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

Testing Dangerousness in Non-Highways Matters

K I v Monmouthshire County Council

Introduction

The guidance used to test the dangerousness of defects on adopted highways is well known to anyone dealing with highway maintenance claims on a regular basis. There will be intervention levels and safety defect criteria set by Local Authorities for such defects, which will usually be adduced in evidence by the appropriate Highways Manager.

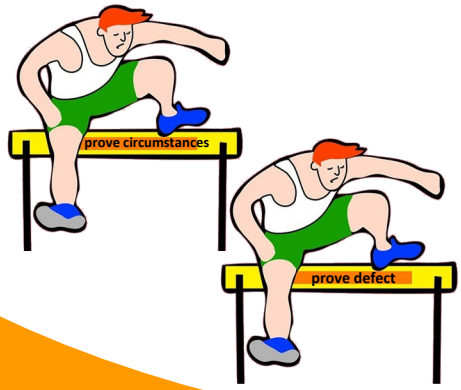
However, the guidance is less certain in those cases where accidents occur at locations that are not part of the adopted highway, even though still subject to a relatively high level of pedestrian footfall. Invariably, these locations will be subject to the Occupiers' Liability Act 1957.

Under Section 2(2) of the 1957 Act, an occupier of premises owes to its visitors the common duty of care, as in all the circumstances is reasonable, to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there.

The Court of Appeal in *Dean & Chapter of Rochester Cathedral v Debell [2016] EWCA Civ 1094* applied much of the guidance on dangerousness from leading highways cases to the 1957 Act and was relied upon in the recent case of *K I v Monmouthshire County Council*, where Dolmans represented the Defendant Authority.

Background and Initial Hurdles

The Claimant alleged that she was walking through a car park owned and occupied by the Defendant Authority, when she tripped in a pothole, causing her to fall and sustain personal injuries. It was alleged that the Defendant Authority was negligent and/or in breach of Section 2 of the Occupiers' Liability Act 1957.



Before considering dangerousness, the Claimant must, of course, overcome the initial hurdles and prove that the accident occurred in the circumstances alleged, in addition to showing that the alleged defect had caused the accident. This was, of course, confirmed in the well known case of *James & Thomas v Preseli Pembrokeshire District Council (1993) PIQR P114*, where the Court assessed the individual alleged defect and not the state of the whole highway.

The Claimant in the current matter had disclosed photographs of the alleged pothole. However, this photographic evidence was lacking in many respects. It was not clear who had taken the photographs or when they were taken. No Witness Statement was served by the photographer. The photographs were not particularly clear and showed no measurements, apart from a fifty pence piece that had been placed into a crack within the alleged defect. There were also no context shots, showing the alleged defect from a wider angle. It was argued, therefore, on behalf of the Defendant Authority, that the Claimant was unable to prove that the alleged defect shown in the photographs was that which had caused the Claimant's alleged accident.

The Claimant had not described her direction of travel, either in her pleadings or Witness Statement, and merely stated that the pothole was some three car lengths from her own vehicle, but again without any context shot showing where her vehicle was parked.

There were also a number of inconsistencies in the Claimant's medical records. Although a pothole was mentioned, the mechanism of the Claimant's alleged fall was described in places as either a trip, a slip or a twist; all three, of course, being very different mechanisms.

The Defendant Authority was not suggesting that there was no fall or any dishonesty on the Claimant's part, but that she had failed to establish the mechanism of her alleged fall. Indeed, the mechanism of the Claimant's alleged fall had been firmly in issue since the Defence was filed and served on behalf of the Defendant Authority and it was argued that the Court ought properly to expect to see a detailed description of the said mechanism, including direction of travel and the process by which the Claimant says she fell.

Dangerousness

As has already been stated above, the Court of Appeal in *Dean & Chapter of Rochester Cathedral v Debell* applied much of the guidance on dangerousness from leading highways cases to the Occupiers' Liability Act 1957.

