DOLMANS INSURANCE BULLETIN

Welcome to the July 2019 edition of the Dolmans Insurance Bulletin

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- The new personal injury discount rate

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- Expert evidence - life expectancy - Ogden Tables - personal injury claims
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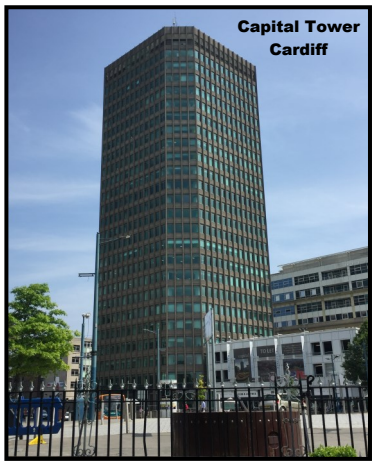


If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

DOLMANS SOLICITORS

DOLMANS REPORT ON

ABUSE OF PROCESS : FAILING TO REVIVE A STRUCK OUT CLAIM

R Limited v Ageas Insurance Limited

The above case, in which the author represented the Defendant insurer, serves as a timely reminder of the need to conduct litigation efficiently and the consequences of not doing so.

Background

The claim related to a road traffic collision which occurred on 8 August 2015. The collision was caused by the Defendant's insured and liability was admitted before proceedings were issued. The claim proceeded in relation to quantum only and specifically the Claimant claimed the pre-accident value of their vehicle (£12,578.78), the applicable policy excess (£250.00) and miscellaneous expenses (£60.00).

The Claimant issued proceedings on 1 November 2017, and, after obtaining an extension of time, we filed a Defence, limited to quantum, on 21 December 2018. The Court sent out a Notice of Proposed Allocation to the Fast Track on the same date. The Notice required the parties to file completed Directions Questionnaires and Proposed Directions by 22 January 2018. We filed the Defendant's Directions Questionnaire and Proposed Directions at Court on 18 January 2018 and requested a stay in order to negotiate settlement of the claim. These documents were sent to the Claimant's solicitors on the same date. The Court made an 'Unless' Order on 25 January 2018 due to the Claimant's failure to file a Directions Questionnaire. The Order required the same to be filed at Court and served on the Defendant within 7 days of service of the Order (ie – on or before 5 February 2018), failing which the claim would be struck out. In the absence of receiving a Directions Questionnaire, the Court confirmed, in correspondence dated 14 February 2018, that the claim was struck out on 12 February 2018. We closed our file of papers.

Unexpectedly, on 19 October 2018, we received a General Form of Judgment or Order, dated 4 October 2018, which referred to the claim being transferred to Oxford County Court to list an Application. We had not been served with any such Application. We wrote to the Court and the Claimant's solicitors and it transpired that the Claimant had made an Application on 21 September 2018 for relief from sanctions and for the claim to be reinstated.

DOLMANS REPORT ON

Claimant's Application for Relief

The Claimant's Application was heard on 3 December 2018. We opposed the Application on the basis that it did not meet the three stage approach as set out in the Court of Appeal Judgment in *Denton v TH White Ltd [2014] EWCA Civ 906* for assessing Applications for relief from sanctions made under CPR Part 3.9(1).

Firstly, CPR Part 3.9(1)(b) requires a Court, when considering an Application for relief from sanctions, to consider the need to enforce compliance with Rules, Practice Directions and Orders. We argued that the Claimant had failed to comply with two Court Orders, specifically the Notice of Proposed Allocation and, thereafter, the 'Unless' Order which specified the significance of the failure to comply (ie – the claim would automatically be struck out without further order of the Court). We argued that the breach was serious and significant. The Claimant's solicitors did not dispute receiving the Orders. According to the Witness Statement filed in support of the Application, the default occurred due to inadequate/poor internal procedures at the Claimant's solicitors.

Both Orders were said to have been filed away by administrative personnel and not passed to the appropriate fee earner to deal with. We argued that this was not a good reason for why the default occurred. Finally, in consideration of all the circumstances of the case, we noted that the Application was made on 21 September 2018. This was over 7 months after the claim had been struck out. That indicated that the fee earner could not have reviewed the file for at least 7 months. We argued that a failure to review or progress a file for such a period of time is not an efficient way of conducting litigation. There was also no explanation provided by the Claimant's solicitors for the failure to make the Application sooner.

