DOLMANS INSURANCE BULLETIN

Welcome to the January 2026 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor:

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REPORT ON

Schools, Grass Banks and the Occupiers' Liability Act 1957

OW (a minor) v Merthyr Tydfil County Borough Council

Many secondary schools, particularly in more rural areas, will have outdoor play areas connected by a framework of paths traversing grassed areas. For various reasons, pupils will not always keep to these paths and will venture onto grassed areas that could be slippery and cause pupils to fall.

In the recent case of *OW (a minor) v Merthyr Tydfil County Borough Council*, in which Dolmans represented the Defendant Local Authority, the Court was asked to adjudicate in such a matter.

Background and Allegations

The Claimant was a pupil at a secondary school controlled by the Defendant Local Authority.

Through his Litigation Friend and father, the Claimant alleged that he was proceeding with friends along a path within the school grounds when he fell on the adjacent grass verge which was poorly maintained, thereby sustaining personal injuries. The Claimant alleged that both the path and the grass verge were muddy, that he was running after his friends and that he was effectively forced onto the adjacent grass verge as the path was busy.

The Claimant alleged that he landed on a defective and sunken edging stone between the path and the grass verge within the immediate vicinity of his alleged accident.

As a result of his alleged fall, the Claimant sustained personal injuries.

The Claimant alleged that the Defendant Local Authority was negligent and/or in breach of Section 2 of the Occupiers' Liability Act 1957, having allegedly failed to take any reasonable care to ensure that the Claimant was reasonably safe when using the premises and exposing the Claimant to a foreseeable risk.

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REPORT ON

Claimant's Evidence

The Claimant's evidence was somewhat vague. He accepted that he was running after his friends and slipped on mud. The Claimant appeared to submit that the only thing in the vicinity that must have caused him to initially lose his balance was the sunken edging stone, but that he also slipped as a result of the adjacent muddy grass verge.

The Claimant's father returned to school to take various photographs along the relevant path, but was not present at the time of the Claimant's alleged accident.

None of the Claimant's friends gave evidence.

The Claimant averred that the Defendant Local Authority should have taken measures to make the relevant location safe, such as widening the path, erecting warning signs and a fence to keep pupils off the grass verge.

CCTV

The location of the Claimant's alleged accident was covered by CCTV. Unfortunately, the relevant CCTV footage of the Claimant's alleged accident had become corrupted and was no longer available. However, two of the Defendant Local Authority's witnesses had both viewed the CCTV footage before the same had become corrupted and had taken a screenshot, although this showed only the aftermath of the Claimant's alleged accident and not the alleged fall.

The Defendant Local Authority's witnesses were, however, able to mark the exact location of the Claimant's fall on this screenshot, as was seen when they viewed the CCTV footage. This was not at the same location alleged by the Claimant.

Defence

The Defendant Local Authority had in place an appropriate system, including a reactive system, for dealing with any alleged defects or issues within the school premises. Following investigation of the Claimant's alleged accident however, no defects were noted at the location of the same and no remedial works were required as a result of the Claimant's alleged accident.

Although subsequent refurbishment works were undertaken in the area, such works were to move a fire assembly point and were totally unrelated to the Claimant's alleged accident.

The Defendant Local Authority averred that appropriate supervision was provided, when required, and that it had no record of any complaints or other accidents relating to the location of the Claimant's alleged accident during the 12 month period prior to the date of the Claimant's alleged accident.

As for the Claimant's suggestion that a fence could have been erected between the path and the grass verge to prevent pupils accessing the grass verge, the Defendant Local Authority responded that it would not have been safe to do so, given the proximity of several fire exits from the adjacent building.

The Defendant Local Authority maintained that it had taken all reasonable measures to ensure that pupils at the school were kept reasonably safe.

The Defendant Local Authority argued that there was a high degree of contributory negligence on the Claimant's part.

Defendant Local Authority's Evidence

The Defendant Local Authority was aware that pupils used the grass verge.

One of the Defendant Local Authority's witnesses even recalled using the path and the grass verge when he was a pupil at the school many years previously without any issues whatsoever.

The Defendant Local Authority was aware that the grass verge could become muddy and slippery, but did not consider the grass verge to present a real source of danger.

The path was wide enough for three pupils to pass each other, without needing to use the grass verge anyway.

Likewise, the Defendant Local Authority did not consider the sunken edging stone to be a particular and/or real source of danger. It did not require any repair.

The Defendant Local Authority undertook health and safety inspections prior to the Claimant's alleged accident, when all external walkways were found to be in good repair. As already referred to above, the relevant location was inspected following the Claimant's alleged accident, when no issues were noted and no repairs required.

