

DOLMANS INSURANCE BULLETIN

Welcome to the November 2025 edition of the
Dolmans Insurance Bulletin

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

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REPORT ON

Highways, Kerbs and Intervention Levels

TW v Bridgend County Borough Council

It is of course common practice for highway authorities to have appropriate intervention criteria for defects in footways and carriageways, with various intervention levels for emergency and non-emergency defects. However, kerbs can be somewhat unusual insofar as they might just form the threshold between a footway and a carriageway as in most street scenes, or they can take on different features and purposes. For example, kerbs can merely form a boundary between a carriageway and a grass verge, or they can be utilised to account for differences in levels and drainage.

In the recent case of *TW v Bridgend County Borough Council*, in which Dolmans represented the Defendant Local Authority, the Trial Judge had to consider an alleged dip/defect in a back-to-back kerb specifically.

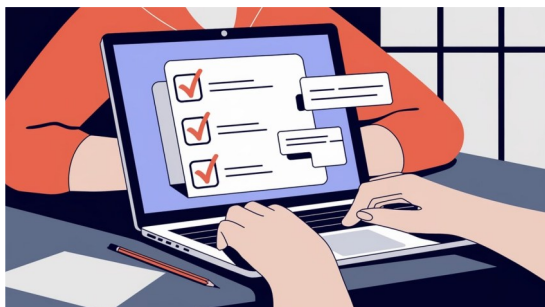
Background

The Claimant alleged that there was a dip in the surface of a kerbstone that caused her to fall as she stepped upon the same. The alleged defect was situated near the Claimant's home.

The kerb in question was part of the adopted highway and was a back-to-back kerb designed to encourage water to drain away from adjacent properties. Hence there was a difference in levels on each side of the kerb, with the kerb protruding from both the footway and carriageway surfaces.

Claimant's Allegations and Burden of Proof

The Claimant alleged that the Defendant Local Authority was negligent and/or in breach of Section 41 of the Highways Act 1980.



In order to succeed in her claim, the Claimant needed to prove, on the balance of probabilities, that she fell and was injured as a result of the alleged dip, that the said dip represented a defect in the highway and that the dip was a danger to pedestrians using the said highway.

Somewhat unusually in a highways case such as this, the Claimant was able to provide CCTV evidence taken from her home, and the Defendant Local Authority had no option but to concede that the Claimant fell as a result of placing her foot into the dip as alleged.

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Dangerousness

Although it was evident that the Claimant would succeed on factual causation, she still needed to prove that the dip represented a defect and was dangerous.

The Claimant provided measurements, which were disputed by the Defendant Local Authority.

It was argued that Section 41 of the Highways Act 1980 Act does not require the Defendant Local Authority to ensure all roads are kept to the standard of a bowling green, as per Dillon LJ in *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR:

“The liability is not to ensure a bowling green which is entirely free from all irregularities or changes in level at all. The question is whether a reasonable person would regard it as presenting a real source of danger. Obviously, in theory any irregularity, any hollow or any protrusion may cause danger, but that is not the standard that is required.”

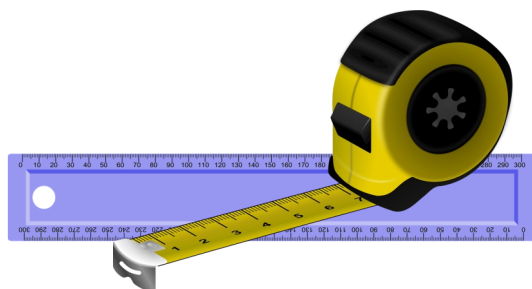
In addition, the Defendant Local Authority relied upon *Dean and Chapter of Rochester Cathedral v Debell* [2016] EWCA Civ 1094, in which Elias LJ stated:

“Tripping, slipping and falling are everyday occurrences on the roads and pavements. No highway authority or occupier of premises like the Cathedral in this case could possibly ensure that the roads or the precincts around a building were maintained in a pristine state. Even if they were, accidents would still happen; it is part of the human condition. There will always be some weathering and wearing away of roads, pavements and paths resulting in small divots, slopes or broken edges which might provide some kind of risk to the unwary and lead to accidents. The law does not seek to make the highway authority or the occupier of land automatically liable for injuries caused by such accidents.”

