DOLMANS INSURANCE BULLETIN

Welcome to the April 2021 edition of the Dolmans Insurance Bulletin

in this issue we cover:

REPORT ON

- The importance of narrowing the issues to a successful Defence - *AH v Caerphilly County Borough Council*

RECENT CASE UPDATES

- Amendments to Defence - fundamental dishonesty - Section 57 Criminal Justice and Courts Act 2015
- Part 36 Offers - protected persons - withdrawal
- Police - accidents at work - burden of proof - risk assessments - safe system of work
- Sexual abuse - vicarious liability - non-delegable duty

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

The Importance of Narrowing the Issues to a Successful Defence

AH v Caerphilly County Borough Council

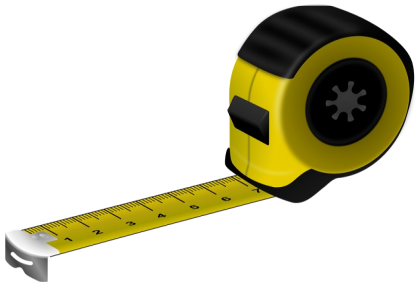
Claimants will often attempt to raise various arguments and allegations in the hope that just one will be enough to persuade a Trial Judge to find in their favour. Defendants will, however, usually attempt to narrow the issues where appropriate in the hope that this will assist the Trial Judge in focusing on the pertinent factors when reaching his/her decision. As always, a carefully pleaded Defence and relevant witness evidence is crucial in this scenario.

This was illustrated in the recent case of *AH v Caerphilly County Borough Council*, in which Dolmans represented the Defendant Authority.

Background

The Claimant allegedly fell and sustained personal injuries while walking along a footway maintained by the Defendant Authority. The Claimant alleged that the edge of the footway, adjacent to private property owned by a third party, was worn and exposed bricks at the edge of the footway at a different level, which caused the fall.

The Claimant disclosed a photograph of the alleged defect that showed a maximum difference in levels of 30mm, which was within the Defendant Authority's intervention level of 40mm for the footway.



Given that the Defendant Authority would not necessarily have, therefore, marked the alleged defect for repair, it was conceded that if breach of duty on the Defendant Authority's part was established, then any Section 58 Defence was likely to fail.

The Claimant was put to strict proof as to the circumstances of her alleged accident and was cross-examined regarding the same, although the Judge accepted that, on a balance of probabilities, the Claimant's alleged accident had occurred as alleged.

The Judge, therefore, had to decide whether or not the alleged accident occurred due to a defect on a highway maintainable at the public expense, the Defendant Authority having denied throughout that the alleged defect was on the adopted highway, and whether the alleged defect was dangerous in accordance with Section 41 of the Highways Act 1980.

REPORT ON

Highway Maintainable at the Public Expense

All of the Defendant Authority's witnesses were adamant that the exposed bricks did not form part of the adopted footway, but were part of the adjoining property in private ownership.

The Claimant disclosed title documents and plans alleging that these indicated the position of the boundary between the footway and the adjoining private property, and that the bricks were not on the private land. The Defendant Authority's witnesses disagreed and maintained that the plan was merely indicative of the actual boundary line. The Defendant Authority's witnesses were also able to confirm that bricks would not be used by the Defendant Authority or its predecessors as a sub-base when constructing such a footway.

By referring to various historical Google Street View images, it was also apparent that there were walls either side of the relevant property and that it followed that the exposed bricks in question had formed part of a boundary wall on the adjoining landowner's land, which had been demolished some time prior to the date of the Claimant's alleged accident. It was, however, also apparent from these images that the footway had been resurfaced since the date of the Claimant's alleged accident.

It was evident that these resurfacing works had extended over the bricks that had been exposed at the time of the Claimant's alleged accident. This coupled with the title documents and plans were, according to the Claimant, sufficient to prove that the location where the Claimant's alleged accident occurred was part of the highway maintainable at the public expense.