In assessing dangerousness, the Defendant Authority argued that the Courts have provided a great deal of guidance, including the following:

- *Meggs v Liverpool Corporation [1968] 1 WLR 689*, in which it was held that *"everyone must take into account the fact there may be unevenness here and there."*
- *Littler v Liverpool Corporation [1968] 2 All ER 343*, where it was famously stated that *"a highway is not to be criticised by the standards of a bowling green."*
- As well as being the authority for the proposition that the Court assesses the individual alleged defect and not the state of the whole highway, as referred to above, *James & Thomas v Preseli Pembrokeshire District Council* also maintained that *"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."*

REPORT ON

In *Dean & Chapter of Rochester Cathedral v Debell*, the Court of Appeal summarised highways and occupiers case law in assessing the dangerousness or otherwise of a cathedral precinct, finding that *"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."*

In addition to the above, the importance of the Claimant's photographic evidence should not be underestimated when assessing dangerousness.

In *Walsh v Kirklees MBC [2019] EWHC 492 (QB)*, Mr Justice Dingemans dismissed the Appellant'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 from the photographs disclosed to determine what effect the road material had on the measurements of the pothole.

The Claimant's photographs in the current matter were clearly lacking, with no meaningful measurements and no context shot showing the alleged pothole from a wider angle. Indeed, from the Claimant's photographs, the pothole shown could have been located anywhere.

The Court was also invited to look to the location of the alleged defect. It was not on an obvious footway within the car park, being located in a car parking space.

Although not on the adopted highway, the alleged defect had been noted for repair as a category two defect for repair within 28 days and the Claimant's alleged accident had occurred within this 28 day period. It was argued, on behalf of the Defendant Authority, that had it been considered that the alleged defect was dangerous, then it would instead have been noted as a category one defect. It was also argued that the Defendant Authority is not required to remove all risk, but to act reasonably to reduce any risk to a reasonable level.

Taking all of the above arguments into account, it was submitted that the Claimant had failed to prove that the alleged defect was dangerous.

Breach of Duty

In the event that the Claimant was able to persuade the Court that she had proved the alleged mechanism and dangerousness, she needed to prove breach of duty on the Defendant Authority's part in order to succeed in her claim.

Although the Defendant Authority was adamant that the Claimant had not sufficiently proved the alleged mechanism and dangerousness, it presented evidence that there had been no breach of duty in any event.

The Defendant Authority argued that it had a safe system in place, with both scheduled and reactive inspections of the car park. A defect had been noted for repair within 28 days, indicating that the system was effective and was repaired within the said period. However, the Defendant Authority reiterated that the alleged defect was not dangerous, as has already been referred to above. It was argued that there was no basis for the Court to say that this ought to have been noted as a category one defect.

In this regard, the Defendant Authority relied upon the decision in *Mills v Barnsley Metropolitan Borough Council [1992] PIQR P291*, in which it was held that *"it is important that our law should not impose unreasonably high standards, otherwise scarce resources should be diverted from situations where maintenance and repair of the highway is more urgently needed."* In light of the Court of Appeal's approach in *Debell*, it was argued that this is also true in cases involving the Occupiers' Liability Act 1957.

Judgment

Despite the inconsistencies, the Trial Judge accepted the mechanics of the Claimant's alleged accident and that she was near a pothole when she fell. However, she had not done enough to prove that the alleged pothole had caused her accident. The Judge reminded the Court that good supportive evidence, such as clear photographs and measurements, were needed to assist the Court in making its finding regarding dangerousness. However, for the reasons already referred to above, such evidence was lacking in this particular matter.

Likewise, the Trial Judge held that the Claimant's photographs were not sufficient to allow the Court to make a finding that the alleged defect was dangerous and that it was not sufficient for the Claimant to say that it must follow that a category two defect is dangerous.

The Claimant had failed to demonstrate that the alleged defect was dangerous and her claim was dismissed accordingly.

Conclusion

The Claimant in the above matter had clearly not done enough to prove that the alleged defect had caused her accident. The Claimant's photographs not only failed to assist the Court in reaching a decision as to the defect that had caused the Claimant's alleged accident, but also did not assist the Court in making a finding regarding dangerousness.

The Court was assisted, however, by a carefully pleaded Defence, strong witness evidence on behalf of the Defendant and effective cross-examination of the Claimant at Trial, leading the Judge to make a finding in the Defendant Authority's favour, without the need to consider any breach of duty.

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FOCUS ON

Professional Negligence - Duty of Care - Scope of Duty

Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20

Khan v Meadows [2021] UKSC 21

On 18 June 2021, two Supreme Court Judgments were handed down by the same panel of seven Justices regarding the application of the approach to ascertaining the scope of a Defendant's duty of care laid down in *South Australia Asset Management Corporation v York Montague Limited [1997]* ('*SAAMCO*'). This brief summary focuses on the approach of the majority.

