

DOLMANS INSURANCE BULLETIN

**Welcome to the April 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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DOLMANS REPORT ON

APPEAL OF FEES FOR INTERVENTION (FFIs) - FFI WITHDRAWN DUE TO FINANCIAL CIRCUMSTANCES OF THE RECIPIENT - ALL SAINTS CHURCH OF ENGLAND SCHOOL DORSET



Readers of this bulletin who are involved in health and safety issues will be all too aware of the Fee For Intervention (FFI) system whereby the Health and Safety Executive (HSE) invoice an organisation for their regulatory involvement and/or initial investigation of a particular incident. What is less well publicised are the mechanisms which are in place to challenge the basis of FFIs. A formal appeal process is written into the FFI system, whereby the relevant tribunal for such an appeal is the Employment Tribunal. For a number of reasons, this is a system which is not well utilised by institutional defendants to FFIs and/or regulatory notices from the HSE.

What is less well known is the system of informal representations to the HSE; a system short of a formal appeal and, in many senses, a potentially more cost effective, *halfway house*, as it were, in the right case. Dolmans has recently achieved some success in relation to that latter route on behalf of a Board of Governors of a former Church of England School located in the Dorset area arising out of an incident at the school in the summer vacation period 2017.

We received instructions to represent the Board of Governors of the former All Saints Church of England School in Dorset, via the legal expenses insurers of the Board, in summer 2018. This arose out of ongoing investigations by the HSE in relation to an incident at the school over the summer vacation period 2017, leading to serious injuries to a contractor working at the school.

The background to that incident was complex; the Board of Governors, at that time, were responsible for the day to day running of the school, however, all capital expenditure (aside from minor works, specifically and financially defined) was authorised and overseen by the diocese responsible for the funding of the school and who owned the buildings from which the school operated. In that regard, the diocese operated through its appointed architect, who was engaged by the diocese direct and separate from any involvement by the school. As outlined overleaf, the diocesan architect had responsibility for drafting the scope of works, engaging contractors and running any necessary tender process to select contractors for the works.

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In early 2017, it was resolved by the diocese (in conjunction with its architect) that certain building works would take place on site in relation to an ongoing window replacement process at the school. Due to the extent of these works, it was resolved that they should take place during the school summer vacation period in 2017.

The scope of works was drawn up by the architect retained by the diocese, who liaised with relevant contractors as to the provision of the works themselves. The school were peripherally involved in this process, but, only inasmuch as access to the site would be required during a school summer vacation period when there would be no staff on site on a daily basis (and, therefore, arrangements for access would be required).



Unfortunately, during the course of the works, a contractor ventured onto an unprotected fragile roof and fell through the same, sustaining injury in the process. Understandably, given this incident, HSE were involved and began investigating the incident, and the involvement of the parties concerned. Shortly after the incident in July 2017, the school itself was placed into special measures, consequent upon a very significant budgetary deficit within the school. Indeed, the Board of Governors at the school in place at the time of the contractual works resigned following the imposition of special measures and we were required to liaise with an entirely new Board of Governors, appointed following the imposition of special measures, in relation to the incident.

It was necessary, against that background, to undertake extensive investigations into the incident and the background to the same and, in that regard, we were significantly assisted by the school's former business manager, with whom we liaised extensively, together with the Chair of the new Board of Governors at the school who provided detailed background on the school's difficult financial position, together with the interrelationship between the school and the diocese in relation to the sourcing and control of contractual works at the school. Critical to the latter was the understanding of the role of the diocesan architect who, as above, controlled the works on behalf of the diocese which, in effect, received the benefit of the same as the owner of the site and buildings thereon.

This latter issue was extremely important in the context of the relevant CDM Regulations in regard to the incident in question; investigation of the same being one of the main focus points for the HSE in regard to the incident as a whole. Understandably, the HSE were concerned to identify, pursuant to the CDM Regulations, who the 'client' organisation was for the purpose of considering duties and potential breaches of those Regulations.

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On the basis that the HSE took the view that the Board of Governors was the client for CDM purposes, the HSE issued the Board of Governors with a series of Fees For Intervention for their ongoing involvement in this matter, the first of which arrived well before our involvement from late summer 2018 onwards (and, therefore, by which stage, the usual period for an ordinary appeal had expired by that point). As readers will be aware, such FFIs can (and, indeed, to a large extent are designed to) transfer the liability for the incident and investigation of the same from the tax payer (from ordinary funding of HSE) to the 'guilty party' who are required to pay for the involvement of the HSE, usually from the point of service of the first FFI until any ultimate prosecution ensues (the latter then generating a whole new raft of costs, usually including legal costs for outside solicitor agents retained by the HSE).

