motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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Palmer v Mantas & Another [2022]

The claimant brought an action for damages for personal injury following a road accident. The matter proceeded to trial. The defendant alleged that the claimant was being fundamentally dishonest. The claimant's case was that she had suffered a minor traumatic brain injury combined with a somatic symptom disorder as a result of the accident. Initially, there did not appear to have been any immediate concern about the claimant having suffered a significant head injury.

It was not until almost 3 years post-accident that the claimant stopped working and appeared to become far more dependent on others. Throughout that period of time, the claimant had been regularly posting photographs and comments on social media evidencing a variety of holidays and other activities.

The defendant, in advancing its argument that the claimant had been fundamentally dishonest, provided the court with a wide range of evidential sources including lay witnesses, medical experts, social media, surveillance, notes and records from the GP, hospital, other treating professionals, a case manager and the Department of Work & Pensions.

The fundamental dishonesty arguments failed in this case as, according to the judge, the claimant had provided a largely consistent and honest description of her ongoing difficulties. It also did not assist the defendant in their allegations of fundamental dishonesty that the surveillance they obtained was only served following a specific request from the claimant for full disclosure.

RO v Gray & Another [2022]

This case involved a claimant who had been seriously injured following a confrontation with the defendant outside of a nightclub. The defendant chased the claimant, deliberately colliding his vehicle with the claimant's van, forcing the claimant off the road and into a wall.

His Honour Judge Bird dealt with the trial on the issue of liability only. The claimant pleaded assault and battery rather than negligence. The defendant alleged that the claimant had engaged in criminal damage, deliberately provoking and antagonising the defendant, prompting the aggressive response and relied upon the common law of defence of illegality as a complete defence. Whilst the claimant's conduct was "deplorable and disgraceful", it was noted that at the time of the collision he was trying to escape. This emphasised a clear break in the chain of events between the claimant's wrongdoing and the loss he suffered. Therefore, the claimant would not be receiving compensation as a result of his illegal conduct, but because of the violent and unexpected act of the defendant. In addition, it was noted that if the defence was upheld, then the burden to provide care and rehabilitation would revert to the state and the NHS.

His Honour Judge Bird concluded that the illegality defence did not apply to the facts of the case and judgment would be entered for the claimant for damages to be assessed.

Chowdhury v PZU SA [2022]

This case involved a claimant who was a 34 year old British citizen who had suffered a road traffic accident in Poland in 2017. The insurer was based in Poland, as was the insurer of the other car involved in the accident. The claimant brought proceedings in England and the insurer applied for a declaration that the English courts did not have jurisdiction because the claimant was not domiciled in England. The claimant had been brought up and educated in England and worked in investment banking in England. The accident occurred on holiday and the insurer admitted liability. The claimant alleged that he had suffered soft tissue injuries with long-term effects. In April 2018, he moved to Germany to seek treatment in a German hospital and he rented accommodation near the hospital. Due to the COVID pandemic, he had only limited trips to the UK to visit friends and family.

At first instance, it was concluded that the claimant was habitually resident in England and that he had, therefore, been entitled to bring proceedings in England. The insurer appealed, but the appeal was dismissed and the High Court concluded that the claimant had been resident in England even though he had been present in Germany since 2018 seeking medical treatment for the injuries arising from the accident. The High Court noted that to establish jurisdiction to commence proceedings in England the claimant had to show that he was resident in England and that the nature and circumstances of his residence indicated that he had a substantial connection with England.

Furthermore, although residence was to be determined at the time of issue of the proceedings, the timescale for establishing a substantial connection had to be longer than the day of issue of the Claim Form.

The court was required to look at the history of the claimant's residence and its nature and circumstances. His life and activities had been based in London until the move to Germany for medical purposes, with the intention to return afterwards. It was not determinative that he did not own or rent property in England when proceedings were issued; the claimant's generation were more likely to rent due to high property prices and he had given up his rental to go to Germany. There was no valid ground to overturn the decision at first instance.

