DOLMANS INSURANCE BULLETIN

Welcome to the February 2019 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,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

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DOLMANS REPORT ON

TOO MUCH NOISE?

MJW v Merthyr Tydfil County Borough Council & Others

This was an interesting and somewhat unusual noise induced hearing loss (NIHL) claim where we were instructed to act on behalf of the Local Authority, Merthyr Tydfil County Borough Council.

The Claimant was born on 13 June 1953 and is now 65 years old.

The Claimant alleged that he was employed by the First Defendant, Triang Pedigree Limited, between 1970/71 and 1973/74.

He alleged that he was employed by the Local Authority, and its predecessors, between 1974/75 and 1976/77 and again between 1979 and 2009. The Local Authority admitted that the Claimant was employed by them, and their predecessors, at various times between 1974/75 and 2009 on the basis of the information contained in the HMRC Employment Schedule, but could not be more specific as to the exact dates.

The Claimant alleged that he was employed by the Third Defendant, Cambridge Box Limited, between 1975/76 and 1978/79.

The Claimant alleged that he was exposed to excessive noise during his employment with the Defendants during the periods in question and that the Defendants were negligent and/or in breach of their statutory duty in that regard. The allegations made against the Local Authority included allegations of breaches of the Noise at Work Regulations 1989 and the Control of Noise at Work Regulations 2005.

Readers will appreciate that this was a very old claim, with the Claimant first alleging exposure to excessive noise with the First Defendant almost 50 years ago and with the Local Authority almost 45 years ago. We considered and investigated the issue of limitation, but were unable to challenge the Claimant's date of knowledge and allege that the claim was statute barred.

The Claimant alleged that he was employed by the Local Authority as a Labourer until 1986, as a Foreman from then until around 2000 and finally as a Supervisor. He alleged that he worked in the Grounds Maintenance Department. He also alleged that from 1986 onwards, he worked at a cemetery where he operated grass cutting machinery and strimmers. He further alleged that he became a Supervisor from around 2000, as a result of which he operated machinery around 60% of the time, with the remaining 40% of the time spent working near colleagues and in the office.

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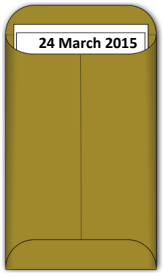
It was clear from the outset that the contents of the Particulars of Claim were inconsistent with the information provided by the Local Authority during the pre-litigation stage and were also inconsistent with the contents of an open letter written by the Claimant's solicitors on 24 March 2015. We dealt with these issues in the Local Authority's Defence as follows:

- It was stated in the letter that the Claimant became a Foreman in 1986, whereas it was pleaded in the Particulars of Claim that the Claimant became a Supervisor from around 2000.

- It was stated in the letter that the Claimant would spend 50% of his time labouring and 50% of his time supervising during the period from 1986 to 1989, whereas it was pleaded in the Particulars of Claim that the Claimant only commenced supervisory duties in or around 2000.

- It was stated in the letter that from 1989 onwards, the Claimant ceased assisting with labouring duties and remained in a supervisory position and was not "really exposed to excessive noise" once he became a Supervisor in 1989. This was at variance with the Particulars of Claim in which it was pleaded that the Claimant operated machinery around 60% of the time from around 2000 onwards.

The Claimant chose not to serve a Reply to Defence to deal with these issues, which we found surprising. However, he indicated his intention to amend the Particulars of Claim to deal with a number of issues arising.



We were surprised by the nature of the proposed amendments to the allegations made against the Local Authority in view of the contents of the letter from the Claimant's solicitors dated 24 March 2015. It was clear that the Claimant was keen to distance himself from the comments made in that letter and we were intrigued as to the instructions given to enable that letter to be written in the first place.

The Claimant was given permission to amend his Particulars of Claim and the Defendants were given permission to amend their respective Defences.

We investigated the matter and were able to locate some witnesses who had worked with the Claimant, albeit for fairly short periods of time. The parties proceeded to exchange Witness Statements.

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The Claimant disclosed a Witness Statement from himself, but no supporting witnesses.

