DOLMANS INSURANCE BULLETIN

Welcome to the June 2024 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

Algae on the Highway - What is a Defendant Authority's Duty?

RL v Pembrokeshire County Council

The alleged cause of a Claimant's accident on a highway can take various forms. Potholes, subsidence, damaged kerbs and/or erosion feature in many claims. The legal arguments and duties involving such defects in the fabric of the highway will be familiar to readers of this bulletin. However, claims are sometimes pursued where the alleged cause is not in the fabric of the highway but on the surface of the highway, such as moss and algae.

It was necessary to explore the relevant duty and legal arguments surrounding such causes in the recent case of *RL v Pembrokeshire County Council*, in which Dolmans represented the Defendant Local Authority.

Background and Allegations

The Claimant alleged in his Particulars of Claim that he was walking along the footway when he slipped on paving slabs that were covered in a green, slimy and slippery algae-like surface, causing him to fall and sustain personal injuries.

Although the footway was part of the adopted highway, the Claimant did not specifically plead breach of the Highways Act 1980. He did plead, however, that the Defendant Local Authority was negligent in failing to adequately clean/maintain the footway and failing to install any anti-slip measures, amongst other allegations.

Factual Causation

The Claimant's medical expert stated in his medical report that the Claimant was unsure of the exact mechanism of injury, that he did not lose consciousness, that he fell on kerb, that he slipped on kerb and that he tripped on kerb.

Factual causation was, therefore, disputed and the Claimant put to strict proof as to the circumstances of his alleged accident.

In addition, the Claimant had written to the Defendant Local Authority prior to Court proceedings being issued stating that, "It had been raining and the pavement was wet as I walked from the road". However, the Claimant made no mention of this in his Particulars of Claim.

All of the above inconsistencies were specifically pleaded in the Defendant Local Authority's Defence, which was robust in its stance regarding liability.

Dangerousness

The Claimant had not reported his alleged accident at/around the time and did not provide any contemporaneous evidence/ photographs showing the location of his alleged accident at the time of the same. The Claimant was, therefore, put to strict proof as to dangerousness.

Defendant Local Authority's Duty

Although breach of the Highways Act 1980 had not been specifically pleaded, it was averred that the Defendant Local Authority owed a statutory duty to maintain the fabric of the footway where the Claimant's alleged accident occurred under the Highways Act 1980.

The Claimant initially represented himself and, undoubtedly, the solicitors he later instructed would have eventually raised the Highways Act 1980 at some point in the proceedings. It was decided, therefore, to refer to the Highways Act 1980 at an early stage within the Defence, as tactically this would hopefully deter the Claimant's solicitors from pursuing these arguments in due course and possibly the claim altogether.

Reference to the Highways Act 1980 was also pertinent, insofar as the Defendant Local Authority could not be liable in negligence for any acts/omissions over and above the duty set out in Section 41 of the Highways Act 1980; the Defendant Local Authority relying upon the decision in *Valentine v Transport for London and The London Borough of Hounslow [2010] EWCA Civ 1358*.

The Defendant Local Authority further relied upon the decision in *Goodes v East Sussex County Council (2000) I WLR 1356*. The scope of a Highway Authority's duty under Section 41(1) to maintain the highway is no wider than the previous common law duty of repair, which was confined to making good defects in the surface of the highway itself. Further, it was averred that the Defendant Local Authority's liability in relation to the condition of the highway in question is set out under Section 41 of the Highways Act 1980. The Defendant Local Authority also relied upon the cases of *X v Bedfordshire County Council (1995) 3 ALL ER 353, Stovin v Wise and Norfolk County Council (1996) AC 923 and Gorringe v Calderdale Metropolitan Borough Council (2004) 2 ALL ER 326*, averring that a duty cannot be created under common law that would not have been owed at common law if the statute was not there.

Algae-Like Surface and Case Authorities

It was argued on behalf of the Defendant Local Authority that any alleged algae-like surface did not constitute the fabric of the highway; the Defendant Local Authority's duty under Section 41 of the Highways Act 1980 being of course to maintain the fabric of the highway. It is not a duty to ensure that safe passage along the highway is unimpeded by obstructions on the surface of the highway which, according to the High Court decision in *Rollinson v Dudley MBC [2015] EWHC 3330*, would include moss/algae/some other green substance growing on the highway.

It was denied that as any such algae-like surface was not part of the fabric or structure of the highway, it could render the highway out of repair. The Defendant Local Authority relied upon the decision in *Rollinson v Dudley MBC [2015] EWHC 3330*.

By showing that the Defendant Local Authority had an appropriate system in place this would assist in defending the claim in negligence and in pursuing any Section 58 Defence, in the event that the Claimant eventually amended his pleadings to allege breach of the Highways Act 1980.

