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DOLMANS INSURANCE BULLETIN

Welcome to the February 2023 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

Overcoming Expert Engineering Evidence - The Importance of Good Contemporaneous Witness Evidence

C O v Merthyr Tydfil County Borough Council

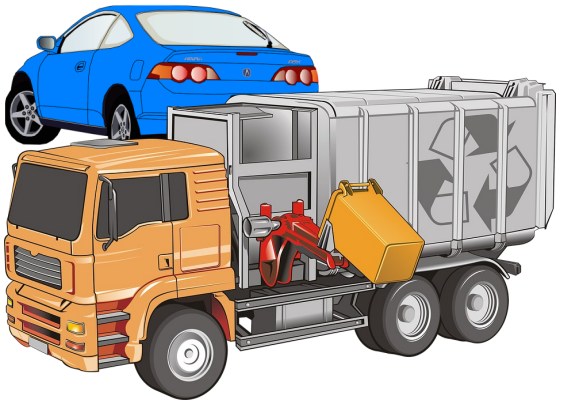
Situations often arise where, following a collision between vehicles, the Claimant's vehicle is disposed of after the Claimant's engineer has inspected the vehicle, but before the Defendant has had an opportunity of instructing its own engineer.

In this scenario, and especially where the extent of any vehicle damage is disputed, it is important that any Defence is worded specially and that lay witness evidence is utilised to overcome any issues.

This is illustrated in the recent case of *C O v Merthyr Tydfil County Borough Council*, in which Dolmans represented the Defendant Local Authority.

Background, Allegations and Admissions

The Claimant alleged that his vehicle was parked unattended on the highway, when the Defendant Local Authority's vehicle, being a refuse collection vehicle driven by its employee, collided with the Claimant's parked vehicle.



It was alleged that the driver of the Defendant Local Authority's vehicle was negligent.

The Claimant alleged that his vehicle was damaged as a result of the said collision, specifically the nearside door mirror and rear quarter panel of his vehicle. As a result of the alleged damage to the rear quarter panel, the Claimant's engineer had deemed the vehicle to be uneconomical to repair.

In addition to the alleged vehicle loss/write off value, the Claimant claimed substantial hire charges and engineer's fee, totalling in excess of £6,000.00.

An interim payment was made before Court proceedings were commenced, but limited to the cost of repairs to the door mirror only. It was admitted that the Defendant Local Authority's vehicle had brushed against the Claimant's vehicle door mirror, but that the said door mirror was already damaged, and all other alleged damage was disputed, as were the hire charges.

REPORT ON

Defence

Given the specific admissions and denials that had been made before Court proceedings were commenced, it was important that the Defence reflected these precisely.

It was admitted in the Defence that a collision between the Defendant Local Authority's vehicle and the Claimant's vehicle took place and that the said collision was caused by the negligence of the Defendant Local Authority's employee. However, no admissions were made as to any loss and/or damage suffered by the Claimant, as alleged in the Particulars of Claim.

The Defendant Local Authority averred that the collision had been between the Defendant Local Authority's vehicle and the Claimant's vehicle door mirror only. The Claimant was put to strict proof accordingly.

Claimant's Engineering Evidence

The Claimant's vehicle engineer recorded damage to the nearside door mirror, including glass, cover and motor. Damage also appeared to be recorded to the rear quarter panel which apparently rendered the vehicle undrivable.

Photographs of the Claimant's vehicle indicating nearside vehicle damage were attached to the said engineer's report. The Claimant's vehicle was deemed uneconomical to repair.

The Claimant's vehicle had already been disposed of and the Defendant Local Authority was, therefore, unable to obtain its own engineering evidence. However, the Defendant Local Authority disputed that the Claimant's vehicle was a total loss due to any accident related damage.

As such, an amended engineer's report was requested before Court proceedings were issued, to reflect alleged damage to the Claimant's vehicle door mirror only. However, the Claimant's engineer responded that the damage was consistent with the alleged accident circumstances and that the Claimant denied any pre-existing damage. No amended engineer's report was, therefore, forthcoming.

The Claimant did, however, provide, as requested, an invoice for the alleged door mirror repairs only, and these were paid in full on behalf of the Defendant Local Authority before Court proceedings were issued.