Dangerousness

As referred to above, the Defendant Authority argued that the alleged defect was not on the adopted highway and, even if it had been, the alleged defect was within the Defendant Authority's relevant intervention level. In addition, there had been no previous complaints and/or other accidents relating to the footway at the said location, which suggested that the location was not dangerous.

The Claimant attempted to argue that the fact that the Defendant Authority's witnesses all believed that the alleged defect was not on the highway maintainable at the public expense might explain why the alleged defect was not repaired either before or after the Claimant's accident, rather than the dangerousness of the alleged defect.

REPORT ON

The Claimant also sought to rely upon the following case authorities, which have become relatively commonplace when dealing with highways matters, in an effort to persuade the Judge that the location of the alleged accident did present a danger to pedestrians.

Mills v Barnsley [1992] PIQR 291

In order to succeed in such a claim against a Highway Authority, the Claimant must prove:

(a) the highway was in such a condition that it was dangerous to traffic or pedestrians in the sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public;

(b) the dangerous condition was created by the failure to maintain or repair the highway, and;

(c) the injury or damage resulted from such a failure.

James and Thomas v Preseli Pembrokeshire District Council CA 27.10.92

The test of dangerousness is one of reasonable foresight of harm to users of the highway. However, in drawing the inference of dangerousness, the Court must not set too high a standard. Any defect, if its uncorrected presence is to impose a liability, must, therefore, be such that failure to repair shows a breach of duty.

Against the backdrop of these case authorities, it was argued that if a person's foot met a defect of the nature complained of by the Claimant in this particular matter, it is foreseeable that the person would lose his/her balance and that the alleged defect is dangerous given the nature of the road, including the volume of foot traffic that is likely to use it and its location adjacent to the uneven driveway on the adjoining private land.

As such, the Court was invited to find that the alleged defect was dangerous and constituted a failure to maintain the highway within the meaning of Section 41 Highways Act 1980.

Judgment

In his Judgment, the Judge considered that responsibility for the brick wall was the real issue in this particular matter. The Claimant argued that the bricks were part of the adopted highway and relied upon subsequent resurfacing of the footway over the bricks in support of this argument. All of the Defendant Authority's witnesses were adamant that the bricks did not form part of the adopted highway.

The Judge preferred the Defendant Authority's witness evidence, and particularly that the bricks are not a constituent part of the foundation for the tarmacadam surface of such a footway. The Judge went on to say that it did not follow that the decision to tarmac over the bricks, probably taken on the day that the resurfacing works were being undertaken, meant that this is where the edge of the footway was meant to be. The Judge found that, despite the Claimant's attempts to persuade him otherwise, the actions of the resurfacing team could not alter title to the land in question.

As such, the Judge found that the Claimant was unfortunate to have encountered the tripping hazard, but this was on the adjoining property owner's land and not on the adopted highway. The Claimant's claim was dismissed accordingly.

Conclusion

The Defendant Authority argued throughout that the bricks at the location of the Claimant's alleged accident were not part of the highway maintainable at the public expense.

The Claimant raised several arguments and sought to rely upon various case authorities in an effort to persuade the Judge that the Defendant Authority was responsible for the Claimant's alleged accident. The Claimant had even attempted to argue that the footway was not well-lit, although the Defendant Authority was able to produce various street lighting records to rebut this argument.

Despite the Claimant's attempts to raise such diverse arguments, the Judge effectively had just one decision to make: Were the bricks that caused the Claimant's alleged accident part of the adopted highway or not?

The Judge's decision was, undoubtedly, assisted by the robust Defence that had been filed and served on behalf of the Defendant Authority, in addition to the quality of the evidence adduced by the Defendant Authority's witnesses and the unified stance that each maintained, particularly under cross-examination.

