motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
In this edition we cover:

case summaries

- **costs**

  NJL v PTE [2018]

- **expert reporting practices**

  Liverpool Victoria Insurance Company Limited v Asef Zafar [2019]

- **interim payments**

  Farrington v Menzies-Haines [2019]

- **MIB - late service?**

  Daniel James Colley v (1) Dylan Shuker (2) UK Insurance Limited (3) Motor Insurers Bureau [2019]

- **RTA 1988 interpretation**

  R&S Pilling (t/a Phoenix Engineering) v UK Insurance Limited [2019]

  Scott Richardson v Director of Public Prosecutions [2019]

- **unidentified driver**

  Cameron v Liverpool Victoria Insurance Company Limited [2019]

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NJL v PTE [2018]

The claimant brought a claim for personal injury following a road traffic collision in which he sustained a serious brain injury. His solicitors entered into a CFA in August 2012, by which time the defendant had formally admitted liability. There was, however, a dispute as to quantum, specifically a disagreement between the parties' medical experts, and the defendant's case was that the injury sustained by the claimant in the accident made little difference to his life trajectory. The claim settled for over £2 million 2½ months before a trial on quantum was due to begin. The CFA provided for a 25% success fee if the claim settled more than 3 months before trial, rising to 100% within the 3 months before trial. At the costs assessment, the claimant's solicitors conceded that the 100% success fee could not be justified and, instead, they argued for 67%. The defendant argued that CPR Part 45.19 operated to fix the success fee at 12.5%. The district judge assessed the success fee at 65%, pursuant to CPR Part 45.18(4). The defendant appealed the district judge's assessment, submitting that neither the claimant's solicitors nor the district judge had properly analysed the relevant risks. The defendant submitted that there was little CPR Part 36 risk when the CFA was entered into and, given that the claimant was a protected party, the need for approval of any settlement reduced the likely costs potency of an early Part 36 offer.

It was held, on appeal, that there were two fundamental risk factors to consider. The first was the risk arising from the timing of the Part 36 offer, because only those costs incurred from 21 days after the making of the offer would be at risk. The second factor was the risk arising from rejecting a Part 36 offer, but failing to better it at trial. As the district judge had not attempted to analyse the risks outlined above, it was held that her decision was plainly wrong and had to be overturned.

Moreover, it could not be said that a 65% success fee was standard or usual in the circumstances. It was held that given the claimant's solicitors' experience and obtaining an advice of leading counsel, the risk of their advising the claimant to reject a Part 36 offer, which they then failed to better at trial, was relatively low. Their overall chance of success was 87.5% which, using the ready reckoner, justified a 14% success fee. However, since the claimant had failed to achieve a success fee of 21% or more, CPR Part 45.19 operated to reduce it to 12.5%.

Liverpool Victoria Insurance Company Limited v Asef Zafar [2019]

Following a road traffic collision, a medical expert revised a prognosis in his medical report by simply adopting his instructing solicitor's suggestion to do so. The expert did not re-examine the claimant or exercise judicial judgment and there was no clinical justification for the amendment. The judge held that the expert had been reckless as to the truth of the revisions and whether they would mislead the court, and he was given a suspended 6 month custodial sentence.

The insurance company sought permission to appeal. This was granted on the basis that there was no authority or reported decision on the appropriate sentence for expert witnesses whose reporting practices placed them in contempt of court or who lied about such practices.

In hearing the appeal, the court gave guidance as to the appropriate sentence to pass. The general approach to sentencing for contempt involving a false statement verified by a statement of truth was a serious offence, whether it was a dishonest or reckless act. It was held that the deliberate or reckless making of a false statement would usually be so inherently serious that only committal to prison would suffice. The 2 year maximum sentence for contempt of court had to cater for a large range of conduct and sentence length would be determined on the individual facts, but a period "well in excess of 12 months" had previously been taken as a starting point. An early admission would be important mitigation, and the earlier the admission the greater the potential reduction. In the instant case, given the number of aggravating factors, it was held that the custodial sentence term should have been significantly longer than 6 months and should have been served immediately. However, a more severe sentence would not be imposed because it was held to be unfair to impose the adverse consequences of the instant guidance on the respondent, which had not been available at the time of his sentence. As such, the sentence was found to be unduly lenient, but was not varied.

Farrington v Menzies-Haines [2019]

In January 2016, the claimant had been riding a motorbike when the defendant drove his car out from a junction and into the claimant's path, causing him to suffer a brain injury.

