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DOLMANS INSURANCE BULLETIN

Welcome to the latest edition of Dolmans Insurance Bulletin

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REPORT ON

Multiple Defendants and Recovery of Costs

DH v Monmouthshire County Council and Another

Claims involving multiple defendants can become complicated. Where a defendant has a strong defence however and this is advanced tactically, it is possible to not only avoid liability but to also recover costs in certain circumstances.

This occurred in the recent case of *DH v Monmouthshire County Council and Another*, in which Dolmans represented the Defendant Local Authority.



Background and Allegations

The Claimant alleged that during the course of his employment with the Defendant Local Authority, he stepped backwards onto a manhole cover that gave way and caused him to fall into a drain. As a result, the Claimant alleged that he sustained personal injuries.

In addition to the Defendant Local Authority as First Defendant, the Claimant also pursued his claim against the landowner as Second Defendant.

The Claimant alleged that the Defendant Local Authority was negligent and/or in breach of various Workplace Regulations, which were disputed. It was alleged that the Second Defendant was in breach of the Occupiers' Liability Act 1957 and/or the Defective Premises Act 1972.

Response to Claim

A robust Defence was filed and served on behalf of the Defendant Local Authority, although care was taken not to attribute any blame towards the Second Defendant. This stance was also adopted in the Defendant Local Authority's witness evidence.

The Defendant Local Authority argued that it had an appropriate system in place, including a risk assessment and safe working practice policy. The Claimant had been employed by the Defendant Local Authority for many years and had received extensive training. The Claimant was aware of the Defendant Local Authority's policy to report any issues but had not reported any such issues prior to his alleged accident. The Claimant had worked at the relevant site several times previously and had allegedly inspected the site prior to working there on the day of his alleged accident but did not report any issues.

REPORT ON

When considering breach and the standard of care owed by the Defendant Local Authority to its employees, the Court was reminded of the observations by Swanwick J in *Stokes v Guest Keen and Nettlefold (Nuts and Bolts) Ltd (1968) 1 WLR 1776/1783,* as follows:



"The overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of (the employer's) workers in the light of what (the employer) knows or ought to know … where there is developing knowledge, (the employer) must keep reasonably abreast of it and not be slow to apply it … (The employer) must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and (the employer) must balance against this the probable effectiveness of the precautions which can be taken to meet it and the expense and inconvenience they involve."

Judgment

The Trial Judge accepted the Defendant Local Authority's argument that it had taken reasonable care of its employees and had an appropriate system in place.

The Trial Judge agreed with the submission that the Defendant Local Authority cannot prescribe every single risk. The Claimant was walking backwards at the time of his alleged accident and there was also an element of common sense required.

Although the Trial Judge found no negligence or breach of duty by the Defendant Local Authority, the Second Defendant did not avoid such liability.

The Second Defendant had a reactive system of inspection/maintenance in place and appeared to rely upon any issues raised by the Defendant Local Authority. The Defendant Local Authority had however previously raised issues regarding some defective manholes with the Second Defendant, as landowner. Although it appeared that subsequent inspections were undertaken by the Second Defendant, insufficient evidence was adduced as to the same and the Trial Judge could not be certain therefore that the Second Defendant had discharged its duty.

As such, the Trial Judge held that the Second Defendant had breached its duty of care and caused the Claimant's alleged injuries.

REPORT ON

Recovery of Costs

In QOCS (Qualified One-Way Costs Shifting) matters such as the above, the usual costs order in cases where a defendant is successful is, of course, that any costs awarded in the defendant's favour are not to be assessed or enforced without the court's permission.

In this particular matter however, the Claimant had succeeded against the Second Defendant but not against the Defendant Local Authority as First Defendant.

The Court of Appeal in *Cartwright v Venduct Engineering Ltd (2018) EWCA Civ 1654* held that under CPR 44.14(1), a successful defendant can enforce an order for costs out of damages ordered to be paid to a claimant by another defendant.