Based upon the above and for various reasons specific to the current matter, the Defendant Local Authority contended that the dip did not present a real source of danger to members of the public.

The Defendant Local Authority contended that although there was no intervention criteria specifically for such kerbs that were not at designated crossing points, the dip was below its intervention level for emergency defects in the adjacent footway in any event, as measured by the Defendant Local Authority's Highways Officer following the Claimant's alleged accident. It was argued that such measurements, taken by an experienced engineering technician utilising proper measuring equipment, should be preferred to the Claimant's measurements.

Indeed, it was apparent from the Claimant's photographs that the bottom of the tape measure utilised by the Claimant has been placed at the front of the dip and the horizontal ruler used to mark the top of the kerb had been placed towards the back of the kerb, so that the tape measure was at an angle and did not accurately illustrate the alleged difference in levels.



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In any event, the Defendant Local Authority also argued that the position of the dip meant that it did not pose a real source of danger. The dip was situated on a kerbstone to the edge of the footway and was not at a point where pedestrians would regularly walk. There was no designated crossing point at the relevant location, nor was there any other indication that the relevant location was a place where pedestrians would regularly be stepping up and down the footway. The relevant location was traversed on an ad hoc and infrequent basis. In addition, it was argued that pedestrians should be anticipating a difference in levels, given the presence of the kerb and should, therefore, take more care when placing their feet.

Although there was no intervention criteria for such kerbs that were not at designated crossing points and the alleged defect was below the intervention level for emergency defects in the adjacent footway, the Defendant Local Authority repaired the relevant kerb following the Claimant's alleged accident as a matter of prudence and given that a similar defect in the footway is likely to have resulted in a non-emergency repair.

Section 58 Defence

In the event that the Court might accept that the dip was a defect rendering the relevant highway as being dangerous, the Defendant Local Authority averred that, on a balance of probabilities, it had taken such care, as in all the circumstances was reasonably required, to secure that the relevant highway was not dangerous, pursuant to Section 58 of the Highways Act 1980.

Neither the Claimant's Litigation Friend nor any other member of the public had reported the dip as a danger prior to the Claimant's alleged accident, also indicating, therefore, that nobody had previously identified the same as a real source of danger. There were no records of any complaints and/or other accidents at the relevant location prior to the date of the Claimant's alleged accident.

The footway at the location of the Claimant's alleged accident was subject to scheduled inspections and maintenance, as well as being inspected and maintained on a reactive basis. The said footway was inspected by a Highways Inspector on foot, being above and beyond the Code of Good Practice that only required driven inspections. These inspections were meaningful and, where identified, any actionable defects were noted and repaired.

At the time of the Defendant Local Authority's combined pre-accident scheduled inspection of the relevant footway and carriageway, no actionable defects were identified at the location of the Claimant's alleged accident. A damaged kerb that needed repair was identified at a different location, indicating that inspections extended to the furthest edges of the footway.

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Judgment

The Trial Judge took some time overnight to consider the evidence and various arguments in this particular matter, delivering his Judgment the day after submissions were given on behalf of both parties.

Given that factual causation had been conceded, the Trial Judge focused on the arguments relating to dangerousness and breach of duty accordingly.

The Trial Judge accepted that when considering dangerousness, case law indicated that it is not simply a case of measurement and there is no expectation that the footway will be completely free of defects. The Trial Judge preferred the Defendant Local Authority's measurements of the alleged defect.

The Trial Judge also specifically considered the nature of the kerb and agreed that this was not commonly walked upon, being a back-to-back kerb with the expectation that a pedestrian would normally step over the said kerb.

The Trial Judge found that the expectation was that pedestrians would be stepping up and paying attention, so the alleged damage would be more apparent. However, the Trial Judge also held that pedestrians were not just stepping up in this particular scenario and would also be stepping down off the kerb. The Trial Judge found, therefore, that pedestrians might place their feet on the kerb and that a defect at this level/height could cause a pedestrian to lose balance and fall forward, potentially into the path of a vehicle in the carriageway. As such, the Trial Judge held that in this particular scenario, there was a defect present that did cause a reasonable foresight of harm.

