DOLMANS INSURANCE BULLETIN

Welcome to the March 2021 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

Keeping Focused on the Claimant's Burden of Proof

AP v Bridgend County Borough Council

Introduction

When defending personal claims against Local Authorities, or indeed any Defendant, it is important not to lose sight of the fact that the Claimant bears the burden of proving his or her claim, notwithstanding the plethora of allegations that the Claimant might attempt to make against the Defendant.

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

Claimant's Allegations

The Claimant alleged that he was walking in a car park that was owned and controlled by the Defendant Authority, when his foot twisted in a pothole, causing him to fall and sustain personal injuries.

The Claimant's alleged accident occurred as he was walking back to his vehicle in the car park, and he had not experienced any issues when walking from his vehicle along the same route earlier.

It was alleged that the Defendant Authority was in breach of its statutory duty under the Occupiers' Liability Act 1957 and/or that it was negligent. It was evident, however, that the Claimant was a lawful visitor to the car park and that the 1957 Act applied.

Defence

The Defendant Authority argued that it had a reasonable system of inspection and maintenance in place, with regular scheduled inspections of the car park, as well as a reactive system.

Although the last scheduled inspection of the car park prior to the date of the Claimant's alleged accident was carried out just two months earlier, an additional 'ad hoc' inspection was undertaken only three days before the date of the Claimant's alleged accident as a precautionary measure prior to a local event.

The alleged defect at the location of the Claimant's alleged accident was not noted for repair during any of these inspections, although the Defendant Authority accepted that there could have been a vehicle parked over the alleged defect at those times. Inspectors are not, however, expected to inspect underneath parked vehicles for obvious health and safety reasons.

The Defendant Authority had no record of any complaint in relation to the alleged defect during the twelve month period prior to the date of the Claimant's alleged accident and had no record of any other accident occurring at the location during this period.

Claimant's Evidence

The Claimant relied upon several photographs, which indicated that the surface of the car park had undergone many historical repairs, including previous repairs at the location of the Claimant's alleged accident. However, the Claimant's evidence was somewhat lacking in other regards.

Despite the Claimant's partner having apparently witnessed the alleged accident, she did not provide a Witness Statement and was not called to give oral evidence at Trial. Indeed, no other witness evidence, independent or otherwise, was adduced to corroborate the circumstances of the Claimant's alleged accident. The Claimant's oral evidence was somewhat vague, especially under cross-examination.

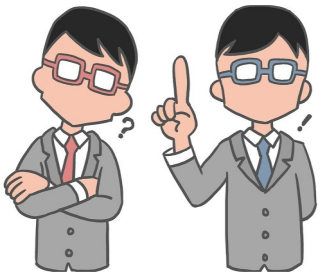
The photographs relied upon by the Claimant were taken by a third party some five weeks following the date of the Claimant's alleged accident and contained no measurements of the depth of the alleged defect. The Claimant was not in attendance when the photographs were taken and although the photographer had provided a Witness Statement in support of the photographs, he did not attend Trial to give oral evidence. The Defendant Authority was not, therefore, afforded an opportunity of cross-examining the photographer as to the nature of the alleged defect or its location.

The Claimant's solicitors had invited the Defendant Authority to agree the photographer's Witness Statement prior to Trial, but this invitation was declined.

REPORT ON

Arguments and Submissions

The Claimant's arguments that he had done enough to prove his claim and that the Defendant did not have a reasonable system were both disputed by the Defendant Authority.



The Defendant Authority submitted that the only photographs adduced by the Claimant illustrating the alleged defect were taken five weeks after the alleged accident without the Claimant being present and that no other witness evidence had been adduced to corroborate the Claimant's version of events.

The Defendant Authority relied upon the Court of Appeal decision in *James and Thomas v Preseli Pembrokeshire DC [1993]*, arguing that it was not enough for the Claimant to allege that the surface of the car park as a whole was poor, which was denied anyway, that the Claimant could not satisfy the Court as to exactly where he fell and that the Court should dismiss the Claimant's claim on that basis.

In any event, the Defendant Authority submitted that the alleged defect was not dangerous. The Claimant could not prove the depth of the alleged defect at the time of his alleged accident. Although the Defendant Authority accepted that it would have noted the alleged defect for repair if present and as shown in the Claimant's photographs, these were taken five weeks after the accident date and did not illustrate the alleged defect at the relevant time. It was argued that a pothole could have occurred or deteriorated substantially during this five week period.