Thus, in summary, at the point of our initial involvement in this matter, we had inherited a situation (as it were) where the initial period for appeal of the FFI situation had expired and, moreover, the financial position of the organisation concerned was highly precarious, with, once again, the school in special measures consequent upon a very significant budgetary deficit having been identified. Additionally, there were legal reasons to suspect that the Board of Governors were not the proper recipients of FFIs in the first place, given their role (see above) and given the roles of the diocesan architect and the diocese itself, both of which, we had been informed, had also received (apportioned) Fees For Intervention arising out of the same incident/investigation.

Accordingly, having established the facts of the situation in some detail, we resolved to write to the HSE Fee For Intervention Team at the HSE offices in Bootle, Liverpool, and make representations as to the FFIs levied in this matter. Our submissions in this regard covered a number of aspects of the case which can be summarised as follows:

- It was acknowledged that the approach as to FFIs was technically 'late' but, at the same time, given the parlous financial position which the Board of Governors and the school found itself in, clearly, it was preferable that these submissions were entertained by the HSE, rather than 'force' the Board of Governors to engage yet further cost in instigating a formal appeal, particularly given the cost in management time which would be engaged by such a process in the context of the somewhat existential struggle faced by the school in other respects.
- Following on from the above, the reality was that the school was in no position to pay the FFI invoices which had been levied against it. In that regard, detailed financial information was provided to the HSE as to the state of affairs which the school found itself in. In essence, an organisation in deficit to the extent of this school, moreover a public sector organisation, ought not to be paying FFI fees to the HSE, another public sector organisation.

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- If necessary, a formal appeal would be launched as regards to the FFIs outstanding in this matter, but, we submitted, given the above and the below, it clearly made sense for the HSE to at least forego enforcement of these FFIs pending a decision/conclusion as to wider prosecution of all parties involved (which had not yet been reached).
- Generally, FFIs should not be levied against the school, given the role of the diocese and the diocesan architect as client (as per the CDM Regulations) and controller of the works/client representative on site (a site, which, from the school's perspective, was closed and unoccupied at the material time, and which, in our submission, was highly material to the determination of 'client' pursuant to the CDM Regulations); in short, they were the parties responsible for the works and, therefore, if there were perceived deficiencies in the organisation of the said works, they should answer for the same, rather than the Board of Governors who had no involvement in the organisation of the works, management of the same on a day to day basis or having anyone on site at the material time.

Having made these submissions in some detail, we awaited the outcome of the same, together with a decision as to prosecution from the HSE.

Helpfully, we received an intermediate decision from the HSE to the effect that they would not expect us, given the financial situation of the school, to launch a formal appeal with regard to the FFIs. Moreover, enforcement of the FFIs would not be pursued pending a decision as to the wider principle of the same by the HSE FFI Team in Bootle. Thus, we had immediately secured a significant saving in further legal costs in obviating the need for a formal FFI appeal.



At the present time, a decision as to prosecution remains outstanding. However, we have recently received confirmation from the HSE that our appeal of the FFIs issued against the Board of Governors has been upheld in full on the basis that the HSE (sensibly in our view) reached the view that the financial position of the Board of Governors was such that it would be inappropriate for FFIs to be levied against them. In that context, it is important to understand and emphasise that the decision by the HSE is not an adjudication on our submissions as to the relationship between the various parties (see above), but, rather, a sensible and pragmatic decision reached by reference to the financial situation of the school (which, ultimately, led to the school itself being transferred/converted to Academy status in an effort to 'rescue' it from the financial situation it found itself in). The situation as to prosecution of some, or all, of the parties involved in the incident remains unresolved and, no doubt, that will become clear in due course.

Clearly, however, and at the risk of stating the obvious, the ability of the Board of Governors to pay a regulatory fine mirrors its position as to FFI liability.

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Comment

This case/situation illustrates the need for detailed investigation of health and safety matters, not only in terms of the question of a potential prosecution, but also from the perspective of potential collateral financial penalties, such as Fees For Intervention. Often, FFIs are (rightly) seen by organisations as the appropriate 'price' for regulation by the HSE when they have experienced an incident. However, it is not universally the case that FFIs are appropriate in all circumstances, as this case demonstrates.



