DOLMANS INSURANCE BULLETIN

Welcome to the April 2026 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

Deflecting Various Arguments in Highways Matters

LB v Merthyr Tydfil County Borough Council

Claimants will often introduce a variety of arguments in an attempt to persuade the Court that a Defendant Local Authority has breached Section 41 of the Highways Act 1980.

In the recent case of *LB v Merthyr Tydfil County Borough Council*, in which Dolmans represented the Defendant Local Authority, the Claimant raised various issues, including categorisation and use of the highway, the slope of the carriageway and inspections under parked vehicles in an effort to convince the Trial Judge that the Defendant Local Authority had breached Section 41 and/or that the Defendant Local Authority had no Section 58 Defence under the Highways Act 1980.

This matter also provides a useful summary of the basic framework of the issues to be considered when dealing with such highways matters.

Background and Allegations

The Claimant alleged that she was walking along a rear access lane when she stepped in a depression, causing her to fall and sustain personal injuries.

The relevant location was part of an adopted highway and the Claimant alleged breach of the Highways Act 1980 accordingly.

The Claimant's Particulars of Claim also pleaded a breach of common law negligence. It was argued, however, that there is no common law duty to maintain the highway, any such common law duty in respect of the highway being restricted to misfeasance rather than nonfeasance. It was accepted that the Claimant had a cause of action for breach of the statutory duty in accordance with Section 41 Highways Act 1980, but did not have a cause of action in common law negligence accordingly.

The Claimant was required to prove the mechanism of the alleged accident, including identification of the particular defect. In addition, the Claimant had to prove that the alleged defect was a real source of danger at the time of the alleged accident.

The Defendant Local Authority argued that it had an appropriate Section 58 Defence, the burden to prove the same shifting to the Defendant Local Authority. Likewise, the Defendant Local Authority was required to prove any contributory negligence alleged on the Claimant's part.

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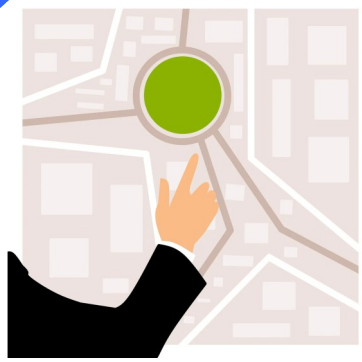

Mechanism of the Alleged Accident

The Claimant argued that she was able to prove the circumstances and mechanism of her alleged accident, relying upon her own evidence, that of her husband who did not witness the mechanics of the Claimant's alleged accident and various photographs taken by the Claimant's husband some days following the date of the Claimant's alleged accident when she was not present.

The Defendant Local Authority referred to the Court of Appeal decision in *James v Preseli Pembrokeshire District Council (1993) PIQR 114*, where it was held that a claimant must satisfy the court that the particular spot where they tripped or fell was dangerous and the question is not whether the highway as a whole was in poor condition.

Some of the Claimant's photographs in the current matter showed various locations in the vicinity which the Claimant stated merely provided some perspective of the relevant lane.

As in all such matters, it is important to consider the Claimant's copy medical records. In this particular matter, the Claimant's copy medical records referred to the Claimant having tripped rather than having placed her foot in a depression as alleged. The Claimant was forensically cross-examined at trial and was adamant that she had not tripped, but that her foot had gone down into the alleged defect.

Real Source of Danger

In accordance with the Court of Appeal decision in *Dean and Chapter of Rochester Cathedral v Debell (2016) EWCA Civ 1094*, it is not enough for the court to find that the defect posed a foreseeable risk to users of the highway. The risk must be such as to create a real source of danger, borrowing the language of Dillon LJ in *Mills v Barnsley MBC [1992] 1 P.I.Q.R. 291*. The assessment of dangerousness must also take account of the nature of the highway where the alleged accident occurred.

The rear access lane where the Claimant's alleged accident occurred in the current matter did not have a designated footway and was classed as a carriageway, providing vehicular access to the rear of the adjacent properties. The Claimant argued that the relevant carriageway should be re-categorised to account for pedestrian usage.