Hence, the Trial Judge needed to consider the Defendant Local Authority's Section 58 Defence. The Trial Judge found that the Defendant Local Authority's system was reasonable and indicated that defects were being picked up for repair when actionable. The Trial Judge accepted the argument that the alleged defect could have been caused by vehicle overrun since the date of the Defendant Local Authority's pre-accident inspection and there was no direct evidence that the alleged defect had been present at the time of the said pre-accident inspection.

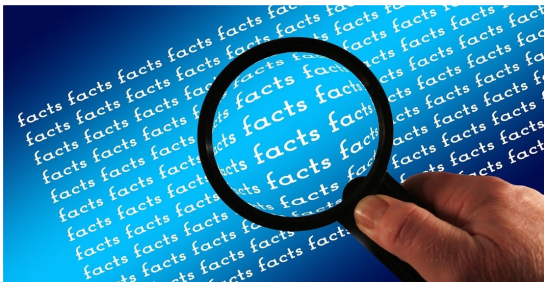
The Trial Judge accepted that there was no direct intervention criteria for the kerb, only specific intervention criteria for the adjacent footways and carriageways. Whilst the Trial Judge noted that, in theory, the Defendant Local Authority could introduce separate intervention criteria for the kerb, it was accepted that there are many different areas, such as grass verges that could also have specific criteria. The Trial Judge held, therefore, that this could lead to the Defendant Local Authority having a huge number of intervention criteria that would be unmanageable.

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Finally, the Trial Judge also noted that the Defendant Local Authority's Highways Inspectors received appropriate training and that their work was audited. The Defendant also had a reactive system and there were no records of any complaints and/or other accidents prior to the date of the Claimant's alleged accident.

Taking the above into account, the Trial Judge held that, on a balance of probabilities, the Defendant Local Authority had an effective policy in place and had the protection of an appropriate Section 58 Defence. The claim was, therefore, dismissed.

Comment



Although the Trial Judge found that the alleged defect posed a risk to pedestrians in this particular matter, each case will of course be decided upon its own merits and take account of the exact circumstances of the said case. In this matter, the Trial Judge took account of the nature and location of the back-to-back kerb and the potential consequences therefore of the defect therein. However, that is not to say that a similar defect in a differently structured kerb would also pose a risk to pedestrians.

The Trial Judge understood that many different kerb structures exist and that it would be unmanageable, therefore, for the Defendant Local Authority to have various intervention criteria for each and every such kerb structure.

In any event, the Defendant Local Authority in this matter was able to rely upon an appropriate system, resulting in a successful Section 58 Defence and dismissal of the Claimant's claim.

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CASE UPDATES

Claim Forms - Extensions of Time - Limitation Periods - Issue of Proceedings

*Bali v 1-2 Couriers Limited & Walshingham Motor Insurance Limited
[2025] EWCA Civ 1413*

For the purposes of CPR r.7.2 and r.7.5, the date of issue of a Claim Form is the date on which it was sealed, not the date on which it was sent out by the Court Office. Solicitors who failed to track down a missing Claim Form as a court deadline loomed should have been 'far more proactive' the Court of Appeal has found.



The Appellant had been injured in a road traffic accident on 2 December 2019. The Appellant instructed solicitors on 22 November 2022. The Court Office received the Claim Form on 2 December 2022, the last day of the 3 year limitation period. On 16 December 2022, the Court Office requested more fee information, but the Appellant's solicitors did not respond until 15 March 2023. Further delays occurred in the solicitors paying the court fee, which was finally processed on 12 December 2023. An e-mail receipt was sent to the Appellant's solicitors on that date which indicated that the claim had been allotted a claim number.

The court seal which appeared on the face of the claim was dated 13 December 2023. At first instance, the Judge found that was the date on which it was affixed. However, for reasons which were unknown, the sealed Claim Form was not posted to the Appellant's solicitors until 2 April 2024. In the intervening period, the CCMC sent a letter to the Appellant's solicitors on 20 January 2024 which referred to a 'Help for Fees' application which had been submitted. The Appellant's solicitors did not respond to this correspondence until 21 February 2024. This letter confirmed that payment had been taken by the Court in December 2023 and that the court forms had already been sent for issue. This letter referred to the claim number which had been provided by the Court.

