trial in April 2025.

The Claimant's claim was dismissed at Trial.

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In relation to causation, the Judge noted that the only witness for the Claimant was the Claimant herself. The Claimant stated in evidence that she did not know what she had slipped on; that she took a photograph the following day and did not touch the area concerned and did not see any sap; she just saw a darker patch on the pavement; she was not looking for “sap” as she had no reason to think it was sap at that time. The Claimant said that she was not particularly in a rush and had waited for a gap in the traffic, and as she went to walk to the car it was as if her feet were tackled from under her.

The Claimant was found to be an honest witness who did not seek to embellish her evidence. However, whilst the consensus was that the lime trees exuded a sticky sap, there was no direct evidence of aphid sap and whether it became slippery on the pavement. The letter from the Claimant's friend following the Claimant's accident only stated that the pavement became slippery when wet, but the letter, which did not carry the same weight as a witness statement, was the best information the Judge had. The Judge stated that the other complaints which the Defendant Local Authority had received about The Watton stated that the pavement was slippery, but there was no evidence the Judge could rely on to substantiate it was due to sap except by anecdotal evidence.



In giving her evidence to the Court, the Claimant accepted that she did not establish what the black mark on the floor might be. Counsel for the Claimant suggested that a Google Streetview image from August 2024 suggested there were dark patches under the trees caused by sap or aphids. Whilst there were clearly dark patches on that image, the Streetview image from August 2022 did not appear to show any patches; the Streetview image for March 2021 showed the trees pollarded and the road was wet, so it was of little use. A Streetview image of the area from September 2018 showed no dark patches.

Whilst there were photographs of the pavement provided by the Claimant, the Judge found that they could not draw any conclusions by comparing the images. Overall, the Judge found that the Court did not have sufficient evidence that the Claimant slipped due to sap from the trees or insects, only that they did slip. There was not enough evidence to say what they had slipped on. The Claimant had assumed it was sap.

In any event, the Judge went on to state that even if the Claimant's accident was caused by sap, they would not have found the Defendant Local Authority had created any trap by negligence or in nuisance. The evidence of the Defendant Local Authority's Senior Highways Manager that he had been aware of the complaints which had been made was noted, and that the Defendant Local Authority had accelerated the pollarding of the lime trees in response. It was also noted that other streets in the area had lime trees and the same slabs, and there had been no similar reports of slipping.

The Judge also heeded the position of the Defendant Local Authority that it was likely that Brecon Town Council would object to the Yorkstone paving slabs being removed, in any event.

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In all the circumstances, the Judge accepted the Defendant Local Authority's evidence that there was nothing inherently dangerous about the Yorkstone paving slabs, or the trees, and they existed together elsewhere without similar difficulty.

### Comment

Whilst the Claimant's claim ultimately failed on causation, the decision of the Court in this case was supportive of the position which had been taken by Dolmans on behalf of the Defendant Local Authority throughout the Claimant's claim. Detailed investigations were carried out, and valuable evidence was obtained from the Defendant Local Authority's witnesses with regards to the history of the planting of the lime trees along The Watton and the installation of the Yorkstone paving slabs, and the steps which had been taken by the Defendant Local Authority to respond to all of the complaints which had been received prior to the Claimant's accident to try and resolve the issues raised. It was accepted that the Defendant Local Authority were restricted, to a certain extent, by the resources which were available to them at the material time and the stance which was likely to be taken by the Town Council in relation to any proposed changes to the area was also a very relevant factor and limitation as to what could be achieved by the Defendant Local Authority. Overall, the Court accepted that there was nothing more that the Defendant Local Authority could do above and beyond what was being done at the material time.

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## CASE UPDATES

### Authorised Persons - Reserved Legal Activities

#### *Mazur v Charles Russell Speechleys LLP [2025] EWHC 2341 (KB)*

The Appellants had failed to pay fees owed to the Respondent totalling £54,263.50. Another law firm (G) had been instructed to recover the debt.