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RECENT CASE UPDATES

Amendments to Defence - Fundamental Dishonesty - Section 57 Criminal Justice and Courts Act 2015

Mustard v Flower
[2021] EWHC 846 (QB)

Background

The Claimant's claim arose out of an RTA when the Claimant's vehicle was struck from behind. Liability was not in issue. The Claimant had a complex medical history. She claimed that in the accident she sustained a subarachnoid brain haemorrhage and a diffuse axonal brain injury. There were, however, marked differences between the expert evidence obtained by the parties as to her presentation and the interpretation of her medical records, imaging, and history. In part, these differences depended on, or may be influenced by, the findings of fact made by the Court as to the speed of impact. The Defendant's case was that the speed was relatively minor. On the Claimant's case, it was at least a "medium velocity impact".

The matter was set down for a 10 day Trial in November 2021.

In February 2021, the Defendant applied to amend its Defence. The proposed amendments were uncontroversial, save for the following which concerned fundamental dishonesty (italics added):

"The Claimant's accounts of the RTA and its immediate aftermath, and the nature and severity of her symptoms both before and after the accident, have varied over time, are unreliable and are in issue. They have exaggerated (or in the case of her pre-RTA history minimised) either consciously or unconsciously – the Third Defendant cannot say which absent exploring the issues at Trial. *In the event that the Court finds that the Claimant has consciously exaggerated the nature and the consequences of her symptoms and losses, the Third Defendant reserves the right to submit a finding of fundamental dishonesty (and the striking out of the claim pursuant to Section 57 Criminal Justice and Courts Act 2015 and/or costs sanctions including the disapplication of QOCS) is appropriate".*

The Claimant objected to this amendment on the basis that it amounted to an allegation of fraud, which was not properly particularised and for which there was no basis in the evidence. That was contrary to Rule 9 of the Bar Standards Board Code of Conduct (which requires "reasonably credible material which establishes an arguable case of fraud").

The Defendant's response was that the Defendant was not making a "positive averment of dishonesty" but was simply alerting the Claimant to the nature of its case at Trial. It intended to explore in cross-examination whether the Claimant was consciously exaggerating her symptoms for gain and, if appropriate, make an Application under Section 57. The purpose of the amendment was to ensure that the Claimant was not being "ambushed".

Decision

The Defendant's Application was heard at a Case and Costs Management Conference in March 2021.

The Judge refused permission for the italicised section of the amendment above. He found that it was open to the Trial Judge to make a finding of fundamental dishonesty, whether that had been specifically pleaded or not. An Application by the Defendant for the dismissal of a claim, pursuant to Section 57(1) of the 2015 Act, also did not require any particular formality. It could be made orally, and perhaps at as late a stage as the Defendant's Closing Submissions. The factors governing whether the Trial Judge would entertain such an Application were set out by Newlett LJ in *Howlett v (1) Davies (2) Ageas Insurance Limited [2017] EWCA Civ 1696* – namely whether the Claimant had been given adequate warning or a proper opportunity to deal with it, rather than whether the Defendant had positively averred fraud in its Defence.

Neither a Defendant nor a Judge may be in a position to make any conclusions about a party's dishonesty until that party had given evidence and been cross-examined (especially in cases where honesty and dishonesty turns upon the distinction between conscious and unconscious exaggeration). It would not be professionally proper for a Defendant's legal representative to allege fraud or fundamental dishonesty based upon a mere suspicion, or upon a mere prospect that that is how the evidence might turn out. This was such a case.

Whilst it might be said that the contingent and provisional plea proposed by the Defendant was simply giving the Claimant fair warning that the Defendant may make an Application under Section 57, the Court refused permission for the amendment (in italics) for the following reasons:

(1) The proposed amendment served no purpose. The Defendant could make the Application, if appropriate, without having foreshadowed it in a pleading.

(2) At the time of the Application, a plea of fundamental dishonesty had no real prospect of success. Therefore, even pleaded on a contingent basis, it did not satisfy the test for granting permission to amend.

(3) It could cause prejudice to the Claimant, as the pleading of fundamental dishonesty would have to be reported to her legal expense insurers which opened up the possibility of them avoiding the policy ab initio.

The amendment of the Defence insofar as the proceeding sentence to the italicised words was, however, allowed. This made it clear that this was a matter the Defendant intended to explore at Trial and was far removed from threatening an Application under Section 57.

