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

The Importance of Good Photographic Evidence in Highways Matters

EB v Bridgend County Borough Council

Good photographic evidence is an essential tool in a Claimant's armoury when attempting to prove factual causation and dangerousness in highways matters. Without such photographic evidence, and particularly when faced with a lack of other supportive evidence, a Claimant will face an uphill struggle to convince a Trial Judge that an accident occurred in the circumstances alleged and/or that an alleged defect was dangerous. This was illustrated in the recent case of *EB v Bridgend County Borough Council*, in which Dolmans represented the Defendant Local Authority.

Background / Allegations

The Claimant alleged that she was walking along the Defendant Local Authority's adopted footway, when she tripped and fell over a protruding edge of a paving slab/stone, causing her to sustain personal injuries.

The Claimant alleged that the Defendant Local Authority was negligent and/or in breach of Section 41 of the Highways Act 1980.

Liability

The burden was, of course, on the Claimant to prove that her accident had occurred in the circumstances alleged and that the relevant location was dangerous. If the Court was satisfied that the Defendant Local Authority was in breach of Section 41 of the Highways Act 1980, the burden was upon the Defendant Local Authority to show that it had an appropriate Section 58 Defence.

Claimant's Evidence

The Defendant Local Authority argued that the Claimant's evidence was lacking and insufficient to prove factual causation. The Trial Judge was reminded that a positive finding of the factual matrix was necessary before moving on to assess dangerousness.

The Claimant's photographs provided no context shots, failing to indicate any direction of travel and no measurements at all. There was even no item placed next to the alleged defect to indicate an approximate measurement and the Claimant described the said photographs as merely showing the general state of repair of the relevant area.

The situation was amplified by the Claimant under cross-examination and by the fact that her only eye witness did not give any evidence in support of the Claimant's claim.

The Claimant admitted that she only realised she had tripped on a leading edge after her alleged accident and could not recall which foot was involved. It was argued, therefore, that while the Claimant knew that she fell, she was attempting to put some explanation together after the event.

The Court was reminded that it was not being asked to assess the quality of the entire highway, but the specific defect that allegedly caused the Claimant's accident.

Dangerousness

In assessing dangerousness, the Courts have, of course, provided a great deal of guidance over the years, including the following:

- *"Everyone must take into account of the fact there may be unevenness here and there"*; *Meggs v Liverpool Corporation [1968] 1 WLR 689*.
- *"A highway is not to be criticised by the standards of a bowling green"*; *Littler v Liverpool Corporation [1968] 2 All ER 343*.
- *"The test of dangerousness is one of reasonable foresight of harm, but in drawing the inference of dangerousness, the Court must not draw too high a standard"*; *James & Thomas v Preseli Pembrokeshire District Council (1993) PIQR P114*. This is also authority for the proposition that a Court assesses an individual alleged defect and not the state of a whole section of land or highway.

The Court of Appeal summarised Highways and Occupiers' Liability Act case law in *Dean & Chapter of Rochester Cathedral v Debell [2016] EWCA Civ 1094* in assessing the dangerousness or otherwise of a Cathedral precinct as follows: *"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"*.

Photographic Evidence

To assist in proving dangerousness, a Claimant requires good quality photographic evidence of the nature of the dangers and defects complained of; the burden resting firmly with the Claimant.

In *Walsh v Kirklees MBC [2019] EWHC 492 (QB)*, Mr Justice Dingemans dismissed the Claimant's appeal on the basis that the Trial Judge was right to find that *"there was not enough reliable evidence of the dimensions or condition of the pothole to say it was more likely than not that it presented a real source of danger"*. It was not possible in that case to determine what effect the road material underneath the tape measure, together with the road material in that part of the relevant area, had on the measurements of the pothole, using the photographs in the Trial Bundle.

By utilising similar arguments relating to the Claimant's photographs in the current matter, the Defendant Local Authority argued that the Claimant could not prove dangerousness.

Early Judgment

In light of the strength of the Defendant Local Authority's arguments regarding factual causation and dangerousness in particular, the Trial Judge was invited to make a finding on factual causation and dangerousness before moving onto any breach of Section 41 of the Highways Act 1980 and/or and Section 58 Defence. The Trial Judge agreed; the Claimant raising no real objection to the said approach.

The Trial Judge, after considering the Claimant's evidence as referred to above and the Defendant Local Authority's arguments in response to the same, wasted little time in finding that the Claimant had failed to prove factual causation and/or dangerousness, thereby dismissing the Claimant's claim.

