DOLMANS INSURANCE BULLETIN

Welcome to the June 2020 edition of the Dolmans Insurance Bulletin

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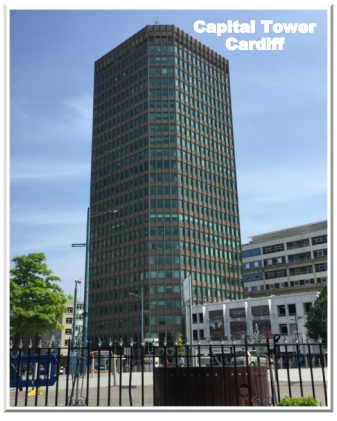

If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor,
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REPORT ON

Lockdown Trials - The New Normal?

L E v Rhondda Cynon Taf County Borough Council

Since lockdown began on 23 March 2020, many organisations have faced challenges in attempting to continue effectively in their day-to-day business. The wheels of justice keep turning and all involved in the legal process have had to adapt to deal with these challenges.

Although Trials were being adjourned in the early days following lockdown, the Courts have since embraced the technology that allows these Trials to proceed remotely. Unfortunately, and unlike Dolmans, not all Claimant organisations are ready to welcome these advances.

This was illustrated in the recent case of *L E v Rhondda Cynon Taf County Borough Council*, where Dolmans represented the Defendant Authority.

Background

The Claimant had undergone heart bypass and aortic valve replacement surgery in 2014, following which she underwent a rehabilitation programme provided by the Defendant Authority. This involved some physical exercise in a gymnasium setting at one of the Defendant Authority's leisure centres.

The Claimant had participated in the scheme for several weeks and had already completed the initial phases of the rehabilitation programme when her alleged accident occurred.

The Claimant alleged that during one particular session she was using a 'stepper', when she fell backwards and struck a nearby rowing machine. The Claimant alleged that the Defendant Authority was aware that she had problems with balance and a history of falls, but despite this she was instructed to hold onto a stack of chairs while using the 'stepper' when it was unsafe to do so.

The Claimant alleged that the Defendant Authority was in breach of the Occupiers' Liability Act 1957, and/or, that it was negligent.

A robust Defence was filed and served on behalf of the Defendant Authority denying liability and strong lay witness evidence was obtained in support of the same.

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The Claimant sustained significant injuries following her alleged accident, including a compression fracture to the first lumbar vertebra and a fracture to the left distal radius of the left wrist. In addition, the Claimant allegedly suffered psychological injuries.

Expert evidence was sought on behalf of both the Claimant and the Defendant Authority from Consultant Orthopaedic Surgeons, Consultant Psychiatrists, Consultant Cardiologists and Care Experts.

As such, the matter was originally listed for a three day Multi-Track Trial in the Cardiff County Court in June 2020 dealing with both liability and quantum. All experts, save for the Consultant Cardiologists, were scheduled to give oral evidence, as well as two lay witnesses for the Claimant and three for the Defendant Authority.

Possibility of a Lockdown Trial

The Court, of its own volition, listed the matter for a Directions Hearing by telephone in May 2020, utilising the 'BT MeetMe' platform. This was specifically listed to consider whether the three day Trial listed in June 2020 could proceed remotely *"in light of the present public health emergency and the need to ensure social distancing"*. It was envisaged at that stage that if the Trial was to proceed, then it would be done utilising either the 'Skype for Business' or 'Microsoft Teams' platforms.

The Court needed to consider, amongst other things, that the parties had *"sufficient technical skill to operate the relevant hardware/software"* and ordered both parties' solicitors to file appropriate Witness Statements prior to the telephone hearing.

Having made enquiries with the Defendant Authority's lay witnesses, various experts and Counsel, Dolmans was able to assure the Court that the Trial could proceed remotely, as far as the Defendant Authority was concerned.

Claimant's Attempt to Adjourn the Trial

The Claimant's solicitors argued that the three day Trial should be adjourned to a later date, particularly as the Claimant had apparently just begun to show early signs of possible Alzheimer's Disease and they considered that the matter was not suitable for a remote hearing.

Dolmans argued on behalf of the Defendant Authority that the matter should proceed on a liability only basis, thereby reducing the time estimate for the Trial to just one day and saving the costs associated with calling the various experts to give oral evidence.