Judgment

The Judge was not satisfied that the Claimant had proved his case and that it would have been useful if the Claimant's partner had given evidence to corroborate the circumstances of his alleged accident.

The Judge reiterated that the burden of proof was upon the Claimant and that he had not done enough to discharge this burden. It was not sufficient for the Claimant to say that the car park was in a state generally. He had to show that the alleged defect had caused his accident, and his evidence was lacking in this regard.

The post-accident photographs of the alleged defect were taken by a third party who did not witness the alleged accident and the Claimant was not present when these photographs were taken. As these were taken five weeks following the date of the Claimant's alleged accident, they did not show the alleged defect as it would have been at the relevant time in any event.

The Judge dismissed the Claimant's claim, finding also that he was satisfied that the alleged defect was not dangerous and that the Defendant Authority had taken such care as was reasonable in all the circumstances.

Conclusion

It should be noted that the Defendant Authority in this particular matter could not rely upon a *McGeown* Defence as it was evident that the alleged defect had been repaired previously, and that for *McGeown* to succeed the alleged defect would have had to have been a non-feasance rather than a misfeasance, as in this case.

With a potentially 'reduced' Defence therefore, the burden placed upon the Claimant was not to be underestimated and was emphasised to the Court by the Defendant Authority in this particular matter.

This, coupled with reliance upon the decision in *James and Thomas v Preseli Pembrokeshire DC [1993]*, being such an important weapon in the Defendant's armoury, provided the Trial Judge with the basis upon which to reach his decision.

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RECENT CASE UPDATES

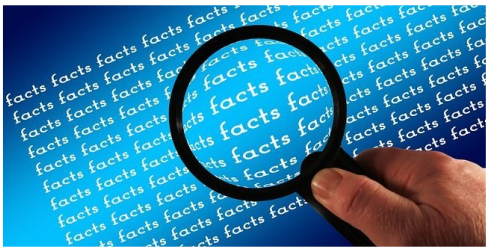
Adjournments of Trials - Unavailability of a Witness - Dishonesty

BILTA (UK) Ltd (in Liquidation) v Tradition Financial Services Ltd [2021] EWCA Civ 221

The Defendant appealed against the refusal of its Application for an adjournment of the Trial of VAT fraud proceedings in which it was accused of dishonest assistance. The claims alleged dishonesty against a number of the Defendant's employees, including a manger ('M'), who was unable to attend the Trial (listed in January 2021) due to illness. It was indicated that M was likely to have recovered sufficiently to give oral evidence by October 2021.

The Court of Appeal identified the principles to be applied when deciding whether to adjourn a Trial because of the illness of a party or important witness.

The applicable test was whether the refusal of an adjournment would lead to an unfair Trial. The assessment of what was fair was a fact sensitive one and was not to be judged by the mechanistic application of any particular checklist. Although the inability of a party themselves to attend Trial through illness would almost always be a highly material consideration, it was artificial to seek to draw a sharp distinction between such a case and the unavailability of a witness. There was no difference in the weight to be given to an application to adjourn based on a party's own unavailability or that of a witness, and the significance to be attached to the inability of an important witness to attend through illness would vary from case to case, but would usually be material and potentially decisive.



If the refusal of an adjournment would make the resulting Trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other Court users, unless that were outweighed by injustice to the other party that could not be compensated for.

In the instant case, the Judge should have asked himself whether it would be fair to have a Trial without M's oral evidence and then, if the answer was 'no', whether that was outweighed by uncompensatable prejudice to the Claimant. Instead, he had balanced the importance of the evidence to the Defendant against the inconvenience of an adjournment. The instant Court was, therefore, obliged to form its own view on the question of fairness.

The case against M was heavily based on inferences from transcripts or recordings of telephone conversations, and the Defendant was, undoubtedly, justified in wanting her to give oral evidence to explain why those inferences should not be drawn. The weight to be given to her written evidence would be limited without the possibility of cross-examination. It was not fair that the Defendant should be deprived of the opportunity of calling her in person. There was no suggestion of uncompensatable prejudice to the Claimants.

Appeal allowed.

RECENT CASE UPDATES

Amendments - Court Fees - Limitation

(1) Graham Scott Butters (2) Carol Linda Hayes v Timothy Francis Lage Hayes [2021] EWCA Civ 252

The Appellants appealed against a decision that non-payment of a Court fee did not mean that time continued to run for limitation purposes of the Limitation Act 1980 s.35.