This argument was therefore advanced on behalf of the Defendant Local Authority when considering the principle of costs following the above Judgment in this particular matter.



It was also argued that subject to CPR 44.15 and 44.16, orders for costs made against a claimant may be enforced without permission of the court, but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for or agreements to pay or settle a claim for damages, costs and interest made in favour of a claimant.

In addition, and pursuant to CPR 44.14 (3), orders for costs made against a claimant may only be enforced after proceedings have been concluded and costs have been assessed or agreed.

It would be for a claimant to seek to claim those costs from the unsuccessful defendant and the court would take account of the pre-action conduct of the defendant, including the reasons the claimant elected to issue against all defendants.

The Claimant did not make any such application for indemnity against the Second Defendant at trial following the handing down of Judgment in this particular matter. No Bullock, Sanderson or similar orders were sought accordingly.

REPORT ON

The usual order was made awarding Judgment for damages and costs in the Claimant's favour against the Second Defendant and dismissing the Claimant's claim against the First Defendant, being the Defendant Local Authority.

An order was also made however that the Claimant pay the Defendant Local Authority's fixed Fast Track costs and disbursements, which amounted to almost half of the damages and costs recovered by the Claimant. Indeed, the Claimant paid such costs within the time specified in the relevant Court Order.

Comment

It is important to remember that a conscious decision was made on behalf of the Defendant Local Authority not to advance any allegations against the Second Defendant in the above matter, whether in the Defence or subsequent witness evidence. Hence, the Claimant could not argue that he had joined the Second Defendant into Court proceedings based upon any arguments advanced by the Defendant Local Authority. Otherwise, the Claimant would have, undoubtedly, attempted to deflect the above Costs Order on this basis.



By not pursuing any such allegations against the Second Defendant and maintaining a strong Defence throughout, the Defendant Local Authority in this particular matter not only avoided having to pay any damages or costs to the Claimant but also recovered a sizeable proportion of its own costs from the Claimant.

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CASE UPDATES

Costs – Fixed Costs – Precedent U – Late Service

Ashi Group Ltd (formerly Anglian Windows Ltd) v Peter Daniels and Bridget Angela Daniels [2026] EWCC 68

Background



This appeal arose from a costs decision in which a Trial Judge refused all fixed recoverable costs because the Claimant's Precedent U was served late. Under CPR 45.63(2), parties must file and serve a Precedent U at least 24 hours before trial. In this case, the Claimant served it about 19 hours before trial, missing the deadline by roughly 5 hours. At first instance, the Court deprived the wholly successful Claimant of its fixed recoverable costs and Part 36 enhancements (of approximately £15,000) on the basis that the Defendants, who were Litigants in Person, should have had the full 24 hours notice of their potential costs exposure. The Claimant's oral application for relief from sanctions was refused. The Claimant appealed.

Appeal

The appeal raised the following issues:

(a) Does CPR 45.63(2) impose an express or implied sanction capable of engaging CPR 3?

(b) If such a sanction is not imposed, did the District Judge err in law by determining the Claimant's application under CPR 3.9 rather than exercising their ordinary powers of case management under CPR 3.1(2)(a)?

(c) If CPR 3.9 was engaged, did the District Judge err in principle by taking account of irrelevant considerations, failing to take into account relevant considerations, misdirecting themself as to the relevance of the fact that the Defendants were Litigants in Person, and reaching a conclusion which no reasonable exercise of case management discretion could justify?

Decision

It was held that CPR 45.63(2) imposed no express or implied sanction, so CPR 3.9 was not engaged. The Judge considered the wording of Practice Direction 44.9.5, which was almost identically worded to CPR 45.63(2), and found that the word "must" did not signify an implied sanction; citing *Yesss (A) Electrical Ltd v Martin Warren [2024] EWCA Civ 14*. This made *Macdonald v Taree Holdings Ltd [2001] 1 Costs LR 147* very persuasive authority for the proposition that CPR 45.63 contained no implied sanction and CPR 3.9 did not apply.