The Judge was keen to stress that nothing in his Judgment was intended to detract from the modern "cards on the table" approach. Therefore, where a Defendant does have a proper basis for a plea of fundamental dishonesty and intends to apply under Section 57, that should ordinarily be set out in a Statement of Case or written Application at the earliest opportunity.

RECENT CASE UPDATES

Part 36 Offers - Protected Persons - Withdrawal

Wormald v Ahmed
[2021] EWHC 973 (QB)

The Claimant, 'C', was seriously injured in a road traffic accident. Proceedings were issued in 2013. Due to his injuries, C lacked capacity to conduct the litigation and was a protected party. In October 2014, the Defendant, 'D', made a Part 36 offer in the sum of £2 million. A preliminary issue Trial of Liability resulted in Judgment in C's favour for 60% of his damages to be assessed. A Quantum Trial was listed for 9 days in October 2021.

C's injuries had caused ongoing health problems, and C had used a wheelchair and had a stent in his trachea. D's Solicitors were aware that C had been admitted to hospital on a number of occasions with respiratory infections and this had affected appointments with experts. On 14 September 2020, C's Solicitors were informed that C was back in hospital, having choked and suffered a cardiac episode. On 15 September 2020, C's condition remained critical and a full review of the claim and offers was carried out. On 17 September 2020, C's Solicitors notified D's Solicitors that C was in hospital and some upcoming appointments would have to be cancelled/postponed. C's Solicitors consulted Counsel on an urgent basis and urgent instructions were obtained from the Litigation Friend. On 18 September 2020, C's Solicitors served Notice of Acceptance of the 2014 Part 36 Offer. D's Solicitors responded asking for confirmation that C remained alive and, if so, a detailed resume of what C's Solicitors had been told about C's condition and prognosis. C's Solicitors responded that C was on life support and in a critical condition. C died later that day.

D's Solicitors were notified of the death on 21 September 2020. On 25 September 2020, D's Solicitors purported to withdraw the Part 36 Offer in light of C's death. C applied for a declaration that pursuant to CPR 36.11(2), D's offer had been accepted and could not be withdrawn and for Court approval of the settlement.

The Judge considered that the key issues to be decided were:

(1) Where a protected party accepts a Part 36 Offer, is the other party subsequently able to withdraw that offer before approval of the settlement?

(2) When the Court is asked to approve a settlement, on what grounds (if any) can a Part 36 Offer be withdrawn?

(3) Should the Court grant permission for withdrawal of D's offer or approve the settlement in the amount offered?

CPR 21.10 provides that no settlement, compromise or payment and no acceptance of money paid into Court shall be valid so far as it relates to the claim by a protected party without the approval of the Court. In or about 2010, CPR Part 36 was amended to provide that a Part 36 Offer can only be withdrawn if the offeree has not previously served Notice of Acceptance (CPR 36.9(1)). Part 36 is a self-contained code and is not governed by ordinary contract principles.

RECENT CASE UPDATES

Case authority (*Dietz v Lennig Chemicals [1969]* and *Drinkall v Whitwood [2003]*) provide that a compromise or settlement is not binding on the parties until it is approved by the Court, even if agreement is reached under CPR Part 36. However, C submitted that this reflected the situation before CPR 36 was amended to introduce express restrictions on the withdrawal of an accepted Part 36 Offer. C submitted that having been accepted, the offer could not be withdrawn, and the only question for the Court was whether or not to approve the settlement. In that respect, there was no valid reason to decline approval as the purpose of CPR 21.10 was to ensure that the settlement adequately provided for the protected party in the light of their injuries and the litigation risks. The fact that a settlement is advantageous or provides a windfall is not relevant.

D submitted that Part 36 is subject to CPR 21.10 which is paramount and permission of the Court is required before there can be a valid acceptance. The effect of a non-binding acceptance is that either party is free to resile. Case law supported that Part 36 did not operate differently in this respect. In the alternative, if the withdrawal was ineffective, the settlement should not be approved.