Nothing then happened for over a month. On 27 March 2024, there was one last attempt by the Appellant's solicitors to find out why they had not received a sealed Claim Form. They were informed by the CCMC that a query had been logged and was being investigated. On 2 April 2024, an e-mail was sent to the Appellant's solicitors apologising for the inconvenience caused and confirming that the fee had been paid. It said that the sealed Claim Form had been sent out that day. This was not received by the Appellant's solicitors until 15 April 2024, 2 days after the period for service had expired on 13 April 2024 (the Claim Form having been issued on 13 December 2023).

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On 16 April 2024, the Appellant's solicitors issued an application for relief from sanctions. It was not until 22 November 2024 that they sought to amend that application to include an application to extend time for service of the Claim Form. The applications were unsuccessful, and the Appellant's claim was struck out. The case was transferred by the Judge to the Court of Appeal under CPR r.52.53 when permission was granted to appeal as it was recognised that the appeal raised important points of principle and practice concerning (1) the period of time within which a Claim Form must be served and (2) the correct approach to applications for an extension of time for service of a Claim Form when a claim has been brought within the prescribed limitation period but the Court Office has delayed sending out the Claim Form and/or a claimant is unaware that the Claim Form has been issued.

Issues

When was the Claim Form issued?

The question at the heart of the appeal was "what is the date on which the Claim Form is "issued" for the purposes of CPR rules 7.2 and 7.5?"

The Court of Appeal ruled that the date of issue for a claim is the date it was sealed, not the date it was sent out by the Court Office. The date stamped on the sealed claim for was conclusive evidence of the date of issue.



The Claim Form had been sealed by the Court on 13 December 2023. From that point, the Claimant had 4 months in which to serve. For what the Judgment stated were unknown reasons, the Appellant's solicitors received the sealed Claim Form only after that deadline had passed. That being so, the only basis on which the Judge could have afforded the Appellant any relief from the consequences of late service would be if he had granted an extension of time for service under CPR r.7.6(3). A number of decisions in the Court of Appeal have made it clear that the rules relating to relief from sanctions do not apply to the scenario where service of a Claim Form is late or otherwise invalid; *Robertson v Google LLC* [2025] EWCA Civ 1262 and *Bellway Homes Ltd v Occupiers of Samuel Gartside House* [2025] EWCA Civ 1347.

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Should an extension of time for service have been granted?

During the 4 month period between the Claim Form being issued and received by the Appellant's solicitors, there was no evidence of the solicitors taking any steps to find out why the letter with the sealed Claim Form had not arrived. Nor was there any evidence that the solicitors considered making a precautionary application to the Court for an extension of time for service. In the lead Judgment, Lady Justice Andrews said a reasonable person in this situation would have sought to find out whether the Claim Form had been issued and, if it had, whether it had been sent out, and, if so, when.

Lady Justice Andrews found the Judge made no error in his approach to the evaluation of the reasonableness of the solicitor's behaviour and had reached a conclusion which was the 'only realistic conclusion' available on the evidence. Although a person cannot serve a Claim Form until it is in their possession, the attempts made to obtain it (in order to be able to serve it) are plainly relevant to the question whether they have taken all reasonable steps to serve it in time.

It was wrong to focus exclusively on events after the claim had been issued. The previous delays prior to the date of issue were also relevant to an assessment of what took place after and the Judge was entitled to take into account the entire background, including the fact that proceedings were brought on the very last day of the limitation period and the lengthy delays which occurred between the lodging of the unsealed Claim Form and the issue of the sealed Claim Form, which were largely (though not exclusively) due to inactivity on the part of the solicitors.



The Appellant's solicitors should have been far more proactive, especially given the expiry of the limitation period and the background of extreme delay. They should have expected to receive the Claim Form at the very latest before the New Year. They did nothing to find out whether it had been issued and, if so, what had become of it. The inactivity of the Appellant's solicitors once they knew the appropriate fee had been paid in December 2023 and that a claim number had been assigned could not be justified, and it did not leave the solicitors with no reasonable steps to take. They had done too little to chase up the CMCC to send out the Claim Form. They had made a 'dangerous assumption' that the Claim Form had not been issued until the Court had made contact. The Judge was entitled to find that the solicitors bore a significant responsibility for the fact that there was such a lengthy delay in the issue of the Claim Form after the unsealed document had arrived in the Court Office on the very last day of the limitation period.