Manchester Building Society v Grant Thornton UK LLP

[2021] UKSC 20

Between 2004 and 2010, the Appellant Building Society ('MBS') purchased and issued lifetime fixed rate mortgage loans which were funded by MBS borrowing at variable rates of interest. In order to 'hedge' against the risk that the variable cost at which MBS was borrowing would exceed the fixed rate of interest it would recover from its clients, MBS entered into interest rate swap contracts. The 'mark-to market' ('MTM') value of a swap is the price for which it can be traded in the market at a given date. From 2005, MBS was required to prepare its accounts in accordance with the International Financial Reporting Standards, which require swaps to be accounted for on the balance sheet at their fair value, the MTM value, whereas the mortgage loans were accounted for at book value. This would have made MBS's accounts appear more volatile, which would have increased the amount of capital needed to satisfy regulatory requirements.

MBS's auditors, Grant Thornton, advised MBS in April 2006 that it could apply hedge accounting rules which enabled the value of the lifetime mortgages on the accounts to be adjusted to offset changes in the MTM value of the swaps. This avoided the apparent volatility in the accounts.

From 2006 to 2011, MBS relied on Grant Thornton's advice when entering into more lifetime mortgages and swaps during this period. In March 2013, Grant Thornton informed MBS that it was not after all permitted to apply hedge accounting in preparing its financial statements. MBS had to correct its accounts, as a result of which it had insufficient regulatory capital. In order to extricate itself from the situation, MBS terminated all its interest rate swap contracts early, resulting in a significant loss. MBS claimed compensation from Grant Thornton for these losses. Grant Thornton admitted that its advice had been negligent, but submitted that its negligence did not cause the losses claimed and/or that those losses were not recoverable in law because they were not losses from which Grant Thornton owed MBS a duty to protect it.

At first instance, the Judge found that MBS could not recover damages for this loss because he derived from *SAAMCO*, as explained in *Hughes Holland v BPE Solicitors [2017]*, that the test is that a Defendant is only responsible for losses if they flow from matters for which the Defendant has 'assumed responsibility', and the losses here flowed from market forces for which Grant Thornton did not assume responsibility. MBS appealed.

The Court of Appeal dismissed the appeal, albeit finding that the Judge had erred in approaching the issue of liability on the basis of assumption of responsibility. The Judge should have considered whether Grant Thornton gave 'advice' or only 'information' to MBS. Applying that approach, this was not an 'advice' case where Grant Thornton was responsible for 'guiding the whole decision making process' and, hence, liable for all the foreseeable financial consequences of the decisions to enter into the swaps. This was an 'information' case and Grant Thornton was, thus, only liable for the foreseeable financial consequences of its information / advice being wrong. MBS could not show that it had suffered any losses that it would not have suffered if Grant Thornton's information had been correct (in which case the swaps would not have been terminated). To show that it had suffered a loss by terminating the swaps when it did, MBS would have to prove that it would have been better off if it had continued to hold the swaps which had not been proved. MBS appealed to the Supreme Court.

The Supreme Court allowed the appeal. Three separate Judgments were given. Whilst all reached the same outcome, the approaches to *SAAMCO* differed. This summary focuses on the majority approach.

The scope of duty principle is that a Defendant is liable only for losses which fall within the scope of his or her duty of care to the Claimant. The majority considered it helpful to analyse the place of the scope of duty principle in the tort of negligence via a series of questions:

(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

(2) What are the risks of harm to the Claimant against which the law imposes on the Defendant a duty to take care? (the scope of duty question)

(3) Did the Defendant breach his or her duty by his or her act or omission? (the breach question)

(4) Is the loss for which the Claimant seeks damages the consequence of the Defendant's act or omission? (the factual causation question)

(5) Is there a sufficient nexus between a particular element of the harm for which the Claimant seeks damages and the subject matter of the Defendant's duty of care as analysed at stage (2) above? (the duty nexus question)

(6) Is a particular element of the harm for which the Claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it, or because the Claimant has mitigated his or her loss, or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)

FOCUS ON

The scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given. Therefore, in the case of negligent advice given by a professional adviser, one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk. The distinction drawn between 'advice' and 'information' cases in *SAAMCO* was too rigid and was liable to mislead. For the purposes of accurate analysis, rather than starting with the distinction between 'advice' and 'information' cases and trying to shoehorn a particular case into one or other of these categories, the focus should be on identifying the purpose to be served by the duty of care assumed by the Defendant. The *SAAMCO* counterfactual, which asks whether in an 'information' case the Claimant's actions would have resulted in the same loss if the advice given by the Defendant had been correct, is simply a tool to crosscheck the result given pursuant to an analysis of the purpose of the duty. It is subordinate to that analysis and should not supplant or subsume it.