It is also important to note that some of the photographs within the Claimant's engineer's report appeared to show damage to the offside of the Claimant's vehicle, which was not the side nearest to the Defendant Local Authority's vehicle as it was travelling along the road.

REPORT ON

Defendant's Witness Evidence

Unfortunately, the driver of the Defendant's vehicle was no longer employed by the Defendant Local Authority, making it even more important that the Defendant Local Authority's witness evidence dealt precisely with the disputes and issues between the parties.

Witness evidence was adduced by the Banksman who had been at the scene and a Team Leader to whom the alleged accident was reported at the time.

Banksman's Evidence

The Banksman had provided an internal handwritten statement at the time of the alleged accident, a copy of which was exhibited to his Witness Statement in the proceedings. This confirmed that the Defendant Local Authority's vehicle just brushed against the door mirror of the Claimant's vehicle, which was already damaged and taped up. The Banksman stated that he could not see any new damage to the door mirror at the time and there was certainly no damage elsewhere that had been caused by the Defendant Local Authority's vehicle.

The Banksman referred specifically to the Claimant's engineer's report and photographs of the alleged damage, which were also exhibited to his Witness Statement. However, the extent and location of the damage shown was disputed.

Having witnessed the alleged accident, the Banksman stated that he could not see how the Claimant's vehicle was not driveable or why the Claimant needed to hire an alternative vehicle because of any damage caused by the alleged accident. In particular, the Banksman disputed that the Defendant Local Authority's vehicle collided with the nearside rear of the Claimant's vehicle or, indeed, with any other part of the Claimant's vehicle, other than brushing against the Claimant's door mirror that was already damaged before the alleged accident.

Team Leader's Evidence

The Team Leader completed an internal Incident Report at the time of the Claimant's alleged accident, a copy of which was exhibited to his Witness Statement. This Incident Report was based upon what the driver of the Defendant Local Authority's vehicle told him at that time and a Civil Evidence Act Notice was filed and served regarding the said driver's evidence.

As part of his investigation into the alleged accident, the Team Leader called at the Claimant's house approximately four hours after the alleged accident occurred. He spoke with the Claimant's wife and told her that he was taking photographs of the Claimant's vehicle, which was parked outside the Claimant's house.

The Team Leader noted that the vehicle was covered in scratches and dents that had obviously been there for some time. In addition, the door mirror was taped up, as the Banksman also stated, and this looked as though it had been done some time before. The Team Leader took various photographs of the Claimant's vehicle, copies of which were also exhibited to his Witness Statement.

The Team Leader stated that the alleged damage to the Claimant's vehicle was not consistent with the circumstances of the accident as alleged by the Claimant.

REPORT ON

Judgment

The District Judge preferred the Defendant Local Authority's evidence and dismissed the Claimant's claim.

The District Judge, after considering all of the evidence, did not consider even that the Claimant had proved damage to the vehicle's door mirror. It was noted that an interim payment had already been made to cover repairs to the said door mirror, but the District Judge was content to find that this had merely been made as a goodwill gesture.

Given the specific circumstances of the case, it was not considered appropriate to pursue any finding of fundamental dishonesty in this particular matter. There had been a collision and no CCTV footage was available. The Claimant had instructed an expert engineer and was arguably merely relying upon the said engineer's report and findings.

In addition, the District Judge was not prepared to make any adverse or unreasonable costs order against the Claimant in this particular matter.

Comment

This matter illustrates the importance of good quality contemporaneous evidence and the effective presentation of the same to the Court, which assisted the District Judge in this particular matter.

The District Judge dismissed the Claimant's claim, preferring the Defendant Local Authority's evidence, against a backdrop of an expert engineer's report that was, on the face of it, supportive of the Claimant's claim and without the direct witness evidence of the driver of the Defendant Local Authority's vehicle, thereby saving the Council from the significant damages claimed and costs.

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FOCUS ON

Amendments to QOCS

In last month's edition of the Dolmans' Insurance Bulletin, we reported on the ongoing attempts to overcome the difficulties for Defendants in enforcing costs orders in their favour where there has not been an order for damages made at trial and the proposed changes to CPR 44.14 to address these issues, the finer details of which were awaited. The wait is now over.