The Judge held that CPR 36.11 expressly provides that acceptance of Part 36 Offers is subject to CPR 21.10. *Drinkall* is strong persuasive authority to suggest that even where an offer falls within Part 36, either side may withdraw its offer pending approval because the offer is not binding. The amendment to Part 36 introducing CPR 36.9(1) was not designed to depart from the position that a compromise concluded with a protected party under Part 36 is not binding on either side until approved. However, Part 36 does place express restrictions on withdrawal of offers and these should be given effect as far as possible. The Judge thus concluded that:

(a) A compromise made on behalf of a protected party by acceptance of a Part 36 Offer requires the approval of the Court under CPR 21.10 (CPR 36.11 & 36.14).

(b) Where a protected party accepts a Part 36 Offer, the offer and its acceptance are not binding to make a valid settlement until approved by the Court (CPR 21.10).

(c) The proceedings are not stayed until the Court approves the settlement (CPR 36.14).

(d) Until the settlement is approved, the other party may resile from its offer by giving notice of withdrawal (*Drinkall*). The withdrawal serves a purpose in giving notice that the settlement is challenged.

(e) However, the notice of withdrawal will not in itself be valid for the purposes of Part 36 (CPR 36.9), in particular in relation to costs consequences.

(f) Either party may apply for approval of the settlement (Practice Direction 21). A party resiling from the settlement may raise its position on that Application. The Court will decide whether the withdrawal is to be given effect or the settlement is to be approved.

(g) Further consequences were not explored, but that party could probably issue an Application to resolve any issue as to how the proceedings continue, including the effectiveness of its withdrawal from the settlement.

In relation to the second issue, the Judge considered that the question is whether, in all the circumstances, approval of the settlement would be unjust. The assessment is to be made taking account of how matters stand at the date of the Approval Hearing. The onus of showing it would be unjust to bind a party to its offer lies on that party. The decision will be fact sensitive.

In the circumstances of this case, D was not notified of the change in prognosis or the critical nature of C's condition until after the offer had been accepted. The disparity between the parties' respective knowledge and D's lack of opportunity to take advice and respond to the changed prognosis was significant. The settlement would result in the Estate recovering substantially more than C would have recovered if the actual prognosis had been known and the balance was now between the Estate and D's Insurer. On the evidence and submissions, the Judge considered that it would be unjust for D to be bound by the accepted offer but, as C had not provided the information required for approval of the settlement (opinion on the merits of settlement, any financial advice and documentary evidence material to the opinion on the merits) or fully answered D's requests for medical records, the Judge concluded that it was unfair to decide the issue if there might have been oversight or misunderstanding and reserved the final determination as to whether the settlement (or withdrawal of the offer) should be approved in order to give C's Estate the opportunity to address this.

Police - Accidents at Work - Burden of Proof - Risk Assessments - Safe System of Work

Galvin v Chief Constable of Thames Valley Police [2021] WL 01253801

Background

The Claimant brought a claim against the Defendant after she sustained injuries during her employment as a police officer. The Claimant was in a police van on a busy weekend in October 2016 when a robbery was announced over the radio. The police officers in the van saw what appeared to be the suspects. The van stopped and two of the officers jumped out to chase them. The driver of the van continued looking for a stopping place to enable his other colleagues to also decamp. In doing so, the van slowed down and speeded up. Soon after the van either slowed down again to almost stationary, or was stationary, the Claimant moved to exit. As she stepped down from the van, the van speeded up, causing her to fall and sustain injury. The Claimant was badly injured.

The Claimant alleged that the driver of the police van was negligent. In the alternative, the Claimant alleged that there was no safe system of work in place for officers decamping from vehicles. The Claimant asserted that the facts and the fact that police vans sometimes drove with the van doors open was prima facie evidence of negligence.

Held

The starting point for the Claimant was to prove, on the balance of probabilities, that there had been negligence, either by the manner in which the vehicle was being driven or by failing to implement a safe system of work.