The Appellants believed that the person conducting the litigation, namely G's Head of Commercial Litigation (M), did not hold a current practising certificate. They sought an order requiring M to be replaced by a qualified solicitor, but the Judge stayed the proceedings and sought an explanation from G. In the meantime, M was replaced by a qualified solicitor and G's director (X) self-reported to the Solicitors Regulatory Authority (SRA) in connection with M's employment. The SRA decided not to investigate and stated in its decision letter that "[G's] employees are permitted to undertake reserved legal activities due to section 21(3). We are satisfied that [M] has not conducted reserved legal activity without entitlement to do so".

The Respondent subsequently applied to lift the stay. It argued that under the Legal Services Act 2007 Pt 3 s.21(3), M had been authorised to conduct the litigation as an employee of G, which was "a regulated body being duly authorised". It relied on the letter from the SRA supporting that view. X also explained that he had supervised M's work.

The Appellants argued that the SRA's letter had wrongly construed s.21(3) and that an employee of an authorised person was not entitled to carry out reserved legal activities (including the conduct of litigation) unless they were also authorised.



The Judge lifted the stay, ordered amended court documents to be signed by an authorised person and ordered the Appellants to pay costs of the Application to lift the stay in the sum of £10,653. The Appellants appealed against the decision to lift the stay on proceedings.

The statutory framework governing who can conduct litigation is set out in the Legal Services Act 2007. Section 12(1)(b) of the LSA designates "the conduct of litigation" as a reserved legal activity. Schedule 2, paragraph 4 defines this as:

- the issuing of proceedings before any court in England and Wales;
- the commencement, prosecution and defence of such proceedings; and
- the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).

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Section 13 establishes that a person may only carry out a reserved legal activity if they are either an "authorised person" (defined in section 18 as someone authorised by a relevant approved regulator, such as the SRA) or an "exempt person". Section 14 makes it a criminal offence to carry on a reserved legal activity without entitlement. Significantly, section 16 provides that an employer commits an offence if their employee carries on a reserved legal activity without being entitled to do so – even if the employer itself is authorised.

In allowing the appeal, the following findings were made:

- (1) Section 21(3) of the LSA does not authorise employees to conduct litigation

The argument that section 21(3) of the LSA authorises employees of regulated firms to conduct litigation was rejected. Section 21(3) defines "regulated persons" for the purposes of an approved regulator's "practice rules", "conduct rules" and "discipline rules".



It includes both persons authorised by the regulator and their employees. It was held that this provision "... is not extending the definition or scope of who is 'authorised' to carry out reserved legal activities but is saying that for the purposes of regulation there are two categories: persons who are authorised to carry out reserved legal activities and their employees". In other words, employees of an authorised firm can be regulated by the SRA, but that does not make them authorised to conduct litigation.

- (2) Supervision does not create an entitlement to conduct litigation

A critical distinction was drawn between:

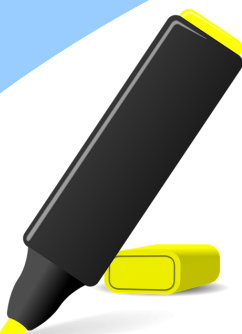
- **Supporting or assisting** an authorised solicitor in conducting litigation (permitted);  
and
- **Conducting litigation under supervision** (prohibited).

The submissions of both the Law Society and the SRA that the LSA contains no provision allowing an unauthorised person to conduct litigation under supervision were accepted. It was noted that paragraph 3 of Schedule 3 to the LSA expressly contemplates supervision in the context of "reserved instrument activities" (i.e. conveyancing) but contains no equivalent provision for conducting litigation.

The LSA expressly contemplates that there will be persons falling within category (a); that is, persons who 'assist' in the conduct of litigation. There is nothing in the LSA, however, which contemplates category (b): that is, a person who conducts litigation under the supervision of an authorised solicitor.

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(3) The test: who has assumed responsibility and exercises professional judgement?



**non-qualified  
staff roles**

Whilst the Judge declined to make factual findings about whether M was conducting litigation or merely assisting (to avoid prejudicing any SRA investigation), he endorsed the SRA's suggested test; this being that the key question is whether the non-authorised person "has assumed responsibility for the conduct of the litigation and exercises professional judgement in respect of it". An unauthorised employee who drafts litigation documents, letters, proofs witnesses or performs similar functions under the final professional judgement and responsibility of a solicitor does not conduct litigation.