The Defendant Local Authority referred to the decision in *Cenet v Wirral MBC (2008) WHC 1407 (QB)*, where Swift J held that when making an assessment of dangerousness, the correct approach is to apply the standards of the carriageway to such defects, unless there is evidence of an abnormal amount of pedestrian traffic on the particular stretch of the carriageway. There was, however, no evidence to suggest an abnormally high level of footfall upon the rear lane in the current matter.

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The Claimant also argued that the Defendant Local Authority's post-accident inspection did raise an actionable defect at the relevant location. The Claimant's Claim Notification Form was submitted over 3 months after the date of the Claimant's alleged accident. In response to this, the Defendant Local Authority's Highways Inspector undertook an ad-hoc inspection and did, indeed, note an actionable defect at that time.

It was argued, however, that it did not automatically follow that the alleged defect was the same size as at the time of the Claimant's alleged accident and that the Claimant had to prove that the alleged defect was a real source of danger at the time of her alleged accident by reference to her own photographs and measurements, which were disputed. The Defendant Local Authority's said inspection indicated a range of measurements, some of which were below the relevant intervention level for the location.

Many of the Claimant's photographs did not contain any measurements, but rather showed the scene and various angles of the depression in the carriageway. The remaining photographs did include a tape measure, but it was not possible to determine the size of the depression from these images. It was argued that the Claimant's photographs showed a depression in the carriageway that would not present a real source of danger to the ordinary traffic utilising that particular stretch of the highway, namely slow-moving vehicles. In addition, the alleged defect was located on the edge of the carriageway and could easily have been avoided by users of the highway.

Section 58 Highways Act 1980

By way of a reminder, Section 58 of the Highways Act 1980 provides:

(1) In an action against a Highway Authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense, it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove the Authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.

(2) For the purposes of a defence under subsection (1) above, the Court shall in particular have regard to the following matters:

(a) The character of the highway and the traffic which was reasonably to be expected to use it;

(b) The standard of maintenance appropriate for a highway of that character and used by such traffic;

(c) The state of repair in which a reasonable person would have expected to find the highway;

(d) Whether the Highway Authority knew or could reasonably have been expected to know that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;

(e) Where the Highway Authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed.

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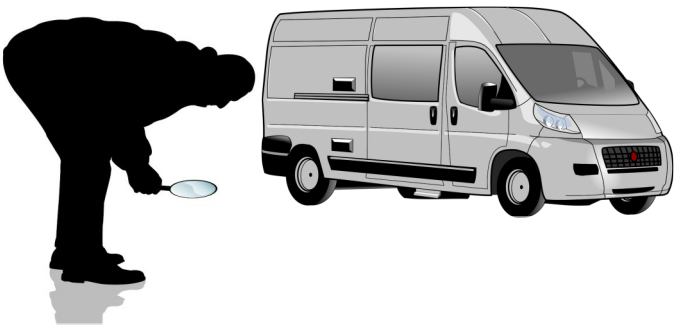
The rear access lane where the Claimant's alleged accident occurred was subject to 6 monthly walked inspections. No actionable defects were noted at the location of the Claimant's alleged accident during the Defendant Local Authority's pre-accident scheduled inspection.

The Claimant maintained that the alleged defect had been missed during this pre-accident scheduled inspection. In support of this allegation, the Claimant referred to another ad-hoc inspection that was undertaken by the Defendant Local Authority prior to notification of the Claimant's alleged accident, but since the Defendant Local Authority's pre-accident scheduled inspection. At the time of this particular ad-hoc inspection, no actionable defects were noted at the location of the Claimant's alleged accident. This was not, of course, the ad-hoc inspection referred to above when the Defendant Local Authority subsequently took measurements.

The Defendant Local Authority argued that even if the alleged defect was missed at the time of this other ad-hoc inspection, which was denied, that was not evidence that the alleged defect was, in fact, present and actionable some months earlier at the time of the pre-accident scheduled inspection and was not evidence that the said pre-accident scheduled inspection was not carried out reasonably and competently.