Counsel for the Claimant submitted that while the breach was serious and there did not seem to be a good reason for the breach, it would be unjust not to grant relief in the circumstances. She sought to underplay the administrative errors made on the part of the Claimant's solicitors as unfortunate, but not the fault of the Claimant. The Claimant's Counsel argued that it was in the interests of justice to grant relief. Further, it was submitted that there would be no prejudice to the Defendant if the claim was reinstated because the insurers had admitted liability and should relief not be granted, the Defendant would receive a windfall.

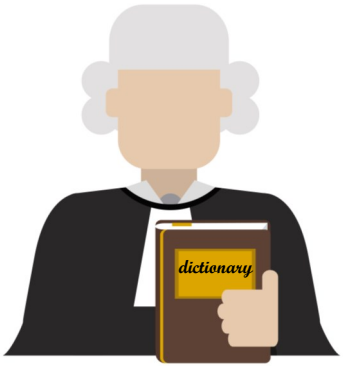
District Judge Buckley-Clarke found that the breaches were serious and significant and there was no good reason for them. She noted that they were part of a broader context of default and that the filing of the Directions Questionnaire was a standard part of proceedings for which the Claimant's solicitors ought to have been prepared. She noted that the Claimant had also failed to provide a letter of claim and documentation to support the losses claimed. The Judge was particularly influenced by the long delay before making the Application and the failure of the Claimant's solicitors to explain the delay.

The Judge stated that she had considered all three limbs of the *Denton* test and, in respect of the third of those, namely "*all the circumstances of the case*", justice pointed away from granting relief. The Judge acknowledged that the errors were not those of the Claimant, but suggested that the Claimant would have redress against their solicitors. The Judge would not grant relief and dismissed the Claimant's Application, ordering the Claimant to pay the Defendant's costs of the Application which were summarily assessed in the sum of £1,200.00.

A Second Bite of the Cherry

We had not received payment for the Defendant's costs when we became aware that the Claimant had issued a second set of proceedings on 6 January 2019 to recover damages for £12,331.29 (a different sum than in the first action) arising from the same road traffic accident. On 5 February 2019, we made an Application to the Court to strike out the proceedings pursuant to CPR Part 3.4(2)(b) on the basis that the Claimant was effectively seeking a second bite of the cherry and the new proceedings were an abuse of the Court's process.

The Application was heard before District Judge Devlin in the Oxford County Court on 25 March 2019. There were lengthy submissions by both Counsel on the authorities regarding the proper approach to identifying an abuse of process. We provided a chronology of events, from the inception of the first action onwards (noting the particular deficiencies of the Claimant's second set of pleadings) and with close reference to the Court of Appeal's decision in *Collins v CPS Fuels [2001] EWCA Civ 1597* and the more recent High Court authority of *Davies v Carillion Energy Services Ltd & Anor [2017] EWHC 3206 (QB)* which reminded the Judge that the circumstances leading to the strike out of the first action was relevant to the Court's balance of factors. We submitted that the law in this area is far from settled, that the first action was not in itself an abuse of process and that the mere act of bringing a second set of proceedings does not per se constitute an abuse of process but, in the context of the conduct of the Claimant's solicitors throughout, the bringing of this second set of proceedings did constitute an abuse. We provided the Court with a copy of the Witness Statement in support of the Claimant's Application for relief from sanctions and submitted the reasons why that decision had been made, in particular the focus on features for which there was neither excuse nor explanation. We invited the Judge to note the Claimant's failure to address the substantive issues at that stage and, while accepting that there was no agreed note or transcript of the Judgment, it was clear that the Application had failed. We, therefore, submitted that the question as to whether the claim should be permitted to proceed had already been determined by the Court. We referred to the need to take into account the apportionment of the Court's limited resources (noting the time already taken up in this matter) and that the usual arguments around prejudice to the Claimant did not stand up, particularly in contrast to the circumstances in *Collins* where the potential prejudice to an innocent child who was injured in an accident was significantly greater, but in which the claim was still struck out for an abuse of process. We submitted that there needed to be a special reason for the claim to be pursued and that, in the circumstances of the case, no such special reason was present, nor had there been any Witness Statement filed or served on the Claimant's behalf.



