DOLMANS INSURANCE BULLETIN

Welcome to the November 2022 edition of the Dolmans Insurance Bulletin

in this issue we cover:

REPORT ON

- Complex Regional Pain Syndrome case discontinued following emergence of Fundamental Dishonesty argument - *PJ v TH Limited*

RECENT CASE UPDATES

- Civil procedure - split trials - vulnerable adults
- Costs - multiple claims - personal injury
- Electronic Working Pilot Scheme - electronic filing - time limits
- Inquests - Article 2

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,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

DOLMANS
SOLICITORS

REPORT ON

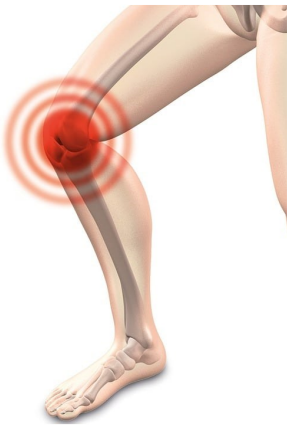
Complex Regional Pain Syndrome Case Discontinued Following Emergence of Fundamental Dishonesty Argument

PJ v TH Limited

On 5 April 2017, the Claimant, employed by an internet media provider as an engineer, sustained an accident at the Defendant's premises somewhere in London. On that date, he fell through certain floor panels at their premises; these floor panels providing access to underfloor data cables and having been left insecure by persons unknown. The Claimant fell into the shallow void below, causing injury to, mainly, his right leg.

Primary liability was conceded by our insurer clients (Mitsui Sumitomo Insurance (Europe) Limited). The Claimant was living in Essex, but instructed Claimant solicitors based in the Cardiff area to pursue his claim for damages for personal injury and consequential losses.

Initially, the Claimant was seen in the A&E Department of a local hospital and diagnosed with an ankle sprain (only) of the right ankle. However, at this time, he also reported some symptoms in his right hip, ankle and knee. During his initial period of absence from work, his ankle symptoms settled, but symptoms of alleged pain from his right knee began to predominate.



In June 2017, the Claimant underwent a knee arthroscopy under general anaesthesia following which, allegedly, he experienced severe pain which would not settle.

At some point, probably in early 2018, a diagnosis of Complex Regional Pain Syndrome (CRPS) was made by the Claimant's consultant orthopaedic surgeon at this point, ***not*** by a pain consultant. Following this, the Claimant was referred to a private pain consultant for treatment of his alleged CRPS. Treatment from this consultant included strong analgesia and a right sided L2/3 dorsal root ganglion block – the latter resulted in some temporary relief of the Claimant's symptoms (lasting around 1 month), but then the symptoms resumed once again. Thus, pulsed radiofrequency treatment was attempted (in June 2018) with little effect. A further nerve block was attempted in August 2018, which again provided some temporary relief of the alleged pain, albeit the same then returned once again after around 1 month.

By the time we first saw the papers (in mid 2019), ongoing pain was said to be having a significant effect on the Claimant and his daily life. In particular, it was alleged that the Claimant was only able to walk 50 yards before he had to rest. Moreover, even to achieve this distance, the Claimant required the use of a walking stick.

Interestingly, the first medicolegal evidence disclosed in the case was a pain consultant's report from Dr Alexander-Williams disclosed on 11 April 2019. This accompanied a preliminary Schedule of Loss putting a value on the claim of just short of £30,000. According to the medical evidence provided, the Claimant used to play rugby and used to engage in a lot of weight training in the gym. Additionally, and perhaps most importantly, it was noted that the Claimant had been previously diagnosed with psoriatic arthritis (that is, arthritis secondary to psoriasis).