In any event, the relevant Highways Inspector dealt specifically with this other ad-hoc inspection by way of witness evidence, when it was recalled that a van was parked in the rear access lane that would have obscured the alleged defect. The Highways Inspector even returned later that day to check if the van had been moved, but it had not.

The Defendant Local Authority does not permit its Highways Inspectors to look underneath vehicles when inspecting the highway for reasons of safety and it was argued that this is plainly reasonable in the circumstances. It was also adduced that the Highways Inspector had noted other defects close to the relevant location and that it was unlikely, therefore, that the said Highways Inspector would have missed the alleged defect, unless that section of the carriageway was obscured as alleged.

There were no complaints and/or other accidents recorded in relation to the location of the Claimant's alleged accident during the 12 month period prior to the same.

REPORT ON

Judgment

The Trial Judge found that the Claimant, her husband and all the Defendant Local Authority's witnesses were entirely credible, sincere and genuine.

Although the Claimant's husband did not witness the Claimant's accident, he was present at the time and the Trial Judge was satisfied with the Claimant's evidence regarding the mechanism of the alleged fall. The Trial Judge was also satisfied that the Claimant's evidence as to the location of the alleged defect was accurate. However, the Trial Judge preferred the Defendant Local Authority's evidence regarding dangerousness.

The Trial Judge preferred the Defendant Local Authority's photographs and was not satisfied with the Claimant's measurements. Counsel for the Claimant submitted, however, that the Trial Judge did not have to make a finding as to the depth of the alleged defect, only as to its overall dangerousness. The Claimant had also suggested that the alleged defect was on a slope and that this slope must be taken into account, as this allegedly increased the risk. However, the Defendant Local Authority argued that the focus would be on the depth of any alleged defects and that the slope at the relevant location did not increase the risk in any event.

The Trial Judge held that the Claimant had failed to prove that the alleged defect was dangerous and did not consider that the same presented a real source of danger at the time of the Claimant's alleged accident. Again, the Trial Judge was appreciative of the strength of the Defendant Local Authority's witness evidence and particularly the relevant Highways Inspector's post-accident measurements taken when the alleged defect was accessible.

As such, the Claimant's claim was dismissed.

Although he did not need to do so, the Trial Judge did comment upon the Defendant Local Authority's potential Section 58 Defence and was satisfied that this would have succeeded had he found that the Claimant had proved dangerousness in accordance with Section 41 of the Highways Act 1980.

The Trial Judge found that the highway was correctly categorised and that the relevant intervention level for this particular highway was, therefore, also correct, despite the Claimant's submissions to the contrary. The Defendant Local Authority's system was entirely appropriate and had been adhered to. The Trial Judge agreed that the Defendant Local Authority's post-accident ad-hoc inspection undertaken prior to notification of the Claimant's claim was frustrated by the parked van, but it was completely reasonable for the Highways Inspector not to look under vehicles for safety and practical reasons.

Comment

Although he recognised the efforts and various arguments made by the Claimant in an attempt to persuade him otherwise, the Trial Judge was not persuaded to find in the Claimant's favour.

The Defendant Local Authority was able to deflect the Claimant's arguments through a strongly pleaded Defence, detailed witness evidence, submissions and reliance upon relevant case authorities.

This was a Multi-Track matter claimed up to £100,000.00. The Trial Judge's decision, therefore, resulted in substantial savings for the Defendant Local Authority in both damages and costs.

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FOCUS ON

Updated Judicial College Guidelines

The 18th Edition of the Judicial College Guidelines was published on 9 April 2026.

The purpose of the Guidelines is to facilitate a more uniform and consistent approach to the assessment of damages. They are based on awards of damages made by the Courts.

Figures in the 18th Edition have been uplifted from those in the 17th Edition by reference to the Retail Prices Index (RPI) for August 2025. In the main, this constitutes an uplift in the region of 8.26%. These figures would need to be increased by the appropriate index for inflation between August 2025 and the date of any assessment of damages.