The Claimant submitted that that there did not need to be a special reason because the first action was not an abuse of process. They sought to persuade the Judge that although the conduct of the Claimant's solicitors had not been ideal, it had been neither contumelious nor sufficient in any other way to constitute an abuse of process. It was submitted that the kinds of examples cited in the White Book are of a much greater magnitude and that it would be unjust to grant the Defendant's Application. The Claimant argued that there could not be said to have been inexcusable conduct or inexcusable delay and, as such, the criteria for abuse of process could not be met. It was submitted that the efficient use of Court resources did not trump the need to do justice (per *Davies* – see below). We responded by asking the Judge in what context the Claimant's solicitors' conduct could be said to have been excusable, giving the term its ordinary meaning in the absence of any definition in either the CPR or the case law. The Judge looked up the word in his dictionary noting that it was defined as *something so bad as to be unjustifiable or intolerable.*

Abuse of Process?

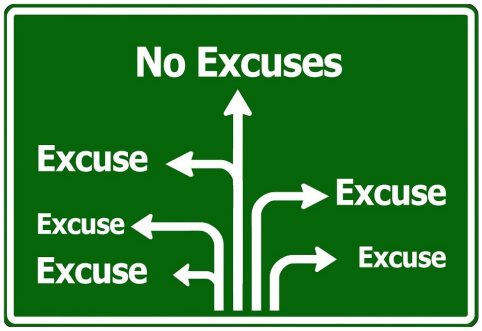
The Judge confirmed that, in his view, there had been inexcusable delay. He had noted the deficiencies in the Claimant's Witness Statement in support of the Claimant's initial Application for relief from sanctions and further observed the lack of any Witness Statement in response to the Defendant's Application. The Judge commented that the Claimant did not seem to have been bothered to respond on this occasion to the Defendant's Application.

Having found that there had been inexcusable delay in relation to the first action, noting the Claimant's breaches, including a failure to send a letter of claim, the failure to file the Directions Questionnaire, the failure to comply with the 'Unless' Order, a 7 month delay before applying for relief from sanctions, the failure to address the reasons for the breaches, together with the failure to apply to appeal the decision of Judge Buckley-Clarke (a feature noted as significant in *Collins*), District Judge Devlin found that there did need to be a special reason for the claim to proceed. The Judge found that no such reason existed nor had any been put forward by the Claimant. For those reasons, he was satisfied to grant the Defendant's Application and the second action was struck out as an abuse of process. The Claimant was also ordered to pay the Defendant's costs of the Application in the sum of £3,158.40.

Comment

The Civil Procedure Rules do not expressly prohibit a second action where a first action, based on the same set of facts, had not been successful. Moreover, in the post Jackson and post Mitchell era, the High Court found in *Davies* that a second claim brought by a litigant in person, after his first action had been struck out, was not an abuse of process with Morris J commenting *"… even post Jackson, ultimately, the importance of the efficient use of resources does not, in my judgment, trump the overriding need to do justice. I am satisfied that the Claimant's conduct in the first action was neither an abuse of process nor inexcusable and, thus, that the second action should not be struck out as an abuse of process."*

The Judge in the instant case was able to distinguish from *Davies* and found that the conduct of the Claimant was inexcusable. The situation might have been different had the Claimant been a litigant in person or his solicitors had acted with more alacrity once the claim had been struck out in February 2018. However, there is no certainty in litigation and this case demonstrates that a failure to file a Court form on time, then failing to rectify the position promptly, could have devastating consequences in a claim where a recovery of damages seems almost certain.

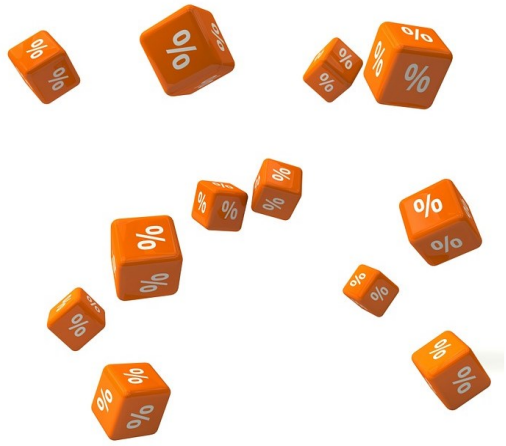


David Cullen
Associate
Dolmans Solicitors

For further information regarding this article, please contact
David Cullen at **davidc@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

THE NEW PERSONAL INJURY DISCOUNT RATE

On 15 July 2019, the Lord Chancellor announced the first new discount rate under the provisions of the Civil Liability Act 2018.