While Dolmans and the Defendant Authority were sympathetic to the Claimant's condition, it was argued that Alzheimer's Disease is a progressive illness and that it would be in everyone's best interests that liability, at least, was decided sooner rather than later.

HHJ Milwyn Jarman QC, who heard the telephone hearing, agreed and ordered that the trial window be reduced to one day to deal with liability only, to include breach of duty, factual causation and any contributory negligence.

Trial by 'Skype for Business'

The liability only Trial was heard remotely utilising the 'Skype for Business' platform before HHJ Timothy Petts sitting in the Cardiff County Court.

The Claimant was the first to give evidence. Following cross-examination, it was apparent, however, that she was unable to confirm what exactly had caused her to fall and that she would have extreme difficulty proving factual causation based upon her own oral evidence. It was obvious to the Defendant Authority at this stage that the Claimant had failed to prove her case and a submission was made to the Judge that there was no case to answer.

The Judge agreed and dismissed the Claimant's claim. There was, however, no question of any fundamental dishonesty on the Claimant's part and, as QOCS applied, the Judge ordered the Claimant to pay the Defendant's costs, albeit not to be enforced without the Court's permission.

Some Tips and Practicalities

As this is such a new phenomenon, it is useful to consider some tips and practicalities arising from the remote Trial.

In total, eleven participants successfully attended the Trial remotely, including the Judge, his Clerk, Counsel for both parties, the Claimant, her husband who was a witness, the Defendant's witnesses and representatives from Dolmans and the Defendant Authority. With so many participants, preparation was the key to the Trial proceeding successfully on the day.

The Court set up the 'Skype for Business' meeting and had e-mailed an invite/link to the parties' solicitors prior to the Trial date. When accepted, this was placed into each solicitors' calendar and they were able to forward the invite/link onto Counsel and their respective witnesses. It is worth checking with all participants beforehand that the invite/link is in their calendars as they need to join the Trial through this link.

Although the Court suggested that participants should join no later than five minutes before the start of the Trial, it was possible to join before this and wait in a 'virtual lobby'. It is certainly worth doing so, as this gives some time to iron out any technical issues and ensure that everyone is connected. The Court requested that participants, other than the advocates and witnesses giving evidence at the time, turn off their microphones and cameras as the picture quality can be affected if too many cameras are switched on within 'Skype for Business'.

It is essential that all participants are confident with their remote connections prior to Trial. There may be certain security/firewall issues that could interfere with connections between the Court and witnesses; using Local Authority computer equipment in particular.

As indicated, the Claimant and her husband were witnesses. There were a few occasions when the Claimant's husband could be heard speaking and sometimes prompting the Claimant off camera. The Judge intervened and asked the husband to sit behind the Claimant, as would be the case in a Court Room. It would be advisable to suggest this at the outset of any hearing and/or request confirmation that the witness is alone in similar situations.

Finally, witnesses need to check beforehand that they are able to easily access Trial Bundles remotely, whilst not interfering with computer connections during the hearing. If not, consideration will need to be given to hard copies of Trial Bundles being provided and their subsequent destruction confidentially.

The Future?

These are uncertain times and it is difficult to contemplate how such remote hearings will develop in the future and to what extent they will become the 'new normal'. Whereas the intention appears to be that they will be a temporary feature, some legal commentators envisage that remote hearings will continue for certain procedures, even post-lockdown.

Dolmans already has experience of 'hybrid' Trials, with Counsel and some witnesses attending in person, with others attending remotely, and some Courts are already looking at other platforms such as the 'Cloud Video Platform'.

In the above matter, Dolmans had also successfully arranged a conference with Counsel that was conducted remotely with the lay witnesses utilising the 'Microsoft Teams' platform.

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Conclusion

The Claimant's claim in the above matter was pleaded in excess of £200,000.00 and could potentially have been worth as much as £400,000.00.

By ensuring that the Trial was not adjourned and was listed for a liability only Trial remotely, the matter was dealt with expeditiously within a day and without the need to call any expert evidence. This resulted in substantial savings for the Defendant Authority, both in damages and costs.

Had the Claimant successfully argued against a remote hearing and the matter been re-listed for another three day liability/quantum Trial, the Defendant Authority would have faced further delays and substantial additional costs, irrespective of the outcome.