Dr Alexander-Williams reached the view that the Claimant was suffering with neuropathic pain around the right knee of unknown origin overlaid upon anxiety and depression. He also considered that the Claimant was suffering from some kind of adjustment disorder as a consequence of the incident and further considered that there was a degree of *"unconscious exaggeration secondary to the adjustment disorder."* Dr Alexander-Williams did not accept a diagnosis of CRPS (as such), but considered the Claimant to be vulnerable to such a condition given previous episodes of depression. He, therefore, attributed the, otherwise, unexplained neuropathic pain in the knee to the incident which formed the basis of the claim. He felt that the exaggeration on the part of the Claimant had to be unconscious because he (the Claimant) had achieved *"no financial gain"* in consequence of the development of the condition.

The Insurers had several concerns at this point, with which we concurred not least with regard to possible constitutional conditions and the Claimant's BMI (and its possible relevance to problems in his knees) which had been as high as 42 in the past. Given the lack of orthopaedic evidence, the Insurers suggested that a desktop report be obtained, and we subsequently instructed Mr Martin Bircher, Consultant Orthopaedic Surgeon, to review the case papers and medical records. We also recommended the obtaining of psychiatric evidence, depending on the nature of the Claimant's evidence in that regard (which had not been disclosed at that point in time). Inevitably, we were concerned by the reference to "exaggeration" – unconscious or otherwise.

Given our concerns, the Insurers also commissioned surveillance in the case.

Mr Bircher's initial desktop report expressed scepticism as to the Claimant's alleged ongoing symptoms. His view of the case was that it was a straightforward orthopaedic injury and that any ongoing symptoms, particularly pain related symptoms, were likely related to constitutional factors, particularly previous knee problems relating to psoriatic arthritis. We reported these findings to the Insurers and awaited developments in the case.

Meantime, the surveillance undertaken was not discouraging (showing the Claimant walking some distance – seemingly without difficulty and, in particular, without use of a walking stick, shopping alone – seemingly without difficulty and engaging in other day-to-day tasks), but, equally, as is often the case in such cases, this material was difficult to evaluate pending crystallisation of the Claimant's case. We, therefore, again, awaited developments in the case.

REPORT ON

Proceedings were issued in April 2020, due to limitation, during the COVID-19 pandemic. These proceedings were not served until 31 July 2020. Accompanying these proceedings, further medical evidence was disclosed, for the first time, comprising:

(1) An orthopaedic consultant's report from Mr Sumati Bothra – dated 25 May 2018 – i.e. *it predated the pain expert's report* from Dr Alexander-Williams disclosed in April 2019.

(2) A psychiatric consultant's report from Dr Martin Baggaley – this report was dated 20 July 2020, but it arose from an examination of the Claimant as long ago as 14 August 2019.

We were concerned at how this evidence had been "held back" and not disclosed to the Insurers in the pre-action phase.

Moreover, the proceedings were also accompanied by a Schedule of Loss dated 29 July 2020. This Schedule put past losses at either £64,316.63 or £92,837.51 (depending on whether the Claimant would be required to repay his company sick pay) and future losses at £199,415.95. Thus, the claim now had a pleaded valuation of between £263,732.58 and £292,253.46; these figures excluded PSLA. This Schedule was verified by a Statement of Truth signed by the Claimant. The underlying theme of this Schedule was that the Claimant suffered with "constant intrusive knee pain" consequent upon the incident.

Interestingly, the orthopaedic evidence accompanying the proceedings from Mr Bothra indicated that the knee symptoms, which formed the basis of this claim, should have settled within 8 to 10 months of the initial incident. This view was very similar to that of Mr Bircher in his desktop report. It appeared that Mr Bothra had not seen the report of Dr Alexander-Williams. More importantly, Mr Bothra indicated that if the Claimant's symptoms had not settled within 6 months, he should be referred to a knee surgeon. He considered that *"(the Claimant's) present symptoms are as a result of arthritis, osteochondral lesion and degenerative changes in the knee."* At the risk of stating the obvious, the aforesaid referral to a knee surgeon did not happen, and, instead, the Claimant was referred, first, to a specialist pain consultant and then to a psychiatrist (Dr Baggaley); the latter's report took quite some time to finalise.