The Civil Procedure (Amendment) Rules 2023 were laid before Parliament on 2 February 2023 and come into force on 6 April 2023. Pursuant to Rule 24 thereof, CPR 44.14 is amended as follows:

"(1) Subject to rules 44.15 and 44.16, orders for costs made against a Claimant may be enforced without the permission of the Court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for ~~damages~~ or agreements to pay or settle a claim for, damages, costs *and interest made in favour of the Claimant.*

(2) For the purposes of the Section, orders for costs includes orders for costs deemed to have been made (either against the Claimant or in favour of the Claimant) as set out in rule 44.9.

(3) Orders for costs made against a Claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.

(4) Where enforcement is permitted against any order for costs made in favour of the Claimant, rule 44.12 applies.

~~(3)~~ (5) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record."

This is a welcome change for Defendants and reverses the effects of the decisions in *Cartwright v Venduct Engineering Ltd [2018]* and *Adelekun v Ho [2021]*, and the cases reported on last month; *Chappell v Mrozek [2022]* and *University Hospitals of Derby & Burton NHS Foundation Trust v Harrison*. All types of settlement are now included.

The amendments increase the 'pot' of money against which Defendants can enforce orders for costs in their favour as it now includes the Claimant's damages and costs.

It should be noted however that the changes are not retrospective. Rule 1(3) provides that these amendments apply only to claims where proceedings are **issued on or after 6 April 2023** (our emphasis).

There are concerns that this will lead to a rush of claims being issued before 6 April 2023. Claimants must however still comply with pre-action protocols or face potential adverse costs consequences for issuing prematurely.

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CASE UPDATES

Costs - QOCS - Non-Party Costs Orders

PME v The Scout Association [2023] EWHC 158 (SCCO)

The Claimant ('C') made a claim for damages for personal injury against the Defendant ('D'). The claim settled without proceedings being issued when C accepted D's Part 36 offer of £29,500. C served a Schedule of Costs. D made an offer to settle the claim for costs which C rejected. Part 8 costs proceedings were commenced by C. The bill was provisionally assessed at less than D's offer. C sought an oral review, but the costs were still assessed below D's offer and C was ordered to pay the costs of the Part 8 proceedings, provisional assessment and oral review. C pursued various unsuccessful appeals, resulting in further costs orders in D's favour. As a result of the operation of QOCS, D was unable to recover its costs by way of set off against C's damages or costs.

The retainer between C and his solicitors ('BBK') comprised a CFA which provided that any shortfall between the sums payable by C to BBK under the CFA and the costs recovered from D was capped at 15% of the damages received by C. Accordingly, D sought an order that BBK pay the costs on the grounds that BBK was the only party with an interest in the outcome of the detailed assessment and, in particular, in recovering more by way of costs than D had offered (a non-party costs order).

The Costs Judge dismissed D's application. A solicitor cannot be said to be acting outside the role of a solicitor if the solicitor is doing no more than the legislation pertaining to CFA's renders lawful and, in such circumstances, it would not be right to conclude that the solicitor is the 'real party' to the litigation. BBK, in attempting unsuccessfully to maximise C's costs recovery and beat D's offer, had been doing no more than any solicitor might do who is acting under any CFA lite or capped CFA. Whilst D was unable to set off its costs against C's damages and costs, that was the consequence of the QOCS regime.

Duty of Care - Construction Design and Management Regulations 2015 - Enterprise and Regulatory Reform Act 2013

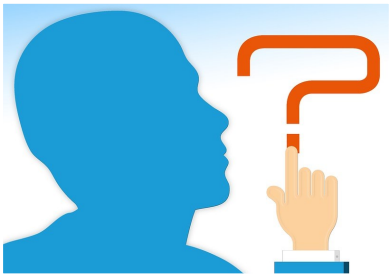
Lewin v Gray [2023] EWHC 112 (KB)

The Claimant was an experienced self-employed builder/roofer who was contracted by the Defendant to carry out some guttering work on a barn. He suffered catastrophic injuries when he fell through the roof of the barn. He brought an action in negligence, initially relying upon the provisions of the Occupiers Liability Act 1957, the Work at Height Regulations 2005 and the provisions of the Construction (Design and Maintenance) Regulations 2015 (CDM Regulations). Both parties were aware that the roof of the barn was fragile.