He alleged that he was employed by the Local Authority as a Labourer until 1986, as a Working Foreman until 2000 and as a Supervisor from 2000 onwards. He gave evidence regarding his work activities and his exposure to noise as a result of carrying out those activities. He alleged that he became a Supervisor in approximately 2000 and that his role changed due to the fact that he was based in different cemeteries. His duties included instructing staff on their job role, walking around with the Chargehand and allocating duties. He alleged that he was still exposed to noise coming from lawnmowers, backpack blowers and jackhammers during this period.

He alleged that he was exposed to the noise of a jackhammer for about 1.5 hours a week and the noise of strimmers for between 4 and 5 hours a week during this period.

He alleged that ear defenders were issued to the staff in or about 2000 but, overall, they did not wear the ear defenders as this was not enforced. He said that he never wore ear defenders during his employment, which we found surprising. This could have been interpreted as a tacit admission that he was not exposed to excessive noise.

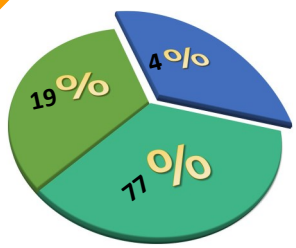
We interviewed 3 witnesses in connection with the claim. Their evidence was that the Claimant would only have been exposed to excessive noise for limited periods of time and that hearing protection was available if required. They said that the process of digging graves was generally not noisy and no hearing protection was required when undertaking this task. It was accepted that using a jackhammer to dig a grave was noisy and that hearing protection was always worn when carrying out such work.

The witnesses thought that hearing protection was provided from about 1991 onwards and said that they used it as and when required.

The witnesses did not recall the Claimant ever using a jackhammer. They recalled him using a strimmer, but said that this was not very often.

DOLMANS REPORT ON

The parties were given permission to jointly instruct an Acoustic Engineer and agreed to instruct Mr Steven Tudor of Strange Strange and Gardner to deal with the matter. He produced a desktop report given the antiquity of the claim.



Mr Tudor concluded that the Claimant was probably not exposed to excessive noise during his employment with the First Defendant, but was exposed to excessive noise during his employment with the Local Authority and the Third Defendant, and should have been provided with hearing protection. He calculated the Claimant's lifetime Noise Immission Level was between 99 and 109 dB(A). He apportioned this as to 4% to the First Defendant, 77% to the Local Authority and 19% to the Third Defendant.

On the basis of the witness evidence provided by the Local Authority, he estimated the lifetime Noise Immission Level to be between 98 and 107 dB(A). He apportioned this as to 5% to the First Defendant, 70% to the Local Authority and 25% to the Third Defendant.

Mr Tudor's report confirmed that the Local Authority had by far the greatest period of exposure and liability in respect of the claim. He calculated that the Local Authority's contribution lay between 70 and 77%. We were disappointed to note Mr Tudor's conclusions given the evidence of the lay witnesses regarding the Claimant's apparent limited exposure to excessive noise.

The Claimant disclosed medical evidence in support of his claim from Mr Geoffrey Shone, Consultant ENT Surgeon.

Mr Shone was of the opinion that the Claimant was suffering from bilateral sensorineural hearing loss which had been caused by a combination of ageing and exposure to excessive noise. He calculated that the average binaural hearing loss was 25.3 dB, which was made up of a hearing loss due to ageing of 16.7 dB and a hearing loss due to noise of 8.6 dB.

He was of the opinion that the Claimant was not suffering from tinnitus.

He also said that the Claimant would benefit from wearing bilateral hearing aids and appeared to recommend that the Claimant should purchase private hearing aids.

We were a little surprised to note Mr Shone's conclusion that the Claimant was suffering from noise induced hearing loss because the Local Authority had in its possession audiometric screening of the Claimant undertaken in 1994, which revealed that he did not have a hearing disability at that time. Unfortunately, the audiogram upon which this conclusion was (presumably) reached could not be found, despite an extensive search.