That psychiatric report reached the view that:

"(The Claimant) has developed a relapse of a recurrent mixed anxiety and depressive disorder. He has also developed chronic pain syndrome. He would benefit from continuing antidepressant medication and having a course of CBT. He would require further CBT for his chronic pain. I am guarded about the outcome (however)."

REPORT ON

Readers will, doubtless, recall that when these proceedings "landed" we were in the teeth of the COVID-19 pandemic and albeit the lockdown rules had been somewhat relaxed, we were still, substantially, in a lockdown situation where face-to-face medical examinations were simply not taking place. However, to make progress in the case, we recommended the instigation of remote examinations by a pain expert (Dr Neal Edwards) and a psychiatrist (Dr Cosmo Hallstrom). We hoped that, with time, a face-to-face examination with Mr Bircher would be possible.

We negotiated an extension of time for service of the Defence to 23 September 2020 and Counsel was instructed to settle the same. Following service of the Defence (which made no admissions as to medical causation or quantum), the matter proceeded to a Costs and Case Management Hearing on 7 May 2021 in the Central London County Court. The usual directions were made, with witness evidence being due by 15 October 2021 and a sequential exchange of medical evidence with the Claimant serving updated reports by 19 November 2021 and the Defendant serving its reports by 17 December 2021. The matter was listed for trial in the period 1 June 2022 to 30 September 2022.

The Claimant's Costs Budget was assessed at £151,569.38 to trial.

Assembly of the Defendant's medical evidence in this case was time consuming and complex. As above, the examinations by Dr Hallstrom and Dr Edwards were conducted remotely (via Zoom/Teams). However, we were able, due to an improvement in the pandemic situation, to arrange a personal attendance upon Mr Bircher in September 2021. The Insurers resolved to coordinate surveillance around that latter appointment to supplement the surveillance already obtained. Meantime, a trial date of 12 September 2022 (time estimate 4 days) was received on 24 June 2021. Shortly after that, a final Pre-Trial Review was listed before the Designated Civil Judge in London on 15 July 2022.

In their initial views, none of the Defendant's experts were wholly convinced by this claim and all expressed reservations as to the presentation and purported diagnosis of Complex Regional Pain Syndrome, or chronic pain. Dr Edwards, the Defendant's pain consultant, did consider the question of a somatoform disorder in his initial views. However, in the usual manner, experts were initially instructed without recourse to the surveillance material.

The surveillance of the Claimant undertaken in September 2021 proved to be crucial. On the day of the examination by Mr Bircher, the Claimant was seen using an elbow crutch and walking with difficulty to and from the appointment. However, at other times, apart from that day, he was moving in the surveillance footage without any walking aid and walking significant distances. He was also seen driving a vehicle which did not belong to him but seemed to be a test drive for his partner. Vehicle searches on that vehicle subsequently confirmed this was a manual vehicle. On seeing this footage (see below), Dr Edwards, in particular, felt he had been significantly misled by the Claimant.

REPORT ON

Witness evidence was disclosed by the Claimant – late – the Claimant's solicitors requested a 28 day extension for service of the same to 12 November 2021. This necessitated adjustments to the balance of the timetable. The Claimant's supplemental medical evidence was to be served by 19 January 2022 and the Defendant's medical evidence was to be served by 18 February 2022.

The Claimant disclosed witness evidence from himself, his partner and his son, all of whom asserted a life changing injury arising from the incident – with a reiteration of all previous significant symptoms of ongoing pain and a significant impact of the same on his life. In particular, the central allegation of an inability to walk more than 50 metres was repeated and this was supplemented by an assertion that the Claimant was unable to drive a manual car anymore.