With this in mind, it was averred in the Defence that the footway where the Claimant's alleged accident occurred was the subject of a regular system of maintenance and walked inspection on a monthly basis, in addition to a reactive system.

Although one defect had been noted at the time of the Defendant Local Authority's last scheduled inspection prior to the date of the Claimant's alleged accident, no algae was noted at the said location. The location of the Claimant's alleged accident was subject to street cleaning on a daily basis and, again, no algae was noted at the time of the Claimant's alleged accident. In addition, the location of the Claimant's alleged accident was subject to deep cleaning on an annual basis. Sufficient drainage was provided at the location and the footway was on a gradient, thereby countering any suggestion by the Claimant that the footway was wet and/or that water had played any part in the accumulation of algae on the footway. The Defendant Local Authority had no record of any complaints relating to the location of the Claimant's alleged accident and/or of any similar accidents at the said location during the 12 month period prior to the date of the same.

Comment

The Defence filed and served on behalf of the Defendant Local Authority in this matter was very detailed, specifically averring the Defendant Local Authority's stance and referencing the various case authorities that are referred to above.

It was submitted that the Claimant had no cause of action against the Defendant Local Authority in negligence and/or under Section 41 of the Highways Act 1980, if pleaded at a later date.

As is usual, Notice of Proposed Allocation to the Fast Track followed the filing of such Defence, by which time the Claimant had instructed solicitors. Having considered the content of the Defence, the Claimant's solicitors quickly discontinued the Claimant's claim before Directions Questionnaires needed to be filed.

This early discontinuance resulted in substantial costs savings for the Defendant Local Authority, and of course the damages claim itself.

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CASE UPDATES

Costs Budgeting - Child Claim

PXT v Atere-Roberts
[2024] EHWC 1372 (KB)

The Claimant ('C') is a child and the claim was, therefore, not subject to automatic costs budgeting. The Court was required to consider the Defendant's ('D') Application for an Order that the claim be costs budgeted on the grounds that, on the particular facts of this case, such costs management was appropriate and necessary.

C suffered injuries, including a serious brain injury, in a road traffic accident in 2021. Liability was agreed 85/15 in C's favour and this was approved in June 2023 when directions were made in relation to issues of quantum through to a further Case Management Conference in 2025. C's paediatric neurologist had advised that it was too early to give an accurate prognosis of the full effects of her traumatic brain injury and it was probable her disability and care needs would evolve. The expert recommended reassessment in 2026.

The aforementioned directions required C to serve an estimate of costs and provided that if D wanted to apply for a Costs Management Order to be heard at the Case Management Conference in 2025, it should make an Application no later than 14 days before that Case Management Conference.

C provided a costs estimate in June 2023 which included matters such as liaising with the Deputy, case manager, a property finder, letting agent and attendance at quarterly Multi Disciplinary Team meetings to monitor the care and rehabilitation package. Estimated future costs were put at £185,000.

In December 2023, in support of a request for an interim payment on account of costs, C provided details of incurred costs in the region of £411,000 excluding VAT. For the purposes of D's Application, C provided further costs details showing incurred costs of £850,000 including VAT, and estimated future costs to the 2025 Case Management Conference of £262,000 including VAT.

D raised concerns that the costs had now substantially exceeded the June 2023 costs estimate and regarding the amount of costs claimed in general.

It was agreed that in determining whether to order costs budgeting the Judge had a discretion which was to be exercised having regard to the overriding objective to deal with cases justly and at proportionate cost and, insofar as practicable, to consider the saving of expense.

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D submitted that there was no good reason for C's estimate to have increased so much and that the costs were simply too high. Concerns included the hourly rates (which were 30 – 59% above Guideline Hourly Rates), C's solicitors' involvement in rehabilitation and implementing care regimes and insufficient delegation of work.

C argued that the underlying rationale for excluding child cases from automatic costs budgeting applied in this case (i.e. the length of time it can take for injuries to stabilise and a proper prognosis to be given and budgeting for 5 – 10 years was not sensible). On the existing medical evidence, a prognosis in this case would not be known until at the earliest 2026. There were too many uncertainties in this case including difficulties with schooling, accommodation issues, a deterioration in C's and her mother's mental health and the sustainability of the care / case management / therapy packages.

Given the possibility of a final prognosis in 2026, the Judge considered that there was some reasonable expectation of an assessment of damages within a period that was reasonable for costs budgeting purposes. Further, D's concerns provided a clear and compelling justification amounting to a good reason for a Costs Management Order. On the facts of this case, and for the very reason that costs budgeting is considered appropriate for other substantial personal injury, it was appropriate here. Costs budgeting was likely to lead to a very substantial saving of expense. Leaving costs to a detailed assessment was not adequate or appropriate in circumstances where the Court could manage them now. The costs of costs management would be a fraction of the costs of detailed assessment. Phased budgeting would enable C's solicitors to carry out their work at proportionate and reasonable cost, and give both sides a clear idea of the level of costs likely to be incurred and their respective liabilities, and enhance settlement.