The appeal was dismissed.

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Costs - Detailed Assessment - Misconduct

McNamee v LB Brent
[2025] EWHC 2612 (SCCO)

The Costs Judge dealt with two preliminary issues in detailed assessment proceedings.

The claim arose out of a tripping accident in 2019. The Claimant ('C') tripped over a broken paving slab and sustained facial, dental and orthopaedic injuries. Proceedings were issued against LB Barnet ('D1'), LB Brent ('D2') and Keith Bailey & Co (Travel) Ltd ('D3'). The claims against D1 and D3 were discontinued with no order as to costs. The case against D2 was settled shortly before trial by a Consent Order which provided for D2 to pay C damages of £26,000, *'the Claimant's costs to be assessed if not agreed'* and for D2 to pay D1's costs in the sum of £7,000.

Shortly following the settlement, C's solicitors provided a Without Prejudice Costs Summary claiming costs of £208,583.76. D2 made an offer of £50,000, which was rejected. C made a counteroffer of £195,000, which was rejected. C subsequently commenced detailed assessment proceedings, with a Bill of Costs prepared by an external costs draftsman in the sum of £140,430.60.



The two preliminary issues were:

- (1) Did the Consent Order allow C to recover from D2 her costs incurred against all three Defendants or just those applicable to D2?
- (2) Did the pre-commencement conduct of C's solicitors (in submitting such an exaggerated informal Statement of Costs and offer) amount to misconduct pursuant to CPR 44.11(1) and, if so, should the Court exercise its discretion to disallow part of the assessed costs pursuant to CPR 44.11(2)?

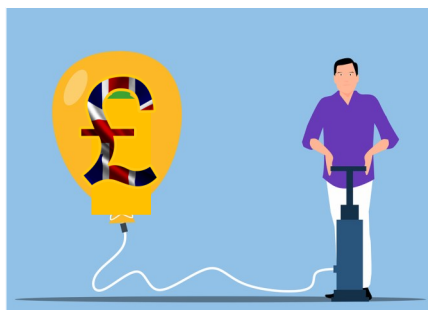
On the first issue, D2 submitted that C could not recover from D2 her costs of the discontinued claims against D1 and D3 as this would be contrary to the plain terms of the Consent Order. The claims against both D1 and D3 were discontinued with no order as to costs and that 'meant what it says'. C submitted that the Consent Order reflected the collective intention that C should recover against D2 all of her costs against all three Defendants and the order for costs payable by D2 was unfettered and did not limit the Claimant's entitlement to the costs incurred against D2 only.

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The Costs Judge found in favour of C. The paragraph in the Consent Order for payment of C's costs by D2 did not purport to limit or fetter her recovery in any way. The agreements to discontinue against D1 and D3 did not provide that no recoverable costs should arise, simply that D1 and D3 would bear no direct liability to C. The Consent Order was broad and clear in its intention to provide that C could recover her costs against all three Defendants from D2.

On the second issue, CPR 44.11 allows the Court to disallow all or part of the costs being assessed where the conduct of a party or their legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper. D2 sought a reduction on this basis of 75% of C's costs. C submitted that no sanction was applicable.

There was an additional issue in that C's informal Statement of Costs and settlement offer of £195,000 were marked Without Prejudice, and D2, therefore, had to establish an exception applied to the general principle that without prejudice communications are not admissible as evidence. The appropriate test was 'unambiguous impropriety'. C disputed that this high threshold for losing without prejudice privilege was met in the circumstances of this case.



The Statement of Costs had been prepared by the solicitor with conduct of the case ('M') and claimed 9.3 hours for preparing it. M had claimed Grade A rates throughout, despite not being a Grade A fee earner for the whole period. The hourly rates claimed were up to 25% in excess of the rates allowable under the contractual retainer with C. The time claimed was far in excess of that actually spent. Whilst C's solicitors accepted that the Statement of Costs represented a highly exaggerated approximation of their actual costs, they submitted this was due to inadvertent oversight as M was a solicitor with no costs training who had adopted a broadbrush approach.