As previously, the Guidelines' editorial team has given consideration to whether an index other than RPI should be used, but has concluded that it is not for them to prescribe a different inflationary index from that which is judicially approved and adopted by the courts dealing with personal injury claims. This is a matter for the Court's adjudication. Nevertheless, the comment is made that it is '*important that the issue of the appropriate inflationary index to be applied to general damages is resolved. This is particularly so given the government's stated intention to replace RPI with the CPI/ CPIH by the end of this decade*.'

There have been changes to the section on Epilepsy in Chapter 3, including the medical terminology used. In particular, the previously used terms established grand mal and established petit mal, which are no longer used in clinical practice or medical literature, have been replaced with reference to generalised motor or tonic-clonic seizures (formerly grand mal) and focal seizures (formerly petit mal). Further, the two categories have been merged to reflect that the factors influencing the level of award are likely to be similar in each case, such that there is now a single very wide bracket for established epilepsy.

Changes have also been made in the category of Sexual and/or Physical Abuse in Chapter 4 to reflect updated case law. There are more factors detailed to be taken into account in respect of assessing both general damage for the abuse and psychiatric injury and aggravating features that could lead to an additional sum for injury to feelings. Whilst the brackets in this section have largely been adjusted in line with inflation, it is notable that the top figure for the moderately severe category (and hence bottom figure of the severe category) has increased by c.18.29%.

A new section on Miscarriage has been included in Chapter 6.

As ever, the Introduction to the Guidelines reminds us that, whilst the Guidelines are persuasive authority, they are not binding and no two cases are likely to be the same in their effect. Interpretation and good judgement will always be needed to reach a just and fair award in any particular case.

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CASE UPDATES

Costs - Authorised Persons - Reserved Legal Activities

Mazur & Others v CILEX & Others
[2026] EWCA Civ 369

The Court of Appeal has overturned the High Court ruling in relation to supervised legal work. The decision has been hailed as "the most consequential judgment for legal services in recent history".

In September 2025 when the case came before the High Court, the Judge, Mr Justice Sheldon, distinguished between (a) supporting or assisting an authorised solicitor in conducting litigation and (b) conducting litigation under the supervision of an authorised solicitor. He decided that an unauthorised person could do (a) but not (b). Therefore, unauthorised individuals, such as paralegals and trainee solicitors, were not permitted to carry out tasks involved in taking legal action, even under supervision. It was held:

"*Mere employment by a person who is authorised to conduct litigation is not sufficient for the employee to conduct litigation themselves, even under supervision. The person conducting litigation, even under supervision, must be authorised to do so, or fall within one of the exempt categories. In my judgment, this is the proper construction of the LSA (the Legal Services Act 2007)*". This left the business models of many firms of solicitors in disarray.

The Appellant (CILEX) appealed to the Court of Appeal. On appeal, the issues were:

(1) Whether the Judge was right to hold that unauthorised persons were "carrying on the conduct of litigation" if they did acts that constituted the conduct of litigation under the supervision of an authorised individual;

(2) What tasks constituted 'conducting litigation';

(3) Whether the working model adopted by law centres was contrary to the Legal Services Act.

CILEX and the interveners submitted that both activities were lawful. They contended that to "carry on the conduct of litigation" involved two elements: performance and responsibility; performance could be delegated to unauthorised persons working under the supervision of an authorised individual without that authorised individual delegating responsibility for the conduct of the litigation.

The Court of Appeal allowed the appeal and reversed the decision of the High Court.

Held

The Court of Appeal's starting point was linguistic: 'conduct of litigation' refers to tasks to be undertaken; 'carry on' denotes the direction and control of, and responsibility for, those tasks. Responsibility, the Court held, is the decisive factor. An unauthorised individual who performs litigation work under the direction of an authorised person does not assume responsibility and, therefore, does not 'carry on' the reserved activity.

The Court also noted that the distinction drawn by the High Court between (a) assisting or supporting and (b) conducting litigation under supervision was not correct. An unauthorised person is allowed to act for and on behalf of an authorised individual so as to conduct litigation, provided they are appropriately supervised by the authorised individual.