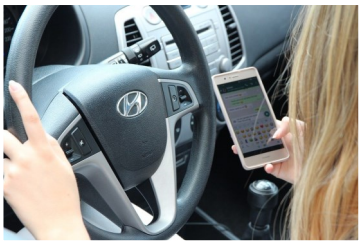
HRA V KGC [2022]

The child claimant brought a claim against his mother having suffered catastrophic injury allegedly as a result of her negligent driving. The claimant was a passenger in his mother's Range Rover Sport on 5 December 2012 at approximately 4:25pm when a vehicle coming in the opposite direction attempted to overtake a lorry. That attempt resulted in a minor collision with the vehicle in front of the mother's car being a clash of wing mirrors and there being a significant amount of debris scattered across the road. The overtaking driver remained untraced at time of the liability only trial. The mother's car did not stop, however she did take evasive manoeuvres resulting in her crossing over the opposite carriageway, through a fence and colliding with a freight train on a railway line that was running parallel to the road. The question for the court was whether her driving fell below the required standard with the defence essentially being that she acted in the "agony of the moment" and, as such, should not be criticised.

As in many cases, there was a significant discrepancy in the oral evidence, with the judge concluding that the mother's case that she steered to her left onto a wet grass bank causing a loss of control was rejected on the evidence at the scene and expert evidence. The vehicle in front of her had pulled over to its left to avoid a more significant collision. The mother's first account was that she recalled the vehicle in front "disappear". The judge took the view that this was evidence that the mother did not have her eyes on the road ahead and that when she did look back she was struggling to make sense of what had happened in front of her. It was also significant that the action she took was deliberate as opposed to a lack of control and that at no time did she brake which would be the natural reaction. That of itself would have been sufficient to make a finding of negligence, but was also supported by an analysis of the mother's mobile phone.

Such analysis revealed a series of 4 text exchanges between the mother and her boss at work all within a period of about 11 minutes preceding the accident. The last text was received at 16:24:59. The telephone call from a witness to the emergency services was between 16:24 and 16:24:29, thus coinciding compellingly with the period in which the mother was likely to be either reading or preparing to respond to the last text. The judge rejected the possibility that the text messaging had, by coincidence, stopped shortly before the accident, largely because of the mother's lack of candour during the police investigation. She had told the police there was a Bluetooth connection to a handsfree device, but did not volunteer any information that she had been texting, and when confronted with the texts her evidence had been inconsistent and less than full.

In finding for the claimant, the judge concluded that a reasonably careful driver would have seen and reacted to the events unfolding in such a way as to avoid any collision or loss of control, and that the likeliest explanation for the accident was that the mother was not keeping a proper lookout or paying proper attention because at the crucial time she was using or was about to use her mobile phone.



Martini & Another v Royal and Sun Alliance Insurance plc & Others [2022]

The collision, which occurred at night on an unlit carriageway, involved five vehicles in three phases. First, the driver of a Fiat van, insured by the first defendant, fell asleep at the wheel and hit the rear of a Mercedes HGV. The Fiat sustained heavy impact damage and was left stranded in the middle of the motorway. Second, a Scania HGV, approaching the collision site in lane 1, was forced to move into lane 3 to avoid the Fiat. Unfortunately, this put the Scania directly in the path of the Claimants' Audi. In attempting to avoid the Scania, the Audi struck the Fiat and the Scania and came to rest in the middle lane. The claimants exited the Audi and moved to the grass verge beside the hard shoulder. The third and final phase involved a Vauxhall van insured by AXA XL Insurance Company. The Vauxhall approached the scene, moved into the second lane and hit the Fiat, causing it to spin across the carriageway before hitting the claimants standing on the grass verge.

The claimants and the two occupants of the Vauxhall sustained injuries and the driver of the Fiat was subsequently convicted on four counts of causing serious injury by dangerous driving.

During the course of the trial, the first defendant conceded liability, but argued contributory negligence on the part of the second and third defendants and continued to seek a contribution from the second and third defendants respectively. The primary allegations of negligence against the third defendant were that he should have seen the Scania much earlier. Had he done so, he would have had more time to react to its emergence into lane 3 and he could have responded in a more measured way with firm braking rather than swerving. The judge did not accept these arguments, finding instead that the Scania's movement into lane 3 was likely rapid and unexpected. The third defendant would likely have had only 5 seconds in which to react and avoid a collision. The time needed to brake and avoid the Scania without swerving was more likely longer than that. The first defendant maintained that the second defendant could have avoided a collision by taking one or more precautionary steps as far back as 200 metres away from the accident scene. Amongst other things, these included illuminating his main beam lights, slowing down and remaining in the first lane but at a slower speed.