Although the Defendant Local Authority was not required to give evidence, Witness Statements had been obtained and witnesses were available to prove that the Defendant Local Authority had an appropriate Section 58 Defence if necessary.

Comment

It was realised at an early stage in the above matter that the Claimant's photographic and other evidence was severely lacking, to the extent that the Trial Judge was invited and agreed to give Judgment on the basis of the Claimant's evidence alone. As such, Judgment was given swiftly and without having to consider the Defendant's witness evidence.

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FOCUS ON

Negligence - Duty of Care; Human Rights Act 1998 - Limitation - Article 3 Investigative Duty

CJ, PJ, OB, HD and PD v The Chief Constable of Wiltshire Police [2022] EWHC 1661 (QB)

The Claimants are victims of sexual abuse perpetrated by MP. On 21 December 2012, MP's sister found indecent images of children on her laptop at the family home and reported it to the police. A police officer, 'DSE', attended the home and seized the laptop. DSE delivered the laptop to the Defendant's Hi-Tech Crime Unit (HTCU) for examination on 2 January 2013. DSE carried out no further investigations at that time and MP, who lived in the family home, was not interviewed. The case was assessed as a mid to low priority by the HTCU and, as such, the examination of the laptop was not completed until 23 April 2014. In the meantime, DSE had closed the case on the Defendant's Information Management System. The HTCU's examination showed that MP was responsible for the creation of the images. DSE was informed. The images were downloaded onto a police laptop, which DSE collected from the HTCU on 20 May 2014. DSE failed to progress the investigation thereafter.

In October 2014, OB's mother found MP through a childcare website and engaged him to care for OB. In February 2015, OB told his mother that MP had made him watch rude photographs. OB's mother reported this to the police. OB had been sexually abused by MP between November 2014 and February 2015.

In January 2015, the mother of HD and PD had found MP through the same website and engaged him to provide childcare. On 8 April 2015, HD made a comment to his mother that rang alarm bells. She reported this to the police. The report was linked to the report made by OB's mother and a full investigation into MP began. HD and PD had been sexually abused by MP between 29 January 2015 and 8 April 2015.

MP was arrested on 10 April 2015. In June 2015, DSE belatedly resumed his investigation into the laptop images and discovered that MP was being investigated in relation to the above reports. He contacted the investigating officer and the investigations were amalgamated. MP was charged on 28 November 2015. He pleaded guilty and was sentenced to 10 years imprisonment in March 2016.

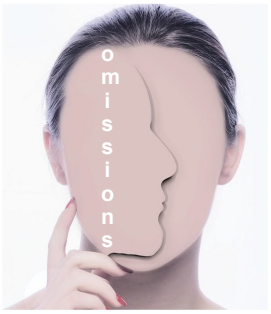
CJ and PJ were the niece and nephew of MP and had spent considerable time in MP's family home as their maternal grandmother provided childcare. They had been sexually abused by MP between 1 January 2013 and 11 April 2015.

The Claimants claimed damages against the Defendant for negligence and breach of their Article 3 ECHR rights.

Negligence

The Judge found that the Defendant, through DSE, was negligent and, had the investigation been conducted properly, MP would have been denied the opportunity to abuse the Claimants.

It was accepted that the negligence claims for OB, HD and PD were bound to fail on existing case law as theirs was an omissions case and no duty of care was owed. On behalf of CJ and PJ, it was submitted that there had been positive acts by DSE which meant that theirs was not an omissions case or, if it was, one of the exceptions giving rise to a duty of care existed. The positive acts alleged were retaining ownership of the investigations rather than passing the case to a more experienced or senior officer, closing the case in August 2013 and deciding not to pursue investigations following receipt of the HTCU report.



The Judge accepted the Defendant's submission that, properly analysed, the positive acts relied upon were no more than omissions in disguise. On the facts, none of the exceptions were established. Accordingly, the claims in negligence were dismissed.

HRA 1998

Limitation

Pursuant to s7(5) of the HRA 1998, proceedings must be brought within one year beginning with the date on which the act complained of took place or such longer period as the Court considers equitable having regard to all the circumstances.

The solicitors for OB had been instructed in September 2016, at which time an Independent Police Complaints Commission (IPCC) investigation was ongoing. The IPCC report was available in August 2017. A Letter of Claim requesting a limitation moratorium was sent to the Defendant on 9 March 2018, which was not responded to. A conference with Counsel took place on 25 June 2018 and proceedings were issued on 16 July 2018.