The Respondent brought a harassment claim against the Appellants in 2005. At a Case Management Conference in 2011, the Judge gave him leave to file an amended Statement of Case. He did so, alleging a further 120 acts of harassment. The Appellants maintained that the value of the claim had increased because of the amendments, meaning that a further Court fee should be paid. They applied to strike out the Amended Particulars of Claim on limitation grounds, based on the non-payment of the Court fee. The Application was refused.

On Appeal, the Judge found that the amended claim had been properly brought because it had been allowed to proceed at the Case Management Conference when no additional fee had been demanded. She also found that the Amended Particulars had made new claims that were deemed to have been commenced at the same time as the original action and were, therefore, within the limitation period (Limitation Act 1980 Pt III s.35(1)).

The CPR did not provide that a new claim would not be considered to have been “made” if an appropriate increment was not paid or that an original action would not have been brought if the original Court fee was not paid. The Court of Appeal, therefore, held that the statutory framework led to the conclusion that the non-payment of a fee did not, of itself, prevent a new claim from being “made” for the purposes of S.35. The existing case law was largely concerned with the bringing of actions under Pt 1 of the Act. It did not directly concern a new claim made by amendment within exiting proceedings. None of the authorities, however, suggested that the non-payment of a fee prevented a new claim from being “made” for the purposes of S.35.

There was a division of opinion as to whether an action delivered, but not issued in time, was brought at the date of delivery if the correct fee had not been proffered. It was unnecessary for the instant Court to resolve that issue, but its provisional view was that there was force in the concerns expressed in a number of cases about the disallowing of a claim on limitation grounds merely because of an inadvertent miscalculation of a Court fee: *Page v Hewetts Solicitors [2013] EWHC 2845 (Ch)*, *Lewis v Ward Hadaway [2015] EWHC 3503 (Ch)*, *Glenluce Fishing Co Ltd v Watermota Ltd [2016] EWHC 1807*, *Dixon v Radley House Partnership (A Firm) [2016] EWHC 2511* and *Atha & Co Solicitors v Liddle [2018] EWHC 1751* considered.

Dismissing the Appeal, the Court of Appeal held that the new claim had been made on the date when the amendment itself was made and not on the date of the Order allowing it to be made, but that the amendment had been made in accordance with the Order allowing it to be made and the new claims contained in the Amended Particulars of Claim did not fall outside the limitation period.

RECENT CASE UPDATES

Part 36 Offers - Causation

Seabrook v Adam
[2021] EWCA Civ 382

This claim arose out of a road traffic accident in which the Defendant, 'D', collided with the rear of the Claimant's, 'C', vehicle. C brought a claim for damages alleging that he had suffered a whiplash injury to his neck and a back injury. Breach of duty was admitted by D, but it was denied that the said breach was causative of the injury alleged. C made two Part 36 offers. The first, *"to accept on condition that liability is admitted by* (D), *90% of the claim for damages and interest to be assessed"*. The second, "*to agree the issue of liability on the basis that* (C) *will accept 90% of the claim for damages and interest to be assessed"*. In completing the Part 36 Offer N242A forms, the first offer was indicated to apply to the whole of the claim, whereas the second offer was indicated as applying to the issue of liability in the claim.

C's claim for damages was in the region of £10,000. At Trial, C was awarded £1,574.50 for the whiplash injury. Causation of the back injury was not proved. C submitted that he had bettered his Part 36 offers because had D accepted either of C's offers, D would only have had to pay 90% of the damages awarded, whereas because D had not accepted the offers, C obtained 100% of the damages awarded. The Judge rejected C's submission, finding that had D accepted the offer and accepted liability, it would have meant admitting liability for both the neck and back injuries. C's appeal was dismissed. C appealed to the Court of Appeal.

C submitted that the Part 36 offers were genuine offers to settle. Their effect was that in return for an admission that some damage had been caused by D's breach of duty, D would benefit by receiving a 10% discount on the damages he had to pay. Having accepted either of the offers, judgment would have been entered, but D could still have argued issues of causation on an assessment of damages.