CASE UPDATES

The Claimant had vast previous experience of working at the Defendant's farm. In view of this, no criticism could be levelled at the Defendant for his selection of the Claimant as a competent contractor or for any failure to supervise the Claimant. Further, the Defendant was entitled to rely upon the Claimant to appreciate and guard against the risks inherent in performing the work at his property, pursuant to Section 2(3)(b) OLA 1957.

Neither the Claimant nor the Defendant had heard of the CDM Regulations before the accident and it was obvious that neither had complied with their respective obligations under the same.



The central issue at trial was whether the failure by the Defendant to comply with his obligations under the CDM Regulations, in having failed to request a completed Construction Phase Plan from the Claimant, gave rise to a cause of action. That required two further issues to be determined:

(1) Did the Defendant owe a duty of care in tort to ensure that the Claimant produced a Construction Phase Plan?

(2) If so, did the failure to discharge that duty cause or materially contribute to the Claimant's accident?

The Court held that no tortious duty of care arose. The obligations under the CMD Regulations did not translate into a common law duty of care. The fact that the CDM Regulations had been breached did not mean liability would attach, unless that breach was negligent. There could be no justification for imposing a common law duty on the Defendant for the failures of the obligations set out in the CDM Regulations.

The Defendant had not been charged with a criminal offence in connection with a breach of the CDM Regulations. It was not, therefore, fair or reasonable to override S.47 of the Health and Safety at Work Act 1974 (as amended by Section 69 of Enterprise and Regulatory Reform Act 2013) that "*Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide".* Further, whilst a criminal conviction can be evidence of negligence, the Defendant was not prosecuted, and even if the Defendant had been charged and convicted, it did not mean that an action in negligence would inevitably have succeeded.

Even if the Court was wrong on this, there was nothing to suggest that even if the Claimant had produced a Construction Phase Plan, having been asked to by the Defendant, he would have addressed the risks of falling from height more thoroughly and would have requested the Defendant provide an elevated cage to act as a "crash deck" (the Claimant's evidence being that this cage had been available and used on previous jobs at the property). There was nothing in a written Construction Phase Plan which would have alerted the Claimant to the need for a crash deck or prompted him to depart from his usual practice.

Obiter comments: Had the Claimant established liability, this would only have been to the extent of 25% of the value of the claim due to the Claimant's experience and skill and of him having used crash decks previously, which would have rendered him 75% contributory negligent.

CASE UPDATES

Mixed Injury Claims - Civil Liability Act 2018 - Whiplash Injury Regulations 2021

Hassam & Another v Rabot & Another [2023] EWCA Civ 19

The Civil Liability Act 2018 ("the Act") removed certain Claimants' rights to full compensation for whiplash injuries, but not for other kinds of injury. Together with the Whiplash Injury Regulations 2021 ("the Regulations"), the value of general damages for pain, suffering and loss of amenity payable in respect of whiplash injuries was to be an amount specified in the Regulations made by the Lord Chancellor. The figures prescribed by the Regulations are substantially lower than the PSLA awards made by the Courts following a common law assessment. The purpose of the Act had been to reform the claims process for RTA related whiplash injuries to reduce insurance costs.

The Act and the Regulations, however, are silent as to how Courts are to assess the combined damages in mixed injury claims and in this case the Court was required to determine the proper approach for assessing damages for pain, suffering and loss of amenity where the Claimant suffered a whiplash injury which came within the scope of the Act, but also suffered additional injury which fell outside the scope of the Act which did not attract a tariff award.

At first instance, DJ Hennessey provided for a stepped approach for assessing damages, namely:

(1) Determine the nature of each injury.

(2) Value the whiplash injury in accordance with the tariff laid down by the Regulations and value the other injuries in accordance with the common law.

(3) Add the two figures together and then step back exercising the type of judicial discretion that Judges have been doing over many years.

(4) Reach a final figure by making an appropriate deduction (if any).

This decision was appealed and the cases were identified as test cases which were then expedited to the Court of Appeal in light of the important question which was raised as to the proper construction of Section 3 of the Act.

The Court of Appeal approved the approach taken by DJ Hennessy, with one caveat: the final award cannot be less than would be awarded for the non-tariff injuries if they had been the only injuries suffered by the Claimant.

CASE UPDATES

It was held that the Act and the Regulations represented a statutory incursion into the common law method of assessing damages and a radical departure from the common law approach to such an assessment in that they abandoned the "fair and reasonable" approach to the assessment of whiplash injuries and minor psychological injuries in cases falling within the scope of the legislation.