In September 2017, the Justice Secretary, David Liddington, had led the market to believe that the new rate might be in the region of 0% to 1%. The Chair of the Justice Committee had said that the rate would be set somewhere between 0.5% and 1%. In light of this, many are surprised that the new rate has been set at -0.25% with effect from 5 August 2019. However, whilst this is at the very lowest end of expectation, it is not a complete surprise in light of developments in Scotland during the passage of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019.

The Government's impact assessment suggests that the change in rate from the current -0.75% will save insurers £320 million per year and save the NHS £80 million per year.

The ABI have responded by stating that the new rate is a bad outcome for insurance customers and taxpayers that will add costs rather than save their customers money. They have also indicated that it will put further pressure on premiums.

It is clear from the Government's statement that the Lord Chancellor has built in "further prudence" than that recommended by his Actuary Department by choosing a rate of -0.25% on the basis that this means Claimants on average are twice as likely to be overcompensated as they are to be undercompensated.

Needless to say, Claimant organisations have welcomed the review.

It is also clear that whilst the Government gave consideration to a dual discount rate, it took the view that there was currently insufficient quality of evidence to introduce dual rates. That option remains open in future reviews.

The review means that England and Wales are left with one of the lowest discount rates in the western world and makes it less attractive to international capital.

The next review of the discount rate has to be started (not finished) within the next 5 years, ie – by no later than 14 July 2024. In the meantime, we will have a period of stability where both Claimants and Defendants alike will have certainty during negotiations.

From a practical point of view, the new discount rate means that:

- Reserves will have to be recalculated.
- Any outstanding Part 36 Offers will need to be reconsidered.
- Cases which are settled, but awaiting Court approval, may need to be renegotiated.
- In cases where negotiations have been postponed pending the announcement of the discount rate, they can now continue with certainty.
- Accommodation claims will remain problematical with the *Roberts v Johnstone* methodology remaining unsuitable with a negative discount rate.

In the future, leading up to the next review in 5 years' time, it is likely that we will see a return to tactical behaviours in either speeding up or slowing down negotiations and Court process depending on the perceived outcome of the next review.

Simon Evans
Partner
Dolmans Solicitors

For further information regarding this article, please contact
Simon Evans at **simone@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

DOLMANS RECENT CASE UPDATE

Costs Orders - Detailed Assessment - Part 36 Offers

JLE (A Child by her Mother and Litigation Friend, ELH) v Warrington & Halton Hospitals NHS Foundation Trust [2019] EWHC 1582 (QB)

Following a successful claim, the Claimant's solicitors had served a Bill of Costs of approximately £615,000. They made a Part 36 Offer in respect of costs of £425,000. This was not accepted. The Claimant's solicitors secured a Costs Assessment of £431,800, therefore, beating the Part 36 Offer by just under £7,000.

CPR r.36.17(4) provided that, in those circumstances, the Court "*must, unless it considers it unjust to do so, order that the Claimant was entitled to (a) interest; (b) costs on the indemnity basis from the expiry of the offer; (c) interest on those costs and (d) an additional amount, not exceeding £75,000, calculated by applying 10% to the sum awarded by the Court*". The Master made Orders in respect of (a) to (c), but no Order in respect of (d), finding that it would be unjust to do so where the offer was beaten by a small margin; the Bill had been significantly reduced on Detailed Assessment and an Order under CPR r.36.17(4)(d) would result in a disproportionate "bonus" of £40,000.

On appeal, the Claimant's solicitors argued that the Master was wrong to apply a separate test of unjustness in respect of each subparagraph in CPR r.36.17(4). The appeal was allowed.