The defendant admitted primary liability, but contributory negligence remained in issue. Imaging of the claimant's brain shortly after the accident showed that he had suffered a mild to moderate brain injury, but subsequent imaging showed that his brain had significantly recovered. The defendant's case was that any continuing problems suffered by the claimant were mostly psychological and were not a direct result of the brain injury incurred in the accident, but were related to other life-changing events in the claimant's life and/or his excessive use of cannabis. The defendant's insurer had been funding the claimant's rehabilitation, but ceased to do so in September 2018. The claimant, who had received £260,000 already, applied for an interim payment of £450,000. In his application, the claimant contended that the court should assume that the figure for past losses and general damages would be around £900,000 on a conservative estimate. The defendant contended that it could not be assumed that the claimant's medical evidence, from a neuro-psychiatrist, which was favourable to the claimant, would be accepted by the court.

It was held that the objective of an interim payment was to ensure that a claimant was not kept out of his money while avoiding any risk of overpayment. Therefore, where there were genuine and substantive challenges to causation, the court could not award an interim payment by assuming that causation issues would be decided for the claimant, otherwise interim payment applications would be mini trials of causation.

It was held that there remained a significant gap between what the claimant was seeking and what the defendant was conceding, and if the court acceded to the application, there would be a real risk of overpayment. On that basis, the application was refused.

Daniel James Colley v
(1) Dylan Shuker (2) UK Insurance Limited
(3) Motor Insurers Bureau [2019]

The claimant, who was a passenger in a car driven by the first defendant, suffered serious injuries after the first defendant crashed the car. The claimant had been aware, before getting into the car, that the first defendant did not have a valid driving licence or insurance. The car was owned by the first defendant's father who was insured by the second defendant's insurer. The insurer obtained a declaration that it was entitled to avoid the policy pursuant to the Consumer Insurance (Disclosure and Representations) Act 2012. The claimant sought to set aside the declaration and brought a claim against the first defendant driver, the insurer and the MIB.

In March 2018, enquiry agents ascertained that the first defendant was living with his father and the claimant served proceedings on him at that address in June 2018. The papers were returned stating that the first defendant no longer lived there and the claimant obtained an extension of time for service until October. The claimant served the proceedings on the first defendant at his new address on 25 September 2018. The insurer applied to strike out the claim, relying on the declaration it had obtained under s. 152 of the Road Traffic Act 1988. The MIB applied to set aside the extension of time, arguing that the claimant had delayed serving the proceedings after receipt of the enquiry agents' report in March.

The first question was whether the claim against the insurer should be struck out. It was held that the wording of s. 152 was clear and provided the insurer with a complete defence to any claim to satisfy a judgment against the first defendant. The claimant had no cause of action against the first defendant's father who owned the vehicle and the first defendant was not an insured person. The court had no power to displace the clear provisions of s. 152(2) and it was held that the claim against the insurer had no real prospect of success and was struck out. The second question was whether the extension of time for service on the first defendant should be set aside. The court was satisfied that the claimant took reasonable steps to check the first defendant's address by instructing agents. There was no evidence of any change over the relative short period between March and June 2018 and it was held that good service was, therefore, effected in June 2018.

Even if it had not, it was appropriate to grant an extension of time because it was reasonable for the claimant to assume that the first defendant continued to reside at the last known address and the MIB had suffered no prejudice.

R&S Pilling (t/a Phoenix Engineering) v UK Insurance Limited [2019]

The appellant provided H with a policy of motor insurance who, during the period of cover, had been repairing his car at his employer's premises (with his employer's permission) to enable it to pass an MOT. Sparks caused by his welding caused a fire, which resulted in substantial damage to the employer's premises and an adjoining property.

The employer's insurer paid out in respect of the damage and brought a subrogated claim against H for an indemnity, although it agreed not to pursue him personally and would limit itself to whatever it could recover from the appellant.

The appellant sought a declaration that it was not liable to indemnify H, arguing that the policy did not cover claims arising from the repair of the car on private property. Clause 1(a) of the appellant's policy booklet provided cover for damage to property "if you have an accident in your vehicle" and the insurance certificate promised that the policy satisfied the requirements of s. 145(3)(a) of the Road Traffic Act 1988. The high court interpreted the policy as covering accidents occurring on private property, but concluded that H's significant repairs did not constitute "use" of the car, as required by s. 145(3)(a).

The court of appeal reversed that decision, holding that s. 145(3)(a) extended the cover provided by clause 1(a) to all accidents "involving" the vehicle, whether occurring in public or private places. The motor insurer appealed to the supreme court.

