DOLMANS INSURANCE BULLETIN

Welcome to the December 2022 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

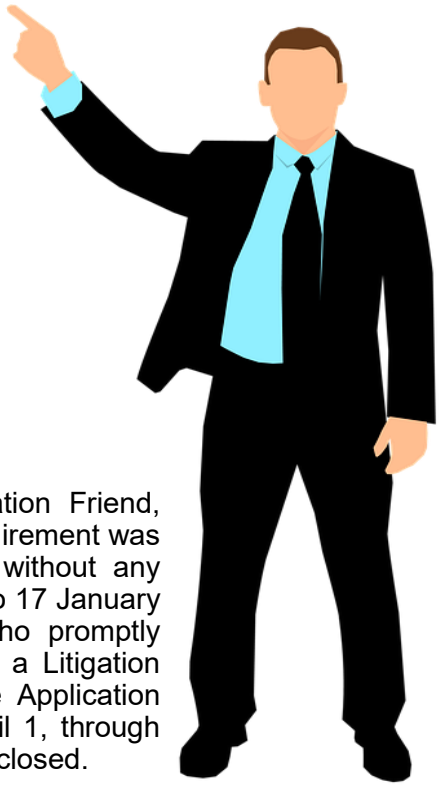
Pre-Action Disclosure in Personal Injury Cases:

Weighing the rights of third parties when records relating to them are sought by way of disclosure; appealing an initial Order by a Deputy District Judge

A Child v Cardiff Council

In *A Child v Cardiff Council*, the Claimant, a Year 8 secondary school pupil, had been injured in a classroom incident in which, she alleged, the teacher had stepped out of the classroom to deal with an unruly pupil when another pupil engaging in horseplay threw an object, which inadvertently stuck her and caused personal injury with permanent, albeit relatively minor, symptoms. It was part of the Claimant's case that the pupil who threw the object had known behavioural / disciplinary problems and should have been managed differently and ought not have been in mainstream education.

The Claimant, though her Solicitors, asked for, and was provided with, standard Pre-Action Disclosure by the Authority's Claims Handlers. The Claimant also asked for specific disclosure of the school behaviour records for the pupil who threw the object (known throughout as "Pupil 1"), but this was refused on the grounds that the pupil, through their parents, would have to consent to the records being disclosed, and they had not done so. The Claimant issued an Application for Pre-Action Disclosure of the school behaviour records.



Dolmans were instructed to act on behalf of the Respondent Local Authority in defence of the Claimant's Application. For reasons known only to the Claimant and her Solicitors (and notwithstanding that all parties and Solicitors were based in Cardiff and, presumably, seeking some sort of procedural advantage), the Application was issued in the County Court at Merthyr Tydfil on 26 November 2021 and listed for a telephone hearing on 29 December 2021.

The Claimant had not, at this stage, appointed a Litigation Friend, notwithstanding that she was still only aged 15, and this requirement was pointed out to her Solicitors and the Court. The Court, without any explanation, on 13 December 2021, adjourned the hearing to 17 January 2022, where it came before a Deputy District Judge, who promptly adjourned the hearing so that the Claimant could appoint a Litigation Friend. The Respondent, at that stage, indicated that the Application would be opposed for the reason already stated; that Pupil 1, through their parents, would have to consent to the records being disclosed.

The matter came back before the Court on 21 March 2022, where a different Deputy District Judge ordered that the school behaviour records for Pupil 1 be disclosed, notwithstanding that the subject matter of those records / their parents had not been involved in the disclosure process, stating (in a reserved Judgment handed down on 18 May 2022) that:

"[t]he Respondents have also argued that the interest of Pupil 1's privacy and human rights should be considered when balancing the question of whether to disclose or not the documents. I note that issues concerning the processing of personal data under the GDPR was raised at the hearing. … Indeed I note ***with some surprise*** *that the Respondents have sought to discuss the question of disclosure with Pupil 1's parents and that they did not want the records disclosed. … I am not persuaded that those considerations trump the underlying and indeed overwhelming principle that govern the question of Pre-Action Disclosure in the appropriate case."*

Permission to appeal was refused, but the Disclosure Order was stayed pending any Application to the Appeal Court for permission.

The Respondent Local Authority duly sought permission to appeal from the County Court at Cardiff on three grounds:

Firstly, the Judge had committed a serious procedural irregularity within the meaning of CPR 52.21(3)(b) in that despite having been informed that the parents of Pupil 1 had refused consent to disclosure of his behavioural records, he failed to ensure they had had notice of the Application, or of the hearing date, or of the opportunity to make written or oral representations, which he ought to have done because of the interference with Pupil 1's European Convention on Human Rights, Article 8, rights (see *R (on the Application of B) v Stafford Combined Courts Centre* [2007] 1 WLR 1524) which provide that:

"Everyone has the right to respect for his private and family life, his home and his correspondence. … There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

REPORT ON

Secondly, the Judge was wrong within the meaning of CPR 52.21(3)(a) in deciding that the behavioural records of Pupil 1 were relevant and/or that Pre-Action Disclosure was desirable in circumstances where there was no allegation in the Claim Notification Form or the Letter of Claim, or, indeed, any evidence in the Witness Statement in support of the Application that Pupil 1, who was in the same class as the Claimant, had been involved in prior incidents of violence and aggression or throwing things in class. Absent such an allegation, the request for the behavioural records of Pupil 1 was a fishing expedition and the Claimant did not need their records to know whether they had behaved in a similar way before because she was in the same class as them and would have known of any such behaviour.