It was held:

- The Court had jurisdiction to consider it unjust to order some, but not necessarily all, of the consequences set out in CPR 36.17(4). However, it would be unusual for the circumstances to yield a different result for only some of the Orders envisaged in subparagraph (4).
- The small margin by which the Claimant's offer had been beaten was not relevant. It was not open to Judges to take into account in the exercise of their discretion the amount by which a Part 36 Offer had been beaten.
- The degree of reduction in the Bill was not relevant as this was not considered by the Master to render it unjust to make an award under CPR r.36.17(4)(a) to (c). In those circumstances, there was no reason why it should be a factor rendering an award under r.36.17(4)(d) unjust.
- The additional award of 10% should not be characterised as a "bonus". It was not meant to be compensatory. There was a penal element when a Claimant had made an adequate offer and detailed policy considerations had given rise to the assessment of the appropriate award under r.36.17(4)(d). Further, the 10% award was all or nothing. It had to be awarded in full, unless it was unjust to do so.

DOLMANS RECENT CASE UPDATE

Costs - Switching Funding from Legal Aid Funding to CFAs Pre April 2013

There have been two further cases in which it was held that success fees and ATE premiums were not recoverable from the Defendants because the Claimants failed to justify that switching from Legal Aid funding to CFAs prior to the change in the funding regime in April 2013 was reasonable.

XDE v Middlesex University Hospital Trust
[2019] EWHC 1482 (QB)

In a claim arising from the delayed diagnosis of tuberculosis meningitis, the Claimant, C, was granted a Legal Aid Certificate in 2009, limiting costs up to Stage 2 to £55,480. In December 2011, C's solicitors sought a £10,000 increase to the costs limit. The Legal Services Commission (LSC) advised that a formal request for funding should be made using form CLSAPP8. In May 2012, C's solicitors responded stating that their current costs were £57,000, costs at the point of issue would be £67,000, they would not be able to progress the case within the current costs limit and requested that the Certificate be discharged. The LSC discharged the Certificate and C entered into a CFA-lite with 100% success fee and ATE insurance. Upon assessment of costs, the Costs Judge disallowed recovery of the success fee and ATE premium. C appealed.

C sought to distinguish the case from *Surrey v Barnet* and *Chase Farm Hospitals NHS Trust [2018]* by submitting that the decisive factor in that case was the failure to advise the Claimants that changing from Legal Aid to a CFA before 1 April 2013 would dis-entitle them to the 10% *Simmons v Castle* uplift, whereas the switch in this case was effected before the *Simmons v Castle* uplift was announced and was, therefore, not a factor and the case did not apply, or a CFA-lite was so obviously advantageous that its qualities were bound to be dispositive in any decision making process. In the alternative, the Costs Judge was wrong to hold that the switch was unreasonable as C had no choice as she had exhausted her Legal Aid budget.

The Judge dismissed the argument that absent the *Simmons v Castle* uplift factor such a change of funding would be reasonable. The principle in *Surrey* was that the receiving party's reasons for switching required scrutiny. The real reason for the change in funding in this case was that in May 2012, the existing Legal Aid funding had run out. The question was whether C's solicitors were culpable, or otherwise, in relation to that state of affairs. C's solicitors should have kept the case within budget, demonstrated their adherence to the budget and made a timeous and proper application for additional funding if needed. C had failed to discharge the burden of proof and the appeal was dismissed.

DOLMANS RECENT CASE UPDATE

EPX v Milton Keynes University Hospital NHS Trust

[2019] EWHC 1508 (QB)

The Claimant, C, suffered extensive brain injury shortly after birth. In a claim for damages, C's solicitors initially acted under a Legal Aid Certificate limited to obtaining expert evidence to investigate liability and causation with a costs limit of £20,000. C's solicitors obtained reports from three medical experts on liability and three medical experts on quantum. After reaching the costs limit, they applied for an extension of funding, which was refused. The scope of the Certificate was extended to include issue of proceedings, but the LSC indicated that if the Defendant continued to deny liability, it was possible that LSC funding would cease. C's solicitors informed C and funding was switched to a CFA with ATE insurance. On assessment of costs, the Master held that the reasons put forward did not justify the change in funding and disallowed recovery of the success fee and ATE premium. C appealed.