The Council's claims handlers considered the Claimant's medical records and personnel file which contained no entries of note in relation to the issues of deafness and hearing loss. We considered the occupational health records, which also contained no relevant entries.

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The Claimant was examined on behalf of the Defendants by Mr Andrew Parker, Consultant ENT Surgeon.

Mr Parker was of the opinion that the Claimant was suffering from deafness as a result of ageing and that anything in excess of that would be non-age/non-noise in nature. He was of the opinion that the Claimant had not been noise deafened. He also said that if the Court were to find otherwise, the Claimant would not have been disabled by any noise deafening.

Mr Parker said that the Claimant's hearing might deteriorate further in time, but this deterioration would not be as a result of noise exposure. He also said that the Claimant would not benefit from any medical or surgical intervention. He was of the opinion that the hearing losses on the right were bad enough to warrant the wearing of a hearing aid, but the position on the left was different.

Mr Parker and Mr Shone discussed the matter and prepared a Joint Statement. They agreed that the audiogram undertaken by Mr Parker on 3 September 2017 was more likely to be accurate than Mr Shone's audiogram undertaken on 17 March 2015. Mr Parker was of the opinion that the Claimant's hearing losses could easily be explained by age alone, and even if the Court were to find that he had not been noise deafened, it would not have disabled him. Mr Parker said that the degree of hearing loss of 2.1 dB was not material, appreciable, significant, noticeable and meaningful. Mr Shone acknowledged that the diagnosis of NIHL was borderline and dependent upon noise evidence. He also maintained that the hearing loss was appreciable, although he acknowledged that some experts would regard this as "de minimis".

The contents of the Joint Statement were helpful from the Local Authority's point of view and it was clear that Mr Shone had made concessions to Mr Parker.

Proceedings were commenced in the County Court Money Claims Centre and were transferred to Merthyr Tydfil County Court following the filing of Directions Questionnaires. The District Judge allocated the matter to the Fast Track, but gave the Claimant and the Defendants joint permission to obtain their own medical evidence. The case was listed for Trial on 19 September 2018.

In view of the contents of the medical reports and the Joint Statement, the Defendants took the view that it was essential that Mr Parker and Mr Shone attend Court to give oral evidence. The Defendants issued an Application for such permission, which was heard before the District Judge on 26 July 2018. The District Judge granted the Application, re-allocated the matter to the Multi Track and ordered that the matter be transferred to Cardiff County Court.

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The case was then listed for Trial in Cardiff County Court on 27 and 28 December 2018.

The Claimant discontinued his claim against the First Defendant in late August 2018. This was not entirely surprising given the contents of the joint engineer's report.

Both we and the solicitors for the Third Defendant thought that the Claimant might also decide to discontinue his claim against the Local Authority and the Third Defendant. We invited the Claimant to discontinue his claim, but he was not prepared to do so.

The Claimant was represented by the firm of Roberts Jackson Solicitors who specialise in pursuing deafness and other disease claims. The firm went into administration on 28 September 2018 and the administrators sold it immediately to the firm of AWH Solicitors. We thought that the Claimant might have discontinued his claim at that time, but he did not do so.

We took the view that this was a case where the evidence in relation to noise exposure was fairly minimal and that there were serious doubts as to whether the Claimant would be able to establish medical causation in any event. The solicitors for the Third Defendant were of the same view.

We agreed to hold a joint conference with Counsel and Mr Parker in order to assess and evaluate the issue of medical causation. Counsel was of the opinion that Mr Parker's evidence was strong and persuasive and that the Local Authority and the Third Defendant would be justified in contesting the matter on the basis that the Claimant would struggle to establish medical causation. He also advised that the Local Authority and the Third Defendant should not admit breach of statutory duty and negligence, but leave all matters in issue. He further expressed the opinion that the Claimant was likely to discontinue his claim before Trial.

We contacted the solicitors for the Claimant on a number of occasions in the period leading up to the Trial and the solicitors for the Third Defendant did likewise. We made it clear that the Defendants were willing to contest the matter to Trial and asked them to confirm that they had reserved Counsel and arranged for Mr Shone to attend the Trial. Their replies were somewhat evasive and we were not convinced that they had taken these steps.

