DOLMANS INSURANCE BULLETIN

Welcome to the January 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,
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DOLMANS REPORT ON

COMPELLING EVIDENCE AND A ROBUST DEFENCE OVERCOME ALLEGATIONS OF A DEFECTIVE SIGN POST ON THE HIGHWAY

Claimant v Bridgend County Borough Council

The Defendant Authority (represented by Dolmans in this matter) was faced not only with a highly unusual set of circumstances, but also with an alleged defect that was also somewhat out of the ordinary.

The Claimant alleged that she sustained significant facial/dental injuries and scarring after falling onto a defective sign post in the footway. The Claimant also alleged that she had suffered psychological injuries.

The matter was allocated to the Multi Track; the Claimant having served expert evidence by a Consultant Oral & Maxillofacial Surgeon, a Consultant in Restorative Dentistry and Chartered Clinical Psychologist. However, the Claimant's medical evidence was not complete and the matter was, therefore, listed for a split/liability only Trial before HHJ Timothy Petts sitting in the Cardiff County Court.

Unusual Circumstances

The exact circumstances surrounding the Claimant's alleged accident were somewhat unclear, even on the Claimant's own evidence. She had initially stated (in her Claim Notification Form) that she had fallen as a result of protruding brickwork from an adjacent wall, which was not owned or controlled by the Defendant Authority. However, the Claimant's medical records indicated that she had collapsed while standing on the footway speaking with an acquaintance, who had passed away since the accident.

An appropriate Part 18 Request for Further Information was served upon the Claimant and it became apparent that the Claimant had collapsed, although she could not say whether this was as a result of dizziness or the protruding brickwork. The Claimant also confirmed that she was not alleging that any breach of duty by the Defendant Authority had caused her to fall.

The Claimant was adamant, however, that her injuries had been caused by the defective sign post and the alleged circumstances needed to be considered in tandem with the alleged defect in order to paint a clearer picture.

DOLMANS REPORT ON

Alleged Defect and Claimant's Submissions

The sign post onto which the Claimant allegedly fell was designed to incorporate electrical works that could have illuminated the sign; if ever this was required. However, the sign at the location was not illuminated and there were no electrical workings within the body of the sign post. As such, there was no door covering the opening where any such electrical works would have been accessed and it is this absence of a door that the Claimant alleged caused her to come into contact with the jagged/rusty edge surrounding the opening.

The Claimant argued that had there been a door on the sign post, then her face would not have come into contact with the jagged/rusty edge and her injuries would not have been so severe, although it was difficult to deny that she might have sustained other injuries by striking the footway or, indeed, the adjacent wall, for example.

The Claimant submitted that any Defence of reasonable inspection should fail if the Court concluded that the sign post posed a foreseeable risk of injury to those using the highway and/or constituted a public nuisance. Given that the street sign had never had the benefit of a cover and had never been repaired or maintained, as it was not considered to pose a danger, the Claimant argued that liability should follow in the event that the Court found that the sign post posed a foreseeable risk of injury to those using the highway or amounted to a public nuisance.

Defendant Authority's Stance

The Defendant Authority accepted that the footway was part of the adopted highway and that the sign post was within its ownership and control. However, the Claimant did not plead any breach of statutory duty and alleged instead that the Defendant Authority was negligent and guilty of nuisance.

The Defendant Authority had measured the width of the opening in the sign post at no more than 120mm and it was difficult to comprehend, therefore, how the Claimant's face came into contact with the jagged/rusty edge as alleged.

The Defendant Authority maintained its denial of liability and put the Claimant to strict proof accordingly, arguing that there was no foreseeable risk of injury and that the sign post was not dangerous, despite being rusty.

DOLMANS REPORT ON

Evidence

The Claimant gave evidence, as did someone who allegedly saw the Claimant's face come into contact with the sign post and her tooth fly from her mouth despite being some considerable distance away.

Both the Defendant Authority's Highways Inspector (since retired) and its Highways Network Manager gave evidence, which included the following:

- It was not uncommon for posts such as this to be utilised (even when there are no electrics in situ) as electrics could be connected at a later date if needed.
- There is no need for a door on the post unless there are electrics to be protected.
- As far as both witnesses were aware, the relevant sign post had never been illuminated and certainly not during the 30 years when the Highways Inspector had been inspecting the relevant area.
- Likewise, no complaints about the sign post, or reports of similar accidents, had been received during this period.
- Although it was accepted that the signpost was rusted in places, it was not dangerous or defective in any way.
- Had the relevant Highways Inspector considered the sign post to be defective during his inspections of the highway, he would have requested repair or replacement of the same.
- The signpost was still without a door at the date of the Trial and had not been replaced or repaired as it was deemed not to be dangerous.
- The Highways Inspector of almost 30 years standing for the relevant area confirmed that the sign post had never been illuminated in that time and that he did not recall there ever being a door on the sign post during that period and that the signpost had no electrics.