Thirdly, the Judge was wrong within the meaning of CPR 52.21(3)(a) in that the scope of disclosure of Pupil 1's behavioural records as set out in his Order was far too wide and potentially required disclosure of entries which had absolutely nothing to do with any propensity on the part of Pupil 1 to violence or aggression (e.g. lateness, truancy, failure to do homework, bad language, etc). Any Order for Pre-Action Disclosure of sensitive personal records of this nature should have been very carefully confined to previous incidents involving violence and aggression over the preceding 12 months only.

Permission to appeal was promptly given on paper by His Honour Judge Jarman KC on 14 June 2022 on the basis that the Respondent Local Authority's grounds had a realistic prospect of success and the matter was set down for a 2 hour appeal hearing on 24 June 2022 (this was adjourned at the Claimant's request to 26 July 2022).

The appeal came before His Honour Judge Hywel James and was successful on all grounds (in doing so, the Judge found that the Application was, indeed, a fishing expedition). As this was a pre-action Application, Qualified One-Way Costs Shifting did not apply and the Claimant was ordered to pay the Respondent Local Authority's costs in the summarily assessed sum of £10,810.27.

Comment

This case perhaps illustrates the difference in attitude and approach to disclosure at District Judge level to that at Circuit Judge level. The District Judge is the level at which almost all Applications for Pre-Action Disclosure are made and dealt with; irrelevant of value or complexity. There is sometimes a sense that District Judges are predisposed to allow Applications by Claimants in personal injury claims for Pre-Action Disclosure and they often do so without a hearing (it is important that disputes about the scope of Pre-Action Disclosure are, therefore, made clear at the outset, as it was in this case, in order to reduce the risk of any contentious Application being dealt with on paper).

Even when Applications for Pre-Action Disclosure are opposed at a hearing, District Judges can often seem impervious to opposition. Both Deputy District Judges in this case failed to draw the conclusion that the Application lacked merit (even the initial Deputy District Judge could have dismissed the Application altogether, but did not do so). This case is a useful reminder that the more considered view of a Circuit Judge can sometimes bring a different result. The obvious problem is the difficulty in getting permission to appeal in the first place.

This case is also a vindication of the Local Authority's decision to protect the Article 8 rights of Pupil 1 against intrusion into his private life. Had the Order to compel disclosure of his behavioural records been allowed to stand then there was a real risk that the Claimant would have gained an unjustifiable knowledge of very personal information relating to their education and background. Had the Local Authority not taken steps to protect Pupil 1's Article 8 rights, then there was a real possibility that they would have been criticised for not doing so, possibly with legal consequences.

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RECENT CASE UPDATES

Delay - Abuse of Process - Strike Out

Ahmed v Chojnowski
[2022] EWHC 2863 (KB)

On the Claimant's appeal against an Order striking out his claim, the Judge found that although the Master had been entitled to find that the Claimant's delay and failure to comply with an agreed timetable in a draft Consent Order, which had not been sealed or approved by the Court, was an abuse of process, strike out was not a proportionate response.

The claim arose out of a road traffic accident in April 2015. Liability was admitted and the claim was valued in excess of £300,000. Directions were given in July 2020, including that the parties could, by prior agreement in writing, extend the time for Directions by up to 56 days without applying to the Court, but that any extensions beyond 56 days had to be submitted by email to the Court to consider whether a formal Application was necessary. The parties progressed the Directions and were working towards the trial window in March to May 2021.

In December 2020, the Defendant served surveillance evidence. The parties agreed timescales for the Claimant to respond to the surveillance evidence by way of further witness evidence; for addendum reports to be secured from the orthopaedic experts; and for the provision of an up-to-date Schedule of Loss and Counter-Schedule. These revised timescales extended the original deadlines by more than 56 days and meant that the original trial window could not be kept. The parties proposed moving the trial window from June to July 2021. The proposed new timetable was set out in a draft Consent Order which was signed on 16 February 2021 and submitted to the Court by the Defendant. However, the Consent Order was never placed before a Master or Judge for approval.

The parties began working to the agreed timetable. In April 2021, the Defendant was informed that the Claimant wished to instruct new solicitors, but no action was taken. The Claimant thereafter failed to comply with the agreed timetable. There was then a pattern of correspondence over some months of the Claimant's Solicitors either not responding or giving indications of progress to come which did not materialise.

In June 2021, the Defendant issued a strike out Application which was listed for hearing in February 2022. In January 2022, the Claimant's Solicitor raised, for the first time, that the draft Consent Order had not been approved and contended that the strike out Application was premature.

The Master considered the history "*lamentable in terms of everything grinding to a halt*". The way in which the case had been conducted was obstructing just disposal, was an abuse of process and, effectively, a breach of a Consent Order, and a breach of the overriding objective. The case was struck out.