The Claimant was again invited to discontinue his claim in order to save the incurring of unnecessary costs.

We were eventually contacted by the solicitors for the Claimant on 11 December 2018, when they indicated that the Claimant would discontinue his claim against the Local Authority and the Third Defendant on the basis of each party bearing its own costs. The discontinuance was on the basis that the Local Authority and the Third Defendant would bear their own costs and disbursements as this was a QOWCS claim.

We were pleased that the claim was eventually discontinued, although we were disappointed that this did not occur at an earlier date. We understand that the Claimant's claim was being funded by way of a CFA and the Claimant's Solicitors had invested a significant amount of time and resources in pursuing the claim over a number of years.

Conclusion

This case highlights the importance of taking a robust stance in an appropriate case. There were numerous inconsistencies in the Claimant's pleaded case and evidence and we were not convinced that the Claimant had been exposed to excessive noise during his employment with the Local Authority on the basis of the lay witness evidence obtained. This appeared to be borne out by the medical evidence which showed that either the Claimant was not suffering from any hearing loss caused by exposure to excessive noise or that such hearing loss was minimal. The Defendants were willing to require the Claimant to prove his claim in Court on oath and it appears that he was not willing to do so.

We were surprised that the Claimant's solicitors did not review the matter and advise the Claimant to discontinue his claim at an earlier stage in view of the numerous discrepancies in the evidence and documents. The Claimant did not make a Part 36 offer which we thought was surprising.

The Local Authority were adamant that they wished to contest the claim and their stance was vindicated by the late discontinuance of the claim against them.

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DOLMANS RECENT CASE UPDATE

Civil Procedure - Costs - CPR

(1) Paul Andrews (2) Christopher Smith v (1) Retro Computers Limited (2) David Levy (3) Suzanne Martin (4) Janko Mrsic-Flogel [2019] 1 WLIK 237

During a Detailed Assessment Hearing, the Defendants applied, under CPR r.44.11(1)(b), for partial or full disallowance of the Claimant's costs on the ground of the First Claimant's alleged serious misconduct before and during the proceedings. The Defendants alleged that the First Claimant had, among other things, lied in his Witness Statements, misled the Court in several respects, abused the Defendants' websites, hacked e-mails and filed false allegations. They maintained that such conduct amounted to unreasonable behaviour within the meaning of r.44.11(1)(b).

Deputy Master Friston of the Senior Court Costs Office held that there was a two stage test to be applied under r.44.11(1)(b):

(1) Whether the relevant threshold had been met, ie – whether there had been improper or unreasonable behaviour.

(2) Whether it would be unjust to impose a discretionary sanction.

Improper and unreasonable conduct was interpreted as conduct which the consensus of professional opinion would regard as improper; *Ridehalgh v Horsefield [1984] Ch. 205* applied.

In ordinary circumstances, CPR r44.11(1)(b), which concerned the Court's powers in relation to misconduct, should not be used to allow paying parties to adjust or negate their costs liability for reasons that were, or could have been, addressed when the Costs Order was made. There was nothing in r.44.11(1)(b) which allowed Costs Judges to revisit the formation of earlier Costs Orders and their ability to impose sanctions for unreasonable or improper conduct was limited.

In the instant case, the Court had already made an issue based Costs Order in relation to some of the conduct issues and was prevented by the operation of issue estopped from revisiting them. Courts should guard against the possibility of double jeopardy. All of the Defendants' allegations of misconduct were rejected.

DOLMANS RECENT CASE UPDATE

Civil Procedure - Costs - Duress - Part 36 Offers - Acceptance

Momonakaya v Ministry of Defence
QBD 05.02.19

The Claimant, a soldier who was discharged from the army for medical reasons, brought a claim against the Defendant, Ministry of Defence. On 30 April 2018, the Defendant made a Part 36 Offer which expired on 21 May 2018. The Claimant advised the Defendant that he was unable to properly consider the offer without further information. The offer was not accepted.