The solicitors for HD and PD were instructed in November 2016. They wrote to the Defendant in January 2017 advising that a Letter of Claim would be sent after sight of the IPCC report and requested a limitation extension in the meantime. The Defendant did not respond. Following chasing letters, the Defendant refused a limitation extension in February 2018. Proceedings were issued on 19 April 2018.

The solicitors for CJ and PJ were instructed in August 2017. Their mother was MP's sister and she had been abused herself as a child. She was struggling to come to terms with what had happened and was unable to complete the Legal Aid application until March 2018. Legal Aid was granted in August 2018 and proceedings issued on 18 October 2018.

None of the claims had thus been brought within the 1 year limitation period and limitation defences were relied upon.

The Judge considered there were two particular factors which pointed clearly to exercising discretion in favour of the Claimants. First, an action could never have been brought within 1 year because the knowledge of what MP did and its relationship with DSE's investigation came significantly later, realistically only when the IPCC report was released. Therefore, it was always going to be equitable to extend time; the issue was the length of such extension. Second, the Claimants were minors.

Further factors relied upon by the Judge included that the delay after the IPCC report was released was not unreasonable; there was no prejudice to the Defendant, the psychological state of CJ/PJ's mother, the Defendant's failure to respond to correspondence and the eventual refusal to agree a moratorium in the case of HD/PD, which was difficult to justify, and the nature of the claim.

Accordingly, the Judge exercised discretion to extend time to bring the HRA claims.

Article 3

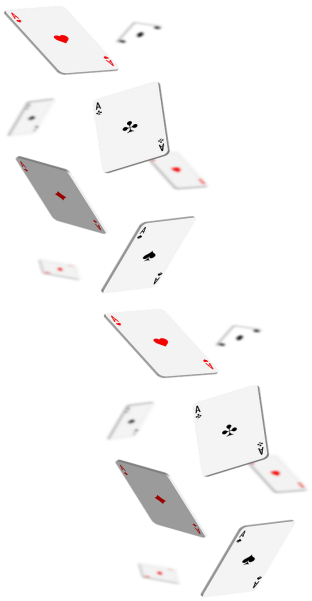
It was common ground that the sexual abuse suffered by the Claimants amounted to inhuman treatment for the purposes of Article 3. It was also agreed that the leading case for the purposes of this claim was the Supreme Court's decision in *D v Commission of Police for the Metropolis [2019]*, in which it was held that the HRA 1998 imposes an Article 3 investigative duty upon the state and that purely operational failures will suffice to establish a claim that an investigation carried out pursuant to an Article 3 duty infringed the duty to investigate, provided that they were egregious and significant.

The Judge found that DSE's failures after he received the HTCU report in May 2014 were egregious. His failings prior to this were culpable, but not egregious.

The crux of the dispute between the parties related to whether the Court should be concerned with the failures in the overall investigation from December 2012 to August 2015 or with the two separate investigations. The Judge did not accept that there was an 'overall' investigation. There were two separate investigations; the investigation of DSE into the laptop images which was amalgamated in or about July 2015, with the separate investigation into the reports of sexual abuse by MP commenced in April 2015.

The Claimants sought to argue that if the eventual harm to the victims represented a violation of their Article 3 rights, and if the earlier investigation could have avoided that harm, then the investigation was, by definition, an Article 3 investigation.

The Defendant submitted that no Article 3 investigative duty was owed until April 2015. Prior to this, on the basis of what was known about MP, there was no evidence that he posed a real risk of a contact offence with a child such as to trigger the duty under Article 3.



The Judge accepted the Defendant's position. It is the fact that the criminal conduct falls foul of Article 3 that informs the enquiry into the standard of investigation and *"the whole rationale falls like a house of cards if the Article 3 duty is extended retrospectively to an investigation into criminal conduct which did not fall foul of Article 3"* … *"There is a wide range of failures, both operational and systemic, which will fall within Article 3; but it must surely be the premise for such liability that the investigation in question is into conduct which is, and is known by the police to be, conduct engaging Article 3"*. Were the Claimants' argument correct, liability would attach, even if the violation of Article 3 was not reasonably foreseeable or foreseeable at all. This would place an intolerable and unjust burden on the police.