Whilst accepting that informal negotiation prior to commencing detailed assessment will be underpinned by broadbrush calculations, the Costs Judge stated there are limits to this. Where a receiving party's Statement of Costs and/or offer to settle costs exaggerates significantly the true liability, in circumstances where the inflation is incapable of reasonable explanation or justification, it is open to the Court to conclude that the receiving party was guilty of CPR 47.11 misconduct.

On the facts of this case, the informal Statement of Costs grossly exaggerated C's true entitlement by over 60%. The Judge considered the errors were fundamental and inexplicable. D2 had demonstrated that C's solicitor's pre-commencement conduct satisfied the test of 'unambiguous impropriety' for misconduct pursuant to CPR 44.11(b) in circumstances where without prejudice correspondence was relied upon. Further, in those circumstances, the Judge was satisfied that the Court should exercise its discretion to impose a sanction under CPR 44.11(2) disallowing 50% of C's assessed costs.

CASE UPDATES

Negligence - Duty of Care - HRA - Strike Out

Khamba and Others v Harrow London Borough Council and Others
[2025] EWHC 2803 (KB)

The First Defendant, Harrow LBC, ('D') applied to strike out a claim brought against it at common law and under the Human Rights Act 1998 in respect of a mental health assessment on the Third Claimant ('C3') co-ordinated by an Approved Mental Health Professional (AMPH) employed by D.

On 14 August 2018, the police were called to the family home and arrested C3. The police took the view that C3 was in urgent need of an assessment and that a mental health setting was more appropriate than police custody. A registered mental health nurse saw C3 and advised he would benefit from a further assessment by the AMHP team to decide whether compulsory admission was necessary. Two doctors approved under s.12 of the Mental Health Act 1983 (the Third and Fourth Defendants in the case) and D's AMHP conducted an assessment and concluded that C3 did not satisfy the criteria for compulsory detention. C3 was released from police custody.



On 23 December 2018, C3 violently attacked C1 in the family home, causing her serious injury. C3's sister ('C2') returned home to find C1 badly injured and sustained injury herself whilst trying to take a knife from C3. C3 was arrested and charged with attempted murder. He was found not guilty by reason of insanity and was detained in a secure psychiatric hospital.

C1, 2 and 3 brought a claim for damages against D1 (and others) in relation to the assessment for detention. D1 applied to:

- (1) Strike out the claim by all three Claimants on the grounds that permission of the Court to bring the proceedings was not sought as required by s.139(2) of the MHA 1983 and the proceedings were, therefore, a nullity.
- (2) In the alternative, strike out of all three Claimants' common law claims on the grounds that no duty of care was owed as regards to an assessment for detention.
- (3) Strike out / summary judgment of C2's HRA operational duty claim on the grounds that there was nothing in the pleaded case to suggest D1 knew, or ought to have known, of any risk to C2 at the material time.
- (4) Strike out / summary judgment in respect of all C3's HRA claims on the basis that the ill-treatment or consequences required to engage ECHR Arts. 2, 3, 5 and/or 8 did not arise.
- (5) Strike out of C2's and C3's claims to be victims of any breach of the ECHR rights of other family members when those family members can enforce the rights themselves.

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Section 139 of the MHA 1983 provides that no civil proceedings shall be brought in respect of any act done in pursuance of the Act without leave of the High Court. C submitted that no permission was required in this case because the Court was concerned with an omission (i.e. a failure to admit to hospital), not an act. C further submitted the statute did not apply in circumstances where the assessed person was not detained under the Act. The Judge rejected C's submissions, finding that the AMHP was carrying out an assessment which was plainly an act done under the MHA and the application of s.139 is not limited to those who have been detained. The proceedings brought by all three Claimants were, therefore, held to be a nullity.

The Judge went on to consider the other grounds for strike out / summary judgment at the request of the parties.

In relation to a common law duty of care, the Judge concluded that the imposition of a duty of care was inconsistent with the proper functioning of the role of the AMHP under the MHA.