Clearly, there is a diversity of virtual platforms and it is envisaged that the Courts may adopt a specific platform in the future. Clients can be assured, however, that Dolmans, having embraced and invested in such technology for a considerable period of time, is ready for such challenges and well placed to conduct such hearings remotely, thereby continuing to protect clients' interests in this 'new' age.

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FOCUS ON

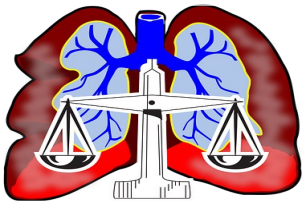
Risky Material - Mesothelioma and Low Level Asbestos Exposure

Valerie Bannister v Freemans plc
[2020] EWHC 1256 (QB)

For the past 18 years, special rules of causation have applied to claims for damages arising from the development of mesothelioma; a fatal malignant tumour usually of the pleura of the lung caused by the inhalation of dust composed of or containing asbestos fibres.

The risk of developing a mesothelioma increases in proportion to the quantity of asbestos dust and fibres inhaled. As a consequence, those working with asbestos containing materials, such as pipe laggers, have been at the greatest risk of developing the disease many years after exposure. However, the level at which exposure to asbestos dust can be tolerated without significant risk of developing the disease is not known, and even incidental exposures have been found to have caused mesothelioma.

So it was, for example, in *McDonald v National Grid Electricity Transmission plc [2014] UKSC 53* that Mr McDonald, whilst collecting pulverised fuel ash from Battersea Power Station out of curiosity (or to visit friends there), wandered into parts of the power station where lagging with asbestos containing materials was taking place, resulting in exposure to asbestos that was held to have caused his death by mesothelioma.



This workplace exposure is against the backdrop of large numbers of asbestos fibres in the general environment, particularly the urban environment, with no way of identifying which fibre, the environment or the workplace (or which workplace) has caused the fatal malignant tumour. The special rules have developed to get around this problem of not knowing which fibre, amongst many, caused the mesothelioma.

In *Sienkiewicz v Grief (UK) Ltd [2011] UKSC 10*, Lord Phillips summarised the law as it stood by 2011:

"Mesothelioma is a hideous disease that is inevitably fatal. In most cases, indeed possibly in all cases, it is caused by the inhalation of asbestos fibres. Unusual features of the disease led the House of Lords to create a special rule governing the attribution of causation to those responsible for exposing victims to asbestos dust. This was advanced for the first time in Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22 […] and developed in Barker v Corus UK Ltd [2006] UKHL 20 […]. Parliament then intervened by section 3 of the Compensation Act 2006 further to vary this rule. The rule in its current form can be stated as follows: when a victim contracts mesothelioma, each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and, thus, creating a 'material increase in risk' of the victim contracting the disease, will be held to be jointly and severally liable for causing the disease."

It should be noted in passing that this special relaxation of the normal rules of causation in mesothelioma claims is not (or at least ought not to be) accompanied by a relaxation of the normal rules of evidence and proof of exposure to asbestos.

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In the recent case of *Valerie Bannister v Freemans plc [2020] EWHC 1256 (QB)*, the Claimant's husband contracted and died of mesothelioma. The Deceased did not work with asbestos; he was an accountant working for a catalogue company at their London offices. The Deceased's work did not bring him into contact with people working with asbestos. Instead, the Claimant's case was that her husband had returned to work after a weekend where remedial works had been undertaken to remove asbestos panels dividing his office from neighbouring offices. Later, the room dividers were reinstated with non-asbestos containing materials. It was alleged quantities of dust created by the removal of the asbestos panels had caused the Deceased's mesothelioma.

In a (second) statement, the Deceased provided evidence that he knew the panels contained asbestos because he had received a memorandum before the works commenced stating that the purpose of the works was to remove asbestos panels. A colleague of the Deceased gave evidence that there was visible dust in the Deceased's office following the works, and that the Deceased had complained about being able to taste dust.

The Claimant's claim was dismissed. Judge Tattersall QC accepted that the memorandum was sent and that asbestos panels were removed, but he drew an inference that the panels would have been removed by specialist contractors who would have carried out the work competently. Further, the Judge was not satisfied that the dust seen by the witness was present after the removal works and may have been left by the reinstatement works. The Judge was, therefore, not satisfied, on the balance of probabilities, that the Deceased had been exposed to asbestos when he returned to work following the removal works. In the alternative, he was exposed to 'other dust' for a very short time. This was sufficient to dispose of the Claimant's claim.