Accordingly, whilst the Claimants' Article 3 rights had been violated by the treatment to which they were subjected by MP, for the purposes of s.7 HRA, the Claimants were not victims of the Defendant by virtue of the failings in the enquiry into the laptop images. No Article 3 investigation was triggered by that enquiry.

Accordingly, the Claimants' claims were dismissed.

Comment

Claimant solicitors will no doubt seek to rely upon the Judge's view that the fact that the Claimants were minors was a significant factor in deciding whether to exercise discretion on limitation. However, the Judge also recognised that the correct approach is to consider all the relevant factors in a case and consider whether it is equitable to allow a period of longer than 1 year, which was reflected in the Judge's decision making. Each case will turn on its own facts.

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RECENT CASE UPDATES

Costs - Clinical Negligence

Macauley v Karim
SC2021-APP-001284

A clinical negligence claim was brought by the Claimant against his General Practitioner (Dr Karim) and Croydon Health Services NHS Trust (the Second Defendant), arising out of a delay in diagnosing and treatment. The Claimant pursued his claim with Legal Aid Funding.

After a 10 day split trial on liability in the High Court, the Second Defendant was found to be negligent and liable to compensate the Claimant for injuries. Whilst the Claimant succeeded against the First Defendant (Karim) in respect of causation, the Claimant did not succeed in respect of breach of duty and, therefore, his claim against the First Defendant failed. The Claimant was ordered to pay the First Defendant's costs on the following basis:

"*The Claimant do pay the First Defendant's costs in respect of breach of duty, such costs to be subject to a detailed assessment if not agreed. These costs are to be payable from any damages awarded to the Claimant at the conclusion of his action against the Second Defendant, but are not to be enforced without permission of the Court. The First Defendant is not entitled to his costs arising out of the causation argument".*

Under the same Order, the Second Defendant was to make an interim payment on account of damages to the Claimant.

The Claimant settled his claim against the Second Defendant by way of a Tomlin Order. The Order provided that the proceedings should be stayed, save for enforcement of the agreed terms, that the Second Defendant would pay the Claimant's costs and that there should be a Legal Aid assessment of the Claimant's costs.

The First Defendant lodged an Application seeking to recover their costs pursuant to the above Order.

Following a preliminary issues hearing, the Court determined the following issues:

(1) Claimants in personal injury cases can have the benefit of both Legal Aid cost protection and QOCS at the same time. Legal Aid costs protection relates to the amount to be paid and QOCS relates to enforcement. The applicability of QOCS is not a bar to a determination under Section 11 of the 1999 Act (although, in practice, if QOCS does apply, there may be little reason for the receiving party to make a request for a determination).

(2) An agreement to pay a sum under a Schedule to a Tomlin Order is not an order for damages and interest in respect of Section 11 Access to Justice Act (Legal Aid) as was already recognised in respect of QOCS; *Cartwright v Venduct Engineering Ltd [2018] EWCA Civ 1654*. Such a sum is, therefore, not available for a successful Defendant's costs.

(3) The interim payment provided for within the Order *on account* of damages was not an Order for damages and interest for the purposes of CPR 44.14.

Consequently, the Court was to proceed on the basis that the Claimant was entitled to QOCS and that no Order for damages or interest had been made against which the First Defendant could enforce its Costs Order.

RECENT CASE UPDATES

Costs - Fixed Costs - Consent Orders - Detailed Assessment

Doyle v M&D Foundations and Building Services Limited [2022] EWCA Civ 927

The Claimant brought a claim following an accident at work which had been commenced by way of the EL Protocol but had left the Protocol when the Defendant denied liability. Consequently, the matter was, ordinarily, subject to the fixed costs regime under Section IIIA of CPR 45.

The parties entered into negotiations to compromise the claim. The Claimant offered to settle his claim under Part 36 in the sum of £5,000. Quantum was agreed by the Defendant without the Part 36 Offer being accepted (because it had been made late and close to Trial). A Consent Order was prepared in relation to the agreed damages of £5,000 which provided that the Defendant was to pay the Claimant's costs, "*such costs to be the subject of detailed assessment if not agreed*".

The Claimant subsequently lodged a Bill of Costs for detailed assessment on the standard basis, citing the terms of the Consent Order. The Defendant disputed this, contending that, as an ex-Protocol claim, the case fell within the fixed recoverable costs regime. At first instance, the District Judge rejected that contention on the basis that the parties had "contracted out" of the fixed costs regime, as reflected in the express terms of the Order.

That decision was upheld on appeal.