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Having concluded that CPR 3.9 did not apply, it was held that the District Judge had erred in law by applying the relief from sanctions test to the late submission of the Precedent U. The correct approach was analogous to that taken in *Macdonald*, which addressed late service by applying a proportionate response to the breach.

Re-exercising the Court's discretion in accordance with *Macdonald*, it was held that the breach was a "mere" failure without aggravating factors. The late filing caused the Defendants no meaningful prejudice. The forfeiture of the Claimant's costs (assessed in the sum of £18,850.47) was disproportionate.

The District Judge's exercise of discretion was also found to have been flawed. The District Judge had not taken into account the Court's own failure to band the case before trial, which made it impossible for the Claimant to have filed and served an accurate Precedent U in good time.

The appeal was allowed, confirming that where a Precedent U is served late, the Court should exercise its ordinary case management and costs powers proportionately, focusing on the consequences of the breach and, particularly, whether the other party has suffered prejudice.

Litigant in Person – Costs – AI Subscription

Foster and Hitchens v Wargrave on Thames Housing Association Limited [2026] EWHC 3000 (KB)

The Judge was required to determine various consequential issues following the outcome of an appeal, including the proportionality of the successful Litigants in Persons' (LIP) claimed costs and whether they could recover the costs of an AI subscription.



The appeal arose in a claim regarding an issue of contractual construction relating to the payment of a contractual electricity charge which the Claimants ('C') had stopped paying resulting in possession proceedings and a Possession Order. C appealed against the Possession Order and the Judge determined the appeal in C's favour. The parties agreed that as C's appeal had succeeded, the Possession Order could not stand and C were entitled to their costs, which the Judge was invited to summarily assess.

Whilst C sought costs on the indemnity basis, the Judge concluded that the costs should be assessed on the standard basis.

CASE UPDATES

C's Schedule of Costs claimed for 649 hours in total, comprising 113 hours in case preparation, 165 hours legal research, 116 hours drafting court documents, 105 hours of correspondence and case management and 150 hours attending hearings. C did not contend they had suffered any quantifiable financial loss and, therefore, sought recovery on the basis of the prescribed LIP hourly rates of £19 per hour (pre-October 2025) and £24 thereafter.

C highlighted that the litigation had extended over a 3-year period and involved 3 linked claims and 10 hearings including a 2-day trial and appeal. It was submitted that the CPR 46.5(2) restriction limiting a LIP's costs to ⅔ of the costs that would have been recoverable had the litigant been represented was not engaged as the Housing Association ('D'), who were represented by solicitors and counsel throughout, had produced a Schedule of Costs for the appeal hearing alone of £12,554.40.

The Judge noted that the fact that C's costs were substantially lower than D's was not a determinative consideration and was, in fact, somewhat double-edge given the difference in the rates that could be claimed. The real dispute was about the extent of the hours claimed. Applying D's hourly rates to C's claimed hours would have produced figures ranging from £120,000 to £227,150.



It was accepted the litigation had required substantial time and effort on the part of C, who had presented detailed and carefully researched submissions on the appeal. LIPs would require more time than experienced legal representatives to undertake legal research and prepare documents. However, whilst the litigation generated a substantial volume of correspondence and procedural activity, it did not involve factual or legal complexity of a kind that would ordinarily justify costs on the scale claimed. The fact that C acted in person could not relieve the Court of its obligation to apply the requirements of reasonableness and proportionality. The Judge concluded that the costs claimed were disproportionate. Adopting a broadbrush approach, the Judge awarded £5,600, approximately 40% of the sum claimed.

In relation to disbursements, the Judge considered that the costs of printing, photocopying, binding, postage and similar administrative activities, generally characterised as overhead expenditure not recoverable from an opposing party are allowed in principle for LIPs. A sum of £300 was allowed in this respect against the sum of £822 claimed.