In relation to the exceptions when a duty of care may be found, C sought to argue that there was an assumption of responsibility. Whilst the AMHP was not a doctor, C submitted there was a therapeutic relationship and the AMHP performed a service of a medical and psychiatric nature. The AMHP was not merely performing a statutory duty, there was a professional relationship. The Judge disagreed, finding that responsibility was not assumed. The AMHP was not taking on a therapeutic and advisory role or providing a 'service'; nor was the situation equivalent to a doctor/patient relationship.



C's alternative submission that the exception of control applied was also dismissed. The AMHP did not have control of, nor any power to control, C3. Further, the power of control without any actual exercise of control is insufficient to found a duty.

Accordingly, the Judge concluded that even if the s.139 point above were not in play, the common law case on duty should be struck out.

In relation to the HRA claims, the Judge concluded that the ill-treatment alleged did not reach the threshold to engage Arts. 2 or 3 and, in any event, the operational obligations in Arts. 2, 3 or 8 were not made out. There was nothing to show that D ought to have known of C2 and the Claimants could not show that D knew or ought to have known that C3 presented a real and immediate risk of harming himself or acting as he did. The HRA claims were also found amenable to strike out / summary judgment on the grounds sought by D.

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Part 35 - Change of Circumstances - Withdrawal of Offers

Chinda v Cardiff & Vale University Health Board
[2025] EWHC 2692 (KB)

There must be some significant alteration in the circumstances of a case which would justify an offeror withdrawing or changing the terms of an offer, and the Claimant's vulnerability (when viewed in tandem with other factors) did not meet this test; the Claimant was held to his Part 36 offer, with the Court declining permission to withdraw it.

The Claimant's claim arose out of a delay in diagnosis of spinal tuberculosis relating to neurological injury. It was admitted that the Defendant, in breach of duty, failed to arrange MRI scanning when the Claimant attended A&E in August 2020.

As a result of his injuries, the Claimant was essentially paraplegic. He suffered from neuropathic pain, paraesthesia and burning sensations in his back and lower limbs, as well as bladder, bowel and sexual dysfunction. The Claimant had a syring pump which, according to the Claimant's neurosurgery expert, gives rise to a small but material risk of future deterioration of the neurological function in his upper limbs, as well as a small risk that he may suffer further deterioration to his bladder, bowels and sexual dysfunction.

Judgment was entered for the Claimant on the basis of the admissions made by the Defendant, with quantum to be assessed. A trial on quantum was scheduled for 2 October 2025.

A Round Table Meeting (RTM) was arranged for 1 July 2025, prior to which all directions had been complied with except for experts' discussions and joint reports. On the day of the RTM, offers were exchanged but settlement could not be reached because the Claimant wished to settle on a provisional damages basis and the Defendant did not have authority to settle on that basis. As the RTM drew to a close, it was agreed that the Claimant would propose new terms (including as to provisional damages) on which he was prepared to settle.

The next day (2 July 2025), the Claimant's solicitors made a Part 36 offer which included a retained lump sum, a variable periodical payments order and an order for provisional damages. This offer was made on the basis of instructions given by the Claimant at the RTM on 1 July 2025.



On 8 July 2025, the Claimant's solicitor wrote to the Defendant to put them on notice that the Claimant wished to withdraw the Part 36 offer made on 2 July 2025. However, that offer was accepted by the Defendant on 22 July 2025.

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The Claimant then wished to settle his claim on the basis of a lump sum damages award and an order for provisional damages calculated on the basis that the lump sum award would be equal in value to the lump sum and variable periodical payments contained within the Defendant's Part 36 offer. That offer was made in writing on 29 July 2025.

By consent, the quantum trial was vacated and the parties required the Court to determine the Claimant's application to withdrawn his Part 36 Offer made on 2 July 2025. The Defendant opposed the application.

Decision

It was not in dispute that, as the Defendant had accepted the Claimant's Part 36 offer before the expiry date of the relevant period, the Claimant required the Court's permission under r.36.10(2)(b) to withdraw the Part 36 offer. The Court, therefore, needed to consider whether there had been "a change of circumstances" and whether it "[was] in the interest of justice to give permission" for that offer to be withdrawn.