On 31 August 2018, a joint expert report was received which clarified quantum issues.

After instructing new solicitors, the Claimant sought to accept the Defendant's Part 36 Offer. 3 days later, the Claimant changed his mind and instructed his solicitor to cancel his acceptance of the offer as he was unhappy with the settlement, and indicated that he had felt under duress to accept the offer. By this date, the Trial date had been vacated. The Defendant sought its costs from 22 May 2018.

The Court held that the pressure the Claimant felt did not meet the very high threshold for arguing that he had acted under duress.

The Court had to order the Defendant to pay the Claimant's costs up until the expiration of the Part 36 Offer, unless it was unjust to do so pursuant to r.36.17(5). At the time the offer was made, there were different positions regarding the quantification of the Claimant's loss. Of "enormous significance" in resolving that difference was the joint expert report. As such, it would be unjust to follow the usual rule (that the Defendant do pay the Claimant's costs up until the expiration of the Part 36 Offer). The offer could not have been evaluated by the Claimant in the 21 day window after the offer was made. The expert report was crucial.

Allowing for a reasonable period within which the Claimant could have evaluated the offer, the window for acceptance was extended to 21 September 2018, 21 days after the expert report was received.

DOLMANS RECENT CASE UPDATE

Civil Procedure - Relief from Sanctions - Witness Statements

Horler v Rubin & Others
Ch D 25.01.19

The Defendants applied to strike out the Claimant's claim for failing to provide Witness Statements and the Claimant applied for relief from sanctions and permission to serve the Witness Statements out of time.

The Claimant brought proceedings against the Defendants seeking an order that a decision in an earlier set of proceedings be set aside. He attached the 3 Affidavits to his Particulars of Claim. In a Directions Questionnaire, he indicated that he intended to rely on the 3 witnesses at Trial. A due date was given for Witness Statements, but the Claimant did not serve any. The Defendants' solicitors asked him whether he still intended to call the witnesses at Trial, given that he had not submitted Witness Statements from them. The Defendants then made an Application to strike out the Claimant's claim. The Claimant provided the Witness Statements and applied for relief from sanctions.

In relation to the strike out Application, it was not clear whether the Claimant had actually breached a Court Order, given that the Directions Order had not provided that he had to serve Witness Statements. The relevant sanction for failure to serve Witness Statements was that those witnesses could not give evidence. That was the sanction for non-compliance and it would be unusual to go beyond that sanction to strike out the claim. The real question was whether to provide relief from sanctions, not whether to strike out. The strike out Application was, accordingly, refused.

In relation to the relief from sanctions Application, the 3 stage test in *Denton* was to be applied. The first question was whether the breach had been serious and significant; both parties agreed that a failure to produce Witness Statements for over 3 months was serious. The second issue was the explanation for the breach. The Claimant stated that the initial breach was due to him having already served the Affidavits with the Particulars of Claim and had not realised that he needed to serve Witness Statements as well. That had been an honest mistake and might not have been unreasonable. However, there was a second period of delay after the Defendants' solicitors pointed out the failure. There was no satisfactory explanation as to why he had not served them after that. The third stage was to look at all the circumstances of the case.

The significant points were that the initial error had been an honest misunderstanding; that admitting the Witness Statements late would not imperil the Trial date; that there was unlikely to be any prejudice to the Defendants given that the Witness Statements largely replicated the Affidavits; and that it had always been clear that the Claimant was intending to call the 3 witnesses. There was a risk of real prejudice to the Claimant, and little to the Defendants, if the Witness Statements were not admitted. Accordingly, relief from sanctions was granted.

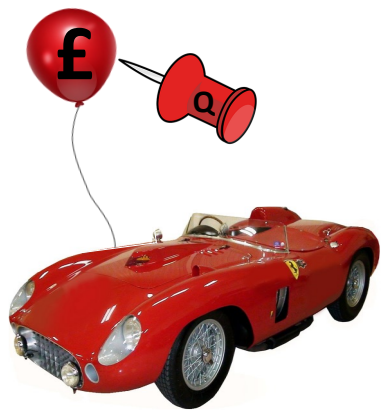
DOLMANS RECENT CASE UPDATE

Duty of Care - Foreseeability - Proximity

Julian Seddon v Driver & Vehicle Licensing Agency
[2019] EWCA Civ 14

This Court of Appeal Judgment provides a helpful analysis of the three tests applied when establishing whether a tortious duty of care exists in cases involving pure economic loss.