On the facts herein, MBS looked to Grant Thornton for technical accounting advice whether it could use hedge accounting in order to implement its proposed business model within the constraints arising by virtue of the regulatory environment, and Grant Thornton advised that it could. That advice was negligent. It had the effect that MBS adopted the business model, entered into further swap transactions and was exposed to the risk of loss from having to break the swaps when it was realised that hedge accounting could not in fact be used, and MBS was exposed to the regulatory capital demands which the use of hedge accounting was supposed to avoid. That was a risk which Grant Thornton's advice was supposed to allow MBS to assess and which their negligence caused MBS to fail to understand.

On the Judge's findings, MBS had suffered a loss which fell within the scope of the duty of care assumed by Grant Thornton, having regard to the purpose for which they gave their advice about the use of hedge accounting. Accordingly, Grant Thornton were liable for the losses suffered by MBS in being compelled to break the swaps once the true accounting position was appreciated. The Judge's finding of 50% contributory negligence was approved.

Khan v Meadows

[2021] UKSC 21

The Supreme Court considered whether, in the context of a claim for clinical negligence, the Court should follow the approach to ascertaining the scope of a Defendant's duty of care laid down in *SAAMCO* and, if so, how that approach is to be applied.

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FOCUS ON

The Claimant, 'C', became aware of the possibility that she was a carrier of the haemophilia gene when her nephew was diagnosed as having haemophilia. C wished to avoid having a child with that condition. She consulted a GP in 2006 with a view to establishing whether she was a carrier of that gene. The blood tests which were arranged were those which establish whether a patient has haemophilia. They could not confirm whether C was a carrier of the haemophilia gene. In order to obtain that information, C should have been referred to a haematologist for genetic testing. C saw another GP at the practice to obtain and discuss the blood test results, who advised C the results were normal. As a result, C was led to believe that any child she might have would not have haemophilia.

In 2010, C had a child who was diagnosed as having haemophilia shortly after birth. C was referred for genetic testing which revealed that she was indeed a carrier of the gene for haemophilia. Had C known this before she became pregnant, she would have undergone foetal testing for haemophilia when she became pregnant. That testing would have revealed that her son was affected by haemophilia. If so informed, C would have chosen to terminate her pregnancy and the child would not have been born.

In 2015, the child was diagnosed as also suffering from autism. This is an unrelated condition; the haemophilia did not cause the autism or make it more likely that the child would have autism. However, autism had made the management of the child's treatment for haemophilia more complicated. The costs of managing the child's haemophilia were agreed in the sum of £1.6 million. Damages covering the management of both conditions were agreed at £9 million. The Defendant GP, 'D', admitted that she was liable to compensate C for the additional costs associated with the child's haemophilia, but denied responsibility in relation to the additional costs associated with his autism.

At first instance, the Judge found D liable for the costs associated with both conditions. The Judge had regard to *SAAMCO* and found that the purpose of the service offered by D '*was not to prevent the Claimant from having any child, but, rather, ultimately, to prevent her having a child with haemophilia'*, however, on the facts as found, as a matter of 'but for' causation, the child would not have been born but for D's negligence. D appealed.

The Court of Appeal allowed the appeal, finding that the scope of duty test identified in *SAAMCO* was determinative of the issues which the Court had to address. D was not liable for the costs associated with the child's autism because that type of loss was not within the scope of the risks which D had undertaken to protect C against and, therefore, was not within the scope of her duty of care. C appealed.

Before the Supreme Court, C submitted that the *SAAMCO* approach, which was relevant to commercial transactions involving pure economic loss, was not suited to cases of clinical negligence in which there was an imbalance of knowledge and power between the clinician and the patient. It was also arbitrary and unfair to draw a distinction between a parent who did not want any pregnancy (as in the 'wrongful birth' cases) and a parent who did not want a particular pregnancy. If *SAAMCO* did apply, then this still did not restrict C's claim as the wrongful birth cases established that the kind of loss which was to be compensated in cases of wrongful birth and wrongful conception extended to disabilities arising from all the normal incidents of conception, intra-uterine development and birth.