It is important that potential defendants seek appropriate legal advice as to regulatory intervention, not only with regard to any possible future prosecution, but also with regard to the possibility that existing elements of the relationship with the Regulator can be explored further and potentially resolved in favour of the regulated party.

Clearly, those cases where FFIs can be successfully challenged will be in the minority. The FFI system is predicated on the understandable basis that the financial burden for an incident or regulatory situation should be transferred to the party responsible for creating it in the first place ("the guilty party"), rather than being funded from general taxation which, ordinarily, forms the basis of funding of the HSE. However, in appropriate instances, a sensible and pragmatic approach can be obtained from the HSE, provided there is an appropriate and substantive reason to pursue a differing approach from the norm.

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DOLMANS FOCUS ON

VICARIOUS LIABILITY - CLARIFICATION BY THE SUPREME COURT

In two long awaited Judgments, WM Morrison Supermarkets Plc v Various Claimants [2020] and Barclays Bank Plc v Various Claimants [2020], the Supreme Court has provided welcome clarification of the law on vicarious liability.

When considering vicarious liability, the Courts are concerned with two issues:

- (1) Whether there is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other?
- (2) The connection between that relationship and the tortfeasor's wrongdoing.



Recent cases have 'muddled the waters' on both issues and appeared to expand the circumstances in which vicarious liability will be found. The Supreme Court's Judgments rein in that expansion.

Barclays Bank Plc v Various Claimants [2020] UKSC 13

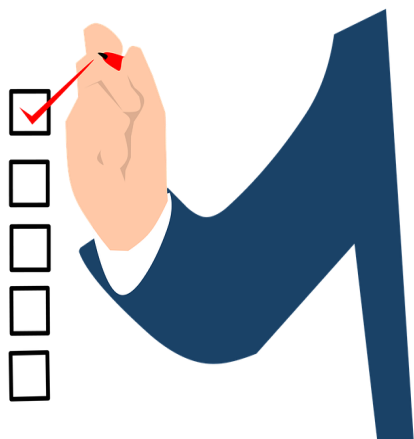
The *Barclays* case concerned the first issue. Briefly, the facts were that applicants for jobs at Barclays who were successful at interview would be told that they would be offered a job, subject to passing a medical examination and obtaining satisfactory results in their GCE examinations. The Bank arranged medical examination appointments with Dr Bates, told the applicants when and where to go and provided Dr Bates with a pro forma report to be filled in headed 'Barclays Confidential Medical Report'. Dr Bates was paid a fee for each report. He was not paid a retainer by the Bank. The examinations took place in Dr Bates' home. The Claimants alleged that Dr Bates sexually assaulted them in the course of those examinations. A preliminary issue trial was ordered of whether the Bank was vicariously liable for any assaults that Dr Bates was proved to have perpetrated in the course of medical examinations carried out at the Bank's request. At first instance, it was held that the Bank was vicariously liable. The Court of Appeal dismissed the Bank's appeal.

Before the Supreme Court, the Bank relied upon the statement of Lord Bridge of Harwich in D & F Estates Ltd v Church Comrs [1989]; "It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work". The Bank argued that although recent decisions had expanded the categories of relationship which can give rise to vicarious liability beyond a contract of employment, they had not so expanded it as to destroy this trite proposition of law.

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The Claimants argued that the recent Supreme Court cases of *Various Claimants v Catholic Child Welfare Society [2012]* (generally known as *Christian Brothers*), *Cox v Ministry of Justice [2016]* and *Armes v Nottinghamshire County Council [2017]* had replaced that trite proposition with a more nuanced multi-factorial approach in which a range of incidents are considered in deciding whether it is 'fair, just and reasonable' to impose vicarious liability upon a person for the torts of another person who is not his employee.

In *Christian Brothers*, Lord Phillips had listed 'a number of policy reasons' usually making it fair, just and reasonable to impose vicarious liability upon an employer for the torts committed by an employee in the course of his employment as follows:



- (i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability.
- (ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer.
- (iii) The employee's activity is likely to be part of the business activity of the employer.
- (iv) The employer, by employing the employee to carry on the activity, will have created the risk of the tort committed by the employee.
- (v) The employee will, to a greater or lesser degree, have been under the control of the employer.