The surveillance material was put to the Defendant's experts and their supplemental views obtained. Unsurprisingly, those views were to the effect that the Claimant had, to a varying extent (according to the expert in question), sought to mislead the experts and/or consciously exaggerated his symptoms. As above, Dr Edwards felt he had been very significantly misled by the Claimant as to the real extent of his symptoms. Further complexity was injected by a second tranche of medical evidence on behalf of the Claimant – deployed on 19 January 2022. In this tranche of evidence, supplemental reports *from all 3 experts* (Mr Bothra, Dr Alexander-Williams and Dr Baggaley) were disclosed. The reports of Dr Baggaley and Dr Alexander-Williams, in effect, reiterated their previous view of the case. Moreover, for reasons which were never adequately explained, Mr Bothra was now persuaded that this was, in fact, a CRPS case. Indeed, he asserted that he had detected *explicit physical evidence* of CRPS at an examination of the Claimant on 5 June 2021. At that examination, Mr Bothra noted that the Claimant "could not walk properly" and that he "walks with a stick" being in "constant pain" from the right knee.

In his report of 29 June 2021, Dr Alexander-Williams repeated similar observations as to limitations on daily existence. He also noted (via video examination) "redness and puffiness" around the knee, which was not present in 2019 (when he examined the Claimant). Dr Alexander-Williams' updated view was that the Claimant was either suffering from neuropathic pain of unknown origin (due to psychiatric predisposition) or, in fact, now, Complex Regional Pain Syndrome (after all).

For his part, Dr Baggaley was satisfied that, due to psychiatric pre-disposition, the Claimant was suffering from Chronic Regional Pain Syndrome, explicitly stating that he *"could elicit no evidence to suggest (the Claimant) is consciously exaggerating his pain."*

REPORT ON

On 18 February 2022, we deployed a significant quantity of medical evidence – 3 reports from each of our experts, an initial report, a further report commenting on the situation having seen the surveillance evidence and a third report commenting on the Claimant's supplemental medical evidence and witness statements. The full extent of the medical opinion deployed on behalf of the Defendant was (obviously) extensive and it is not helpful (in terms of keeping this article to manageable proportions if nothing else) to set it out in detail in this article. However, in general, the Defendant's experts considered that there were major concerns as to causation and, moreover, clear evidence – by comparison between the Claimant's presentation to them, the witness evidence on his side and the surveillance evidence – of conscious exaggeration (malingering). As above, Dr Edwards, in particular (and in conference with Counsel) was very concerned as to the extent to which he had been actively misled by the Claimant.

At the same time as deploying the medical evidence, the full extent of the surveillance footage was also disclosed to the Claimant's solicitors. All of this material was hand delivered to their office.

There followed, following this disclosure, a period of lengthy inactivity by the Claimant's solicitors. Initially, they asserted that they were unable to view the surveillance footage and we were required to provide further copies of the same (in differing formats). However, even having provided the same, we received no proper response and, ultimately, on 21 March 2022, on the advice of Counsel, we issued an Application Notice for permission to rely upon the surveillance evidence at trial on 12 September 2022. Unfortunately, due to administrative problems at the Court, this Application was not listed until the Pre-Trial Review on 15 July 2022, despite a litany of telephone calls and emails to Central London County Court. In fact, initially, the Court staff listed the Application on 26 October 2022, a date well after the trial itself!

At the hearing of the Application on 15 July 2022 before the Circuit Judge (HHJ Luba QC), the Claimant's Counsel sought to object to the admission of the surveillance evidence on the basis that it had been deployed late and was highly prejudicial to the Claimant. These submissions were unsuccessful and Counsel for the Defendant was wholly successful in the Application for permission, securing costs of the hearing also (summarily assessed in the sum of £4,000). Of necessity, following that determination of the position, a reconfiguration of the Court timetable to trial was necessary. Originally, Joint Statements between the experts were due by 28 January 2022. This had been extended to 4 March 2022 (by mutual consent), but no progress was made as to this aspect following deployment of the surveillance herein.

REPORT ON

On 15 July 2022, HHJ Luba QC ordered that Joint Statements would be provided on or by 5 August 2022. He also ordered a finalised Schedule of Loss be served by the Claimant by 29 July 2022 with a Counter-Schedule of Loss being served by the Defendant by 19 August 2022. So began the process of discussion between the experts. The first Joint Statement to emerge was that of the orthopaedic experts, then that between the pain experts, followed by, finally, the Joint Statement between the psychiatrists (late) on 14 August 2022. This was an interesting process, necessitating the need to provide each panel of experts who had not completed their Statement with a copy of the most recently concluded Statement.