The decision in *Mazur* does not change the law or the regulations that were already in place, but it does highlight the issues in relation to the role that non-qualified staff undertake when working within regulated organisations in the context of litigation. The case restates the position in the Legal Services Act 2007 and in the SRA's 2022 guidance note on supervision that even within a regulated entity, only an 'authorised person' may 'conduct' litigation. Unqualified staff are permitted to support an authorised person in the conduct of litigation but not conduct it themselves. The Court emphasised that paralegals and other unqualified staff must operate strictly under the direction of qualified solicitors.

The decision applies to the conduct of litigation but not to claims that settle without proceedings being issued. However, if "on a true analysis and focusing on substance not form, the non-authorised person was the one responsible for the litigation and exercising professional judgement in respect of it", they are conducting litigation unlawfully.

This Judgment only relates to litigation, not to other reserved activities.

### Claim Form - Invalid Service - Jurisdiction - CPR11

There have been two decisions of the Court of Appeal relating to the same issue this month. The first in time, *Robertson v Google LLC* [2025] EWCA Civ 1262, is briefly considered within our case summary below.

### **Bellway Homes Ltd v The Occupiers of Samuel Garside House** **[2025] EWCA Civ 1347**

The first instance decision in this case was reported upon within the July 2024 edition of Dolmans' Insurance Bulletin.

## CASE UPDATES



The Respondents to this appeal ('C') are the occupiers of flats within a building developed and constructed by the Appellant ('Bellway'). Following a serious fire on 9 June 2019, C brought claims for personal injury, physical damage and loss. The Claim Form was issued on 6 June 2022 and time for service was extended by consent to 4pm on 21 April 2023. This agreement was confirmed by a Court Order. On the afternoon of 21 April 23, C's solicitors emailed Bellway's solicitors asking them to agree a further extension. This was declined. C's solicitors attempted to serve the Claim Form by fax, but this failed. Ultimately, on 21 April 2023, the Claim Form was placed in a designated area of C's solicitor's office's reception for collection by the DX courier which usually occurred after office hours.

On 27 April 2023, Bellway's solicitors emailed C's solicitors stating that the Claim Form and Particulars of Claim had not been served in time and they would be applying to strike out the claim under CPR 3.4(2)(c).

On 28 April 2023, C applied for a declaration that the Claim Form had been served or, alternatively, for relief from sanctions for any failure to serve in time and/or for an extension of time.

The first instance Judge concluded that there had been no valid service of the Claim Form by the required time and date. Relief from sanction was refused as the relevant jurisdiction was CPR 7.6 and the relief from sanction regime under CPR 3.9 and CPR 3.10 could not be used to evade this. Further, as C had not taken all reasonable steps to comply with CPR 7.5 (service), they were not entitled to an extension of time under CPR 7.6.

However, C raised a further argument, at first instance, to the effect that even though the Claim Form had been served late, the proceedings should be permitted to continue because Bellway had failed to file an Acknowledgement of Service and/or make a CPR 11 application challenging the Court's jurisdiction. The first instance Judge held that submission was correct and Bellway were obliged to do both. Bellway subsequently applied to serve an Acknowledgment of Service and/or a CPR 11 Application out of time, which the Judge refused.

Bellway appealed submitting:

- Having found the Claim Form was not served in time and C were not entitled to an extension of time, the Judge should have found that this action could not proceed further.
- The Judge was wrong to find that Bellway was required to file an Acknowledgement of Service within the time set out in CPR 10.3 in circumstances where both the Claim Form and Particulars of Claim were served outside the relevant period.
- The Judge was wrong to hold that he could only find that the Court had no jurisdiction to hear the claim in the event that Bellway had made a valid and timely Application under CPR 11 following the filing of an Acknowledgement of Service.

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C cross-appealed, arguing that the Judge had been wrong to hold that they had not effected valid service of the Claim Form by DX, submitting that they had left the Claim Form out for collection by the DX by 4pm and that was sufficient to comply with CPR 7.5.