The Court of Appeal affirmed that unauthorised individuals can lawfully perform such tasks "for and on behalf of an authorised individual," including solicitors or authorised legal executives. It confirmed that the Legal Services Act 2007 was not intended to disrupt the established approach of delegation of litigation tasks. It held:

"An unauthorised person may lawfully perform any tasks, which are within the scope of the conduct of litigation, for and on behalf of an authorised individual such as a solicitor or appropriately authorised CILEX member, provided the authorised individual retains responsibility for the tasks delegated to the unauthorised person (both formal responsibility and the responsibilities identified at section 1(3) of the 2007 Act). In that situation, the authorised individual is the person carrying on the conduct of litigation."

The Judgment also places renewed emphasis on the quality of supervision. Authorised individuals remain professionally accountable for all delegated work. The SRA's Code of Conduct requires solicitors to ensure that those they supervise are competent and that the level of oversight is appropriate to the nature of the work and the experience of the individual.

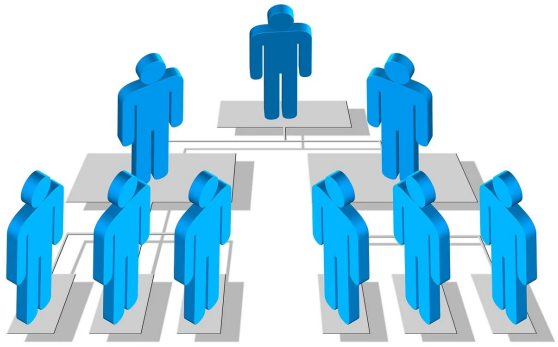
What is appropriate will depend on the circumstances, including:

(1) The complexity and nature of the work itself;

(2) The experience, competence and capacity of the unauthorised individual; and

(3) The availability of alternative means of support.

The Law Society advises that the authorised individual should have sufficient relevant experience and competence to supervise effectively.



The Court of Appeal's decision does not amount to an invitation for a 'free-for-all' when it comes to the handling of litigation. The lead Judgment of Lord Justice Birss explains:

"The delegation of tasks by the authorised individual to the unauthorised person requires proper management supervision and control, the details of which are a matter for the regulators. In some circumstances the degree of appropriate control and supervision will be high, with approval required before things are done. In other, for example routine, circumstances, a lower level of control and supervision will be required. In such cases, it may be sufficient for the authorised individual to conduct regular meetings with the unauthorised person and to sample their work. The degree of prior approval contended for by the Law Society and SRA is not required by the 2007 Act. In short, provided the authorised individual puts in place appropriate arrangements for supervision of and delegation to unauthorised persons, those persons may perform tasks that amount to the conduct of litigation for and on behalf of the authorised individual."

Legal Aid - Right to Legal Representation

Davies v Lettington
[2026] EWCA Civ 364

The Court of Appeal has held that a County Court Judge should have adjourned a civil committal hearing so that the Defendant could obtain publicly funded legal representation. The Court concluded that the refusal of an adjournment was vitiated by a mistaken understanding of the Legal Aid position and by a failure to give practical effect to the Defendant's Article 6 right to representation.

The appeal arose from a rural land dispute. At the original hearing, the Appellant represented herself. The Judge informed her that she was entitled to legal representation for a committal hearing, that Legal Aid might be available but might depend on her means, and that it was her responsibility to make appropriate enquiries. The Appellant asked for an adjournment because she had been advised by a local solicitor that there was no Legal Aid for civil cases. The Judge refused, stating that the solicitor would know the rules. He found that the Appellant was in deliberate breach of an injunction.

Held

On appeal to the Court of Appeal, it was held that the following principles could be drawn from the ruling in *All England Lawn Tennis Club (Championships) Ltd v McKay [2019] EWHC 3065 (QB), [2020] 1 W.L.R. 216, [2019] 11 WLUK 209* and applied to the County Court, *McKay* applied:

(i) A defendant to civil committal proceedings had the right to legal representation.

(ii) Legal Aid for civil committal proceedings was treated as criminal Legal Aid for the purposes of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Pt 1 s.14 (h) and the Criminal Legal Aid (General) Regulations 2013 reg.9.