Perhaps the most important of these Joint Statements was that between the pain experts (Dr Alexander-Williams and Dr Edwards), in which Dr Alexander-Williams, for the Claimant, accepted and agreed that the surveillance *"clearly suggests that the Claimant has magnified and exaggerated his symptomatology during consultations."* Moreover, these two experts agreed *"that the Claimant does not have and never had had CRPS."*

On that latter note, Dr Alexander-Williams revisited his previous observations as to the redness and swelling in the Claimant's knee on (video) examination, concluding, on reflection, that these were likely due to a resurgent episode of psoriatic arthritis.

On 21 July 2022, in response to a request for a Joint Settlement Meeting from the Claimant's solicitors, on instructions from the Insurers, we declined that invitation (given the outcome of the hearing on 15 July 2022) and invited the Claimant to discontinue his claim against the Defendant, indicating that if that happened the Claimant would still have the protection of Qualified One-Way Costs Shifting (QOCS) as no explicit finding of Fundamental Dishonesty had (yet) been made. This was, in effect, a proposal to "drop hands" on this case given the costs which would inevitably be incurred by a 4 day trial in London in September 2022, involving 3 experts, Counsel and the conducting solicitor. That was, it should be noted, in the context of reconnaissance having been undertaken as to the Claimant's financial means.

On 29 July 2022, the Claimant served a Final Schedule of Loss setting out losses (excluding PSLA) of £277,318.36. This was verified by a Statement of Truth signed by the Claimant. On 19 August 2022, the Defendant's Counter-Schedule of Loss was served – this adopted a primary position that this was a claim demonstrating Fundamental Dishonesty consequent upon the Claimant's exaggeration of symptoms and, therefore, should be struck out. Prior to this, on 15 August 2022, by an email of that date, we indicated that our proposal to "drop hands" would only remain open for acceptance until 4pm on 22 August 2022.

At 09:32 hours on 22 August 2022, the Claimant's solicitors accepted the drop hands offer, discontinuing the claim entirely and bringing the claim to an end on that basis.

REPORT ON

Comment

There was no explicit Fundamental Dishonesty finding in this case. An explicit decision was made, referable to the circumstances of this case only, to permit the Claimant to discontinue, at a particular point in time only, because trial costs could be avoided. However, if that window of opportunity had closed, the Insurers' explicit view was to proceed to trial and seek the Fundamental Dishonesty finding.

This is another example of what can be achieved, in terms of significant outlay savings, where suspicions exist as to presentation of symptoms. The figures above speak for themselves. However, this was only achieved via a significant amount of hard work by the legal team and unflinching support from the Insurers who were prepared to invest in what was, at the outset, a nuanced and difficult to predict case.

Peter Bennett
Partner
Dolmans Solicitors

For further information regarding this article, please contact
Peter Bennett at **peterb@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

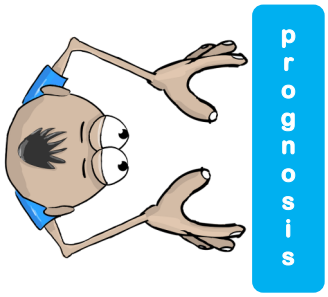
RECENT CASE UPDATES

Civil Procedure - Split Trials - Vulnerable Adults

AXX v Zajac
[2022] EWHC 2463 (KB)

The Court had to determine whether it should order a split trial in relation to a damages claim arising out of a road traffic accident. The Claimant claimed that he had suffered a traumatic brain injury resulting in psychosis, paranoia and delusion. The Defendant denied that the Claimant's condition was caused or contributed to by the accident. The Claimant failed to engage with experts wanting to assess his medical condition, which meant that there were no proper reports available about his mental state or the brain and psychiatric injuries allegedly caused by the accident.