Lady Hale, giving the unanimous Judgment, considered the development of case law and stated that there was nothing in the trilogy of Supreme Court cases relied upon by the Claimants to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, had been eroded. "*The question, therefore, is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the Defendant. In doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability ... But the key, as it was in Christian Brothers, Cox and Armes, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business, it is not necessary to consider the five incidents*".

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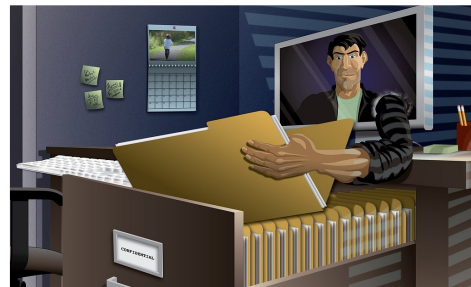
Applying that to the facts of this case, Dr Bates was not an employee of the Bank, nor, the Court held, was he anything close to an employee. Whilst Dr Bates did work for the Bank, he was not paid a retainer and was free to refuse work. He carried his own medical liability insurance. He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the Bank.

Accordingly, the Court allowed the appeal, finding that the Bank was not vicariously liable for any wrongdoing of Dr Bates in the course of the medical examinations he carried out for the Bank.

WM Morrison Supermarkets Plc v Various Claimants [2020] UKSC 12

The *Morrison* case concerned the second issue and, as Lord Reed put it, provided “*The court with an opportunity to address the misunderstandings which have arisen since its decision in the case of Mohamud v WM Morrison Supermarkets plc [2016]*”.

The Claimants in this case were 9,263 employees of Morrisons about whom personal information was published on the internet by another employee of Morrisons, ‘S’. S was a senior auditor in Morrisons’ internal audit team. In July 2013, he was subject to disciplinary proceedings for minor misconduct and was given a verbal warning, following which he harboured an irrational grudge against Morrisons.



In preparation for an annual external audit in November 2013, KPMG requested payroll data from Morrisons. The task of collating and transmitting the data was given to S. S transmitted the data to KPMG. However, he also copied the data from his work laptop onto a personal USB stick. In January 2014, S uploaded a file containing the data of 98,998 employees to a publicly accessible file-sharing website, with links to the data posted on other websites. The file was created from the personal copy of the data which S had made on his USB stick. S made the disclosure when he was at home, using a pay-as-you-go mobile phone linked to a false email account he had created and software capable of disguising the identity of a computer which had accessed the internet. In March 2014, S sent CDs containing the file anonymously to three UK newspapers, purporting to be a concerned member of the public who had found the file on the file-sharing website. The newspapers did not publish the data.

One of them alerted Morrisons. Morrisons swiftly took steps to ensure that the data was removed from the internet, instigated internal investigations and informed the police. It also informed its employees and undertook measures to protect their identities. S was arrested, subsequently convicted of a number of offences and sentenced to 8 years’ imprisonment.

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The Claimants brought proceedings against Morrisons for its own alleged breach of the statutory duty created by section 4 (4) of the DPA, misuse of private information and breach of confidence. The claims were also brought on the basis that Morrisons was vicariously liable for S's conduct.

At a split trial of liability, the Judge rejected the contention that Morrisons was under a primary liability in any of the respects alleged, but held that it was vicariously liable for S's breach of statutory duty under the DPA, his misuse of private information and his breach of his duty of confidence. The Judge rejected Morrisons' argument that S's wrongful conduct was not committed in the course of his employment, holding that Morrisons had provided S with the data in order for him to carry out the task assigned to him and that what had happened thereafter was "*a seamless and continuous sequence of events ... an unbroken chain*" and that S's disclosure to others than KMPG was "*closely related*" to what he was tasked to do. The Court of Appeal dismissed Morrisons' appeal, adding that although it was an unusual feature of the case that S's motive in committing the wrongdoing was to harm his employer, Lord Toulson had said in *Mohamud* that motive was irrelevant.

Again, the Court considered the development of the law. The 'close connection' test was expressed by the House of Lords in *Lister v Hesley Hall Ltd [2001]* and elaborated upon by that Court in *Dubai Aluminium Co Ltd v Salaam [2002]* in which Lord Nicholls said "*The wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment*".



Lord Reed, giving the unanimous Judgment, stated that the general principle set out by Lord Nicholls "*Has to be applied with regard to the circumstances of the case before the court and the assistance provided by previous court decisions. The words "fairly and properly" are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court*". Lord Toulson in *Mohamud* had not suggested any departure from the approach in *Dubai Aluminium*, and his comments had been taken out of context. The Judge and the Court of Appeal had misunderstood the principles governing vicarious liability in a number of relevant respects. The question whether Morrisons was vicariously liable for S's wrongdoing was, therefore, considered afresh.