Conclusion - Claim Dismissed with Significant Savings

The Judge dismissed the Claimant's claim.

The Claimant's evidence was not sufficient to overcome the obvious problems that she faced in proving factual causation and that her accident had occurred in the circumstances alleged, although she was not found to be 'fundamentally dishonest'.

However, even if she had overcome that burden, it is pleasing that the Judge, in this particular matter, was prepared to go further and maintain that he would have found for the Defendant Authority based upon the compelling evidence given by the Defendant Authority's witnesses that the sign post was not dangerous and that there had been no previous complaints/other accidents despite there having been no door on the sign post for many years.

Costs were awarded in favour of the Defendant Authority, but not to be assessed or enforced without the Court's permission as this was a QOCS matter.

Had this matter proceeded to a quantum hearing, the Claimant could have been seeking damages in the region of £40,000.00, and possibly more with supportive medical evidence.

The Claimant's Costs Budget (excluding VAT) had already been approved by the Court in excess of £60,000.00.

Hence, the saving to the Defendant Authority was significant and justified the robust Defence that was maintained throughout.

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DOLMANS RECENT CASE UPDATE

Civil Procedure - Legal Professions - Construction Law

Ndole Assets Limited v Designer M&E Services UK Limited
[2018] EWCA Civ 2665

A dispute had arisen between the Defendant sub-contractor and the main contractor in relation to a construction contract. The main contractor assigned its rights of action to the Claimant company, which subsequently issued proceedings as a Litigant in Person and instructed claims consultants (CSD) to assist with and serve the Claim Form. CSD were not solicitors.

The Defendant argued that CSD had engaged in the "conduct of litigation" under the Legal Services Act 2007 and had engaged in a reserved legal activity and committed an offence. The Judge, however, found that a Litigant in Person could ask an agent to serve a Claim Form on its behalf and refused to strike out the proceedings.

On appeal by the Defendant, the Court of Appeal held that the service of the Claim Form was to be taken as valid unless the Court decided to set it aside. The Court held that there was no reason for so ordering.

The service of a Claim Form by a person who was not an authorised or exempt person for the purposes of Legal Services Act did not mean that the service was invalid, so long as they were simply engaged in the "mechanical" activity of actually delivering the Claim Form. The Claimant and CSD had acted in good faith. They positively thought that they were complying with the law. There was nothing inherently unlawful in the serving legal process; the unlawfulness arose solely from the involvement of CSD for that purpose. To set aside service would confer an uncovenanted advantage on the Defendant in circumstances of "adventitious technicality".

Costs - Part 36 Offers - Interest

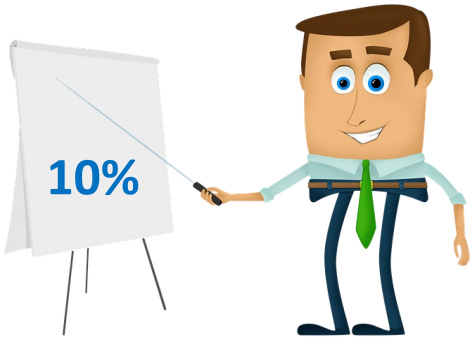
JLE (A Child by her Mother and Litigation Friend, ELH) v Warrington & Halton Hospitals NHS Foundation Trust
[2018] SCCO 20.12.18

At the conclusion of a substantive action between the parties, the Court was required to determine a costs dispute and to interpret CPR r.36.17(4).

DOLMANS RECENT CASE UPDATE

The Claimant had presented a Bill of Costs in the sum of £615,751.51. The Claimant made a Part 36 offer to accept costs, inclusive of interest, in the sum of £425,000.00. That offer was not accepted. At Detailed Assessment, the Claimant's Bill was assessed in the sum of £421,089.16, plus interest of £10,723.89 (a total of £431,813.05). Having beaten its own offer (by only some £7,000), the Claimant sought to rely upon the rewards of CPR 36.17, including a bonus of "the additional 10%" which the Claimant was entitled to unless the Court considered it unjust to allow it.