The judge rejected those arguments, finding that the actions taken by the second defendant were very much in the agony of the moment. Furthermore, the judge said that it was not appropriate for the court to engage in a fine-grained mathematical calculus, based on imperfect information, doubtful assumptions and with the benefit of hindsight, in order to assess liability in negligence. The judge declined to make any finding that the second defendant's actions were negligent. Accordingly, liability for the accident rested with the first defendant alone.

Greyson v Fuller [2022]

The claim arose from a road traffic accident in June 2017 in which the claimant had sustained soft tissue injuries. Liability was admitted promptly by the defendant. The claimant was initially seen by a GP expert in August 2017, who anticipated a full recovery from her injuries by around December 2017. As the claimant failed to recover as anticipated, she was then seen by an orthopaedic surgeon and a pain management expert, who produced further reports in 2018 and 2019. The dispute arose over medical reports disclosed to the defendant in a manner different to that set out in the protocol. The claimant's first and subsequent reports were disclosed together in a stage 2 settlement pack, and after unsuccessful settlement negotiation the matter proceeded to a stage 3 hearing. The defendant argued that the simultaneous disclosure of the reports was a breach of paragraph 7.8B(2)(b) of the Road Traffic Accident Portal Protocol, which requires the first report to be disclosed before the subsequent report. That meant the subsequent report was not 'justified'. The claimant submitted that the reference to sanctions in the relevant part of the protocol applied to costs and not admissibility.

At first instance, the court granted the claimant 'relief from sanctions' and allowed the report in. Ruling on the defendant's appeal, Mrs Justice Foster DBE said the protocol was "clumsily expressed", but that the use of the word 'justified' had to be looked at in context. In this regard, she said, it did not relate to the admissibility of evidence. She added, "if the claimant discloses reports via the portal in an unorthodox manner, they run the serious risk of not recovering that cost from the defendant; the claimant will have to persuade the court that the defendant properly should pay."

Deller v King & McGarvey [2022]

The claimant was injured as a result of a road traffic accident on 29 August 2016 on the southbound carriageway of the M5. The first defendant, Ms King, was driving her Audi A2, when she suffered a puncture to her rear offside tyre. She attempted to move her vehicle onto the hard shoulder of the motorway, but lost control and ended up re-entering the motorway and coming to a halt across lanes 2 and 3. Her vehicle was then struck by Mr McGarvey's Volkswagen Bora at high speed. The claimant is Ms King's 4 year old son. He was a rear seat passenger in Ms King's vehicle, along with his father and older sister. The parties all relied on expert accident reconstruction evidence of the accident circumstances and the likely cause of the puncture.

Ms King gave evidence that she was driving in lane 1 and was just about to move into lane 2 to overtake a lorry when her vehicle started vibrating (as a result of the puncture) and a warning light lit up on the dashboard. As a result, she aborted her overtaking manoeuvre and remained in lane 1.

Ms King's husband gave evidence that she then made a sharp turn to the left onto the hard shoulder and lost control of her vehicle on the hard shoulder.

Mr McGarvey was driving along lane 2 of the motorway and noticed Ms King's vehicle start to wobble as if it were driving on an uneven surface and he then saw that the rear offside tyre was deflated. He was about 100 yards behind her at this point and he stated that he saw her immediately turn onto the hard shoulder and then saw the rear of Ms King's vehicle swinging left and right. Despite witnessing Ms King's vehicle fishtailing, Mr McGarvey considered that she would regain control of her vehicle as she slowed further in the hard shoulder. He did not attempt to slow further or put his hazard lights on. Importantly, the accident reconstruction experts gave almost agreed evidence that Mr McGarvey had a minimum of 4.5 seconds to react to avoid a collision.

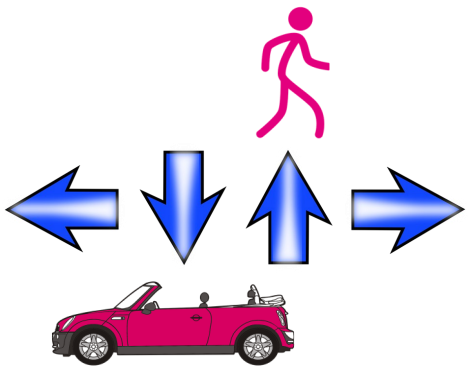
Deputy Judge Mercer found that Mr McGarvey's decision to pass/overtake a vehicle observed to be out of control to be more blameworthy than Ms King's actions. He found that Mr McGarvey was 60% liable and as a result Ms King was 40% liable for the accident.