This is an interesting and welcome example of the requirement that Claimants must provide exposure to asbestos to succeed in their claim, even where in mesothelioma claims the normal requirements for causation have been relaxed by the special rules.

However, the Judge did not stop there, and he went onto consider what the position would have been had the dust on the Monday morning, when the Deceased returned to work, in fact contained asbestos. This part of the Judgment is of general application, albeit *obiter dicta*.

How should the Deceased's exposure to asbestos be assessed?

Counsel for the Claimant, Mr Harry Steinberg QC, argued (on the basis of dicta in *Rolls Royce Industrial Power (India) Limited v Cox [2007] EWCA Civ 1242*) that it was sufficient for the Claimant to satisfy the Court that the extent and duration of exposure had materially increased the risk to the Deceased of contracting mesothelioma, and that it was not necessary or desirable to calculate the precise asbestos dose.

This approach was rejected by the Judge, who held (on the basis of dicta in *Williams v University of Birmingham & Another [2011] EWCA Civ 1242*) that he should attempt to make findings as to the actual levels of asbestos exposure, no matter how imprecise such findings might be.

Preferring the expert evidence of Mr Martin Stear on behalf of the Defendant, the Judge concluded that the Deceased's workplace exposure to asbestos was incredibly small; in the region of 0.0004 fibre/ml years (32.5 times smaller than the dose in *Sienkiewicz*).

Did such exposure represent "*a 'material increase in risk' of the victim contracting the disease*"?

The Judge accepted that whether the asbestos exposure represented a material increase in risk was a question of fact and law. In doing so, he considered that *"whether the exposure [for this purpose, assumed] of the Deceased to asbestos whilst in the employment of the Defendant constituted a material increase in risk, ie – whether such increase in risk is so insignificant that the Court can properly disregard it on the de minimis principle."* The Judge accepted that the test was that which the Claimant's medical expert had previously expounded that *"a dose of asbestos which was properly capable of being neglected could be defined as a dose which a medical practitioner who is aware of the medical risks would define as something that the average patient should not worry about."*

The Judge was satisfied that the Deceased's dose was incredibly small and *"the annual risk of such causing mesothelioma was about 1 in 50 million"*. In his Judgment, *"the Claimant has not established to my satisfaction, on a balance of probabilities, that any exposure which the Deceased suffered in the employment of the Deceased caused a material increase in the risk of him developing mesothelioma."*

Material increase in risk, therefore, appears to equate with '*more than de minimis*', which itself is a matter for the Court, but which corresponds to the a level of exposure that would cause a doctor to advise his/her patient not to worry about.

This is a first instance obiter dicta point and it remains to be seen how widely it is accepted and whether the Appeal Courts adopt the same approach when, which seems likely, the point is raised in a case which appears on appeal. Thus, the decision needs to be approached with causation and, moreover, it remains to be seen if it is, in itself, subject to appeal (albeit given that the primary finding was one of fact, it will be interesting to see the basis of such appeal).

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RECENT CASE UPDATES

Acceptance of Offer - Detailed Assessment

MEF v St Georges Healthcare NHS Trust
[2020] EWHC 1300 (QB)

Detailed Assessment proceedings in a clinical negligence claim commenced in April 2018. The Claimant's, 'C', Bill of Costs was £621,455.57. Various offers and counteroffers were made. On 27 September 2018, the Defendant NHS Trust, 'D', offered £440,000 in full and final settlement of C's costs. In an email dated 19 August 2019, D stated it was proceeding to Detailed Assessment and that its offer dated 27 September 2018 "*is only capable of acceptance subject to the agreement of the Defendant's costs of Detailed Assessment incurred since that date*". There was no response from C and the Detailed Assessment Hearing commenced on 17 September 2019. By lunchtime on the second day of the hearing, it became apparent that C would recover less than £440,000, and C's solicitors sent an email to D's solicitors accepting the offer and confirming that C would pay D's reasonable costs of Detailed Assessment. It was held that C had validly accepted the offer. D appealed, arguing that the Costs Judge should have found that D's offer came to an end after the lapse of a reasonable time which was no later than the start of the Detailed Assessment hearing.