In analysing the place of the scope of duty principle in the tort of negligence, the majority set out the same 6 questions as in the *Manchester Building Society* case above.

The Supreme Court rejected C's submissions. There was no principled basis for excluding clinical negligence from the ambit of the scope of duty principle. Nor was there any principled basis for confining the principle to pure economic loss arising in commercial transactions.

On the facts of this case, the scope of duty question was answered by addressing the purpose for which C obtained the service of D. She approached the general practice surgery for a specific purpose. She wished to know if she was a carrier of the haemophilia gene. D owed C a duty to take reasonable care to give accurate information or advice when advising C whether or not she was a carrier of that gene. In this context, it mattered not whether one described D's task as the provision of information or of advice.

The important point was that the service was concerned with a specific risk; that is the risk of giving birth to a child with haemophilia. Whilst there was a causal link between D's mistake and the birth of the child, that was not relevant to the scope of D's duty. In this case, the answer to the scope of duty question pointed to a straightforward answer to the duty nexus question: the law did not impose on D any duty in relation to unrelated risks which might arise in any pregnancy. Accordingly, D was only liable for the costs associated with managing the child's haemophilia.

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RECENT CASE UPDATES

Accidents at Work - Employers' Liability - Occupiers' Liability - Falls from Height

Moreira v Moran (t/a ACH Joinery and Building Contractors) & Others [2021] EWHC 1800 (QB)

The Claimant worked for the Second Defendant, a self-employed builder. They had worked on a number of jobs with the First Defendant, who was a joiner and a builder. The Third Defendant was a small company that hired the First Defendant to construct a wooden office on the mezzanine of its factory premises.

The section of mezzanine where the office was to be built contained a guard rail around the edge. A barrier rail prevented access to a second section of the mezzanine, which had an unguarded edge. The First Defendant planned the work and subcontracted the Second Defendant to assist on the project. The Claimant was then engaged by the Second Defendant as a labourer.

On the day of the Claimant's accident, the first task was to carry approximately 30 MDF boards from ground level to the mezzanine. A decision was taken by the First and Second Defendant to unload and stack the boards on the section of the mezzanine that was unguarded. The Second Defendant removed the guardrail which had previously prevented access from the guarded section of the mezzanine on which the office was being built to the unguarded section of the mezzanine. The exercise of moving the boards involved the Claimant taking the full weight of the boards. He was unable to cope with the weight and fell from the edge of the unguarded mezzanine onto a concrete floor sustaining skull fractures and brain injury.

It was held:

(1) The Claimant was a general labourer employed by the Second Defendant who owed him a duty of care with regards to his safety. The First Defendant was not the Claimant's employer, but also owed him a duty of care as it was for the First Defendant to plan and organise the work so that it could be carried out safely, minimising the risk of injury to those undertaking the work and persons on the premises.

(2) The decision to work on the unguarded mezzanine section created an obvious risk of a fall and serious injury. Neither the First nor Second Defendant had addressed their minds to that risk. Both had breached their duty of care to the Claimant in failing to provide a safe system of work.

(3) The Occupiers' Liability Act 1957 applied to the Third Defendant. No danger would have arisen but for the decision of the First and Second Defendants to work on the unguarded section of the mezzanine. The Third Defendant was unaware that the Second Defendant had removed the barrier rail which had been put in place to prevent access to the unguarded section. The Third Defendant did not know that they were working on the unguarded section and adopting an unsafe method of work. Further, the Third Defendant had no knowledge of construction work and was entitled to take the view that the First and Second Defendants were skilled workmen who would guard against obvious risks.

(4) The Third Defendant had not breached its duty of care to the Claimant.

(5) The Claimant had merely followed the directions provided to him and was not contributory negligent.

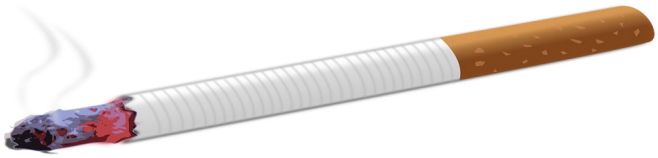
Accordingly, there was Judgment for the Claimant against the First and Second Defendants. The First and Second Defendants were found to be equally to blame for the accident and liability was apportioned 50/50 between them.