CPR 36.17(4) allowed the Court to order that a Claimant who had beaten its own Part 36 offer was entitled to consequences set out in sub-paragraphs (a) to (d), including interest on the sum of money (exclusive of interest) awarded up to 10% above the base rate, costs to be assessed on the indemnity basis and further interest on those costs, again up to 10% above the base rate.



The Master determined the costs consequences in sub-paragraphs (a), (b) and (c), but was not invited to address the 10% "bonus" in (d), and, consequently, did not do so. After the Order had been lodged, but before it was sealed, the Claimant contended that the four consequences in (a) to (d) were not severable and that the Court did have the power to order some, but not all of them.

The Defendant argued that the Court had to consider injustice separately for each of (a) to (d) and decide whether it was just to award all, some, or none of the consequences within the provision.

The issue was how the Court should apply the "injustice" test in r.36.17(4).

The Master found that examination of relevant authorities, none of which were directly on point, led to the conclusion that (a) to (d) were severable. The preferable construction was to hold that Courts should apply the "injustice" test separately for each and then go onto consider, in the round, the overall effect of applying all four.

In the instant case, the Master found that it would be clearly disproportionate and unjust to allow the 10% "bonus" provided for in r.36.17(4)(d). 10% of a large Bill, compared with the very small percentage margin by which the offer was beaten (£7,000), would amount to a disproportionate windfall, leading to injustice.

DOLMANS RECENT CASE UPDATE

Damages - Public Policy - Costs of Surrogacy

XX v Whittington Hospital NHS Trust
[2018] EWCA Civ 2832

The Claimant, X, had been rendered infertile due to the Defendant Trust's negligence in failing to detect signs of cancer from smear tests carried out in 2008 and 2012 and biopsies performed in 2012 and 2013. Liability was admitted. Before undergoing cancer treatment, X underwent a cycle of ovarian stimulation and egg harvest which produced 12 eggs and were cryopreserved. X and her partner decided to have their own biological children through surrogacy in California where commercial surrogacy is lawful. X's damages claim included a claim for the cost of 4 pregnancies using her own eggs and/or donor eggs. The expert evidence was to the effect that X would probably achieve 1 or 2 live births using her own eggs and that using donor eggs gave a slightly lower prospect of success.

At first instance, the Judge held, following the decision in *Briody v St Helens and Knowsley AHA [2001]*, that the claim for the expenses of Californian surrogacy failed because regardless of the position in the United States, commercial surrogacy arrangements were illegal in the UK under the Surrogacy Arrangements Act 1985 and, thus, contrary to public policy. Furthermore, while it was not unlawful, or contrary to public policy, to allow reasonable expenses in respect of UK surrogacy, such a claim, again applying *Briody*, was confined to the use of X's own eggs.

The Judge held that the loss suffered by X was the inability to have "her" child, not "a" child; the use of donor eggs was not, therefore, restorative of her loss. Damages were, therefore, limited to expenses of surrogacy in the UK, using X's own eggs, to lead to 2 children. X appealed.

The Court of Appeal allowed the appeal. X was entitled to recover the costs of commercial surrogacy arrangements in California. Although commercial surrogacy was illegal in the UK, X did not propose to do anything illegal. She intended to enter into an arrangement which was lawful by the law of the place where it was made and, in making such an arrangement, she would not be guilty of any criminal offence either in the UK or abroad. There was nothing in the legislation that suggested that in entering into a commercial surrogacy arrangement in the US X would act contrary to the law or the morals of UK statutes. The Court declined to follow *Briody*, concluding that social attitudes towards surrogacy had changed since that decision was made and the law no longer required a bar to recovery of the damages claimed by X on public policy grounds.

The Court further held that X was entitled to recover the cost of surrogacy using her own eggs and/or donor eggs. The purpose of an award of damages in tort was to put the injured party so far as possible in the position in which they would have been had the tort not taken place. It was accepted that X would probably achieve 1 or 2 live births through surrogacy using her own eggs, and expenses incurred for such surrogacy should, therefore, be recoverable, irrespective of whether the treatment was to occur in the UK or in California. Furthermore, an award of damages for the cost of donor egg surrogacy also reflected the modern law as to restorative compensation. Social changes in the years since *Briody* had led to the current acceptance of an infinite variety of forms of family life, the creation of which was often facilitated consequent on the advances in fertility treatment, including the increased use of donor eggs. The distinction between "own egg" surrogacy and "donor egg" surrogacy, employing the partner's sperm, would be entirely artificial and could not be maintained.