On the facts, the reason for the switch was that C's solicitors had no funding to pay the issue fee or instruct counsel to draft Particulars of Claim. The Master had been entitled to conclude that the reason for that was because C's solicitors had spent money on quantum experts which was outside the scope of the Legal Aid Certificate. If it was the solicitors' practice to instruct quantum experts in the early stages without seeking LSC authority, they did so at their own risk. The costs of such steps could not be counted towards the costs limitation in the Certificate. Whilst it might not be unreasonable to obtain early quantum reports, it was not unreasonable not to obtain them. Such reports were commonly not obtained until after a trial on liability and causation. It would be rare for a Defendant to make a substantial offer without quantum evidence or for a Court to approve an offer in a strong case without quantum evidence. C had failed to discharge the burden of proof to justify the choice to switch funding and the appeal was dismissed.

Expert Evidence - Life Expectancy - Ogden Tables - Personal Injury Claims

Carol Dodds (by her Litigation Friend, Janice Dobbs) v (1) Mohammad Arif (2) Aviva Insurance Limited
[2019] EWHC 1512 (QB)

At a Case Management Hearing in a personal injury claim, the Court was required to determine whether to allow the Defendants to adduce expert evidence on the Claimant's life expectancy. The Court held that permission to adduce expert evidence on life expectancy in personal injury cases would not be given unless, in accordance with the explanatory notes to the Ogden Tables, there was clear evidence that the Claimant was atypical and would enjoy a longer or shorter expectation of life.

DOLMANS RECENT CASE UPDATE

The Claimant sustained a traumatic brain injury and substantial cognitive impairment as a result of being struck by the First Defendant's vehicle, insured by the Second Defendant. The Claimant's medical evidence, from a neurologist, was that unless she developed epilepsy, her life expectancy was "unlikely to be significantly reduced". The Defendants disclosed a report prepared by an expert on life expectancy who concluded that the Claimant's life expectancy had been reduced by 5 years as a result of the accident.

The Court gave guidance on evidence concerning life expectancy:

- Where the Claimant's injury had not itself impacted on life expectancy, permission for that category of evidence would not be given unless "*there was clear evidence … to support the view that the individual is atypical and will enjoy longer or shorter expectation of life*".
- Where the injury had impacted on life expectancy, the normal or primary route for life expectancy evidence was the clinical experts.
- The methodology which the experts adopted to assess the Claimant's life expectancy was a matter for them.
- Permission for "bespoke" life expectancy evidence from an expert in that field would not ordinarily be given, unless the clinical experts could not offer an opinion at all, or for reasons stated that they required specific input from a life expectancy expert, or where they deployed statistical material but disagreed on the correct approach to it.

In the instant case, the expert evidence implied that the Claimant's head injury had some potential impact on her life expectancy. The Court would have to decide by how much the Claimant's life expectancy was reduced in order to arrive at the correct multipliers. That could only be done with the aid of expert evidence. However, bespoke life expectancy evidence from an expert in that particular field was not required because:

(1) Life expectancy was a medical or clinical issue; *Royal Victoria Infirmary & Associated Hospitals NHS Trust v B (a child) [2002] EWCA Civ 348, [2002] P.I.Q.R. Q10, [2002] 3 WLUK 351* followed and *Arden v Malcolm [2007] EWHC 404 (QB), [2007] 3 WLUK 72* applied.

(2) In practical terms, it was much more convenient and cost-effective to ask the clinical experts for their opinion on life expectancy. Recourse to statistics would not be required in every case, but, if it was required, then such material was still a matter for the clinicians in the first instance. It was only if they disagreed on how to apply the statistics that an expert, such as the one instructed by the Defendants, might be required. There were very few life expectancy experts and if it became frequent practice to instruct them, it would introduce delay and considerable extra costs to no great advantage.

(3) The Defendants' expert's report could not be fairly characterised as a clinician's report.

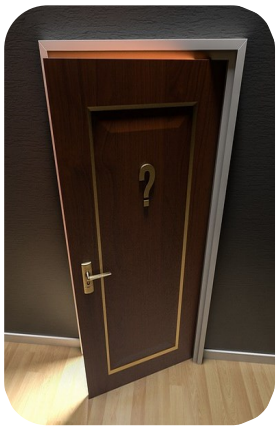
Permission for the Defendants to rely upon their medical evidence was refused.