Highway Code Changes

Readers will be aware that since the last edition of this publication there have been several changes to the Highway Code. There has been significant press coverage about the changes, however the extent to which they really change the manner in which courts will resolve issues is debatable.

Courts have always taken into account causative potency and relative blameworthiness. That approach is now reflected in the changes to the Highway Code which came into force on 29 January 2022. The Code has termed this as being a new *"hierarchy of road users"* contained in rules H1 to H3. Therefore, to experienced litigators, nothing is new and, incidentally, nor is a large section of the public being unaware of the provisions in the old Highway Code, let alone the new changes.

The hierarchy of road users puts those most at risk, such as pedestrians, at the top, and those least at risk, such as motorists, at the bottom. It, therefore, recognises that road users most likely to be injured are pedestrians, cyclists, horse riders and motorcyclists, with children, older adults and disabled people being more at risk.



Thus, those in charge of vehicles that can cause the greatest harm in the event of a collision bear the greatest responsibility to take care and reduce the danger they pose to others. Equally cyclists, horse riders and drivers of horse-drawn vehicles likewise have a responsibility to reduce danger to pedestrians. Needless to say, the Code emphasises that it is the responsibility of all highway users to take responsibility for themselves and other users.

It is perhaps worth reiterating that a breach of the Highway Code does not of itself render a user liable to criminal proceedings of any kind, but it may be relied on by any party to proceedings as tending to establish or negate a liability which is an issue in those proceedings.

There are multiple changes to the Code, with recommendations for different types of highway user, however the above principles underpin all of the changes. It is not possible to set out each and every change in an article such as this and readers are encouraged to review the new Highway Code as and when appropriate. Below are some of the changes which those practising in the field of civil litigation should be aware.

Pedestrians

If there has ever been any question that pavements are for the use of pedestrians only that has now been removed with the Code stating *"only pedestrians may use the pavement".* Therefore, users of e-scooters, hoverboards or bicycles will have difficulty in defending any claim where there is a collision with a pedestrian. The one exception to this is the use of wheelchairs and mobility scooters which are allowed to use a pavement, albeit they would still encounter difficulties due to causative potency.

All road users *"must"* give way to pedestrians on marked crossings and *"should"* give way to pedestrians who are crossing or waiting to cross at a zebra crossing or junction. A driver, therefore, has to assess, in the moment, whether they think a pedestrian is loitering or waiting to cross. Readers should appreciate this also means that road users turning into a junction will have to take care that a pedestrian is not about to start crossing the road with visibility not always at its greatest in such circumstances.

Overtaking

There are now minimum distances that should be maintained for a driver who wishes to overtake certain vulnerable users. Overtaking a cyclist travelling at less than 30mph requires at least 1.5m clearance and at least 2m clearance for any pedestrian or horse. Taking into account the average width of a lane is 3.6m, then at least part of the vehicle will be in the oncoming lane. The Code makes it clear that if the minimum distance cannot be kept, then the overtaking manoeuvre should not be attempted.

Cyclists

A cyclist's position in the carriageway is now subject to a new rule 72 and is dependent on traffic conditions. On carriageways where traffic is travelling faster than the cyclist, they should maintain a minimum distance of 0.5m from the kerb. On quiet roads with slow traffic, they should cycle in the middle of their lane. Further, cyclists should position themselves in the middle of their lane at junctions.

Cycling at a modest distance from the kerb is, we would suggest, common sense in any event bearing in mind most street furniture and debris is within 1m of the kerb.

Rule 163 allows cyclists to either overtake or undertake slow or stationary traffic with care, but, of course, being careful when near junctions and larger vehicles.

The 'Dutch Reach'

There is now even a provision as to how a motorist should open the car door. Previously motorists were simply required to check for cyclists and other traffic before opening the door, whereas now it specifically requires *"looking all around and checking your mirrors".* Whilst that is a minor change, the rule now goes much further by stating *"where you are able to do so, you should open the door using your hand on the opposite side of the door you are opening".* This is a provision that has been in place in the Netherlands for many years, hence being known as the 'Dutch Reach'.

In an attempt at being even handed, rule 67 specifically requires a cyclist to *leave "a doors width or 1m"* when passing parked vehicles, which is perhaps slightly more informative than the previous provision to *"leave plenty of room".*

No doubt pleadings will be full of quotes from the new Code and have practitioners looking them up before deciding that in the majority of cases they make little difference to the likely overall outcome.

If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

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