Applying the general test laid down by Lord Nicholls in *Dubai Aluminium*, the question was whether S's disclosure of the data was so closely connected with acts he was authorised to do that, for the purposes of the liability of his employer to third parties, his wrongful disclosure may fairly and properly be regarded as done by him while acting in the ordinary course of his employment.

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The connecting factor between what S was authorised to do and the disclosure was that S could not have made the disclosure if he had not been given the task of collating the data and transmitting it to KPMG. However, the mere fact that S's employment gave him the opportunity to commit the wrongful act would not be sufficient to warrant the imposition of vicarious liability. Relevant case law illustrated the distinction drawn in *Dubai Aluminium* between "cases ... where the employee was engaged, however, misguided, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own'".

In the present case, it was abundantly clear that S was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier. In those circumstances, applying the test laid down in *Dubai Aluminium* in the light of the circumstances of the case and the relevant precedents, S's wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of Morrisons' liability to third parties, it could fairly and properly be regarded as done by him while acting in the ordinary course of his employment. Accordingly, Morrisons could not be held liable for S's conduct and the appeal was allowed.



Comment

Whilst there remains potential for many nuances in relation to both the relationship issue and the 'close connection' test, which will, no doubt, be played out in future cases, the Supreme Court's clarification of the law, and reining in of what had appeared to be the significantly expanding scope of vicarious liability, is welcome news for Defendants.

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DOLMANS RECENT CASE UPDATE

Coronavirus - Adjournment of Trials

In the Matter of One Blackfriars Limited Ch D Lawtel 06/04/20

The Applicants applied for the adjournment of a 5 day Trial, which was due to begin in June 2020, because of the Covid-19 health crisis. The Trial was to involve witnesses of fact and expert witnesses.

The Applicants submitted that:

- (1) To proceed with the Trial would be inconsistent with the Prime Minister's instructions on 23 March 2020 to stay at home;
- (2) A remote Trial could not proceed without exposing those taking part to an unacceptable risk to their health and safety;
- (3) The technological challenges in conducting a remote Trial were too great;
- (4) There was potential for unfairness in conducting a remote Trial.

The Application was refused.

The submission that it would be inconsistent with the lockdown measures to allow the Trial to proceed was rejected. The Prime Minister's instructions on 23 March 2020 had been translated into enforceable legal provisions, by way of The Coronavirus Act 2020, which contained a wide range of powers to enable the Government to respond to the Covid-19 crisis. Sections 53 to 56 expanded the availability of video and audio links in Court proceedings. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 provided that a person could leave their home to attend Court or to participate in legal proceedings and allowed gatherings of two or more people where that was essential for work purposes or where it was reasonably necessary to participate in legal proceedings. Those provisions suggested that the Government expected the work of the Courts to continue during the Covid-19 crisis.



It was imperative that a remote Trial did not endanger the health of those taking part. However, the Trial was not due to start until early June 2020 and much could change in that time in what was a fast-moving situation. There was also no detailed evidence before the Court of the particular difficulties that participants might have in taking part.

The technological challenges of conducting a remote Trial were not so great as to warrant an adjournment. There were two examples of fully remote Trials having taken place involving several witnesses and experts. It was for the parties to test the systems which would be used in a remote Trial.

The challenges in conducting remote Trials applied to both sides equally, and further delays in the case were in neither side's interest.

In refusing the Application, the parties were ordered to continue to prepare for the Trial and to explore the technological options available to facilitate a remote Trial.

DOLMANS RECENT CASE UPDATE

Damages - Surrogacy - Public Policy

Whittington Hospital NHS Trust v XX ***[2020] UKSC 14***

The Appellant NHS Trust (the 'Trust') admitted liability for the delay in diagnosing cancer of the Respondent's ('X') cervix. This delay meant that X's condition was too far advanced for her to have the surgery which would have preserved her fertility. The chemoradiotherapy treatment she did receive instead caused her to be infertile.

Before receiving this treatment, eight mature eggs were collected from her and frozen. The evidence indicated that X and her partner wanted to have four children. It was probable, through surrogacy, that they could have two children using her eggs and his sperm, but wanted to have a further two children using donor eggs. Their preference was to proceed with a surrogacy arrangement in California where the law allows for the payment of a surrogate mother on a commercial basis, as opposed to in the UK where such commercial agreements are banned.