The Court of Appeal dealt with the cross-appeal first.

### Decision on C's Cross-Appeal

CPR 7.5 requires, in relation to service of a Claim Form, that a claimant complete the step required which, in relation to service by DX, is leaving with, delivering to or collection by the relevant service provider.

In accordance with the agreed extension / Court Order, C was required to file and serve the Claim Form and Particulars of Claim by 4pm on 21 April 2023. There was no evidence as to when the Claim Form was printed out and left for collection by the DX, other than it was after 3:40pm. The Court of Appeal rejected C's solicitor's request that the Court infer it was by 4pm. There was no basis for such an inference and the evidence pointed firmly the other way. C's solicitors were frantically attempting to fax the Claim Form until at least 4:03pm. C had, therefore, failed to show, as a matter of fact, that they had taken the necessary steps for service by 4pm.



The Court went on to find that even if it was wrong and the Claim Form was left out for collection by the DX before 4pm, this still did not comply with CPR 7.5, which requires that the document must be 'left with' the DX service. The Court held that this *'requires an act of transmission by the claimants: in essence, the passing on of the document from the solicitor into the possession of the DX service. You do not leave a document with the DX by having it in your reception for their collection at some point in the future'*. The Court confirmed that each of the methods of service identified in CPR 7.5 constitute a positive and irrevocable act. Once a document has been posted / left with / delivered / collected by the DX, it cannot be taken back. It cannot be amended. By contrast, documents left on the receptionist's desk can be taken back and amended, which is not within the concept of service.

C's argument relied upon the proposition that a document 'left for collection' came within one of the options in CPR 7.5. The Court held it did not. It was an elision between two different phases in CPR 7.5: 'left with' the DX and 'collected' by the DX. *'Leaving a document out for collection by the DX is not therefore something which could constitute proper service under r7.5 in any event.'*

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Further, the Court noted that the Court Order in this case required service by 4pm on 21 April 2023 and C would have had to leave the Claim Form with the DX on 20 April 2023 to comply with CPR 7.5.

Accordingly, C's cross-appeal failed.

### Decision on Bellway's Appeal

Where a defendant avers that a Claim Form has not been properly served, they are raising a jurisdictional issue. The question for the court is whether, in such circumstances, a defendant is required, notwithstanding the defective service, to take positive steps, such as filing an Acknowledgement of Service and/or issuing a CPR 11 application, and whether, if the defendant does not do so, they are deemed to have accepted the court's jurisdiction.

This issue was considered by a differently constituted Court of Appeal who handed down Judgment earlier this month in *Robertson v Google* [2025].



In *Robertson*, the Court of Appeal was concerned with another case where there had been no valid service of the Claim Form within the required time and the Claimant could not meet the stringent test for a retrospective extension pursuant to CPR 7.6(3). Shortly before the appeal hearing, the Claimant had taken a new point that the Defendant (Google) had failed to serve an Acknowledgement of Service and/or make an Application to challenge jurisdiction under CPR 11. The Court of Appeal refused permission for the Claimant to amend his grounds of appeal, to include this new point because it was considered unarguable as well as too late.

In relation to why the point was unarguable, the Court of Appeal considered that all the rules concerned with service of the Acknowledgment of Service presuppose that the Claim Form and/or Particulars of Claim have been validly served. There is no obligation to serve an Acknowledgement of Service in circumstances where the Claim Form has not been validly served.

On the facts in *Robertson*, the Court considered there was also no requirement for Google to make a CPR 11 application. The Court indicated that such an application is required in circumstances where a defendant decides, at the outset, that they wish to make a challenge to the court's jurisdiction. They are then required to communicate that position to the claimant. However, on the facts in *Robertson*, Google were responding to the Claimant's own Application to rectify his invalid service, and made it plain from the outset that they opposed that Application. If the Claimant's Application failed, the Claim Form was not validly served and the proceedings would be a nullity, and the Court would have no jurisdiction. Accordingly, there was no need for a separate CPR 11 application.

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In the *Bellway* case, C accepted that unless *Robertson* could be distinguished, that decision would also apply here.