The Court of Appeal considered it was necessary to interpret the offers in the light of the pleadings and the fact that breach of duty had been admitted. With that context in mind, a reasonable reader would have understood both offers to be addressing liability and causation and to relate to both heads of damage. It was not open to C to argue that D was only being asked to accept that 'some damage' had been caused. That was not what either offer said and was contrary to their natural and ordinary meaning. Nor was it right to say that D could have accepted either offer, but still disputed causation in relation to either or both of the alleged injuries. The Judge had been right to conclude that had D accepted either of the offers, it would have meant that he admitted liability for both the neck and the back injuries, and he would not have been able to argue that he had not caused the back injury at all. It followed that as D had only been found liable for the neck injury, D had bettered both Part 36 offers.

The Court noted that it is important to make express reference in Part 36 offers to whether the offer relates to the whole claim or part of it and/or the precise issue to which it relates. In particular, if the issue to be settled is liability, it would be sensible to make clear whether the Defendant is being invited only to admit breach of duty or, if the admission is intended to go further, what damage the Defendant is being invited to accept was caused by the breach of duty.

RECENT CASE UPDATES

Vicarious Liability - Sexual Assault

Trustees of the Barry Congregation of Jehovah's Witnesses v BXB [2021] EWCA Civ 356

The first instance decision in this case was reported in the February 2020 edition of Dolmans Insurance Bulletin.

The Claimant, B, was baptised as a Jehovah's Witness in 1986. She and her husband, who was also a Jehovah's Witness, became friendly with another couple within the congregation, Mr and Mrs S. Mr S was a 'ministerial servant', a member of the congregation with special responsibilities, who became an 'elder', one of the spiritual leaders of the congregation, in 1989. B and her husband had concerns about Mr S's behaviour (e.g. flirtation with B, sexual innuendos) which they discussed with Mr S's father, a senior elder, who responded that Mr S was suffering from depression. He requested that they provide Mr S with extra support. In April 1990, the two couples went door-to-door evangelising. The two couples returned to the home of Mr and Mrs S, where, in a back room, Mr S raped B. B issued proceedings claiming damages for the psychiatric harm caused by the rape. The Judge found that the Defendants were vicariously liable for the rape committed by Mr S.

The Defendants appealed, submitting that in his application of stage 1 of the test for vicarious liability, the Judge erred by his conclusion that the activities undertaken by Mr S were an integral part of the 'business' activities carried on by the Defendants and that the commission of the rape was a risk created by the Defendants assigning those activities to Mr S; and, in his application of stage 2 of the test, had erred by his conclusion that the rape was sufficiently closely connected to Mr S's position as an elder to justify the imposition of vicarious liability.

The Court of Appeal dismissed the appeal.

In relation to stage 1, whether the relationship between the Defendants and Mr S was capable of giving rise to vicarious liability, the Judge carried out a searching inquiry as to the role of elders within the Jehovah's Witness organisation and his findings were clear, cogent and reflected the evidence. His finding that an elder is as integral to the 'business' of a congregation of Jehovah's Witnesses as a priest is to the 'business' of the Catholic Church was a reasonable conclusion to draw on the facts. In performing their activities as elders in leading the congregation, the elders were the chief conduit of the guidance and teachings of Jehovah's Witnesses; they were not carrying on business on their own account. Elders were integral to the organisation, the nature of their role was directly controlled by it and by its structure. The Judge was entitled to conclude that the relationship between elders and the Jehovah's Witnesses was one that could be capable of giving rise to vicarious liability.

RECENT CASE UPDATES

In relation to stage 2, whether there was a close connection between the relationship between the Defendants and Mr S and the act of abuse, whilst the rape did not occur when Mr S was performing any religious duty, the Court of Appeal agreed with the Judge's observations that that was not a necessary ingredient of liability. The test is more open textured and requires an analysis of the relationship between the tort and the abuser's status. The close connection test has been applied differently in cases concerned with sexual abuse of children where the Courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims, which he has abused. The Court of Appeal considered this tailored version of the test also applies in cases in which adults are alleged to have been sexually abused because the rationale for the test is the same. The issue is the connection between the abuse and the relationship between the tortfeasor and the Defendant, not the particular characteristics of the victim. On the facts of this claim, what was relevant for the purpose of the close connection test was the conferral of authority by the Jehovah's Witness organisation upon its elders, coupled with the opportunity for physical proximity as between an elder and the publishers in the congregation. The Judge's conclusions on the evidence provided the basis for satisfying the close connection test in respect of Mr S's position as an elder, his role and authority within the organisation and the power which it engendered so as to make it just and reasonable for the Defendants to be held vicariously liable for his act in raping B.

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- Public liability claims update

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