The Court found that at the time that the Claimant exited the van, it was being driven very slowly, creeping along and then it increased in speed. As it proceeded very slowly, the Claimant started to step out as she believed that the vehicle was coming to a stop to enable her to deploy. That was an error of judgement. Good practice was considered to be that police officers should wait and only leave a vehicle when it was stationary. All of the police officers knew it was up to each of them to make their own decision when it was safe to leave the van. They had all been trained in dynamic risk assessments and understood that they had ownership of assessing risk and deciding what actions to take in the many situations that face front line police officers.

A police officer is doing a dangerous job that has inherent risks and dangers. The exposure of a police officer to risk is not of itself evidence of negligence. It is plain that every police officer repeatedly has to make judgement calls as to what the risks are and when it is safe to act. A police officer must assess the risk of their actions in the context of any given situation.

The Claimant was in an obviously dangerous situation with inherent risk. The fact that something went wrong might be negligence, but, equally, it might be error of judgement in either the Claimant or the driver's part that was not such as to be negligence. In any event, this was a risk that the Claimant was trained to consider as part of her job. The Claimant accepted that she had to employ a dynamic risk assessment as to when it was safe to leave the vehicle. This was not an accident that was only explained by negligence.

Even if that was incorrect, the Court was satisfied that the Defendant had discharged any evidential burden as it was satisfied that the driver was not driving negligently and that there was a safe system of work in force. Given the multiple different ways a deployment could occur, the best protocol was the one in place – namely, that the officers took ownership and reached a personal decision having assessed the risk. The Court should not impose an unreasonable standard of care on the police acting in the course of their operational duties. The protocol was a safe system for officers deploying from vehicles in chases.

The Claimant's claim was dismissed.

RECENT CASE UPDATES

Sexual Abuse - Vicarious Liability - Non-Delegable Duty

SKX v Manchester City Council [2021] EWHC 782 (QB)

The Claimant, SKX, was taken into care by the Defendant under s.2 of the Child Care Act 1980. In 1989, the Council placed SKX in Bryn Alyn Hall, a children's home that was part of the Bryn Alyn Community ('BAC'), a privately owned children's residential community. Whilst at the home, the Claimant was sexually abused by the Chief Executive of BAC, 'JA'. JA was convicted of numerous historic sexual offences against minors, including 3 counts of indecent assault against SKX. SKX was one of the Claimants who pursued claims for damages for the harm suffered, pursuant to a Group Litigation Order, against the company which owned BAC (the 'Company'). The Company was in liquidation and the claim was defended by its Insurers. The claims were successful in 2001 and on Appeal in 2003. However, the Insurers declined to pay the Judgment sums, relying upon an exclusion clause in their contract of insurance with BAC. In 2006, the Court of Appeal held that the exclusion clause excluded recovery in respect of abuse that was committed by the managerial employees of the Company, which included JA. This brought to an end SKX's prospects of recovery from BAC or its Insurers. There was no prospect of recovery from JA, who remained in prison.

In 2016, SKX's Solicitors advised him that there had been a change in the law, and proceedings were issued against the Defendant contending that the Defendant was vicariously liable for the acts of JA or that the Defendant's duty to protect and care for SKX was a non-delegable duty so that the Defendant was liable even though the Defendant was not itself at fault for the abuse suffered by SKX. SKX did not contend that there had been any fault on the part of the Defendant or its employees. The proceedings were stayed pending the outcome of the Appeal to the Supreme Court in *Armes v Nottinghamshire County Council [2017]*.

In relation to vicarious liability, SKX submitted that a series of cases had led to the incremental extension of the doctrine of vicarious liability, extending it beyond the scope of the traditional employer/employee relationship; for example, in *Armes* the Supreme Court held a Local Authority was vicariously liable for the acts of abuse carried out by a foster carer. By parity of reasoning with *Armes*, SKX alleged a Local Authority which had placed a child in care with a privately run children's home was vicariously liable for the abuse carried out by an employee of the home, or, at least, by a very senior employee of the care home, such as JA.