C sought to argue that there is a distinction between a failure to serve a Claim Form using the right method (which C averred was the category *Robertson* fell into) and a failure to serve a Claim Form on time (which this case fell into). C averred that pursuant to CPR 6.14, even a Claim Form that has been served late is deemed to be served on the second business day after completion of the relevant step and, therefore, obliged a defendant to file an Acknowledgement of Service and, if appropriate, make a CPR 11 application.

The Court rejected C's submissions. The Court considered that deemed service pursuant to CPR 6.14 only occurs *if* the relevant step under CPR 7.5 has been taken. If that step was not taken because the mode of service was defective or service was effected late, then the deeming provision does not apply. The Court further considered it was artificial to distinguish between the two defaults in respect of method and time of service.

The Court noted that there will be many cases of late service in which a defendant will have to go down the CPR 11 route in order to raise the jurisdictional issue. That was not the position in *Robertson* or in this case because the question of service, and, therefore, jurisdiction, was before the court within days of the defective service, and because in both cases the claimant, concerned that service may have been invalid, was seeking the necessary relief. C was always aware that *Bellway* challenged the validity of service and, therefore, jurisdiction. The issue of jurisdiction was already in play and a separate CPR 11 application '*would simply have duplicated paper, time and costs and would have served no practical purpose*'.

Accordingly, *Bellway*'s appeal succeeded.

### Injunctions - Issue of "Proceedings" - Costs

*Gotti v Perrett*  
[2025] EWCA Civ 1168

The Court of Appeal considered the power of a Court to award costs on the discharge of an injunction where no steps had been taken to issue a claim (and no Claim Form was ever issued).

The Claimant applied for an injunction in the County Court under the Protection from Harassment Act 1997, under CPR Part 23, presented on form N16A (the general form of application for an injunction). The Claimant was a director of a cosmetic surgery company who wished to prevent the Defendant from making adverse statements through social media which he considered "defamatory" of his company or its staff. Mrs Perrett was a litigant-in-person.



## CASE UPDATES

After “a short, contested hearing”, the injunction was granted. No undertaking to issue a Claim Form was given to the Court or recorded on the Order, neither was any undertaking in damages. No Claim Form was, in fact, issued.

7 months later, the Defendant instructed solicitors and applied to discharge the interim injunction (under CPR Part 23) and sought an award of damages and costs. On receipt of the Defendant’s Application, the Claimant accepted that his Application had been “deeply misconceived” for several reasons, including:

- the Claimant had intimated an action for defamation under the Defamation Act 2013, but (absent the agreement of the parties) the County Court had no jurisdiction to hear such claims;
- an interim injunction is not an available remedy where a claim for defamation is defended;
- the “jurisdictional reach” of the Protection from Harassment Act 1997 is England and Wales but the Defendant lived in Scotland;
- the Judge had not been invited to consider section 12 of the Human Rights Act 1998 and the “higher test” it imposes before relief may be granted where Article 10 is engaged; and
- the terms of the injunction sought (and made) were “almost certainly unworkable”, including imposing on the Defendant requirements to direct the behaviour of other persons who published comments through social media and prohibited “comments or remarks considered to be defamatory” (which appeared to the Court of Appeal to permit the Claimant to determine what met the description).



The Claimant accepted that the Order should never have been granted but that whilst the interim injunction should be discharged, the Court did not have the power to order damages or costs against them because there were no “proceedings” before the Court within which such an order could be made. The Claimant submitted that as no Part 7 or Part 8 claim was ever issued, the injunction proceedings were essentially a “nullity”.

In the County Court, the Deputy District Judge described the Claimant’s argument as “ingenious” before roundly dismissing it. The Deputy District Judge deemed that the Court did have jurisdiction.

## CASE UPDATES

The Claimant obtained permission for an appeal, notwithstanding that the Judge granting permission considered his argument as “an affront to common sense”. At the heart of the appeal was whether the Court had the power to make orders ancillary to the discharge of an injunction where at the time of the injunction order (i) no undertaking in damages was offered or recorded, (ii) no undertaking to issue a Claim Form was taken and no equivalent direction given, and further where (iii) no Claim Form was ever in fact subsequently issued. The Claimant’s appeal was dismissed.