Expert Evidence - Change of Expert - Expert Shopping

Rogerson (t/a Cottesmore Hotel, Golf and County Club) v Eco Top Heat & Power Limited [2021] EWHC 1807 (TCC)

The Claimant, 'C', is the owner of a hotel at which there was a fire in June 2018. At the time of the fire, the Defendant building contractors, 'D', were undertaking window installation works at the hotel. C is pursuing a claim for damages against D in negligence and breach of contract, alleging that the fire was most probably caused by a cigarette discarded by one of D's employees or the fire was caused by a spark emitted from an angle grinder used by D's employees. D denies liability. D's case is that none of its employees on site were smokers and D denies using an angle grinder on the day of the fire. D does not advance a positive case as to the mechanism which caused the fire.

The fire occurred on 11 June 2018. On 13 June 2018, D's solicitors wrote to C's General Manager noting that suggestions had been made that the cause of the fire was the careless discarding of a cigarette end by an employee of D and that this was denied. Further, they were instructed to take all steps necessary to fully protect D's position and were immediately taking steps to arrange for the involvement of an expert forensic fire investigator. On 21 June 2018, D's solicitors identified their instructed expert for the fire investigation as Dr Nagalingam. Dr Nagalingam visited the site, had a joint meeting with experts instructed by C and C's insurer and they all jointly interviewed witnesses. C's solicitor stated that, after the interviews, he asked the experts their opinion on causation. The experts for C both said 'cigarette'. Dr Nagalingam apparently said "*it's hard to see it's anything else*".



In October 2018, Dr Nagalingam met with D's solicitors and set out his views on causation. It was common ground that the attendance note of that meeting prepared by D's solicitors was privileged.

RECENT CASE UPDATES

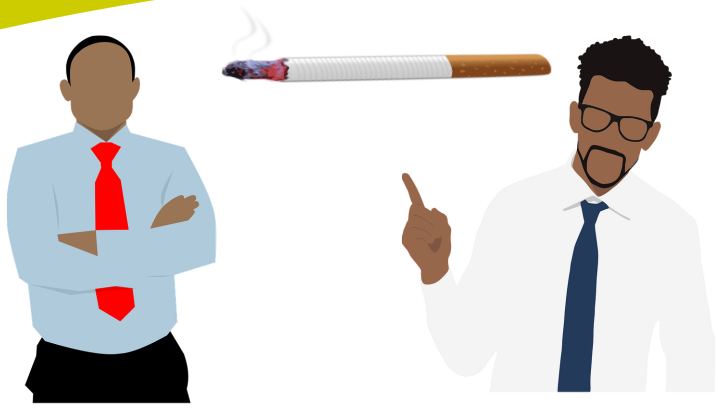
In February 2020, C issued a Letter of Claim pursuant to the Pre-Action Protocol for Construction and Engineering Disputes enclosing reports from the experts who had met with Dr Nagalingam. A Letter of Response was served by D. Although paragraph 8.5.3 of the Protocol provides that the Letter of Response should identify *"the names of any experts already instructed on whose evidence it is intended to rely"*, no expert was identified. Proceedings were issued in August 2020.

In advance of the Costs and Case Management Conference, D's solicitors proposed Directions, which included that D should have permission to call Ms Emma Wilson of Prometheus Forensics Ltd concerning the cause of the fire. C alleged that this involved a substitution for a prior expert, Dr Nagalingam. C did not oppose D relying on Ms Wilson, but made an application for conditions to be imposed upon that direction which involved the disclosure of certain documents and categories of documents as the price for doing so, on the basis that this was a case of expert shopping.

D denied it was changing expert. D stated that Dr Nagalingam had not been instructed by D or D's insurers, but by UK Power Networks, and that D had agreed to share his fees. Further, Dr Nagalingam had never produced for D a report or letter addressing the cause of the fire. He had only provided a view on causation in a privileged discussion with D's solicitors, recorded in their attendance note. Ms Wilson had particular experience in cigarette induced fires. D submitted that a clear distinction should be made between an expert instructed in the immediate aftermath of an event, such as a fire, for the purposes of taking private pre-protocol advice and one instructed once litigation is in prospect and the potential issues are known about. It would be unfair to allow this jurisdiction to reach back this far in time. The pre-action protocol process had not even commenced and there was no equivalent procedure to that which arises in personal injury cases.