DOLMANS RECENT CASE UPDATE

Negligence - Assumption of Responsibility

Al-Najar & Others v Cumberland Hotel (London) Limited
[2019] EWHC 1593 (QB)

The Claimants, C, were guests of the Defendant hotel staying in rooms 7007 and 7008 which had an interconnecting door. CCTV cameras showed that in the early hours of the morning, Philip Spence walked into the hotel dressed such that there was nothing to distinguish him from any other guest or visitor to the hotel. He walked across the lobby, passing within 8 metres of the lobby security officer, and took a lift to the 5th floor. He then made his way to the 7th floor, probably via fire escape stairs. On the 7th floor he saw that the front door to room 7008 had been left open with the deadlock used to prevent it locking. The door had been left open because one of the family members staying in the room had left it on the latch so that a hairdryer could be returned without waking the others. Mr Spence entered the room and started to steal money, jewellery and other items. Three of the occupants awoke and Mr Spence hit them on the head with a hammer he had in his jacket pocket. All three suffered serious injuries. C brought a claim for damages alleging that the hotel breached a duty to take such care as in all the circumstances of the case was reasonable to see that their person and property were kept reasonably safe whilst they were staying at the hotel, and that breach created the circumstances in which Mr Spence could attack them and cause the injuries which they had suffered.



As to the scope of the duty of care, the issue was whether the hotel's duty was limited to a duty not to cause harm to C or whether it extended to a duty to protect C against injury caused by the criminal acts of third parties. Applying *Robinson v Chief Constable of West Yorkshire [2018]*, the Judge confirmed that private bodies and public authorities will not generally owe a duty of care to prevent the occurrence of harm in the absence of one of the identified situations; one of which is where "A has assumed a responsibility to protect B from that danger". The Judge found that the hotel owed C, as guests of the hotel, a duty "to take reasonable care to protect guests at the hotel against injury caused by the criminal acts of third parties". This is because the hotel invited guests to come and stay at the hotel and, thereby, assumed a duty to take reasonable care to protect guests.

The Judge found that the attack by Mr Spence did not amount to a new intervening act and break the chain of causation because the duty was to take reasonable care to protect guests against injury caused by the criminal acts of others.

The evidence of past events showed that incidents of theft were very low and there had been no known prior incident of guests being attacked by a non-guest in a hotel room. However, the hotel's own training had identified this as a risk. The Judge, accordingly, found that the attack was reasonably foreseeable. However, considering all the evidence, the Judge was satisfied that the hotel did take reasonable care to protect C against the injuries caused by Mr Spence and there was, therefore, no breach of duty.

DOLMANS RECENT CASE UPDATE

Public Path - Highway Maintainable at the Public Expense

Deborah Barlow v Wigan Council
[2019] EWHC 1546 (QB)

A County Court Judge had erred in finding that a public path was not a highway "maintainable at the public expense" within the meaning of the Highways Act 1980 s.36(2)(a).

The Claimant was walking on a metalled path through a public park owned by the Defendant local authority, when she tripped on a tree root growing through the path. The land had been purchased by the district council, the predecessor to the Defendant local authority. The park was constructed in the 1930s. It was accepted that the path was a highway and that the Defendant local authority was a highway authority. The Trial Judge, at first instance, found that the path was a highway through at least 20 years use and that the defect was dangerous. However, in order for it to be deemed a highway maintainable at the public expense pursuant to section 36(2)(a) of the Highways Act 1980, it had to have been constructed as such at the time of its construction, ie – that it was intended by the highway authority to dedicate it as a highway. As there was no evidence of this being the district council's intention when it created the path, the claim failed.

The Claimant appealed on the basis that she fell on a highway which had been constructed by a highway authority (which the Defendant local authority had accepted by the time of the appeal), therefore, it met the requirements of section 36(2)(a) and, accordingly, was a highway maintainable at the public expense.

The local authority cross-appealed against a finding that s.36(2)(a) could apply to highways constructed before the Act came into force. It argued that the path was not a highway constructed by a highway authority because:

(1) Whilst the district council was a highway authority, they were not performing the function of highway authority when constructing the path;

(2) When they built the path, there was no intention to dedicate it as a highway, therefore, it was not constructed as a highway by a highway authority; and

(3) Even if they constructed the path as a highway authority and intended to construct a highway, they did so before the 1980 Act, therefore, did not construct it as a highway maintainable at the public expense as the 1980 Act only applied to highways constructed after 1980.