The Claimant appealed to the Court of Appeal. Lewison LJ granted permission to bring a second appeal on the basis that “*The centrality of a Claim Form (either under Part 7 or Part 8) to civil proceedings is one of considerable importance. I regard that as a compelling reason for the grant of permission to bring this second appeal, irrespective of its prospects of success*”.



In a detailed Judgment, the Claimant’s appeal was comprehensively dismissed by the Court of Appeal. The decision of the Judges below that the issue of an N16A application form constituted the commencement of “proceedings” to which the CPR applied was upheld and the Judges were correct in their understanding, application and articulation of the law, and they were entitled to exercise their power under the CPR in the way that they did so as to enable the Defendant to pursue a claim for the costs of defending the injunction and damages.

The basis for the Court of Appeal’s decision can be summarised as follows:

- In granting the application, the Court had exercised an equitable jurisdiction confirmed by statute (Section 38 County Courts Act 1984) and “the grant of injunctive relief is not always conditional on the existence of a subsisting cause of action”.
- If there were still any doubt about this, the Court was satisfied that the term “proceedings” as used in Section 38 CCA 1984 was “wide enough to include an application for pre-claim injunctive relief”. The term ‘proceedings’ is not defined in the CPR and is used inconsistently within the CPR to refer to the period after a claim is issued, but also to the period in which the court is exercising a jurisdiction in the strict sense before a claim is issued. It is clear that the CPR applies generally to “all proceedings” in the County Court. CPR PD2C makes clear that ‘starting proceedings’ in the county court may be by ‘claim or application’.
- The county court has a discrete costs jurisdiction which could be properly invoked in the instance case. Section 51 of the Senior Courts Act 1981 establishes that costs “of and incidental to all proceedings” in the county court were in the court’s discretion and “courts routinely make costs orders when they hear urgent interim injunction applications, whether or not a Claim Form has been issued or will be issued in due course”.

## CASE UPDATES

- If the Claimant was correct that the original injunction application did not constitute “proceedings”, then this would effectively disapply the overriding objective to the management and determination of that application; there would be no obligation on the Court under the CPR to deal with the application “justly” and at proportionate costs. That simply could not be right. Many interim and pre-application injunctions have far-reaching consequences for the respondent/defendant. It would be absurd if the requirements to deal with such an application ‘justly’ and ‘fairly’ did not apply.
- The Claimant’s written argument conceded that the County Court “had the power to make the interim injunction” and, “as a corollary, a jurisdiction to discharge it”. The Claimant’s acceptance of the Court’s “jurisdiction” both to make and discharge the interim injunction was inconsistent with his contention that the application was effectively a ‘nullity’ and/or that it did not have “jurisdiction” (or the power) to make ancillary orders, including as to costs and as to damages as a result of the wrongful grant of the injunction.

Cobb L.J. also went on to briefly deal with the alternative ground as to whether CPR 3.10 could be deployed in the instance case, and agreed that CPR 3.10 could be invoked to correct the Claimant’s error of procedure in using an N16A application form rather than an N208 Part 8 Claim Form to issue his claim. The Court noted that, in accordance with PD 65, certain types of claims (albeit not under the Protection from Harassment Act 1997) are treated as though they are brought by the issue of an N16A. It had previously been held by the Court of Appeal in *Hannigan v Hannigan* [2000] EWCA Civ 159 that where proceedings had been initiated using the wrong form, CPR 3.10 allowed the defect in procedure to be corrected. Applied to the present facts, the Court concluded that “*the error of procedure in filing a N16A rather than a N208 could be corrected under CPR r.3.10 with the effect that the form N16A stands as a claim form in the proceedings*”.