The Claimant appealed on the grounds that:

(1) The Master erred in concluding that a failure to comply with an agreed timetable set out in a Consent Order which had not been approved or sealed by the Court could constitute a breach of a Court Order for the purposes of CPR 3.4(2)(c);

(2) The Master held, wrongly, that a failure to further the overriding objective during the pandemic amounted to either an abuse of process or a breach of a Rule, Practice Direction or Court Order under CPR 3.4(2)(c) to justify a strike out of the case; and

(3) Further, and in any event, even if the Master was entitled to find an abuse of process (which was denied), the Master wholly failed to exercise any discretion, as the Court of Appeal's guidance in *Cable v Liverpool Victoria Insurance Co Ltd* [2020] 4 WLR 110 makes clear was required.

In relation to ground 1, the Judge found that the Master did not err in taking into account the failure of the Claimant to comply with the terms of the draft Consent Order, even though it had not been approved or sealed by the Court. The Claimant's failure to comply with an unapproved and unsealed Consent Order was capable of constituting, or at least contributing to, an abuse of process for the purposes of the power in CPR 3.4(2)(b) and/or the Master's inherent jurisdiction. Further, it was capable of amounting to a breach of the duty on the parties to assist the Court in furthering the overriding objective set out in CPR 1.3, and thus a failure to comply with a "rule" for the purposes of the power in CPR 3.4(2)(c).

In relation to ground 2, the Claimant's failure to comply with the timetable that the parties had agreed as set out in the draft Consent Order was capable of constituting a breach of the duty in CPR 1.3.

As regards ground 3, the Master was fully entitled to find an abuse. The nature of the abuse found went beyond mere delay. The Master was concerned both that the Claimant's Solicitor was not being fully transparent about the reasons for the delay and that the conduct of the Claimant himself justified criticism. However, there was no mention in the Master's Judgment of the second stage of the *Cable* test, that is, the proportionality concept or the weighing of factors for and against the proposition that strike out was a proportionate response to the abuse. In the circumstances, it was not possible to be confident that the Master had applied the second stage of the *Cable* test.

On conducting the two-stage assessment afresh, the Judge reached the same view as the Master as to the finding of the abuse of process and the nature of it. However, the Judge did not consider that a strike out was, in all the circumstances, a proportionate response to the abuse. This was a claim in which liability was admitted and, thus, one in which the Claimant had a right to have his entitlement to damages determined.

The claim was also similar to *Cable* in that the principal impact of the abuse on the Defendant was a period of around one year delay in progressing the claim, and such issues are usually capable of being compensated for in costs or by way of other financial sanctions. The additional factors present here, of the Claimant's solicitor being less than forthcoming about the reasons for the delay and the Claimant's own contribution to the abuse, did not justify a strike out. They too could be addressed in costs and by other financial sanctions.

Accordingly, the appeal was allowed under ground 3 and the case reinstated, subject to costs and interest sanctions directed.

Part 36 - Costs Consequences - Conduct

Moradi v The Home Office [2022] EWHC 3125 (KB)

The Claimant had settled an unlawful detention claim for £15,000 at 5:00pm on the final working day prior to Trial, after the Home Office had made a Part 36 Offer of £15,000 two days before Trial. The timings meant that the usual provisions and presumptions in relation to making and accepting a Part 36 Offer did not apply. The parties could not agree issues in relation to costs liability and the Court was required to determine the issue.

In Autumn 2020, the parties had filed Costs Budgets, which were assessed in the sums of £70,500 for the Defendant and £94,000 for the Claimant – as against a claim which was pleaded up to £30,000. The Claimant had been keen to settle, and, in May 2021, proposed mediation herself. That was unsuccessful. The Defendant made a Part 36 offer to settle for £10,000 in November 2021. The Claimant did not accept this offer and the offer expired on 21 December 2021. The Claimant did not make any serious attempts to progress the settlement negotiations over the following 9 months, until she made a counteroffer of £40,000 on 23 September 2022, a few weeks ahead of the Trial. No explanation was provided as to why, having initially proposed settlement, the Claimant did not then pursue the same.

The Defendant argued that it should pay half of the Claimants costs up to its Part 36 offer expiring in December 2021 and nothing for the subsequent period before the Trial date (October 2022), and that had the Claimant behaved reasonably in December 2021, significant additional costs would not have been incurred.

The Claimant argued that she had recovered more than the Home Office was previously prepared to pay and so was the successful party, even though this was below the full value of her claim.

The Judge concluded that the Claimant was entitled to her costs but that a fair, reasonable and proportionate reduction should be made for the period when the Claimant should have been more active in negotiating. It held that the unrealistic strategy adopted by the Claimant demanded a reduction of her costs that was "significant" rather than token. The Judge noted that during the period in which the negotiations stalled between the parties, an additional £70,000 of costs were expended on both sides, and he felt that this ought to be reflected in the final Costs Order. He ordered the Home Office to pay the Claimant's reasonable costs up to 21 December 2021 and 66% of her reasonable costs thereafter, during which period more fruitful negotiations should have taken place.

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

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