DOLMANS INSURANCE BULLETIN

Welcome to the September 2019 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 SOLICITORS

DOLMANS REPORT ON

PHOTOGRAPHS DO NOT LIE - CONSEQUENCES OF NOT GETTING THE FACTS RIGHT!

RW v Newport City Council

This claim arose out of an alleged accident which occurred at St Woolos Cemetery, Newport, on 17 July 2015.

Background

The Claimant alleged that as she was leaving the cemetery, having visited her mother's grave, she sought to negotiate her way between two gravestones. In doing so, she placed her hand on one of the gravestones, causing it to give way, which, in turn, caused her to fall and sustain personal injuries.

Allegations were made pursuant to section 2 of the Occupiers' Liability Act 1957, together in negligence and/or nuisance. In particular, it was alleged that the Defendant local authority had failed to inspect the cemetery with sufficient regularity, or at all, or, in doing so, failed to carry out sufficiently thorough inspections, and, as such, failed to identify and remove the defective gravestone.

Whilst no admissions were made in relation to the alleged breach of duty, the local authority would have been in some difficulty in defending this aspect of the claim, since it did not have in place a proactive system of inspection at the relevant time, despite there being in existence practical advice published by the Ministry of Justice on managing the safety of burial grounds, which recommended that risk assessments and inspections be undertaken of memorials. Whilst the local authority sought to rely upon a reactive system of inspection (whereby inspections would be undertaken in receipt of a report or complaint), in reality it had no evidence of such a system in place. Further, the Cemetery Superintendent in post at the relevant time was no longer employed by the time the claim was issued, and, therefore, the local authority had limited evidence upon which it could rely to establish that it had taken reasonable steps to ensure the reasonable safety of visitors.

Further, the Claimant valued the claim at £100,000 (she was 78 years of age at the time of the alleged accident and had suffered a significant and life changing ankle injury), therefore, it was not an insignificant claim in terms of quantum.

Given the likelihood of a finding that the local authority had been in breach of its duty, any prospects of successfully defending the claim were likely to lie in undermining the Claimant's evidence as to the cause of her alleged accident.

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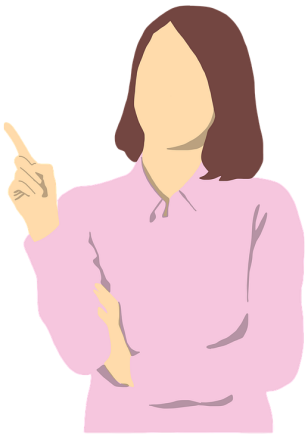
Investigations

The Particulars of Claim were rather vague as to the precise circumstances and cause of the alleged accident, merely stating that "*the gravestone gave way*". In particular, this description offered no specific information as to which part of the gravestone the Claimant had placed her hand and what was said to be defective and/or dangerous.

However, in pre-action correspondence, the Claimant's Solicitors had made a somewhat passing reference to the Claimant having placed her hand on a "*turret*" on a gravestone, which suggested that it was the giving way of this turret which had caused her to fall.



Given the photographs adduced showed no obvious evidence of there having been turrets on any corner of the gravestone, and given the absence of any reference to a turret in the Particulars of Claim, we served a detailed Part 18 Request for Further Information at the outset of proceedings, requiring the Claimant to effectively 'pin her colours to the mast' on this issue.

In her Replies, the Claimant confirmed she had, indeed, placed her hand on a "*turret*" and it was the giving way of this turret which caused her to fall. She even annotated the position and shape of the triangular turret on a photograph.

The local authority's position was that the gravestone in question never had turrets and we argued that the close up photographs of the corner in question showed no evidence of any mortar to suggest that a turret was at some stage affixed there.

Notwithstanding this, given the potential value of the claim and the weaknesses of the Defence overall, we considered it prudent to try and contact the family who owned the gravestone in the hope they would confirm that there had never been turrets on the gravestone so as to further support the Defence.

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Contact was made with the family to ascertain whether they would be able to provide such evidence.

Whilst reluctant to become involved in the litigation at first, following some gentle persuasion on our part, one of the relatives eventually agreed to provide a Statement in support of the Defence and to also travel all the way from West Yorkshire to give evidence at the listed 2 day hearing in Cardiff! However, the 'golden bullet', so to speak, were the photographs the family managed to retrieve, one of which was taken during the 1930s (as shown) shortly after the gravestone was installed, and through the decades to 2016, none of which showed any sign of a turret. This confirmed that there had never been turrets on the gravestone in support of the local authority's position.