In dismissing the Defendant's appeal, it was held that a Court Order's words were to be given their natural and ordinary meaning and were to be construed in their context. The compromise agreement, which was a product of negotiation between solicitors as to the terms of the settlement, with a view to being embodied in a Court Order, had to be construed in accordance with established principles applicable to the interpretation of contractual principles.

There was no ambiguity whatsoever as to the natural and ordinary meaning of "subject to detailed assessment" in an agreement or order as to costs. The phrase was a technical term and plainly denoted that the costs were to be assessed by the procedure in CPR Part 47 on the standard basis.

There was nothing in CPR Part 45 that prevented parties settling a dispute on any terms they pleased, including as to costs; there was no bar on them contracting out of the fixed costs regime.

The terms of the Order had been agreed by firms of solicitors who were both specialists in that type of litigation. The solicitors had to be taken to have been aware of the relevant rules and principles, that the fixed costs regime could be disapplied by agreement and that an Order providing for detailed assessment (without more) entailed an assessment on the standard basis.

RECENT CASE UPDATES

Housing Disrepair - 10% Uplift - Damages for Breach of Repairing Covenant

Khan v Mehmood
[2022] EWCA Civ 791

This claim began as a possession claim. The Claimant did not attend the hearing of that claim and the possession claim was struck out. The Judge at that hearing, however, found in favour of the Defendant in relation to a Counterclaim which included general disrepair damages.

The Claimant landlord appealed an award of damages on two grounds. The first ground was due to a factual dispute. The second of those grounds was that the Trial Judge had erred in applying the 10% "*Simmons v Castle" (2012 EWCA Civ 1288*) uplift to the damages award in what was a housing disrepair claim. The Claimant asserted that the uplift should only apply to cases where damages are calculated with reference to a tariff, although arguments were also raised regarding the appropriateness of the uplift generally.

The Housing Law Practitioners Association (HLPA) intervened in the appeal and set out that the 10% uplift was routinely awarded in disrepair cases, that the uplift was intended to apply to this kind of case and that Claimants in disrepair cases receive modest level of damages, meaning that the 10% uplift is necessary and has a significant affect on the level of compensation they receive. They also submitted that representation by CFA is increasingly common and necessary for potential Claimants.

The Court concluded that there was no good reason why general damages for breach of a repairing obligation should be excluded from the 10% uplift authorised in *Simmons v Castle*. On the contrary, there were good reasons why such damages should attract the uplift.

The Claimant's appeal was, therefore, dismissed.

Part 36 - Genuine Attempt to Settle

Omya UK Limited v (1) Andrews Excavations Limited (2) Daniel Andrews
[2022] EWHC 1882 (TCC)

The Defendants were found liable to the Claimant in the sum of £765,094.40, which was the full amount claimed by the Claimant. This exceeded a Part 36 offer which had been made by the Claimant on 12 June 2020 in the sum of £756,287.05. The Judge had to consider whether the consequences set out at CPR 36.17(4)(a)-(d) applied to that offer. The Defendant submitted that it would be unjust to do so.

RECENT CASE UPDATES

The Defendant contended that the Claimant's offer should not be regarded as a genuine attempt to settle as the offer was to accept a discount of £8,806.95 (1.15%) against the amount claimed. Even if interest at a generous commercial rate were taken into account, the offer was to accept 95% of the total amount claimed inclusive of interest. This was a tactical attempt to catch the Defendants on the hook of Part 36. The case was a binary one, in which the Claimant would either recover the whole sum claimed or nothing at all. The offer, therefore, created no inducement or incentive for acceptance. The offer required almost total capitulation and was made before disclosure and exchange of Witness Statements, when the Defendants did not know the quality or extent of the Claimant's witness evidence.

The Judge held that whilst the mathematical proportion of the offer to the amount claimed is a potentially relevant factor, it is not determinative. This was a case in which there was never likely to be any significant debate as to quantum. Further, it was relevant that the defence lacked credibility. The Defendants' best hope was that some or all of the Claimant's witnesses would not give evidence. This was a genuine attempt to settle.

There was no other reason why it was unjust to apply the normal consequences of a failure to accept a Part 36 offer.

Accordingly, the Defendants were ordered to pay the additional amount of £63,254.72 in accordance with CPR 36.17(4)(d)(i), indemnity costs from the date of expiry of the offer and interest at 5%. The Judge further awarded costs on the indemnity basis up to the Part 36 offer in the circumstances of this case.

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

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- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
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- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

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