(iii) There was no means test for Legal Aid funding for representation for committal proceedings in the County Court.

(iv) The reasons that made legal representation in the interests of justice in the High Court generally also made it in the interests of justice in committal proceedings in the County Court.

(v) Determinations regarding Legal Aid in civil committal cases were to be made by the Director of Legal Aid Casework.

(vi) An application for Legal Aid was made through a solicitor, who would help the client complete the application and then submit it on paper or electronically to the Legal Aid Agency.

The Orders made at the original hearings were set aside. The finding that the Defendant had deliberately breached the injunction were also set aside. The committal application was remitted to the County Court for rehearing before a different judge.

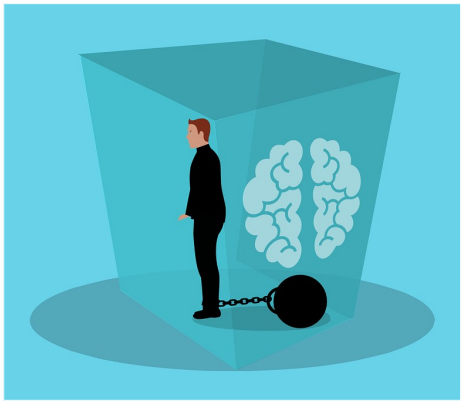
The case restates that civil committal proceedings amount to a criminal charge for Article 6 purposes, that a defendant who wants representation must be given a real opportunity to obtain it, and that those protections cannot be diluted simply because the court proposes to determine breach first and sanction later.

Appeal allowed.

CASE UPDATES

Psychiatric Injury - Secondary Victim - Accident

MIM v Sheffield Teaching Hospitals NHS Foundation Trust [2026] EWHC 562 (KB)



The Claimant (MIM) suffered psychiatric injury as a result of witnessing the labour of his wife and subsequent delivery of his son who, due to the admitted negligence of the Defendant ('D') in the management of the labour, was born requiring resuscitation having suffered an acute profound hypoxic brain injury. Upon D's application to strike out the claim, the Court was required to consider whether MIM had any prospect of succeeding in his claim or whether the claim must fail following the decision of the Supreme Court in *Paul v Royal Wolverhampton NHS Trust [2024]* (reported upon within the January 2024 edition of Dolmans' Insurance Bulletin).

In *Paul* and the two conjoined cases heard by the Supreme Court, the psychiatric injury was caused by witnessing the death (or its immediate aftermath) of a close relative from a medical condition which the Defendants had negligently failed to diagnose and treat and which proper treatment would have prevented. The issue was whether a claim for damages by a secondary victim could only be brought where the Claimant witnessed an accident or whether witnessing what the Supreme Court termed a 'medical crisis' could found such a claim. The Supreme Court held that a claimant cannot recover damages for personal injury as a secondary victim unless the claimant witnessed an accident (or its immediate aftermath), that is, '*an unexpected and unintended event which causes injury (or a risk of injury) to a victim by violent external means'*.

D applied to strike out MIM's case on the basis that it involved a medical crisis rather than an accident. MIM's pleaded claim was that what he witnessed amounted to an external, traumatic event which immediately caused injury to his son and that he directly perceived the event and its immediate aftermath and submitted that this amounted to an accident or, in the alternative, that not only an 'accident' can give rise to a claim from a secondary victim.

In relation to the latter point, MIM relied on comments early in the Judgment in *Paul.* The Judge considered that reading the Judgment in *Paul* as a whole, it was clear that in order to succeed a secondary victim must have witnessed an accident which caused (or had the capacity to cause) injury to the primary victim.

In analysing whether what MIM witnessed was an 'accident', the Judge considered that an ordinary person would say that MIM witnessed the process of labour and the birth of his son in an injured condition such that he required resuscitation, a description of a negligently caused medical crisis rather than an accident. Cross-checking that against the definition of accident in *Paul,* the Judge rejected MIM's submission that it is not always easy to pinpoint the happening of an accident giving rise to the liability to the secondary victim. An essential part of the reasoning in *Paul* was that an accident is '*a discrete event … something which happens at a particular time, at a particular place, in a particular way*'. MIM's description of the event as a continuum during which he feared the worst and eventually the worst happened, running from the time the midwives did not appear to know what was going on and the alarm keeping sounding and culminating in the delivery of his son, did not constitute a discrete event. MIM's very use of the word continuum suggested the opposite.