The High Court, at first instance, awarded reasonable expenses for a surrogacy arrangement only, rejecting the claim for commercial surrogacy on the grounds of it being contrary to public policy. It also found that using donor eggs was not restorative of X's fertility and, therefore, did not award damages for this head of loss. However, it did allow damages in respect of the pregnancies where X's own eggs were used.

X appealed against the decision on the commercial surrogacy and use of donor eggs, and the Trust cross-appealed against the two own-egg surrogacies. The Court Appeal allowed X's appeal, but dismissed the Trust's appeal.

The Trust appealed to the Supreme Court. The Supreme Court (by a majority of three to two) dismissed the Trust's appeal.

The appeal raised three key issues:

- Can damages to fund surrogacy arrangements using X's own eggs be recovered?
- Can damages to fund arrangements using donor eggs be recovered?
- Can damages to fund the cost of commercial surrogacy arrangements in a country where this is not unlawful be recovered?

Damages in tort sought to put the injured party back in the position they would have been in had the injury not occurred, unless such an award would be contrary to legal or public policy or was unreasonable.

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On the first issue, relying on the case *Briody v St Helens and Knowsley AHA (2001)*, the Court found that whether it was reasonable to award damages depended on the chances of a successful outcome. In this case, those prospects were noted to be good and awarded damages.

On the second issue, the view expressed in *Briody* that damages for donor egg surrogacy arrangements were not recoverable because damages could not restore the Claimant's lost fertility was wrong. Thus, subject to a reasonable prospect of success, damages could be claimed for the reasonable costs of UK surrogacy using donor eggs.

On the third issue, it was noted that since *Briody*, the Courts had begun to recognise the relationships created by surrogacy, including foreign commercial surrogacy. The Government now supported it as a valid way of creating family relationships. Further, the use of widespread reproduction techniques was now socially acceptable. Awards of damages for foreign commercial surrogacy were, therefore, no longer contrary to public policy, and, as long as the arrangement had a reasonable prospect of success, it was reasonable for X to seek the foreign commercial agreements proposed rather than making arrangements in the UK. The costs of the arrangement were also found to be reasonable.

Appeal dismissed.

Fixed Costs - Consent Order

Sui Lai Ho v Seyi Adelekun [2020] EWCA Civ 517

The Respondent (A) had issued a claim against the Appellant (H) following a road traffic accident which it was pursuing under the pre-action protocol for low value personal injury claims. The claim was allocated to the Fast Track. A made an Application to have the matter re-allocated to the Multi-Track. When agreeing to the Application, H made a Part 36 offer, which stated that if the offer was accepted, H would pay A's costs to be assessed if not agreed. A accepted the offer and the Consent Order included the term that H would pay A's reasonable costs on the standard basis, to be assessed if not agreed.



The parties did not agree on costs and the matter was adjudicated at a hearing before a Deputy District Judge.

H considered that the fixed costs regime applied. Although the Deputy District Judge agreed, he made no order as to costs on the basis that H had been the author of her own misfortune and should never have agreed in the Consent Order for reasonable costs on the standard basis. His decision on the application of the fixed costs regime was reversed on appeal, but subsequently restored by the Court of Appeal, which found that H had not offered to pay conventional costs as opposed to fixed costs and the parties had not contracted out of the fixed costs regime. It made a Costs Order in favour of H.

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It was agreed that H should be awarded the costs of her successful appeal. However, in issue was whether A should be ordered to pay the costs of the original hearing, and, in particular, whether CPR 44.12(1) entitled H to set off the costs owed to her against that which she had been ordered to pay A for the costs of the claim.

A argued that a Defendant could only enforce a Costs Order, whether by set-off or otherwise, up to the amount of any damages awarded. The Court of Appeal considered there was force in this argument, however, it was bound by the 2017 decision in *Howe v Motor Insurers' Bureau*, and, therefore, had to allow the direct setoff of H's award for costs against A's award for costs.

However, in reaching that decision, the Court of Appeal suggested that the decision in *Howe* had been wrongly decided, and, but for this precedent, would have been inclined to find it had no jurisdiction to allow the setoff against each of the parties' liability for costs, only to set off costs against damages. It urged the Civil Procedure Rule Committee to consider preventing Defendants setting off costs in cases covered by QOCS. It also granted A permission to appeal the case to the Supreme Court.