The Judge noted that in personal injury cases there is a pre-action protocol procedure whereby the solicitors for the parties embark on a process of co-operation in the selection of experts. In such cases, that is the point in time which the Court of Appeal regards as critical because the parties have then engaged with each other in the process of the claim; *Edwards Tubb v JD Wetherspoon plc [2011]*. However, the parties here had followed the Pre-Action Protocol for Construction and Engineering Disputes.

The Judge considered there had been a lack of candour on the part of D. Whilst submitting a distinction should be drawn between an expert merely instructed for an initial inspection and report and an expert instructed for the purposes of prospective litigation, D had not disclosed the retainer to show the terms on which Dr Nagalingam had been engaged or for what purpose.



The Judge found that the type of process which occurred in this case was sufficiently analogous to the one applicable in personal injury cases. Relevant features included that by the time the experts met, it was already assumed in correspondence that litigation would occur and the parties were in dispute over the allegation that D's discarded cigarette was the cause. There were joint meetings and joint interviews of witnesses – the level of liaison and engagement was, therefore, quite considerable. The Judge was satisfied that Dr Nagalingam was instructed as the Defendant's expert to carry out an inspection and to provide a report with a view to (if not in fact) appointing him as the CPR 35 expert. Further, it was not fatal to the application that Dr Nagalingam had not produced any written report.

Having concluded that Dr Nagalingam was a relevant expert, such that the decision to rely on Ms Wilson amounted to a change in expert, the Judge went on to consider whether to exercise his discretion by imposing a condition upon the grant of permission to rely on Ms Wilson.

The Judge considered that there was a sliding scale where, at one end, might sit a flagrant case of expert shopping simply because a party does not like the damaging views expressed by his current expert, and, at the other end, might be the unexpected need to replace the expert for objectively justifiable reasons, such as illness or retirement, of the expert in question. The closer the circumstances are to the former, the more likely it is that a Court will impose conditions commanding a high price – e.g. in respect of the waiver of any privilege and the scale of material to be disclosed. The closer they are to the latter, the less onerous such conditions, if any, as may be imposed will be. A faint appearance of expert shopping would not justify the disclosure of solicitor's attendance notes of telephone calls with the expert, not least because of the risk that they do not properly record the expert's actual words.

On the facts of this case, the Judge was prepared to draw the clear inference that expert shopping had occurred, for tactical reasons, namely that Dr Nagalingam had concluded that a discarded cigarette was the likely cause of the fire and had told D's solicitors this. Accordingly, this was an appropriate case in which to impose a condition that the attendance note of the call of 2 October 2018 be disclosed.

The Judge, therefore, made a direction that D may rely upon the evidence of Ms Emma Wilson of Prometheus Forensics Ltd on the condition that D provided disclosure of D's solicitor's attendance note of 2 October 2018 to the extent that it set out or referred to views expressed by Dr Nagalingam on causation. It may otherwise be redacted.

RECENT CASE UPDATES

Fixed Costs - Low Value Personal Injury Claims - Personal Representatives

West v Burton
[2021] EWCA Civ 1005

The proceedings arose out of a road traffic accident in 2016. A Claim Notification Form (CNF) was submitted on behalf of the Claimant (M) via the Portal. The claim was acknowledged by the Defendant's (B) insurers, but liability was not admitted. The claim 'exited' the Portal. Shortly afterwards, M died (not connected to the road traffic accident).

In December 2018, M's solicitors indicated that they intended to instruct an expert. Following receipt of the ensuing report, B's insurers made a Part 36 Offer on 28 March 2019. M's solicitors accepted the offer. Probate in respect of M's Estate had been granted to Mr West (W) on 20 March 2019. A copy of the Grant of Representation was provided to the insurers.

Agreement could not be reached between the parties in respect of costs as to whether they should be paid pursuant to r.45 Section II or Section IIIA. Part 8 proceedings were issued for costs only.

At first instance, a District Judge found that it was W's claim as Executor that was settled and not the claim initially notified by M. Therefore, the fixed recoverable costs were payable under Section II. B's appeal against that decision was dismissed. The Judge considered that, under the fixed costs regime, regard should be had to the identity of the Claimant. He found that W, as Executor, had been entitled to the damages and costs on settlement, not M.