Further, the matters pleaded did not amount to an unexpected and unintended event which caused injury to MIM's son by external means, violent or otherwise. The sounding of the alarm was not an unexpected or unintended event during the course of labour and did not cause the injury to MIM's son. The injury was caused by a period of hypoxia during the process of labour and birth. It was hard to distinguish the failure in this case to expedite delivery from the cases considered in *Paul* where the Court noted that what the proposed secondary victim witnessed was not an accident but a negligently caused medical crisis.

MIM sought to distinguish his case on the grounds that in *Paul* there was a separation between the medical negligence and the injury – the negligence was remote in time and place to the injury and was not witnessed by the claimants. In contrast, MIM saw everything that went wrong, both breach of duty and outcome, in a relatively short period of time. Further, MIM was closely involved e.g. observing the monitors. The Judge rejected this distinction, noting that in *Paul* the Court found that there need not be a close temporal connection between the negligence and the injury in order for a secondary victim to recover.

The Judge concluded that, on the facts of this case, there was no 'accident' and the case was accordingly struck out.

CASE UPDATES

School - Physical Intervention - Battery - False Imprisonment - Aggravated Damages

FXS v The Mulberry Bush Organisation Limited
[2026] EWCA Civ 415

The Claimant ('C') was placed at the Defendant residential special school between June 2008 and September 2009 (when he was age 9 to 11). The School appealed to the Court of Appeal against the findings that three incidents in which C had been restrained face down constituted the tort of battery and incidents in which a towel had been wrapped around the handle of his bedroom door and the door pulled constituted the tort of false imprisonment. The School also appealed against the awards of aggravated damages made in respect of battery and false imprisonment. The first instance Liability Judgment was reported upon within the June 2024 edition of Dolmans' Insurance Bulletin and the Quantum Judgment within the November 2024 edition.

Battery

The School submitted that the Trial Judge had erred in law in relation to the incidents of face down restraint as an essential ingredient of the tort of battery is that there should be 'hostile intent'. The Court of Appeal rejected this. The Court reviewed the relevant case law and defined the ingredients of trespass to the person in the form of battery as requiring:

(1) The application of force, however slight;

(2) Which is intentional not accidental (it is the force which must be intentional; there need not be any intention to cause harm);

(3) Without the express or implied consent of the other person (recognising that in certain limited circumstances the public interest may require that their consent is not capable of rendering the act lawful);

(4) Which is not physical contact which is generally acceptable in the ordinary conduct of everyday life; and

(5) For which there is not some lawful excuse (which will include certain contact with children, lawful arrest, self-defence, the prevention of crime, and so on).

The Court considered that the Trial Judge was mistaken in treating it as sufficient to establish a battery that the face down incidents involved conduct which was contrary to the School Policy. The relevant issue was whether there was a lawful excuse.

CASE UPDATES

Section 93(1) of the Education and Inspections Act 2006 provides that school staff may use reasonable force to prevent harm to others, prevent damage to property and prevent prejudice to the maintenance of good order and discipline at the School. There could be no doubt in this case that the member of staff ('P') responsible for the face down restraints acted for one or more of the purposes identified in s.93(1). It was common ground that on each occasion the use of physical restraint was appropriate. The question was whether what P did was reasonable.

On the facts of this case, the Court found that the Trial Judge was entitled to conclude that it was not. The appeal in relation to the findings that the three face down incidents involved the tort of battery was, therefore, dismissed.

False Imprisonment

In relation to the finding of false imprisonment, the School submitted that the 'towel method' did not constitute 'imprisonment' for the purposes of the tort because it did not impose a total deprivation of liberty. The Court rejected this submission. Case law is clear that all that is necessary for the ingredient of imprisonment is some enforced restriction of liberty of movement within a confined area, the essence of which is being made to stay in a particular place, whether by physical barriers, threats or other methods of coercion.