In relation to (1), the Appeal Court found that provided that the relevant local authority at the time was, among other things, a highway authority, that was sufficient for the purposes of s.36 (2)(a).

In relation to (2), the Appeal Court found that intention at the time of construction did not matter. If it was dedicated as a highway later, as long as it was constructed by a highway authority, it fitted within the s.36(2)(a) definition. Otherwise, it would mean that a highway authority could construct a highway, not dedicate it until some months later, thereby creating a highway that was not a highway maintainable at the public expense and in respect of which no duty of care was owed.

In relation to (3), the Appeal Court found that the Highways Act 1980 was prospective. From 1980, highway authorities acquired a new duty, for the future only, to maintain highways constructed by highway authorities, whenever they were constructed. There would be no liability until and unless there had been a failure to maintain the highway which caused loss at some point subsequent to the commencement of the Act.

Appeal allowed; cross-appeal dismissed.

Vicarious Liability - Misfeasance in a Public Office

TPKN v Ministry of Defence
[2019] EWHC 1488 (QB)

The Claimant appealed against the striking out of part of her claim and against a Summary Judgment made in favour of the Defendant Ministry of Defence ("MOD").

Whilst serving with the Royal Navy in Gibraltar, the Claimant alleges she was raped by an army private ("T") after a mid-week social night out. She later discovered she was pregnant and returned home to have the baby. Some 18 months later, she reported the offence to police in her hometown. As the alleged offence had been committed overseas, the CPS did not consider it had jurisdiction over the case and referred the matter to the MOD's service police. The Service Prosecuting Authority ("SPA") concluded that T would not be prosecuted. The Claimant then issued proceedings against the MOD on the basis that it was vicariously liable for T's torts, including assault and battery, and misfeasance in public office.

The MOD applied for Summary Judgment and/or the striking out of the Claimant's claim.

In relation to the allegations of vicarious liability, the Claimant relied on a number of factors demonstrating a sufficiently close connection between T's employment and the tort, including the MOD's duty of care to keep the Claimant safe on the base, the duty of personnel to protect others, T's inability to leave the base without permission, the hierarchy of continuing control at all times, including rest periods, and that the offence occurred on the base. The Judge found there was not a sufficiently close connection between T's actions and his employment. In relation to the misfeasance in public office claim, the Judge struck out the claim without hearing further submissions, citing a quote from Halsbury's and finding that T's actions could not be described as the improper execution of his powers as a member of the armed forces.

The Claimant appealed.

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On the issue of whether the MOD could be vicariously liable, the case of *Mohamud v WM Morrison Supermarkets Plc [2016]* was considered. Against a background in which the MOD accepted that the relationship between it and T was capable of giving rise to vicarious liability, and where the Court was required to proceed on the basis that the facts pleaded by the Claimant were true, the Judge had erred by:

- Failing to give appropriate weight to the matters relied on by the Claimant;
- Concluding that the SPA's exercise of jurisdiction in relation to the question of vicarious liability had no prospect of success, when it had a sufficient prospect of success.
- Concluding that there were no triable issues of fact when there plainly were, for example, in relation to the nature of and interconnections between the jobs of the Claimant and T, the duty of care, the SPA's exercise of jurisdiction and the extent of the connection between the position in which T was employed and his wrongful conduct.
- Wrongly stating that the offence occurred on a weekend when it had occurred mid-week.
- Failing to consider whether there were other compelling reasons why the case should be disposed of at Trial.

The Judge's conclusion on this issue was, therefore, overturned.

On the misfeasance in public office issue, the Judge should not have ruled on that issue without first giving the Claimant a clear opportunity to make submissions. Had he done so, the Claimant could have pointed out that the quotation from Halsbury's did not encompass the full scope of the tort. The Judge was, therefore, wrong to strike out that part of the Claimant's case.

Appeal allowed.

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

Amanda Evans at **amandae@dolmans.co.uk** or
Judith Blades at **judithb@dolmans.co.uk** or
Teleri Evans at **telerie@dolmans.co.uk**

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