Defences - Non-admissions - Third Party Enquiries

PI North Limited v (1) Swiss Post International (UK) Limited (2) Asendia UK Limited [2019] EWCA Civ 7

The Appellant had issued proceedings against the Respondents. The Respondents' Defence set out which of the Appellant's allegations they were unable to admit or deny, which they required the Appellant to prove. The Appellant sought to strike out the Defence on the basis that in relation to the non-admissions in the Defence, the Respondents would, or at least might, have been able to admit had they taken reasonable steps to contact key former employees. The Judge found that the relevant rule, CPR r.16.5(1)(b), did not require a Defendant to make reasonable enquiries of third parties before it could be said to be "unable" to admit or deny a particular allegation and that a Defendant could properly make a non-admission based on its own knowledge. However, the Judge, having observed that there was no authoritative decision on that issue, granted the Appellant permission to appeal.

The issues at Appeal were whether a Defendant was obliged to make reasonable enquiries of third parties before pleading that it was unable to admit or deny an allegation under r.16.5(1)(b) and the meaning of "unable" in that context.

The Appellant argued that the purpose of a Defence was to narrow the issues with the view of saving time and costs. This implied that parties were required to make reasonable enquiries before they could say that their personal or corporate knowledge did not permit them to admit or deny an allegation, which in some cases may require a Defendant to investigate the claim with former employees who potentially had knowledge of the facts in dispute.

The Court of Appeal held that a Defendant would be "unable" to admit or deny an allegation within the meaning of r.16.5(1)(b) where the truth or falsity of the allegation was neither within its actual knowledge nor capable of rapid ascertainment from documents or other sources of information at its ready disposal. This rule did not oblige a Defendant to make reasonable enquiries of third parties before pleading that it was unable to admit or deny an allegation. The purpose of the Defence was to define and narrow the issues between the parties in general terms on the basis of knowledge and information which the Defendant had readily available to him during the short period afforded by the rules for filing a Defence.

Given this short period, it was not practicable to impose a general obligation on Defendants to make all reasonable enquiries of third parties who might be in possession of relevant information before filing the Defence. Further, a Defence had to be verified by a Statement of Truth signed by the Defendant or their legal representative; whilst it may not be difficult to comply with that requirement where the contents were based on the Defendant's own knowledge, the position might be very different where an admission or denial was based on information obtained from a third party. The Court found that the wording of r.16.5(1)(b) did not require a Defendant to make reasonable enquiries of third parties before putting the Claimant to proof of an allegation which the Defendant was "unable to admit or deny" and dismissed the Appeal.

Human Rights - Articles 3 and 8 - Solitary Confinement of a Child

R (on the Application of AB (a Child)) v Secretary of State for Justice [2019] EWCA Civ 9

At the age of 15, the Claimant, AB, had been ordered to serve a 12 month detention and training order in a young offenders' institution. Whilst in detention, he resisted restraint, assaulted officers and made racist remarks and threats to other detainees. Between 10 December 2016 and 2 February 2017, AB was placed in a regime whereby he could not leave his cell when other detainees were out of their cells. The Secretary of State conceded that there had been a failure to comply with the procedural requirements of the Young Offender Institution Rules 2000 and there had been a breach of the compulsory education requirement.

At first instance, the Judge held that AB had not been subjected to treatment that breached Article 3. The conditions and facilities in his cell, his food, sanitation and healthcare were all satisfactory. AB had been allowed contact with his solicitors from an early stage. Nothing had been done to deliberately humiliate or degrade him. At all times there had been a considered and proper justification for the removal from association, initially to protect officers, then to protect officers from the prisoner and the prisoner from inmates whose anger he aroused by his shouting sexual and racist abuse.

Proper application of the Rules for review of removal from association was very unlikely to have brought about desegregation in the light of AB's developing behaviour. He should have had education earlier, which would have got him out of his cell earlier and for longer periods, but there would still have been a justified and reasonable extensive removal from association with fellow inmates. There had been periods where AB was in his cell for over 22 hours a day for more than 15 consecutive days, but this did not, of itself, breach Art.3.

AB appealed, submitting that the law on Art.3 had reached the stage where a 'bright line' rule should be declared to the effect that the solitary confinement of any child constituted inhuman or degrading treatment; alternatively solitary confinement for more than 15 days was inherently in breach of Art.3. In the further alternative, there was at least a presumption of a breach where a child was confined for more than 22 hours a day with minimal meaningful contact with others.

The Court of Appeal dismissed the appeal. There was no 'bright line' rule of the kind contended for, nor any presumption to that effect. Whether any contact with others was 'meaningful' or 'minimal' called for an assessment or evaluation, requiring a close examination of the facts. The Judge had not erred in his assessment that there was no breach of Art.3. The regime was necessary for AB's own protection and the protection of others. It was accepted that there had been breaches of the rules relating to educational provision and oversight of AB's removal from association, but that did not lead to the conclusion that there had been a breach of Art.3.