Court fees, transcript fees and travel / parking expenses were recovered in the sum of £946. Costs and disbursements related to consequential proceedings were also awarded in sums of £888 and £220 respectively.

CASE UPDATES

C also sought to recover £1,488 in respect of the costs of an AI subscription to an AI legal research tool, comprising 12 monthly payments of £124. C submitted they had not been able to fund this themselves and had borrowed money from a family member; they selected a well-known major supplier and part of the customisation of their subscription selected the provider's legal agent; the expenditure was incurred specifically for the purposes of this litigation and was used to identify authorities, conduct legal research and assist in the preparation of submissions. C submitted recovery of such expenditure fell within CPR 46.5(3) as a payment reasonably made for legal services relating to the conduct of the proceedings.

In the alternative, C argued that any analogy with a solicitors' overheads was inapt. Solicitors' hourly rates already contain an element reflecting the costs of research infrastructure and database subscriptions as an overhead, whereas an LIP receives no such allowance. On this basis, the costs should be recoverable as a separate disbursement.



The Judge concluded that the subscription was not a payment for legal services within CPR 46.5(3). 'Legal services' has been determined to refer to services provided by or under the supervision of a lawyer. The subscription merely gave C access to a software platform by which C could undertake their own legal research and prepare and develop arguments more efficiently themselves.

The expenditure was incurred by C in carrying out their own legal work and the issue was, therefore, whether it could be regarded as a recoverable disbursement rather than part of the inherent cost of conducting litigation. The Judge considered that the introduction of AI did not require the Court to formulate any special rule. The question was whether, applying established principles, it should properly be characterised as a disbursement and, if so, whether the expenditure was reasonably and proportionately incurred for the purpose of conducting litigation.

The Judge noted that a distinction may properly be drawn between expenditure forming part of a party's general infrastructure and expenditure which is incurred in obtaining a specific litigation support service for the purposes of particular proceedings. The latter is a recognised category. The analysis is fact sensitive and must be undertaken on a case-by-case basis.

In this case, C were LIPs engaged in appellate litigation raising a point of contractual construction. The issues were primarily legal rather than factual and their resolution had potentially serious consequences for C (possession of their home). C were pensioners in their 70s living in social housing. They could not obtain legal aid or afford legal advice.

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The material before the Judge demonstrated that the subscription was used as a research and litigation support tool. They purchased a subscription which gave access to a sector specific AI agent. The written and oral submissions advanced by C were careful, reasonably focused and ultimately successful on the principal issue before the Court, and the Judge was satisfied that the subscription claimed made a real contribution to the proper presentation of C's case.

Further, C incurred the expense specifically for the litigation and funded it through borrowing. The subscription was not maintained for other purposes. It was a discrete item of expenditure incurred in order to assist with the conduct of the proceedings.

On the facts of this case, the Judge concluded that the sum claimed was reasonably incurred and proportionate and allowed its recovery in the sum of £1,488.

The Judge emphasised that he was not holding that the cost of AI assisted support was automatically recoverable. Recoverability will depend upon the circumstances of the individual case, including the nature of the service provided, the purpose for which it was incurred, whether it was reasonable and proportionate and its proper characterisation under established costs principles.

Negligence – Duty of Care – Gambling Company

Ashton v TSE Malta LP
[2026] EWHC 2935 (KB)

The Judge was required to consider whether a duty of care was owed by a gambling company to its customer.



Mr Ashton ('A') died by suicide at the age of 40. He had a long history of gambling. He had online accounts with a number of gambling companies and lost substantial amounts of money. On 21 April 2021, he went missing and was found dead the next day. He had left messages for his wife and children in which he referred to mental health issues and said *'... gambling was just the straw that broke the camel's back*'.

In 2019, 2020 and 2021, A had gambled mainly on the Betfair exchange platform, an online gambling platform. Betfair is the trading brand / name used by the Defendant ('D').