The Defendant Insurance Company wanted a stay of proceedings until such time as the Claimant had cooperated with the medical experts so that all of the issues in the case could be heard at once.



The Claimant's position was he favoured a split trial because it would enable him to resolve the causation issue and, thereafter, apply for an interim payment to fund treatment, and an Application to the Court was made on this basis. The Defendant opposed the Application on the basis that this would lead to increased delay and costs – and might not even have the desired effect; whether causation was tried as a preliminary issue or not, sooner or later the Court would have to grapple with the issue of prognosis.

The Court held that the Claimant fell within CPR PD 1A – his vulnerability either impaired or might impair his ability to (a) understand the proceedings and his role in them; (b) express himself throughout the hearing; (c) put his evidence before the Court; (d) respond to or comply with any request of the Court, or to do so in a timely manner; (e) instruct representatives; and (f) attend any hearing.

The Court's duty was to attempt to mitigate against the effects of the Claimant's vulnerability, and the proposal to split causation from quantum maximised the likelihood of him (i) being better able to engage with experts; and (ii) ensuring his prognosis, good or bad, was made as clear as practicable. Accordingly, the Court ordered a split trial.

The Court was not prepared to make an Order whereby the claim would be stayed automatically, with permission to apply, if the Claimant continued not to cooperate with the Defendant's experts. It was held that it would be proportionate in that event to bring the issue back before the Court so that a more formal decision could be made as to whether the Claimant had capacity to consent to medical examination.

The new guidance in CPR PD 1A on the participation of vulnerable parties and witnesses was said to spell out a "structured reasoning tool" and the process which the Court should go through and the factors to consider in every case to ascertain whether a person was vulnerable, how it might affect their role and position in the claim, and what steps to take to assist that person to participate. It was not, however, an exhaustive set of provisions nor intended to be construed narrowly as if in a statute. The new provisions were part of the wider duty of the Court to ensure hearings, and the management of cases, were fair and to have regard to and apply equalities duties and the principles of ECHR Article 6.

RECENT CASE UPDATES

Costs - Multiple Claims - Personal Injury

Achille v Law Tennis Association Services Limited [2022] EWCA Civ 1407

The Claimant brought proceedings against the Defendant for damages in relation to alleged psychiatric injury and injury to feelings. A District Judge struck out his personal injury claim on the ground that his Statement of Case disclosed no reasonable grounds for bringing the claim, but the claim of alleged injury to feelings continued. The Claimant was ordered to pay the Defendant's costs of the personal injury claim, which were summarily assessed. The District Judge found that the requirements of r.44.15(1) were satisfied and the Costs Order could be enforced without needing the Court's permission.

The Claimant appealed against the Costs Order to a Circuit Judge who upheld the District Judge's decision. The Claimant appealed to the Court of Appeal, arguing that "the proceedings" in r.44.15 referred to the entirety of the claims brought against a Defendant in one action and the proceedings as a whole had not been struck out. Therefore, it was premature for the Costs Order to be enforced against him.

The issue for the Court to determine was whether the strike out of the PI elements of a mixed claim was sufficient to engage CPR 44.15 and automatically disapply QOCS. This turned on the definition of the word "proceedings" within that provision.

The Claimant's appeal was allowed.

The Court of Appeal held that the word "proceedings" within the QOCS provisions must be consistent within the QOCS regime. For this to be the case, "proceedings" had to mean all claims brought by a Claimant against a Defendant or Defendants (*Wagenaar v Weekend Travel Ltd [2014] EWCA Civ 1105* and CPR 44.15 considered). Such an interpretation should not be seen as encouragement to bring 'frivolous claims'. It was not necessary to interpret "proceedings" in r.44.15 as referring to the personal injury claim alone in order to give effect to that deterrent purpose of the QOCS regime.

It was held that in a mixed claim, Courts had wide discretionary powers as to costs pursuant to CPR 44.16(2)(b). Therefore, a Judge striking out a personal injury claim could make an Order for costs and assess them summarily if appropriate.