The offer had not been made as a Part 36 offer and was, therefore, not subject to the provisions of CPR Part 36, which provides that a Part 36 offer can only be accepted once a hearing has commenced with the Court's permission. The offer was made in a *Calderbank* letter. There was no time limit set for acceptance. Accordingly, the Court held that the offer did not lapse by the start of the hearing and C had been entitled to accept the offer part way through the hearing. C's email constituted acceptance of the offer and gave rise to a contractually binding settlement of the Detailed Assessment proceedings.

Article 2 - Inquests

R (Maguire) v HM Senior Coroner for Blackpool & Fylde
[2020] EWCA Civ 738

The deceased, 'J', had Down's Syndrome, in addition to learning disabilities and behavioural difficulties. She lived in a residential care home. Her placement was paid for and supervised by Blackpool Council. The home was not a nursing home and staff were not medically trained. J was subject to a standard authorisation granted by the Council pursuant to the Deprivation of Liberty Safeguards.

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J became ill over a period of two days, and, on 21 February 2017, a call to NHS 111 resulted in advice to consult a GP. A GP telephone consultation took place. Due to continuing concerns later in the evening, an ambulance was called. The paramedics wished to transfer J to hospital, but she would not co-operate. The paramedics concluded that manhandling J might cause injury and that was disproportionate to her medical condition. An out of hours GP was telephoned, who advised that attempts should be made to persuade J to go to hospital, but that if she refused, J should stay in the care home and be monitored overnight. That is what happened. The following morning, J's condition was worse. An ambulance was called and she was taken to hospital. J was found to be severely dehydrated with kidney failure and metabolic acidosis. She died following a cardiac arrest later that day. The cause of her death was a perforated gastric ulcer, peritonitis and pneumonia.

Before the Coroner, J's family argued that the circumstances of the death dictated that there should be an Inquest which satisfied the procedural obligation under Article 2 ECHR; ie – that the investigation to ascertain how, when and where the deceased came by his or her death be read as including ascertaining in what circumstances the deceased came by his or her death (Section 5(2) Coroners and Justice Act 2009). The Coroner initially agreed. Evidence was called at the Inquest which satisfied the evidential obligations of the procedural duty. However, before the Jury was asked to perform its function under section 5 at the conclusion of the Inquest, the Coroner revisited his decision in the light of recent authority (*R (Parkinson) v HM Senior Coroner for Inner London South [2018]*) and decided that the evidence did not suggest that J's death might have resulted from a violation of the positive obligation to protect life imposed by Article 2 ('the operational duty') and, therefore, the procedural obligation to ascertain in what circumstances the deceased came by her death did not apply. The Jury was limited to determining how, when and where J came by her death. The Jury concluded that J's death came about by natural causes.

J's mother, 'M', applied for Judicial Review of the Coroner's decision. At first instance, the claim was dismissed and M appealed to the Court of Appeal on the following grounds:

- 1: The Divisional Court erred in concluding that the procedural obligation under Article 2 ECHR did not apply. By parity of reasoning with *Rabone v Pennine Care NHS Trust [2012]*, the circumstances of J's care dictated that the procedural obligation applied. It was not a medical case of the sort considered in *Parkinson*.

- 2: If *Parkinson* applied, the Divisional Court was wrong to conclude that the failure to have in place a system for admitting J to hospital on the evening of 21 February 2017 – whether an advance plan drawn up by the care home and GP, or a plan on the part of the Ambulance Service faced with a patient without capacity in need of, but objecting to, hospital admission – did not amount to a systemic failure.

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- 3: The Divisional Court erred in failing to take account of the wider context of premature deaths of people with learning disabilities (such information being known to the Senior Coroner at the time, even if not in evidence before him), but, in any event, being relevant to the application of Article 2 in these circumstances.

In relation to grounds 1 and 3, M's underlying argument was that J's vulnerability and deprivation of liberty dictated that she was owed the Article 2 operational duty. However, the Court held that the mere existence of an operational duty did not mean that, for all purposes, the death of someone to whom that duty was owed was to be judged by Article 2 standards. It was necessary to consider the scope of any operational duty. The operational duty and consequent procedural obligation were not owed for all purposes to those in vulnerable positions in care homes (*Dumpe v Lativia*, unreported, applied). The Coroner was right to conclude, on the evidence adduced at the Inquest, that there was no basis for believing that J's death was the result of a breach of the operational duty of the state to protect life. The reports examining the premature deaths of people with learning disabilities did not provide additional weight to the argument that a relevant operational duty was owed to J.