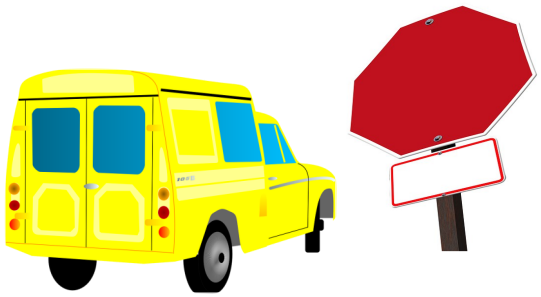
It was held that the court of appeal had gone too far in holding that the clause 1(a) was to be read as providing cover for all accidents "involving" the vehicle. That removed the need for a statutory causal link between the damage and the use of the vehicle on a road or other public place, and, thereby, expanded the cover significantly beyond the requirements of the Act.

The key question was whether the property damage fell within clause 1(a) when properly interpreted. It was held that carrying out significant repairs to a vehicle on a private property did not entail its "use" and the damage was neither caused by, nor arose from, the use of the car on the road. It was the owner's alleged negligence in carrying out the repairs, not the prior use of the car as a means of transport, which caused the property damage. It was, therefore, held that the appellant was entitled to a declaration that it was not liable to indemnify the vehicle owner for property damage and the appeal was allowed.

Scott Richardson v
Director of Public Prosecutions [2019]

The appellant had worked as security at a pub and had been living in a van. On the day in question, the appellant had been drinking in the pub, but had not been working. His van was parked in a nearby car park, which had two entrances/exits without barriers. It had various parking signs within it, with some stating that the parking was private or for customers of specific businesses. The appellant left the pub, fell asleep in his van and one of the bar staff called the police. The appellant was charged under s. 4(2) of the Road Traffic Act 1988 for being in charge of a motor vehicle in a "public place" while drunk. He pleaded not guilty, maintaining that the car park was not a public place.

The appellant was convicted, finding that the car park was a public place with varying restrictions on different parking spaces, but no physical restriction to access, and that the appellant had been parked as a member of the public as he had not been working. He appealed the conviction.



It was held that there was no statutory definition of a "public place" in the 1988 Act. There had to be evidence that the public actually used premises; it was insufficient that they could have access if they were so inclined. It was held that the public's use of the place had to be lawful, in that they had express or implied permission to access it. On the application of the facts, it has held that the applicant's submission of no case to answer should have succeeded. The findings of fact were insufficient to support a conviction. There were various signs in the car park indicating that public parking was not permitted. The appellant could only be convicted if he had parked in a public space, and that depended on where in the car park he had parked. There had been no finding by the justices as to where the appellant had parked and the absence of such a finding was fatal to the conviction. Moreover, there was no evidence of any use of the car park by the public and the appeal was granted.

Cameron v Liverpool Victoria Insurance Company Limited [2019]

There was a hit-and-run collision, where the driver of the car at fault was never identified, but its registered keeper was. An insurance policy covered one named individual, not the named keeper, to drive the car. The motorist who was involved in the collision issued proceedings against the keeper, erroneously believing him to be the driver. When it became clear that he was not driving, the motorist added the insurer as a defendant, seeking a declaration under s. 151 of the Road Traffic Act 1988 that it was obliged to satisfy any unsatisfied judgment against the keeper. The insurer denied liability, arguing that the policy did not cover the keeper and the driver had not been identified. The motorist applied to amend her claim form by removing the keeper as the first defendant and substituting "the person unknown driving vehicle [registration number] who collided with vehicle [registration number] on [date of accident]. The district judge dismissed her application and granted summary judgment in favour of the insurer. The court of appeal reversed that decision, holding that the court had discretion to permit an unknown person to be sued where the driver could not be identified, because otherwise it would not be possible to obtain a judgment which the insurer would be bound to satisfy. The insurer appealed the decision to the supreme court.

It was held that the critical question was what the basis of the court's jurisdiction over the parties was and in what circumstances jurisdiction could be exercised against persons who could not be named. Although it would be possible, in principle, to locate or communicate with a defendant who was identifiable, but their name was not known (eg - a squatter), other unnamed defendants, such as most hit-and-run drivers, are anonymous and cannot be identified. An identifiable, but anonymous, defendant could be served with a claim form because it was possible to locate or communicate with them, but an unidentifiable defendant could not. It was a fundamental principle that a person could not be made subject to the court's jurisdiction without having notice of the proceedings as would enable them to be heard. A person who was anonymous and could not be identified could not be sued under a pseudonym or description unless the circumstances were such that service of the claim form could be affected or properly dispensed with. That result was not inconsistent with EU Directive 2009/103 and, as such, the insurers' appeal was allowed.

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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