Electronic Working Pilot Scheme - Electronic Filing - Time Limits

Microsoft Ireland Operations Limited & Others v JJH Enterprises Limited [2022] EWCA Civ 1509

The Court of Appeal held that the Appellant's Notice, which was filed with the Court of Appeal electronically after 4:30pm, was filed in time.

The issue before the Court was whether, where an Appellant's Notice is filed with the Court of Appeal electronically in accordance with the Electronic Working Pilot Scheme (EWPS) introduced by CPR PD51O, it may be filed at any time up to midnight on the last day of the permitted period or must either generally, or at least in the case of an appeal from the Commercial Court, be filed by 4:30pm.

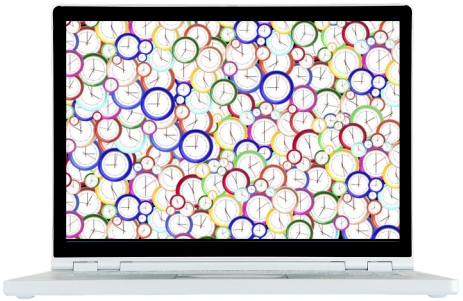
RECENT CASE UPDATES

The Claimant, 'C', brought proceedings in the Commercial Court against the 3 Defendants, 'D'. D's Application to strike out the claim against one of the Defendants, or grant Summary Judgment, and to stay the claim against the other Defendants on grounds of forum non conveniens was dismissed. The Order dismissing the Application extended time for D to file any Appellant's Notice until 6 June 2022, but did not specify a time on the final day by which it should be filed. D filed an Appellant's Notice electronically at 4:52pm. C informed D that the Notice had been filed out of time as it was filed after 4:30pm. D applied for a declaration that the Notice had been filed in time or, if that was wrong, seeking a retrospective extension of time.

At first instance, it was held that the Notice had been filed in time as the effect of paragraph 2.1 of PD51O was that documents could be filed at any time up to midnight. C's solicitor requested that the Master's Order be reviewed by the Court of Appeal.

The Court noted that the rule providing for the time within which an Appellant's Notice must be filed (CPR 5.12(2)) says nothing about the time of day before which filing must occur. Notices filed by post or in person can only be filed in the Civil Appeals Office Registry during office hours (i.e. by 4:30pm) because the Registry has no post-box through which documents can be delivered out of hours. In relation to filing by fax and email, the effect of CPR PD 5A and 5B is that documents must be filed by 4:00pm.

Pursuant to the EWPS, electronic filing in the Civil Division of the Court of Appeal has been mandatory since 14 February 2022. Paragraph 2.1 states "*Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including during out of normal Court office opening hours and on weekends and bank holidays …*". PD51O contains no provision limiting the time of day during which a document can be filed. Accordingly, the Court concluded that there was no Rule or Practice Direction requiring filing in office hours in the case of electronic filing.



Whilst this conclusion meant that the makers of PD51O adopted a different approach from the makers of PD 5A and 5B, the Court considered there was no reason why electronic filing should be treated in the same way as filing by email or fax. The EWPS is a wholly new method.

C had also relied upon para D18.2 of the Commercial Court Guide which provides that if the Court orders an act be done by a certain date without specifying a time for compliance, the latest time for compliance is 4:30pm on the day in question. However, the Court found that did not apply on the facts of this case as the Order in issue did not order that an act be done, it merely extended D's time to file an Appellant's Notice.

Accordingly, the Master's decision that the Appellant's Notice was filed in time was upheld.

RECENT CASE UPDATES

Inquests - Article 2

R (on the Application of Morahan) v HM Assistant Coroner of West London [2022] EWCA Civ 1410

The Court of Appeal upheld the decision of the Coroner that the circumstances of M's death did not call for an Inquest which complied with the investigative obligation imposed by Article 2 ECHR.