As regards ground 2, the State might breach its operational duty in two 'very exceptional circumstances'; where it knowingly put an individual's life in danger by denying access to life-saving emergency treatment or where systemic dysfunction resulted in a patient being denied access to life-saving treatment in circumstances where the authorities knew of the risk but failed to take preventative measures (*Lopes de Sousa Fernandez v Portugal [2018]* applied). The Court concluded that the criticisms of the professionals did not come close to satisfying the first exception identified by the Court in that case; ie – that the patient's life was knowingly put in danger by a denial of access to life saving emergency treatment. The collective judgment of professionals was that J was not in danger on the evening of 21 February 2017 and could be kept under observation at the home, even though it was preferable that she went to hospital. Further, this case did not raise 'systemic or structural dysfunction in [medical] services' which resulted in J being denied life-saving treatment; "*There is nothing in the materials before us which suggests that there is a widespread difficulty in taking individuals with learning disabilities (or elderly dementia patients) to hospital when it is in their interests to do so. The criticism of the care home, the paramedics and the out of hours GP is that between them they failed to get* (J) *to hospital on the evening of 21 February; and that a plan, protocol or guidance should have been in place that would have achieved that end. That is remote from the sort of systemic regulatory failing which the Strasbourg Court has in mind as underpinning the very exceptional circumstances in which a breach of the operational duty to protect life might be found in a medical case. The making of plans in individual cases and the detail of guidance given to paramedics is far removed from what the Court describes in the passage we have set out."*

Accordingly, M's appeal was dismissed.

RECENT CASE UPDATES

Breach of Statutory Duty - Highway Maintainable at Public Expense - Public Paths

Deborah Barlow v Wigan Metropolitan Borough Council
[2020] EWCA Civ 696 CA (Civ Div)

The Claimant tripped over a tree root and injured herself on a public path in one of the Local Authority's parks. The path had been constructed in the 1930's by the District Council predecessor to the Local Authority.

The Local Authority's position was that the path was an unrestricted public right of way and it had no duty to maintain it.

At first instance, it was held that although the path had become a highway through at least 20 years usage, it had to be constructed as a highway for Section 36(2)(a) to apply and there was no evidence regarding the Council's intention to dedicate the path as a highway at that time. The Claimant's claim was, therefore, dismissed.

That decision was reversed on Appeal, with the High Court finding that Section 36(2)(a) did not require express dedication when the path was constructed.

The Local Authority appealed. The dicta of Neuberger J in *Gulliksen v Pembrokeshire County Council [2002]* was relied upon; that Section 36(2)(a) only applied if the relevant body constructed the highway in its capacity as a Highway Authority and only to highways constructed as such at their inception. The Claimant contended that Section 36(2)(a) did not require a Highway Authority to have such intention; alternatively that the path was probably dedicated before 1949, such that it was maintainable at the public expense under Section 47(1) of the 1949 Act, Section 38(2)(b) of the 1959 Act and Section 36(1) of the 1980 Act.

It had been agreed that the defect that caused the Claimant to fall was a dangerous defect within the meaning of Section 41 of the Highways Act 1980. It was also agreed that the path was a highway.

The decision for the Court of Appeal was whether the pathway was a Highway Maintainable at Public Expense.

The Court of Appeal held:

- Section 36(2)(a) of the 1980 Act would only apply if the Local Authority's predecessor was acting *in its capacity as a Highway Authority* when it constructed the path. This was not the case in the instant case. Accordingly, the path was not a Highway Maintainable at the Public Expense as a result of the operation of this section of the 1980 Act. Sedley LJ's comments in *Gulliksen* that it does not matter in what capacity a Local Authority with a Highway Authority function was acting in when constructing a highway have been disapproved.

- Section 36(2)(a) was not retrospective and had no application to the path which was constructed in 1932.

- Sections 47 and 49 of the Parks Act applied. The path was maintainable by the inhabitants at large from prior to December 1949 and automatically became a Highway Maintainable at the Public Expense following the enactment of the Highway Act 1959, and retained this status following the enactment of the 1980 Act.

- As a Highway Maintainable at the Public Expense, Section 41 of the 1980 Act applied and in the absence of a Section 58 defence, the Claimant's claim succeeded.

The Local Authority's Appeal was, therefore, dismissed.