The Judge noted that two persons can, at the same time, be vicariously liable for the acts or omissions of another person. Accordingly, the fact that the Company was vicariously liable for JA's abuse did not mean that the Defendant could not also be vicariously liable. In accordance with the two stage test for vicarious liability set out in *Various Claimants v Catholic Child Welfare Society and Others [2012]* (the *'Christian Brothers'* case), the issue in this case was whether the relationship between the Defendant and JA was of a type that was capable of giving rise to vicarious liability. (It was accepted by the Defendant that if the answer was yes, stage two of the test was also satisfied).

RECENT CASE UPDATES

As made clear in *Various Claimants v Barclays Bank [2020]*, the central question is whether the relationship between the wrongdoer and the person who is alleged to have vicarious liability is akin to employment. If the wrongdoer is carrying out an independent business of his own or that of a third party, then there will be no vicarious liability and there will be no need to consider the five policy reasons set out in *Christian Brothers*, which usually make it fair, just and reasonable to impose vicarious liability. Applying these principles, the Judge held that the Defendant was not vicariously liable for the abuse perpetrated by JA. JA was not in a relationship akin to employment with the Defendant. JA was carrying out an independent business on behalf of a third party, the Company. There was a classic client/independent contractor relationship between the Defendant and the Company. The Company was an independent business, operating for a profit, which provided a service to a large number of Local Authorities consisting of the provision of care and accommodation for the persons placed at its homes. The Company was not part of the Defendant's organisation nor integrated into its structure. JA was part of the Company's independent business.

As regards a non-delegable duty, the Defendant submitted that *Armes*, in which it was held that a Local Authority did not owe a non-delegable duty to ensure that reasonable care was taken for the safety of children in care who were placed in the care and control of foster carers under s.21 of the 1980 Act, provided a complete answer to SKX's claim. For the same reasons, by placing a child in a children's home the Defendant was 'discharging' its duty to look after and protect the child on a day to day basis. SKX submitted that all that was being 'discharged' was the Defendant's duty under s.21 to provide accommodation and maintenance for the child in care. The wider and more fundamental duty to care for and protect the safety of the child in sections 2 and 18 of the 1980 Act was non-delegable.

The Judge rejected SKX's submissions, holding that the Defendant did not have a non-delegable duty to protect SKX when he was placed in a privately run residential home. The central question was whether the Defendant had a statutory duty to provide SKX with day to day care or only to arrange, supervise and pay for it. The clear answer in light of the reasoning in *Armes* was the latter.

SKX had sought to distinguish *Armes* on the basis that the Court had found vicarious liability in that case and, in *Armes*, the Claimant had been taken into care under a Care Order and the duty to care for her arose under s.10 of the Act, whereas in this case SKX had been taken into 'voluntary' care under s.2 and the duty to care for him arose under that section. The grounds relied upon for seeking to distinguish *Armes* were rejected. The Claimant in *Armes* had not lost her argument about non-delegable duty because she was successful on vicarious liability. It was clear from the statutory framework that a Local Authority had the same powers and duties in relation to a child in care whether s.2 or s.10 applied.

In case of an appeal and as limitation had been argued in full, the Judge went on to deal with limitation, notwithstanding that the claim was to be dismissed in any event. The primary limitation period had expired in 1995. The Judge concluded that it was appropriate to exercise discretion under s.33 of the Limitation Act 1980 to permit the claim to be brought outside the primary limitation period. The Judge found that the Defendant had not been disadvantaged by the delay. The non-delegable duty issue was a pure point of law. The vicarious liability issue depended on the nature of the relationship between the Defendant and the Company and JA, which was clear and undisputed. There was no issue between the parties that the abuse had taken place. The Defendant rightly conceded that it had not been significantly disadvantaged by evidential difficulties in relation to remedy. SKX had taken active steps for over 20 years to obtain a civil remedy and it was not surprising that a lay individual did not think to bring a claim against the Defendant until contacted by his Solicitors in 2016. He had acted promptly and reasonably thereafter.

Claim dismissed.

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- 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)
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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**