The Appellant appealed against a decision that the Respondent DVLA owed no duty of care to prospective purchasers of an "historic vehicle".



The Appellant had purchased a racing car for £250,000 in October 2014. The car's registration document stated that it was manufactured in 1964 and was in the "historic vehicle" registration class. At that time, the DVLA were in the process of investigating the car's registration. This investigation concluded that the car was built in 2002 from a mixture of old and new parts manufactured to 1964 specifications. In March 2015, the DVLA decided to allocate a new vehicle identity number and a "Q" plate, which was a plate issued where the age or identity of the vehicle was not known. As a result of having its historic status removed, the Appellant claimed that the vehicle plummeted in value. He sold it for £100,000 and brought a claim against the DVLA for the economic loss.

The High Court had previously found as a preliminary issue that the DVLA did not owe him a duty of care. The Appellant appealed.

The Court of Appeal considered the existence of a duty of care in tort in respect of pure economic loss and applied the tests set out in *Customs and Excise Commissioners v Barclays Bank Plc [2006]*; namely, the assumption of responsibility test, the threefold test and the incremental test.

In relation to the **assumption of responsibility test**, the Court found there was no direct relationship between the DVLA and the Appellant. The DVLA was not aware of the Appellant's identity at the material time. The DVLA did not act voluntarily, but performed the statutory functions of collecting tax, raising revenue for the government and ensuring that vehicles operating on the roads in the UK were registered. In doing so, it relied on declarations and information provided by applicants for a licence or registration mark. The DVLA would not reasonably have expected the Appellant to rely on any statement or service it provided, not least because it had no knowledge of him. The Appellant's reliance on the registration document was not for the purpose provided, but rather to assist him in a private, commercial transaction. There were no direct dealings between the DVLA and the Appellant and no identifiable act of assumption of responsibility by the DVLA towards him. It was not even alleged that there was any duty owed directly to the Appellant; the duty alleged was to inform the registered keeper of the intention to investigate.

In relation to the **threefold test**, there was no challenge to the Judge's finding that the loss was foreseeable. The Judge also held that there was insufficient relationship of "proximity"; for proximity to be established, it was generally necessary for the statement or service in question to be relied upon for the purpose for which it was provided. It would also not be fair, just and reasonable for the DVLA to owe a duty of care to prospective vehicle purchasers. Vehicle registration documents were not provided for the private purpose of informing the commercial decisions of those who might choose to purchase registered vehicles. The Judge had, therefore, been entitled to conclude that the Appellant was relying on the document for purposes other than its statutory purpose and that there was no sufficient relationship of proximity between the statement provided and his economic loss. The Judge was also correct to conclude that it would not be fair, just and reasonable to impose a duty of care on the DVLA as to do so would open the door to wide ranging and extensive liabilities which would impact the performance of its statutory functions.

In relation to the **incremental test**, the authority in *Reeman v Department of Transport [1997]* provided strong support for the DVLA's case on proximity and on whether it was fair, just and reasonable to impose a duty of care.

Appeal dismissed.

Non-Party Costs Order Against Liability Insurer

Various Claimants v Giambrone & Law (A Firm) & Others
[2019] EWHC 34 (QB)

The Claimants, C, brought group litigation against Giambrone, G, a law firm, in relation to its negligent handling of a property investment scheme. G's professional indemnity insurer had argued that it was entitled to aggregate the claims against G so that they amounted to one claim with a liability limit of £3 million. An agreement was reached between G and its insurers on terms that limited the insurer's liability to indemnify G, but provided that the insurer would still advance defence costs with the proviso that it was entitled to withdraw such funding if it reasonably considered that there was no realistic prospect of defending the claims. C succeeded in their claims at Trial. G unsuccessfully appealed to the Court of Appeal and G's Application for permission to appeal to the Supreme Court was refused. Substantial Costs Orders were made against G, which were not satisfied. Accordingly, C made an Application, under s.51 of the Senior Courts Act 1981, for a non-party Costs Order against G's insurers.