Causation - Clinical Negligence - Relief from Sanctions

Simone Magee (Appellant/2nd Defendant) v Joy Angela Willmott (Claimant/Respondent) [2020] EWHC 1378 (QB)

The Claimant/Respondent brought a claim against her GP for negligence because of an alleged delay in diagnosing bowel cancer. Expert evidence was exchanged by the parties on 15 July 2019. The Trial was listed to begin on 16 September 2019. In late July 2019, the Defendant/Appellant's solicitors communicated their view to the Claimant/Respondent's solicitors that the expert causation evidence relied upon by the Claimant did not support the pleaded allegations of breach. On 6 August 2019, the Claimant issued an Application for permission to rely upon new expert evidence in the form of three reports. The Defendant/ Appellant applied to strike out the claim.

At a Pre-Trial Review on 8 August 2019, the District Judge was persuaded to vacate the Trial and the parties' respective Applications were listed for a hearing on 23 September 2019. At that hearing, the Claimant was granted relief from sanctions and given permission to rely upon the new expert evidence. The Defendant's Application to strike out was refused. The Defendant appealed.

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On Appeal, it was held that the Recorder had erred in his approach to the Application for relief from sanction. Although he had purported to apply the test in CPR3.9, his analysis demonstrated a different approach, focusing on the Claimant's Article 6 right.

The breach (the late service of new evidence) was serious and had resulted in the loss of a Trial date. Relisting would have produced further, not insignificant, delay leaving the matter hanging over the parties. The conduct of the Claimant's solicitors was found to be particularly egregious. They had not been frank with the Defendant or the Court, and delayed in making the Application and in giving full disclosure, while they attempted to obtain the necessary evidence to support the claim advanced; they had sought that evidence to plug the gaps in the Claimant's case after the time for service had passed. They did so in response to the Defendant's solicitors appropriately identifying the difficulties in maintaining the pleaded claim. To allow the Application for relief would not only fail to do justice between the parties, but serve to discourage the sensible, pro-active and efficient approach to litigation exemplified on the Defendant's side. The factors in CRP3.9 pointed strongly towards refusing relief.

It was far from clear that the Claimant had been significantly prejudiced by the refusal to grant relief given the weak position she would have found herself in anyway given the piecemeal development of her expert evidence so late in the course of the litigation.

The Application to strike out was partly successful. The Claimant had accepted, on appeal, that part of her claim should be struck out. However, part of her claim was allowed to proceed as the expert evidence which the Claimant had was just sufficient to mount a claim.

Duty of Care - Motorcycles - Risk

Christopher Andrew Wells v (1) Full Moon Events (t/a Dave Thorpe Honda Off-Road Centre) (2) Dave Thorpe Honda Off-Road Centre Limited
[2020] EWHC 1265 (QB)

The Claimant brought a claim in negligence against an off-road Motorcycle Centre after he sustained catastrophic injuries while he was taking part in an event run by the Centre. The event, known as 'enduro day', was non-competitive, involved groups of riders each led by an instructor, riding over varied terrain. The ability of the riders was assessed by the instructor before the event began. The trails were often muddy or puddled.

The Claimant was an experienced and competent off-road motorcyclist. He completed a 'signing off' form and indemnity, whereby he acknowledged that motorsports were hazardous and accepted the risk of injury arising from his participation in the event.

RECENT CASE UPDATES

The Claimant was riding in single file, along a forest byway which was open to all traffic, when he rode through a muddy puddle. He claimed the wheel of his motorcycle struck an object concealed under the water, causing him to lose control and fall.

The Claimant alleged that the Centre was negligent or in breach of an implied contractual term that it would organise the event with due regard to his safety. The Claimant alleged that the Centre should have carried out a risk assessment of the byway, that the instructor should have given them guidance as to how to negotiate the byway and/or warned of the possible presence of submerged obstacles in the puddles on the track.

At Trial, the Claimant failed to prove the cause of his accident, and so his claim was unsuccessful.

However, the obiter comments are of interest. The Court held (obiter):

- The Claimant's own evidence established that he was aware that there was an inherent risk in off-road motorcycling.
- The risk of a concealed hazard in puddles on the track was obvious. The Claimant accepted that he did not need to be warned that muddy water might contain submerged obstacles.
- The Claimant was sufficiently experienced and skilled to negotiate the accident site without difficulty.
- The Centre was well run and had a high regard for safety. It was reasonable for the Claimant's experienced instructor to have taken the group along the byway. The byway had been used by many 'enduro day' riders without incident. It was nothing out of the ordinary.
- It was for each rider to decide for themselves how to negotiate the terrain in terms of route and speed. It would not be reasonable to require the Centre to undertake detailed risk assessments, identify and guard against all hazards, instruct experienced riders how to negotiate all sections of the course, or avoid parts of the course that would ordinarily be regarded as part of the off-road experience. Such a requirement would negate the experience of an 'endure day'.