Accordingly, the Judge was satisfied that an Order for costs management by costs budgeting should be made.

Detailed Assessment Proceedings - Points of Dispute - Guidance

Wazen v Khan
[2024] EWHC 1083 (SCCO)

Following settlement of a clinical negligence claim in the sum of £300,000, the Defendant challenged the Claimant's costs. The key issue was whether the principles in *Ainsworth v Stewarts Law LLP [2020] EWCA Civ 178* on the specificity required in Points of Dispute apply to inter partes detailed assessments and, if so, whether the Defendant's Points of Dispute complied with those requirements.

It was held that the *Ainsworth* principles do apply to inter partes assessments, although less particularity is required than in solicitor-client cases.

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The Judgment provided guidance on the drafting of Points of Dispute:

- Points of Dispute must follow Precedent G in the Schedule of Costs precedents annexed to the Practice Direction. As far as practicable, they must identify the general points or matters of principle which require a decision before the individual items in the bill are addressed and identify specific points stating concisely the nature or ground of dispute PD 47 8.3.
- They must be drafted in a way which enables the parties and the Court to determine precisely what is in dispute and why.
- The requirement for particularity in Points of Dispute is less demanding in an inter partes assessment than a solicitor-client assessment. A more "benign approach" is required in respect of inter partes assessment, as the paying party lacks access to the solicitor's files.
- In an inter partes Points of Dispute, the paying party can often do no more than (a) identify which items are prima facie excessive and require the receiving party to justify them and (b) identifying as best it can what on the paying party's case would be a reasonable and proportionate amount.
- There is a difference in the particularity required in Points of Dispute depending on which of two requirements is being addressed: "what is in dispute" or "the nature of the challenge". The first involves identifying, by reference to item numbers or filtering in an electronic bill, which items are under challenge. Compliance with the second requirement, which entails what is being conceded or offered, can be more broadbrush. The paying party does not have to, at that stage, specify precisely which items are being allowed on its case and to what extent. In many cases it would not be practical to do so.
- When identifying which items are under challenge, a degree of 'grouping' or 'clumping' together of items under challenge is acceptable. However, there are limits to how broad that type of grouping can be if it is not to fall foul of the touchstone requirements identified in *Ainsworth*. The level of particularity required is going to be a case-specific question of fact and degree.

Decision

The Defendant's Points of Dispute in this case fell foul of *Ainsworth* because they challenged the disclosure and ADR phases of the Claimant's bill without identifying any item by number or filter, and the Defendant's offers, expressed in number of hours, were too "broadbrush" and did not distinguish between fee earners or specify monetary amounts.

Permission to appeal was refused.

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Part 36 Offers on Liability - Preliminary Trial - Causation

Elbanna v Clark
[2024] EWHC 1471

An amateur rugby player was found liable for injury he caused when "playing an opponent" without the ball, when, following a kick-off, he ran at speed in the direction of the Claimant and collided with him, causing serious spinal injury. The case was listed for a split trial, with liability and causation to be tried as a preliminary issue. Shortly before the trial, the Defendant admitted issues in relation to causation.

The Claimant had made a Part 36 Offer to accept 75% of the damages sought. At trial, the Claimant recovered 100% of the damages. The question before the Court was whether this was an effective Part 36 Offer.

The Claimant's Part 36 Offer was made on 13 December 2022 in the following terms: "*The Claimant will settle the issue of liability in this claim on the basis that the Defendant will accept 75% of the Claimant's claim for damages to be assessed*".

On 30 December 2022, the Defendant's solicitor replied saying that the offer was not clear as to what was meant by "*the issue of liability*" and, without prejudice to that contention, rejected the offer. The Defendant cited the case of *Seabrook v Adam [2021] 4 WLR 52*, where the Court of Appeal had concluded that the term 'liability' is apt to include issues of both breach of duty and causation.

On 04 January 2023, the Claimant's solicitor advised the Defendant's solicitor that they considered that the terms of the offer were clear.

Decision

The Defendant was right to be cautious about the precise extent of the Claimant's offer to settle and what it referred to. The wording of the offer did not make reference expressly to breach of duty or the causation issue to be determined at the preliminary hearing. The issue of "liability in the claim" might refer to issues of breach of duty and causation, the latter going beyond the single issue of causation which had been identified as a preliminary issue.

The medical evidence was still at a fairly early stage and contained a number of standalone claims which had yet to be the subject of medical opinion. There was a need for some precision as to exactly what the offer related to.