This claim, brought by A's widow, was a claim in negligence under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976. It was submitted that A suffered from gambling disorder, a recognised psychiatric disorder, which was exacerbated by D's negligence causing the distress that was central to A's decision to take his own life.

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In seeking to establish a duty of care, A sought to draw a parallel between a duty of care owed in this case and the employer's duty of care in cases of psychiatric injury as set out in *Hatton v Sutherland [2002]*.



The nature of the duty of care alleged changed over the course of the trial but was ultimately put on the basis that D was under a duty to prevent a risk to A's health that arose when D was, or ought to have been, on notice that A may be at risk from suffering from gambling disorder as a result of A's gambling activity in February and March 2021. It was submitted that when that duty of care arose, the standard of care required was that D take the steps required by the Gambling Commission's social responsibility code. On the facts of this case, it was alleged that would have required contacting A by phone in order to understand and help him understand the reasons for his gambling conduct.

The evidence showed that A had gambled heavily in June to July 2019 and between January to April 2021. His losses in these periods were much more significant than in other periods. He had stopped in July 2019, when he revealed his behaviour to his wife and she became aware of his debts. In March 2021, A began placing bets every day, often early in the morning or late into the evening. His actions triggered Automated SGI Messages (Safer Gambling Interaction) on his online account.

The Judge rejected A's formulation of the duty of care. The Judge did not consider that a duty of care which adopted the Gambling Commission's regulatory standards into the law of tort was appropriate. The regulatory scheme requires from the outset that gambling companies encourage gamblers to gamble responsibly, provide safer gambling tools, monitor how each gambler gambles and discourage excessive gambling. This was not a sensible guide to the scope of a tortious duty of care, and any attempt to reflect such regulatory requirements in the duty of care would go against the grain of s24(8) of the Gambling Act 2005 (which provides that failure to comply with the Gambling Commission's Code of Practice shall not of itself make a person liable to civil proceedings) and result in a radical extension of tortious liability for psychiatric injury and for circumstances falling short of psychiatric injury. The proper place for a tortious duty was situations beyond the limits of genuine and informed choice.

The reasoning of the Court of Appeal in *Hatton* warranted that some duty of care should exist, but the duty should be constrained. The relationship between a gambling company and those who gamble is not the same as that between an employee and employer and is a relationship in which respect for personal autonomy must carry significant weight. The Judge concluded that the duty of care that should exist should be no more than a duty to act to prevent gambling disorder in its severe form when that form of the disorder is foreseeable.

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The Judge further emphasised that the requirement of foreseeability must be applied realistically. The Defendant's state of knowledge should be critical, and cases will depend on their facts. A risk of severe gambling disorder will be 'plain enough' for any reasonable gambling company to realise that it should act and will therefore be sufficiently foreseeable either when the company is on notice of a diagnosis of gambling disorder in any of its forms (mild, moderate or severe) or the customer's behaviour has become so extreme as to demonstrate that their gambling is wholly outside their control.

Applying those findings to the facts of this case, the first issue was whether D knew, or should have known, in mid-2019 or January to April 2021 that A suffered from any form of gambling disorder. A had no such diagnosis prior to his death. His medical records contained no mention of gambling problems or mental disorder.

The psychiatric expert for A reached a diagnosis of gambling disorder post-mortem based on evaluation of A's gambling record with D and opined that this had become severe by the time of his death. D's psychiatric expert expressed caution in seeking to reach such a diagnosis based solely on gambling patterns with no subjective information from the patient. The Judge preferred the evidence of D's expert that there was insufficient evidence to show that A suffered from gambling disorder. If required to draw a conclusion, the Judge considered A did not.



Having concluded that there was insufficient evidence to support a conclusion that A suffered from gambling disorder, A's claim failed as there was no basis to find that D knew, or ought to have known, that A suffered from gambling disorder.

Accordingly, A's claim was dismissed.