The White Book commentary at 36.10.1 was considered, including its reference to *Wolverhampton Hospitals NHS Foundation Trust* [2015] 1 WLR 4659 and Leggatt J's remarks at [52]:



*"The test to be applied when the court is considering whether to give a party permission to withdraw a Part 36 offer is whether there has been a sufficient change of circumstances to make it just to permit the party to withdraw its offer. That test was set out by the Court of Appeal in relation to payments into court in *Camper v Potheary* [1941] 2 KB 58 at 70. The Court of Appeal gave as examples of such circumstances "the discovery of further evidence which puts a wholly different complexion on the case ... or a change in the legal outlook brought about by a new judicial decision ...". This test was adopted in relation to Part 36 payments by the Court of Appeal in *Flynn v Scougall* [2004] 1 WLR 3069, 3079 at para 39. I see no reason why the test should be different in relation to a Part 36 offer and, as mentioned earlier, the defendant's application to withdraw its Part 36 offer was made on the basis that this is the applicable test."*

The case of *Retailers v Visa* [2017] EWHC 3606 (Comm) was also considered. At paragraphs [37]-[38] of the *Retailers* case it was noted that:

*"37. It is accepted that there must be more than a change in the parties' evaluation of known or existing facts or evidence. There must be new evidence which puts a wholly different complexion on the case or a change in judicial outlook by a judicial decision, such as that of the House of Lords in *Benham v Gambling*, which changed the whole approach of the courts to the measure of damages for loss of expectation of life without actually changing the law. That was the position in *Camper v Potheary*.*

38. The tenor of the examples given suggest that what is envisaged is some radical alteration in circumstances which would justify an offeror departing from the valuation it had placed on the case when making the offer it did."

CASE UPDATES

Counsel for the Claimant placed considerable emphasis in oral submissions on the Claimant's status as a vulnerable party and the consequent need for the Court to take that fact into account when interpreting and exercising its power under CPR Part 36 (as required by CPR r.1.2). He also focussed on several other factors, including excerpts from the Claimant's Witness Statement in which the Claimant described his struggles with processing the settlement negotiations due to fatigue.

Master Cook noted that it was not suggested to him that the Claimant might be vulnerable in the sense that his ability to instruct his representatives might be adversely affected. At no point before the hearing was it suggested on behalf of the Claimant that he might be vulnerable in the sense that his ability to instruct his representatives might be adversely affected. In fact, at all times the Claimant was represented by a specialist personal injury firm who were presumably aware of his difficulties, particularly given that such difficulties were referred to within the expert medical reports obtained by the firm. Master Cook remarked that [at 35]: *"In the circumstances, if there had been any such real concern on their part I would have expected the solicitors to raise the issue or at least ensure that their client had sufficient space in which to give his instructions to them. In my judgment this situation is far removed from that in which directions under paragraph 8 or special measures under paragraph 10 of the PD are required."*

As had been repeatedly recognised in case law, CPR Part 36 is a self-contained procedural code: it is highly structured and prescriptive with restricted discretion given to the Court and, as such, certainty and predictability is of vital importance when applying these provisions. Parties and advisors need to know where they stand when offers to settle are made or considered. As such, Master Cook accepted Counsel for the Defendant's submissions that a change of mind cannot amount to a change of circumstances for the purpose of CPR r.36.10(3). To find otherwise would introduce *"an unacceptable degree of uncertainty"* into a code designed to ensure predictability and certainty.

The Claimant did not assert that he lacked capacity to make his decision. The Part 36 Offer was made by solicitors acting on his behalf. Accordingly, Master Cook accepted that there had been a change of mind by the Claimant and that a change of mind cannot amount to a change of circumstances for the purposes of CPR r.36.10(3). To hold otherwise would be to introduce an unacceptable degree of uncertainty into what should be a certain process.



A significant alteration in the circumstances surrounding a case must be identified in order for an offeror to justify the withdrawal of an offer; *Camper v Potheary [1941] 2 KB* and *Retailers v Visa*.

The Claimant was, therefore, held to his Part 36 offer and the Court declined to give him permission to withdraw it.

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

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