Section 3(8) recognised the need for an assessment for an award of damages in respect of injuries additional to those suffered and contained within Section 3(2) or 3(3). In such a mixed injury case, given the differing bases of Section 3(2) and Section 3(3) (tariff) and Section 3(8) (non-tariff) assessments, the Court was required to carry out two separate assessments. There was nothing to suggest that non-tariff injuries should be assessed by reference to anything other than common law principles.

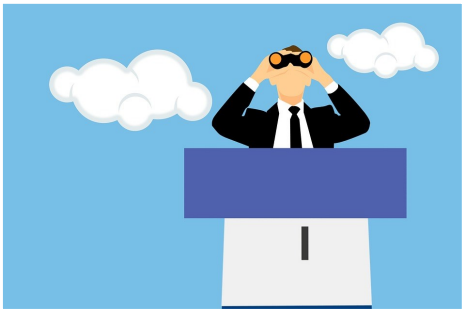
There was no question of a Claimant circumventing the Act or violating Section 3 by asserting a claim for other injuries to be assessed by reference to common law principles. It is understood that the ABI is seeking permission to Appeal to the Supreme Court, so watch this space!

Private Nuisance - Overlooking

Fearn & Others v Board of Trustees of the Tate Gallery [2023] UKSC 4

In 2016, the Tate Modern ('the Tate'), an art gallery on Bankside in London, opened a new extension called the Blavatnik Building. This building is ten stories high and the top floor has a viewing platform which offers 360 degree panoramic views of London. When the claim was brought, an estimated 500,000 – 600,000 people visited the viewing gallery each year. The Claimants own flats in a block of flats neighbouring the Tate. The walls of the flats are constructed mainly of glass. Visitors to the viewing gallery can see straight into the living areas of the flats.

The Claimants brought a claim in private nuisance, seeking an injunction requiring the Tate to prevent members of the public from viewing their flats from the viewing gallery or, alternatively, an award of damages. The Trial Judge found that a very significant number of visitors to the viewing gallery displayed an interest in the interiors of the flats. Some looked, some peered, some photographed, some waved. Occasionally binoculars were used and many photographs showing the interiors of the flats had been posted on social media. However, the Trial Judge held that whilst intrusive viewing from a neighbouring property can in principle give rise to a claim for nuisance, the intrusion experienced by the Claimants herein did not amount to a nuisance. The basis of this decision was that the Tate's use of the top floor of the building as a public viewing gallery was reasonable and the Claimants were responsible for their own misfortune because they had bought properties with glass walls and they could have taken remedial measures to protect their privacy, such as lowering their blinds or installing net curtains.



The Claimants appealed. The Court of Appeal found that the Trial Judge had incorrectly applied the law, but dismissed the appeal on the ground that 'overlooking', no matter how oppressive, cannot in law count as a nuisance. The Claimants appealed.

The Supreme Court allowed the appeal. Whilst the Court of Appeal had been right to find that the Trial Judge had incorrectly applied the law, the Court of Appeal was wrong to decide that the law of nuisance does not cover a case of this kind. The Court reviewed the core principles of private nuisance. In applying the legal principles to the facts of this case, it was beyond doubt that the viewing and photography from the Tate's building caused a substantial interference with the ordinary use and enjoyment of the Claimants' properties. There was no suggestion that operating a public viewing gallery was necessary for the common and ordinary use and occupation of the Tate's land. It was manifestly a very particular and exceptional use of land. It could not even be said to be a necessary or ordinary incident of operating an art gallery. The Supreme Court considered this was a straightforward case of nuisance.

It was suggested that the Courts below may have rejected the claims due to a reluctance to decide that the private rights of a few wealthy property owners should prevent the general public from enjoying an unrestricted view of London and a major national museum from providing public access to such a view. However, that was only potentially relevant to the question of remedy and whether or not to grant an injunction. It could not justify permitting the Tate to infringe the Claimants' rights without compensation.

As the issue of remedy was not dealt with by the Trial Judge due to his findings on liability and did not arise on appeal, the case was remitted to the High Court to determine the appropriate remedy.

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

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- 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

If you would like any further information in relation to any of our training seminars, or wish to have an informal chat regarding any of the above, please contact our Training Partner:

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