The Claimant had the opportunity to provide an explanation which would have put the matter beyond doubt, but did not do so.

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In *Seabrook*, the Court of Appeal had emphasised that: "*Cases of this kind turn, inevitably, on the precise wording of the pleadings and the particular terms of the Part 36 offer. In order to avoid the kind of dispute which has arisen here, especially in a low value claim, it is important to make express reference in the Part 36 offer to whether the offer relates to the whole of the claim or part of it and/or the precise issue to which it relates, in accordance with CPR 36.5(1)(d). 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 a 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*".

The Court found that the offer made was not effective so as to give rise to Part 36 consequences following the preliminary trial. However, the offer may have those consequences at a later stage when all "liability" issues had been determined.

School - Physical Intervention - Battery - False Imprisonment - Negligence

FXS v The Mulberry Bush Organisation Limited
[2024] EWHC 1406 (KB)

The Claimant ('C') was placed by a Local Authority at the Defendant residential special school between June 2008 and September 2009 (when he was age 9 to 11). The School provided placements for children aged 5 to 12 years who had experienced severe emotional damage in infancy and early childhood. At the time of placement, Autism Spectrum Disorder (ASD) was suspected, but assessments were ongoing. A formal diagnosis was made in May 2009. C alleged that the School acted negligently by restraining him frequently and with excessive force, inappropriately confining him to his room and failing to manage his behaviour appropriately; assaulted him during the restraints and/or the acts of restraint constituted battery and/or trespass to the person; and falsely imprisoned him on at least 2 occasions by placing a towel in the doorway of his room to prevent him from leaving.

C's father had begun to raise concerns about the School's treatment of C and the management of his needs from the beginning of 2009. C complained about the restraints and had bruising. C's father considered C's behaviour was due to his ASD and he should be in a school that specifically provided for ASD. The School sought to assure C's father that there were other children at the School with an ASD diagnosis and the approach used by the School was similar to those used in ASD specific schools.

An Educational Psychologist provided a report in May 2009. In June 2009, the Local Authority set out a plan which recognised that C's needs relating to his ASD were not being met by the School and that he would need to move to a more appropriate placement, but this required careful planning and stability for C. The plan proposed that C remain at the School for the next academic year whilst appropriate provision was identified and transfer take place at secondary school transfer age in 2010.

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Towards the end of the Summer Term in 2009, C's disruptive behaviour escalated. His father complained about his management, including the use of restraints and the use of the 'towel method'. A meeting took place in September 2009 when the towel method was discussed and the School explained that restraint was used as a last resort. C's father withdrew C from the School shortly thereafter.

C relied solely upon evidence from his father who stated that in the first few weeks at the School C was restrained on average 3 to 4 times per week, but this increased to up to 20 times per week by the time he left.

Witnesses for the School confirmed that at the time staff were trained in the use of physical intervention through a programme known as PROACT. Whilst the School was not a specialist placement for ASD, many of the staff were experienced in working with children with ASD. Children were not locked anywhere and were not secluded, but the towel method was used in highly charged and violent situations where staff needed to protect themselves. The method involved a towel being looped around the internal door handle and pulled to leaving a gap through which staff could constantly have C within sight and communicate with him, and when C stopped attacking and moved away from the door it would be opened.

The School's behaviour policy specifically provided '*It is not permitted to restrain children face down*'. The policy also provided that locking a child in a single room at any time was not permitted. Three incidents of restraint in the School's records involved face-down restraints. The Judge noted that there could be no dispute that on these 3 occasions C was in a face-down position which the School's policy expressly prohibited. The policy did not qualify that prohibition. C's behaviour was not unexpected. His unpredictability was a key feature of his behavioural issues. There was no basis for an emergency or dynamic response. The Department for Education Guidance in force at the time in relation to planned physical intervention had not been complied with. There was no record of a risk assessment identifying the benefits and risks associated with the application of different intervention techniques, and no evidence that the School had consulted with C's parents on the physical intervention strategies used. The Judge found that the battery claim was made out in respect of the 3 incidents involving face down restraints.

The School's records confirmed that the towel method was used on 14 occasions. C alleged it prevented him leaving his room and was seclusion. The Judge found that the towel method was a planned physical intervention which had not been used in accordance with the Department for Education Guidance in force at the time. The Judge concluded that the seclusion of C through the use of the towel method constituted unlawful imprisonment.

In relation to the negligence claim, the Judge found that save for the face down restraints and false imprisonments, C was restrained as a last resort in the context of a well-managed school environment and restraint was used only when necessary for the protection of C and/or staff to prevent damage to property and to maintain order in the classroom. The School was an appropriate placement for C. The School's approach was on the whole a reasonable one. Negligence was not established and that aspect of the claim was dismissed.

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

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