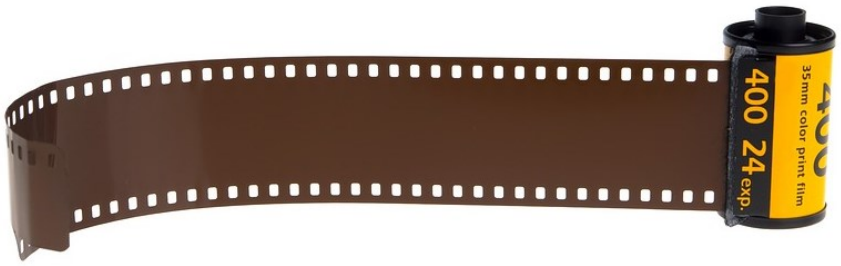
This suggested that, at best, the Claimant had been wholly mistaken as to what had caused her to lose balance.

Shortly after exchange of witness evidence, the Claimant discontinued her claim.

Whilst we explored with our client the prospects of a finding of fundamental dishonesty against the Claimant, it was decided not to take further action as there was little doubt, given the contemporaneous medical records and evidence from independent witnesses, that she had fallen in the area on 17 July 2015 and had sustained a serious injury to her ankle. It was considered that it was more likely than not that the Claimant was purely mistaken and/or confused as to what precisely she had placed her hand on, and, for whatever reason (possibly due to nearby gravestones having damaged/loose turrets at the corners), had convinced herself it was a turret and was genuinely mistaken as to this, as opposed to trying to bring a dishonest claim.

Comment

Whilst a Claimant is not required to offer an explanation as to the reason why they discontinue a claim, given the timing of the discontinuance, one can only assume that the Witness Statement adducing the photographic evidence was a significant factor in this decision. A well drafted Part 18 Request can be a valuable tool in getting to the crux of a Claimant's claim, especially when the Particulars of Claim are vague as to the cause and circumstances of the alleged accident, and evidentially important if you find a witness with a comprehensive gallery of photographs!



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DOLMANS RECENT CASE UPDATE

Costs - Part 36 Offers - False Imprisonment

MR v Commissioner of Police of the Metropolis
[2019] EWHC 1970 (QB)

The Appellant was arrested on suspicion of having committed an offence of harassment, but released without charge. He issued a claim against the Respondent Police Commissioner.

In May 2011, the Commissioner made a Part 36 Offer to settle the claim in the sum of £4,000 and to provide a letter of apology. The Appellant rejected the offer.

In September 2012, the Appellant made a Part 36 Offer to settle for £5,000 on the condition that the Commissioner admit liability for the matters alleged in the claim.

In May 2013, the Appellant made a further Part 36 Offer to settle for £5,000 on the condition that the Commissioner admit unlawful arrest and ensure that all records of his arrest and of the harassment warning be removed from police records and that his DNA, fingerprints and custody photographs be deleted. The Commissioner rejected the offer.

On 20 July 2017, the Appellant made another Part 36 Offer that the matter be settled for nil damages with an admission of liability, plus reasonable costs. The Respondent invited the Appellant to attend a without prejudice discussion. The Appellant did not reply.

At Trial, the Judge found that the arresting officer's suspicion that the Appellant had committed an offence was objectively reasonable. However, she found that the Appellant had voluntarily attended the police station and it had not been reasonable to arrest him. The claim for assault was made out in relation to the fingerprinting and the taking of a mouth swab for DNA. The Appellant was awarded £2,750, but the Judge made no order as to costs.

The Appellant appealed the Order in relation to costs, submitting that he had achieved a Judgment "*at least as advantageous*" as the proposals in his Part 36 Offer of 20 July 2017 and he was, therefore, entitled to his costs.

The issue for the Court to determine was whether the Appellant's Part 36 Offer was a genuine Part 36 Offer.

It was held:

- As a matter of principle, the implications of costs should never overwhelm the issue at the centre of the litigation. The Appellant wanted to "clear his name" and to achieve that aim he had to pursue the litigation to Trial. There was no realistic prospect that he would ever obtain the admission he wanted from the Commissioner by pre-trial negotiation and settlement.
- The Judge had found that the arrest was unlawful, albeit on limited grounds. The Appellant had been vindicated and the Judge had described him as the "successful party". In addition, he had been awarded financial compensation (albeit this was limited and below the level of the Part 36 Offer).
- The fact that the Appellant had given up all claim to a financial remedy was a significant concession indicative of a genuine Part 36 Offer. That offer did engage the provisions of CPR r.36.17 and, accordingly, meant that the Appellant was entitled to his costs from the expiry of the relevant period. It would be unjust not to apply r.36.17.

The Appellant, therefore, succeeded in his appeal and was entitled to costs on the indemnity basis for the period after the expiry of his July 2017 Part 36 Offer (those costs incurred after 14 August 2017), together with the other entitlements set out in r.36.17(4) from that date, to be assessed if not agreed.