Nevertheless, the Judge went on to consider briefly the standard of care. The focus of the parties' evidence had been based upon the premise that the standard of care would mirror the social responsibility provisions of the Gambling Commission's Code of Practice, and the issue would be whether the system of reactive and predictive controls D had put in place had been sufficient to meet any/all of those regulatory standards. The Judge considered that premise was incorrect. The general objective of the regulatory scheme is to identify and manage 'gambling related harm', which is much wider than gambling disorder. The Judge considered that on the correct formulation of the duty of care (as found by the Judge), the action required of a gambling company (the standard of care) would be to cease to provide gambling services to that gambler.

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Negligence – Ex Turpi Causa – Vicarious Liability

Moss v Asda Stores Ltd
[2026] 11 WLUK 160

A supermarket was vicariously liable for serious injuries caused to the Claimant who had been dragged under its delivery van as a result of the driver's negligence. Although the Claimant had abused the driver and stepped into the van's path, the Court held that a reasonably competent driver would have stopped rather than attempted to drive around him. The ex turpi causa defence did not apply despite the Claimant's initial behaviour having constituted a public order offence.

Background



The Claimant brought a personal injury claim against the Defendant supermarket. Whilst out on deliveries, one of the Defendant's drivers had been parked in a cul-de-sac. He moved the van, obstructing the path of the Claimant's car. The Claimant exited his car, approached the van and shouted abuse at the driver, who locked his door. The Claimant returned to his car and drove around the van. He then exited his car, shouted more abuse and tried to open the van door. The Claimant again returned to his car and drove a short way. He then exited his car, which was partially blocking the exit path of the van.

In the final incident, the van approached the car and the Claimant stepped across the road. When the van was travelling at around 4-8mph, the Claimant was pushed by the van and fell under it. He was dragged for around 16 metres, suffering very serious injuries. He brought a claim for damages against the supermarket, which admitted vicarious liability for any tortious acts of the driver. The driver alleged that, in the final incident, he had seen the Claimant with something in his hand and had thought that the Claimant was going to break his window to attack him.

The delivery driver had been given training that, when faced with potential violence, he should stop the van, turn on the hazard lights, repeatedly sound the horn, and call the police.

Decision

The Court found that the Claimant had abused and threatened the driver and, if the van door had not been locked, would have used violence. His actions amounted to an offence under the Public Order Act 1986 s.4.

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However, in the 'final incident', the Claimant had not threatened the driver or been abusive. His anger and aggression had dissipated by this point.

The Defendant's driver had decided to drive around the Claimant, who had reacted by stepping into the van's path in an attempt to stop it. The test for whether the driver had breached his duty of care was whether a reasonably competent driver would have stopped. The Court held that the van was large and heavy, and the Claimant was a pedestrian. The driver had been safe in the van and had failed to carry out the actions required of him by his training. He had decided to drive around the Claimant, and it had not been safe to do so. There had been a significant risk of injury. A reasonably competent driver would have stopped. The risk of injury increased as the situation escalated. Again, a reasonably competent driver would have stopped. The driver had been negligent.

The driver had not, however, intentionally driven into the Claimant or known that the Claimant had fallen under the van. He had not appreciated the potential harm to the Claimant or been indifferent. He had not recklessly or intentionally applied force. Accordingly, trespass to the person in the form of battery was not established.

The fact that criminal conduct was one of two causes of an accident was not a sufficient basis for the ex turpi causa defence to succeed. There were public policy factors which supported the claim being successful: there was a public interest in holding the driver to account for his negligence and in the insurer covering the Claimant's medical costs. Although the Claimant's behaviour had been illegal at the beginning, his final intention had been to block the highway. The gravity of his wrongdoing had been at the lower end of criminal behaviour. The operative cause of the injury was the driver's negligence. It would be disproportionate to deny the Claimant a remedy.



The Claimant had however provoked the driver to fear for his safety and put himself in the van's path. The Claimant's contributory negligence was assessed at 1/3.

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

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