### Unsuccessful Fundamental Dishonesty Allegation - Costs

*Hakmi v (1) East & North Hertfordshire NHS Trust (2) Norfolk & Norwich University Hospitals NHS Trust*  
[2025] EWHC 2597 (KB)

The Claimant (‘C’) is a distinguished orthopaedic surgeon who suffered a stroke in November 2016. He alleged that the decision of the Second Defendant’s Stroke Consultant not to offer him thrombolysis to treat the stroke was negligent and caused him serious disability. Quantum had been agreed, subject to liability, in the sum of £1,033,824. Ultimately, C did not succeed on liability at trial.



## CASE UPDATES

During the course of the proceedings, the Defendants ('D') had raised allegations of fundamental dishonesty. The allegations were first made in a Counter Schedule in March 2025 following an examination by Dr Bach, D's Clinical Neuropsychologist. Dr Bach's assessment was to the effect that C had not put effort into his testing, with the result that he had scored low. C had also taken the Test of Memory and Malinger (TOMM), from which Dr Bach concluded that C's test results could not be relied upon. Upon testing a month later, C's Neuropsychologist, Dr Ford, recorded similar results to Bach's, but not as low.

D pursued allegations of fundamental dishonesty at trial. In cross-examination, D's Counsel put to C that he had deliberately failed to put the required effort into the neuro-psychological testing to produce artificially low results below his actual cognitive performance. C vehemently denied this. Evidence was also heard from D's stroke rehabilitation expert, Dr Santullo, that she considered C had tended to exaggerate his physical symptoms during consultation.



Dr Ford stated in cross-examination that failure in testing in stroke patients is not evidence of malingering. There are genuine memory and attention problems in this patient group and TOMM testing stroke or moderately severe brain injury patients is unreliable.

D's Counsel accepted that the evidence for exaggeration of physical symptoms was limited and impressionistic. The Judge noted that Dr Santullo had seen Dr Bach's report prior to preparation of her own report and this may have influenced her thinking. D relied mainly on the neuropsychological testing and submitted that the variation in certain test scores was highly suspicious and pointed to a non-organic cause. It was submitted that if C's performance was deliberate and self-serving, then C was dishonest and the test of fundamental dishonesty in s.57 of the Criminal Justice and Courts Act 2015 was made out.

The Judge concluded that D had not established, to the civil standard, that C had been dishonest. The Judge preferred the evidence of Dr Ford, regarding the unsuitability of the TOMM assessment, and was satisfied that C's poor performance in Dr Bach's tests could be explained by C's psychological condition at the time of assessment. C had been exhausted by serious familial issues. The Judge considered that if C had been deliberately underperforming, it would run contrary to all he had done to rehabilitate himself following his stroke. C also had statements and letters from colleagues at the hospital attesting to his honesty and integrity, and the steps he had put in place to mitigate his disability following his stroke.

## CASE UPDATES

In view of the finding against C on liability, the claim was dismissed with C to pay D's costs of the action, not to be enforced without the leave of the court (given the application of QOCS).

The further issue for the Judge to address was the costs of defending the claim on the issue of fundamental dishonesty. The Judge noted that prior to trial, C's solicitors had put D on notice that, in the event the issue of fundamental dishonesty failed, C would make an application for costs. D had made two 'drop hands' offers shortly before trial which were not accepted. The trial proceeded and D pursued the issue of fundamental dishonesty to the end.

The Judge concluded that notwithstanding that D would not be able to enforce the Order in its favour for the costs of the claim, it was appropriate for him to make an order that reflected that D had failed to establish fundamental dishonesty. The Judge rejected D's assertion that to make such an order where a claimant fails in his case undermines the costs regime stating '*if anything it is the converse, not to make such an order would give a defendant a free tilt at raising the issue of fundamental dishonesty*'. The Judge noted that the evidence on the issue was explored at trial and found increasingly wanting. It would have been open to D to have abandoned the issue, but they did not do so. There had been unfavourable national press coverage on the first day of trial and the consequences for C, if the allegation had been proved, would have been disastrous for his reputation and career. Accordingly, the Judge considered he should make an order reflecting a percentage of the costs from the time the issue of fundamental dishonesty was raised in D's Counter Schedule dated 18 March 2025.

The Judge ordered D to pay 15% of C's costs from 18 March 2025, to be the subject of a detailed assessment on the standard basis in default of agreement.



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

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