Damages - Malicious Prosecution - Misfeasance in Public Office

Rees & Others v Commissioner of Police of the Metropolis
[2019] EWHC 2120 (Admin)

The Claimants had been charged with murder in April 2008 and held in custody until March 2010 following an investigation into an alleged contract killing in 1987. The prosecution case was based largely on the evidence of a witness, E, who implicated the Claimants and claimed to have been present at the murder scene shortly after the fatal attack. E suffered from a personality disorder and had a criminal record. Proceedings against the Claimants were discontinued in March 2011 without a Trial. The senior investigating officer was found to have prompted E's implication of the Claimants and to have perverted the course of justice.

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The Judge assessed damages following the Court of Appeal's finding that the Claimants were entitled to damages for malicious prosecution and the officer's misfeasance in public office. The Claimants sought damages for mental distress, humiliation and anxiety, a separate award for loss of liberty, aggravated and exemplary damages.

The Judge confirmed that the starting point was the guidelines laid down in *Thompson v Commissioner of Police of the Metropolis [1998]*. The total figure for damages should not exceed what the Court considered to be fair compensation for the injury which the Claimants had in fact suffered. The Claimants all had criminal records, albeit not for murder.

A basic award of £27,000 each was awarded for distress, humiliation and anxiety caused by the malicious prosecution. Two of the Claimants were each awarded £60,000 for the loss of liberty of 682 days. The third Claimant was already in custody in relation to an unconnected conviction and the only relevant loss of liberty was 9 days for which he was awarded £9,000. The Judge was satisfied that aggravated damages were merited. The awards for aggravated damages were reduced to reflect the Claimants' antecedent history, each being awarded £18,000. An award of exemplary damages was also required to highlight and condemn the egregious and shameful behaviour of a senior and experienced police officer. Exemplary damages of £50,000 each were awarded. Accordingly, the total awards were £155,000 each to two of the Claimants and £104,000 to the third.

Defective Premises Act 1972 - Statutory Interpretation

Lessees & Management Co of Herons Court v (1) Heronslea Ltd (2) TNV Construction Ltd (3) National House-Building Council (4) NHBC Building Control Services Ltd [2019] EWCA Civ 1423

This appeal decision dealt with the issue of whether approved inspectors owe a duty under s.1 (1) of the Defective Premises Act 1972 (the DPA 1972) in the exercise of their statutory functions to ensure compliance with building regulations.

The Appellants were lessees of flats at Herons Court. They issued a claim for damages for the alleged defective construction of their flats, asserting that the flats were not compliant with the Building Regulations and, therefore, the Respondent (who was D4 in the action and an approved inspector for the purposes of the Building Act 1984) had breached its duty to the Appellants under s.1(1) of the DPA 1972.

This provision provides:

"A person taking on work for, or in connection with, the provision of a dwelling (whether the dwelling is provided by the erection, or by the conversion, or enlargement, of a building) owes a duty … to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

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The Respondent applied to strike out the claim on the ground that approved inspectors did not owe a duty in law under this section, submitting that:

(1) The natural meaning of *"work for, or in connection with, the provision of a dwelling"* is work whose purpose it is to 'provide', ie – bring into physical existence, a dwelling.

(2) The duty in s.1(1) is directed towards parties, such as builders, architects and engineers, involved in the physical creation of the dwellings, by construction or design and planning.

(3) The function of building control process is to ensure compliance with the building regulations, not to provide the dwellings.

In the High Court, Waksman J agreed with the Respondent and held that s.1(1) did not apply to building control inspectors. He relied on the House of Lord's decision in *Murphy v Brentwood District Council*, which held that local authorities do not owe a duty of care in relation to the passing of plans for a house with defective foundations. Accordingly, the claim against the Respondent was struck out.

The Appellants appealed the decision, asserting that on its natural and ordinary meaning, s.1 (1) did extend to approved inspectors because the words "*in connection with*" were words of the widest import and denoted any link at all.

The Court of Appeal dismissed the appeal. It agreed with Waksman J's decision and found that words included that the duty related to how "*the work which he takes on is done*" and that it was done "*with proper materials*". The focus was, therefore, very much on the doing of work and the work also had to relate to the "*provision of a dwelling*". That suggested the bringing of that dwelling into physical existence. The emphasis was, therefore, on those who did work which positively contributed to the creation of the dwelling, not only those who physically created it, but potentially also architects and engineers. Approved inspectors had *"no statutory power to influence the design or construction of a building in any way, save to stipulate that it must comply with the law"* and *"the AI is not engaged in the positive role of the provision or creation of the relevant building …".* The Judge was correct to conclude that an approved inspector performing statutory function did not fall within s1(1) on its natural and ordinary meaning.

Accordingly, the appeal was dismissed.

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

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