M had a history of illicit drug use and had been receiving treatment for mental health problems for 10 years. In December 2017, M was detained for treatment under section 3 of the Mental Health Act 1983. She had responded well to treatment and remained abstinent from substances. M complied with unescorted leave. In May 2018, she was admitted to an open rehabilitation unit operated by the Central and North West London NHS Foundation Trust ('the Trust'). On 25 June, M's section 3 detention ended as she no longer met the criteria for detention. M agreed to remain at the rehabilitation unit as a voluntary patient. On 1 July 2018, M failed to return to the unit at the time expected. When she returned, M admitted drinking alcohol but denied illicit drug use. Drug testing was negative. Medical assessment found no deterioration in mental state. M appeared remorseful regarding absconding and agreed to continue treatment. There were no grounds for detention. On 3 July 2018, M again failed to return to the unit when expected. Her absence was reported to the police, who called at M's flat on 4 July 2018 but got no response. On 13 July 2018, M was found dead in her flat. A post mortem gave cocaine and morphine toxicity as the probable cause of death, with the death likely to have occurred around 3 July 2018. There was no basis for suggesting that M took her own life. In answers to responses from the family's solicitors, the pathologist responded that tolerance to opiate drugs can be lost rapidly during abstinence so a period in hospital could make taking the drugs more dangerous.

The Coroner concluded that an Article 2 Inquest was not required and this decision was upheld by the Divisional Court. The family appealed on the grounds that the Divisional Court erred:

- in its conclusion that M's death did not occur in circumstances in which the Article 2 operational duty was arguably owed by the Trust;
- in not concluding that an automatic duty to hold an Article 2 compliant Inquest arose on the facts; and
- in concluding that there was no arguable breach of any Article 2 substantive duty.

The Divisional Court had concluded that no operational duty was owed to M to protect her against the risk of accidental death by the recreational taking of illicit drugs as there was no real and immediate risk of death from such cause of which the Trust was or ought to have been aware. The Court of Appeal found that the Divisional Court's decision was unassailable stating *"… as a long term drug user M was at risk, even high risk, of serious harm and accidental death at some stage if she reverted to using drugs but a 'real and immediate' risk' as a Strasbourg term of art is much more specific"*.

In relation to ground 2, the Court of Appeal rejected the family's submission that the death of a voluntary psychiatric patient, whether in or away from hospital, and whatever the cause of death, always requires an Article 2 Inquest. There was no authority which decided that an Article 2 operational duty was owed to voluntary psychiatric patients to protect them from all risks of death. This case did not fall into one of those categories which necessarily gave rise to the possibility of a substantive breach.

Given the finding that no operational duty was owed, ground 3 did not arise.

Accordingly, the Court concluded that the Coroner was right to conclude that M's circumstances did not give rise to an operational duty under Article 2 ECHR upon the Trust to protect her from the risk of accidental death from the use of recreational drugs and, therefore, right to conclude that the parasitic procedural duty to hold an Article 2 Inquest did not arise.

Appeal dismissed.

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

Amanda Evans at **amandae@dolmans.co.uk** or
Judith Blades at **judithb@dolmans.co.uk**

DOLMANS
SOLICITORS

DOLMANS

TRAINING OPPORTUNITIES

At Dolmans, we want to ensure that you are kept informed and up-to-date about any changes and developments in the law.

To assist you in this, we can offer a whole range of training seminars which are aimed at Local Authorities, their Brokers, Claims Handlers and Insurers.

All seminars will be tailored to make sure that they cover the points relevant to your needs.

Seminars we can offer include:

- Apportionment in HAVS cases
- Bullying, harassment, intimidation and victimisation in the workplace – personal injury claims
- Conditional Fee Agreements and costs issues
- Corporate manslaughter
- Data Protection
- Defending claims – the approach to risk management
- Display Screen Regulations – duties on employers
- Employers' liability update
- Employers' liability claims – investigation for managers and supervisors
- Flooding and drainage – duties and powers of landowners and Local Authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage
- Flooding and drainage – duties and powers of Highway Authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the Highway Authority in respect of highway waters
- Highways training
- Housing disrepair claims
- 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, **Melanie Standley** at **melanies@dolmans.co.uk**