Police - Damages - False Imprisonment

Michael Ciaran Parker v Chief Constable of Essex
[2018] EWCA Civ 2788

The Chief Constable appealed against a decision that the Respondent was entitled to substantial damages for false imprisonment.

The Respondent had been a suspect in a police investigation into the death of a man in his swimming pool. The inquest recorded an open verdict. Four years later, the Respondent became the specific subject of the investigation and the police officer in charge of the investigation arranged for the Respondent to be arrested by an officer who had played a central role in the investigation and believed she had reasonable grounds both to suspect the Respondent of committing an offence and to conclude that his arrest was necessary. However, the arrest was actually carried out by another officer. That arrest was unlawful because the arresting officer could not personally have reasonable grounds for the necessary suspicion to justify an arrest pursuant to S.24(3) of the Police and Criminal Evidence Act 1984.

DOLMANS RECENT CASE UPDATE

The Respondent brought proceedings for false imprisonment and claimed substantial damages. The Respondent succeeded in his claim and was awarded substantial damages. The Chief Constable appealed and submitted that there was a strong public interest in applying the principle in *R (on the application of Lumba) v Secretary of State for the Home Department [2011] UKSC 12* to situations where an officer could lawfully have arrested a suspect but for the unlawful arrest by another.

The Court of Appeal held that a procedural failure whereby the arresting officer did not personally have reasonable cause to suspect the Respondent of committing an offence rendered the detention unlawful, but did not merit substantial damages. There were reasonable grounds both to suspect the Respondent of committing an offence and that it was necessary to arrest him. In light of these findings, the Judge had been wrong to conclude that the Respondent was entitled to substantial, rather than nominal, damages.

In finding that the Claimant would have been arrested lawfully had it not been for the unlawful arrest, he had not suffered an actual loss and, therefore, only nominal damages were merited.

Appeal allowed.

Pre-action Disclosure - Medical Records

Lacey v Leonard
[2018] EWHC 3528 (QB)

The Claimant, C, was involved in a road traffic accident in August 2016 in which he suffered personal injury. His solicitors wrote a letter of claim, dated 26 September 2016, advising that £750,000 would be claimed. The letter advised that the solicitors intended to instruct a range of experts. No evidence of injuries or losses was provided. Liability was admitted. C's solicitors refused to disclose medical records. In January 2018, D applied for pre-action disclosure of medical records relating to the index accident. At first instance, the Application was dismissed. D appealed.

The Judge upheld the first instance decision. Pursuant to CPR 31.16(3)(d), an Order for pre-action disclosure may be made where disclosure before proceedings has started and is desirable in order to (i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs. D submitted that once there was an admission of liability, medical records should be disclosed and that lack of co-operation in providing these inevitably led to further costs being incurred.

It was further submitted that disclosure of medical records could assist in agreement on what rehabilitation may be required and putting such rehabilitation in place (the parties had been unable to agree upon a rehabilitation provider) and assessment of an interim payment (which had been requested, but not agreed) without the need for an Application. D sought to distinguish the case from *OCS v Wells [2008]*, in which an Application for pre-action disclosure of medical records had been refused on the basis that disclosure of all medical records had been sought in that case, whereas only medical records relating to the index accident were being sought in this case. Further, a considerable time had elapsed since the initial value had been put on the claim by C. D's insurers wished to reach a resolution, but, without information on which an assessment could be made, an impasse had been reached.

The Judge found, on the evidence, that pre-action disclosure of medical records relating to the accident would not assist in resolving the dispute without proceedings nor lead to a saving of costs. Both parties' solicitors had accepted in correspondence before the Application was made that the case was unlikely to be capable of settlement without medical expert evidence. There had been no indication from D that an interim payment would be made if the medical records were provided. The Judge considered that the contention that providing medical records would assist in agreeing a rehabilitation provider which, in turn, may assist recovery and reduce loss did not bring the Application within CPR 31.16(3)(d). This string of reasoning was far removed from establishing a basis for saying that disclosure of relevant medical records would be likely to lead to the saving of costs or the resolution of the claim. Accordingly, the Judge held that "*whilst there must be some sympathy with* (D's insurers) *in being faced with an unparticularised claim for the large sum of £750,000, their Application for pre-action disclosure does not satisfy CPR 31.16(3)(d) and is dismissed*".

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

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- Industrial disease for Defendants
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- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

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