The Court of Appeal dismissed B's further appeal.

It was held:

- The word "claim" and, therefore, "Claimant" was not used in the Protocol in a formal sense; it was descriptive of a demand for damages prior to the start of any legal proceedings. Read as a whole, the CPR and the Protocol were drafted on the basis that the Claimant throughout remained the person who issued the CNF. Therefore, for the purposes of the Protocol, the Claimant throughout was the person who was involved in the road traffic accident.

- Rule 45.29A and 45.29B were confined to claims started under the Protocol.

- The claim that was settled was that of W, but he was not the person who started the claim within the meaning of the Protocol. As Executor, he could never have started such a claim. Consequently, for the purposes of assessing costs, the claim was not within r.45.29A or R.45.29B.

- The Claimant's costs, therefore, fell to be assessed by reference to section II (*Aldred v Cham [2019] EWCA Civ 1780* and *Hislop v Perde [2018] EWCA Civ 1726* considered).

- The outcome would have been the same even had the claim not exited the Portal.

Appeal dismissed.

Part 36 Offers - Costs - Nominal Damages

Shah v Shah
[2021] EWHC 1668 (QB)

The Claimants brought proceedings in an intense and protracted family dispute. The Claimants sought £30,000 in damages. Ahead of Trial, the Claimants made a Part 36 Offer to settle their claim for £1 and payment of their costs. At Trial, the Claimants succeeded, but only recovered nominal damages of £10.00. The Trial Judge awarded the Claimants their costs up to the date of the Part 36 Offer and then with the benefits of Part 36 thereafter (both parties' Budgets had been set above £100,000 and the Claimants' costs stood at more than £200,000 at Trial). The Defendants appealed, arguing that the normal Part 36 consequences should not follow because the £1 proposal was *"not a genuine offer to settle the value of the claim, it is simply an attempt to game the system in terms of obtaining a Costs Order"*.

The appeal was dismissed. It was held that the Judge's decision on costs was well within the Judge's discretion.

The Claimants' Part 36 Offer was found to be a genuine attempt to settle the litigation. It was held that they were entitled to consider they had a strong case on liability and a valuable claim for damages, and, while the incurred costs were already high, there were still substantial savings to be made for both parties in avoiding Trial and for the Defendant in avoiding the risk of a damages award. In these circumstances, the Judge was satisfied that the purposes of Part 36 were properly served; there was a genuine basis offered for avoiding litigation and if the Defendants chose to proceed, they did so at their own risk.

This was not the sort of case disapproved by the authorities where a Claimant offers to accept the full amount of a claim simply so as to manoeuvre a Defendant into a place where the CPR 36.17 uplifts technically apply.

The disproportion in the case between the commercial value of a win on liability, the offer to settle for nominal damages and the scale of the costs both incurred and the prospective was not lost on the Judge, but it was not necessarily determinative of whether the offer was enforceable. A concession may be genuine, even at the cost of a large costs bill; giving up any and all claims to a financial remedy may be a significant concession and, as a matter of principle, the implications of costs should never overwhelm the issue at the centre of litigation; (*MR v Metropolitan Police Commissioner [2019] Costs LR 1441)*.

Accordingly, the Judge's decision that the Part 36 Offer was a genuine offer was consistent with the authorities and one he was entitled to take.

It was also held:

- The Judgment which had been obtained was 'at least as advantageous' to the Claimants as their offer. They had obtained Judgment on liability and a nominal award of damages slightly higher than the sum they had asked for.

- It was not 'unjust' for CPR Part 36 to take its normal course. The claim had substance and was not abusive; the Claimants had a good case on liability, they had an arguable case on damages (although defectively presented) and in relation to conduct both parties were so heavily invested in winning on fault that the Claimants were prepared to settle without satisfaction of their money claim and the Defendants were 'unbendable' to the point of proceeding to litigation at Part 36 risk – in all the circumstances, it did not amount to an 'injustice' sufficient to set aside the Part 36 costs consequences.

- The test for finding a Part 36 injustice was not whether the Appeal Judge agreed with the Trial Judge or whether all his decisions were the only ones he could have taken. "*The test is whether in any respect he took a decision which was not properly open to him to take at all because he got the law wrong, went wrong in principle or reached a wholly unsustainable conclusion"*. That test was not passed in this case.

The Defendant's appeal was dismissed.

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

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