'*Confining a child at a residential school to their bedroom by holding the door shut with a towel is such a restriction. It is no less so by virtue of the fact that the door is not completely closed but has a space through which communication is possible: exit by the child is not possible through the space and the very purpose of the manoeuvre is to prevent the child from leaving the room.*' However, the real issue was not whether there was 'imprisonment' but whether it was unlawful.

The Trial Judge had found that the towel method was a planned physical intervention which had not been used in accordance with Department for Education Guidance in force at the time. The Judge had erred in finding this was sufficient as it did not determine whether the conduct was lawful. It might be a matter of good practice to consult in advance with parents and/or the Local Authority over the use of such a technique, but a failure to do so does not render the use of the technique in any given situation unreasonable for the statutory purposes identified in s. 93(1). The Trial Judge should have asked herself in respect of each occasion whether the use of the towel method was reasonable for one of those statutory purposes.

The Court considered the notes of each of the incidents made clear that, on all occasions, the towel method was being used to avoid the risk of further injury and was often being applied so as to promote C's welfare by allowing him to calm down whilst communication with a member of staff remained available, as a form of de-escalation. The Court was satisfied on the evidence that in each case it was confinement which was no more than was reasonable to fulfil both the statutory purposes of s.93(1) and also the fulfilment of the School's duty to C and the other pupils under s.87 of the Children Act 1989 in a reasonable and proportionate way.

Accordingly, the appeal in relation to the findings of false imprisonment in respect of the towel incidents was allowed.

Aggravated Damages

In view of the Court's decision that the towel incidents did not involve the tort of false imprisonment, the award of both compensatory and aggravated damages for this fell away.

In relation to the award of aggravated damages for battery, the Court noted that aggravated damages are compensatory, not awarded as punishment. They are to compensate for indignity, humiliation, disgrace or mental suffering. Case law is clear that all damages for injury to feeling from an assault itself should be reflected in the award of basic damages. Aggravated damages should be reserved for additional conduct beyond the assault itself and its motive/ context, which causes additional injury to feelings. It is, therefore, important when considering an award of aggravated damages to avoid double counting by focusing on conduct other than the assault and on additional injury to feelings caused by that additional conduct.

The Trial Judge identified two key features justifying her award of aggravated damages: (1) a failure to appreciate the significance and seriousness of a member of staff using a face down restraint; and (2) the School's conduct of the litigation in two respects: (a) a reluctance to acknowledge the prohibition on face down restraints in the School's Policy; and (b) some witnesses refused to accept the plain wording of the incident reports.

The first of these related to the School allowing P to be involved in the second and third battery after discussing the first with her and being aware of her stature. This was not properly the subject matter of aggravated damages because it was the context in which the second and third battery occurred and injury to feelings from those batteries could only be included in the award of compensatory damages which was made, not an award of aggravated damages.

CASE UPDATES

In relation to the reluctance to acknowledge the prohibition in the School Policy, this was influenced by the Trial Judge's view that the mere fact of such prohibition was sufficient to establish a battery, which was wrong. The School's case was that the face down restraint was reasonable in the particular circumstances of each incident, irrespective of the content of the Policy. That was a cogent case. It did not justify an award of aggravated damages.

Further, an award of aggravated damages, which requires egregious conduct, could not be supported on the basis that some witnesses refused to accept the plain wording of the incident reports. Witnesses were seeking to interpret notes of events that happened 15 years earlier. Whilst the Judge was entitled to find some of their answers unrealistic, this was not the sort of conduct for which aggravated damages are intended. It was not malicious or malevolent; insulting or oppressive; nor the kind of egregious conduct of litigation which is to be characterised as "high handed" or "particularly unacceptable".

Accordingly, the award of aggravated damages on the claim in battery was quashed.

The Court thus allowed the School's appeal, save for the finding on liability in respect of the three face down restraints (battery), for which the award of compensatory damages remained.

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

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