In relation to whether A should be ordered to pay the costs of the first instance hearing, the Court of Appeal considered that the wording of the Consent Order had not been a proper basis to depart from the general costs rule. Accordingly, A was ordered to pay H's costs of that hearing.

Road Traffic Accidents - Emergency Vehicles - Contributory Negligence

Sagal Adam Warsama v London Fire Brigade [2020] EWHC 718 QBD

The Claimant claimed damages from the Defendant for significant personal injuries she sustained in a road traffic accident which took place around 3am on a busy central London road. The Claimant was present on the carriageway when the nearside wing mirror of a moving fire engine, which was responding to an emergency call, struck her head.



Findings of Fact

The Claimant had been in an agitated state and under the influence of alcohol and cocaine at the time of the accident. On the balance of probabilities, she had moved "in a continuous and rapid fashion" from the pavement, between the parked cars and out into the offside lane. Her arms and hands were either raised or outstretched to her sides. The Claimant had wrongly thought that a police car was approaching after she had made a telephone call to the police following an altercation at a kebab shop.

The driver of the fire engine had only applied the brake after seeing the Claimant crossing the thick white line separating the main carriageway from the bus lane. He had not thought that the Claimant would move beyond the white line. He had not applied heavy or emergency braking for fear of skidding.

DOLMANS RECENT CASE UPDATE

Legal Principles

The driver of an emergency vehicle owed the same duty of care to the public as a civilian driver when driving in the course of their duty. The standard of care to be applied was that of the reasonable and careful driver. The statutory speed limit was disapplied under the Road Traffic Regulation Act 1967, but, when driving at speed, an emergency driver had to exercise a degree of care and skill proportionate to the speed at which they were driving.

It was unusual for a pedestrian to be found more responsible than a driver, unless the pedestrian had suddenly moved into the path of an oncoming vehicle; *Eagle v Chambers (No.1) [2003] EWCA Civ 1107* followed.

Negligence

The fire engine had been travelling at around 45mph at the time of the collision. That was too fast in the circumstances; this was a busy road at all times, there was a large group of people around, even on an emergency call it was difficult and rare to exceed 30 to 40mph, the driver's misapprehension that application of emergency braking would cause skidding and the size and nature of the vehicle.

The driver should have started braking as soon as he saw the Claimant emerging from the parked cars. Had he been driving at a more reasonable speed, he would have had sufficient time to brake and respond to the Claimant's presence. Had he done, the accident would have been avoided.

Contributory Negligence

The Claimant had placed herself in an obviously dangerous situation in the main carriageway and misjudged the nature and speed of the fire engine. She should have been able to appreciate its rapid progress along the straight well lit road and to comply with the Highway Code (which provided that pedestrians were not to enter the highway when an emergency vehicle was approaching).

The complication of drink and drugs went against the Claimant. Her conduct impeded the legitimate and important public work of those tasked with attending emergency call outs.

Outcome

Judgment for the Claimant, with a finding of 50% contributory negligence.



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

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DOLMANS

TRAINING OPPORTUNITIES



At Dolmans, we want to ensure that you are kept informed and up-to-date about any changes and developments in the law.

To assist you in this, we can offer a whole range of training seminars which are aimed at Local Authorities, their Brokers, Claims Handlers and Insurers.

All seminars will be tailored to make sure that they cover the points relevant to your needs.

Seminars we can offer include:

- Apportionment in HAVS cases
- Bullying, harassment, intimidation and victimisation in the workplace – personal injury claims
- Conditional Fee Agreements and costs issues
- Corporate manslaughter
- Data Protection
- Defending claims – the approach to risk management
- Display Screen Regulations – duties on employers
- Employers' liability update
- Employers' liability claims – investigation for managers and supervisors
- Flooding and drainage – duties and powers of landowners and Local Authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage
- Flooding and drainage – duties and powers of Highway Authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the Highway Authority in respect of highway waters
- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
- The Jackson Reforms (to include : costs budgeting; disclosure of funding arrangements; disclosure of medical records; non party costs orders; part 36/Calderbank offers; qualified one way costs shifting (QWOCs); strikeout/fundamental dishonesty/fraud; 10% increase in General Damages)
- Liability of Local Education Authority for accidents involving children
- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

If you would like any further information in relation to any of our training seminars, or wish to have an informal chat regarding any of the above, please contact our Training Partner,
Melanie Standley at melanies@dolmans.co.uk