The Judge found that the insurer had obtained some material benefit from the agreement reached with G regarding indemnity. The Judge found that the effect of the agreement reached was that G had power to control the defences with minimal influence from the insurer, despite the fact that there must have been reasonable concerns that the defence would not succeed. That agreement could not operate to exclude the protection from adverse costs consequences afforded to C by s.51. Further, that position was not altered by the fact that C had commenced and maintained their claims knowing the terms of the indemnity agreement.

The Judge found that G had extracted every conceivable benefit from the liberal funding provided by the insurer and it was reasonable to conclude that the insurer's funding of the defence materially increased the costs expended by C in pursuing their claims. A sizeable proportion of the costs incurred in the defence were incurred after the indemnity agreement was reached at a time when the professional advice from G's solicitors was that the claims would be 'extremely difficult' to defend and the prospects of success were no higher than 35%. The Judge estimated that C had spent twice as much in pursuing their claims as they would have done had the insurer not funded the defence in the way that it did pursuant to the indemnity agreement and, therefore, ordered the insurer to pay half of C's costs.

Professional Negligence - Burden of Proof - Causation

Perry v Raleys Solicitors
[2019] UKSC 5

The Claimant, C, a former miner who developed vibration white finger, sought compensation through a government scheme. The Defendant solicitors, R, who had acted for C, advised C to settle his claim for general damages only. C subsequently issued proceedings against R claiming damages for loss of an opportunity to claim a services award for tasks such as gardening and DIY. R admitted that it had given negligent advice, but disputed causation. At first instance, the claim failed. The Judge found that C had given dishonest evidence before him as to his ability to perform tasks unaided and concluded that C had not established that he would have made an honest claim for services if competently advised. Accordingly, C had not established that R's admitted negligence had caused him to settle at an undervalue. C appealed. The Court of Appeal reversed the first instance decision, holding that the Judge had wrongly conducted a trial within a trial on causation, had wrongly imposed a burden on C to prove that he would have brought a successful claim and had inappropriately and irrationally found that the evidence given by C and his family was false. R appealed.

DOLMANS RECENT CASE UPDATE

The Supreme Court confirmed that the test of causation in professional negligence claims, as laid down in *Allied Maples Group Ltd v Simmons & Simmons [1995]*, required the Courts to distinguish between those matters which C had to prove and those better assessed on the basis of the evaluation of a lost chance. Where, as here, the question of whether C would have been better off depended upon what C would have done if competently advised; that had to be proved on the balance of probabilities. C had to prove that, properly advised, he would have claimed a services award within time and the Judge had been correct to add that such a claim would have had to be honest, as dishonest claims fall outside the category of lost claims for which damages can be claimed in negligence against professional advisers. Accordingly, the Judge had not erred in conducting a trial within a trial on causation. The Supreme Court further found that although the Judge had used language which suggested C also had to prove that his claim for services would have been successful, the Judge's analysis of causation in the context of his Judgment as a whole made clear that he had not imposed that additional burden. The credibility of oral testimony was a matter for the Trial Judge and there was nothing to support a conclusion of irrationality in the Judge's assessment of the family's evidence. Accordingly, the Supreme Court allowed R's appeal.

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- Display Screen Regulations – duties on employers
- Employers' liability update
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- Flooding and drainage – duties and powers of Highway Authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the Highway Authority in respect of highway waters
- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
- The Jackson Reforms (to include : costs budgeting; disclosure of funding arrangements; disclosure of medical records; non party costs orders; part 36/Calderbank offers; qualified one way costs shifting (QWOCS); strikeout/fundamental dishonesty/fraud; 10% increase in General Damages)
- Liability of Local Education Authority for accidents involving children
- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

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