RECENT CASE UPDATES

Psychiatric Injury - Secondary Victim

Paul v The Royal Wolverhampton NHS Trust
[2020] EWHC 1415 (QB)

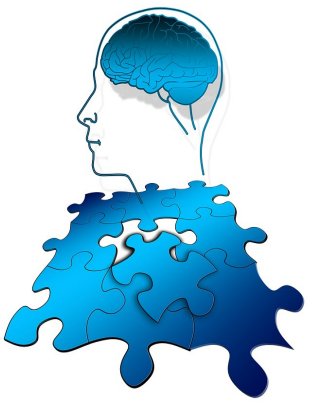
This was the Claimants' appeal against the striking out of their secondary victim claims. The Claimants' father, 'P', was admitted to the Defendant hospital in November 2012 after complaining of chest and jaw pain. P was discharged after various tests and investigations. More than 14 months later, in January 2014, while out on a shopping trip with the Claimants (then aged 12 and 9), P collapsed and died from a heart attack.

P's heart attack was caused by ischaemic heart disease and occlusive coronary artery atherosclerosis. The Claimants' pleaded case was that the failure to diagnose these conditions in November 2012 was negligent. The hospital should have performed coronary angiography on P. This would have revealed significant coronary artery disease, which could, and would, have been successfully treated by coronary revascularisation. Had that occurred, P would not have suffered a cardiac event in January 2014 and the Claimants would not have suffered psychiatric injuries caused by witnessing his collapse and death. The Claimants pleaded that P's collapse from a heart attack in 2014 was "*the first manifestation of the Defendant's breach of duty".*

The Defendant disputed it owed a duty of care to the Claimants and applied to strike out their Statements of Case as disclosing no reasonable grounds for bringing the claims, or, alternatively, for Summary Judgment on the basis that the Claimants had no reasonable prospect of succeeding. At first instance, it was held that the claims were bound to fail and they were struck out.

There was no dispute that if P's collapse from a heart attack in January 2014 was capable of being a relevant 'event', each of the 'control mechanisms' necessary for a successful secondary victim claim was satisfied on the facts pleaded. The key question was, therefore, whether P's collapse from a heart attack, 14½ months after the allegedly negligent treatment, was capable of constituting a relevant 'event'.

It should be noted that as this was a strike out Application, it had to be assumed that the Claimants would establish their pleaded case that P's collapse in January 2014 was the point at which P first suffered injury as a result of the Defendant's breach of duty, or the point at which that injury first became apparent. The Judge had to assume that the cause of action did not accrue; ie – there was no completed tort until P's collapse in January 2014. On this assumption, 'the scene of the tort' was the pavement where, in January 2014, P collapsed and died. The Claimants were present at that scene. The Judge held that the Master was wrong to conclude that these claims were bound to fail on the facts pleaded. There was on the facts pleaded only one event; P's collapse from a heart attack on 26 January 2014.



Whilst this was sufficient to allow the Claimants' Appeal, the Judge went onto consider what the position would be if the Defendant's negligent omission caused actionable damage prior to P's collapse in January 2014. If there were a relevant 'event' prior to P's collapse, the case of *Taylor v A Novo (UK) Ltd [2014]* would preclude liability. The Judge commented that, in the present case, there was nothing that could naturally be described as an 'event' before P's collapse in January 2014, even on the assumption that some actionable damage was suffered before that date. The Judge considered that if it was necessary to identify a stopping point after which the consequences of a negligent act or omission can no longer qualify as an 'event' giving rise to liability for psychiatric damage in a secondary victim, the most obvious candidate is the point when damage to the primary victim first becomes manifest. Accordingly, the Judge held that the principle in *Taylor v A Novo* was no bar to recovery in this case if it was shown that P's collapse from a heart attack in 2014 was the first occasion on which the damage caused by the hospital's negligent failure to diagnose and treat his heart condition became manifest.

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

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