REPORT ON

Judgment

The Trial Judge held that the Defendant Local Authority did not owe a duty to maintain the relevant location in perfect condition and reiterated that the Claimant needed to prove that there was a real source of danger, albeit that it was accepted that children are less aware of any such dangers.

It was accepted that the exact circumstances and cause of the Claimant's alleged accident were somewhat vague and that the Trial Judge needed to grasp this initially.

The Trial Judge held that the Claimant's alleged accident occurred within a matter or seconds, that he was running at some speed and focusing on the friend whom he was chasing. Although the Trial Judge was satisfied that the Claimant was not being dishonest, he found that the Claimant's evidence was hazy and that he was trying his best to recall events. The Claimant had focused somewhat on the sunken edging stone, but only after reconstruction of the circumstances of his alleged accident some time following the same.

Having considered all of the evidence however, the Trial Judge found that the Claimant's alleged accident had occurred on the grass verge and that he would focus upon this in his Judgment. Indeed, this was also in keeping with the alleged CCTV footage.

Whilst the Trial Judge accepted that the Defendant Local Authority was aware that pupils used the grass verge and had a duty to assess the risk to children using the area, it was held that this did not present a real source of danger in this particular matter.

The Trial Judge found that whilst mud can be slippery, this was an everyday hazard seen in all walks of life. The Claimant had not, therefore, established that the Defendant Local Authority had failed to take reasonable steps to ensure the reasonable safety of pupils. It was held that the Defendant Local Authority cannot be expected to police secondary schools at all times and in all places.

As for the Claimant's suggested measures that the Defendant Local Authority could arguably have put in place, the Trial Judge held that a warning sign would not have told the Claimant anything that he did not already know and that there was no duty upon the Defendant Local Authority to widen the path. The Trial Judge stated that unless the Defendant Local Authority covered all grassed areas within the school grounds, there was always a chance that pupils would choose to walk on the grass anyway.

REPORT ON

The Trial Judge held that the Defendant Local Authority had a duty to keep visitors reasonably safe and had complied with this duty by constructing a path wide enough for three pupils to pass.

Notwithstanding the above, the Trial Judge held that the Claimant was the author of his own misfortune and that the Defendant Local Authority could not prevent all accidents. It was held that the Claimant had chosen to leave the tarmacadam path and decided to run on the muddy grass verge, wearing normal trainers and being aware that he could slip. Had he used the path, then the alleged accident would not have occurred.

As such, the Claimant's claim was dismissed.

Comment

Somewhat unusually for a case involving accidents in schools, the Trial Judge was prepared in this matter to go beyond any finding of contributory negligence and find that the Claimant was the author of his own misfortune. The Claimant was, however, a secondary school pupil and this particular finding might, of course, have been somewhat different had the alleged accident occurred in a primary school.

Notwithstanding the above and although each case will, of course, be decided upon its own circumstances, the Trial Judge in this particular matter was satisfied that there were no additional measures that the Defendant Local Authority needed to take, as suggested by the Claimant, and that the Defendant Local Authority had already complied with its duty by constructing an appropriate path accordingly.

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FOCUS ON

Guideline Hourly Rate Increase From 1 January 2026

The Master of the Rolls, Sir Geoffrey Vos, has announced an update to guideline hourly rates for solicitors with effect from Thursday 1 January 2026.

The uplift from the 2025 rates to the new 2026 rates amounts to an increase of 2.28%.

Readers will appreciate the need to review reserves given these increases. The new guideline hourly rates for 2026 are as follows (with the previous year's rates shown in brackets):

Grade	Fee Earner	London 1	London 2	London 3	National 1	National 2
A	Solicitors and Legal Executives with over 8 years' experience	£579 (£566)	£422 (£413)	£319 (£312)	£295 (£288)	£288 (£282)
B	Solicitors and Legal Executives with over 4 years' experience	£393 (£385)	£327 (£319)	£262 (£256)	£247 (£242)	£247 (£242)
C	Other Solicitors or Legal Executives and Fee Earners of equivalent experience	£305 (£299)	£276 (£269)	£209 (£204)	£201 (£197)	£200 (£196)
D	Trainee Solicitors, Paralegals and other Fee Earners	£210 (£205)	£157 (£153)	£146 (£143)	£142 (£139)	£142 (£139)

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CASE UPDATES

Civil Procedure - Fundamental Dishonesty - Artificial Intelligence

Taiwao v Homelets of Bath Limited
[2025] EWHC 3173 (KB)

This case concerned the oral renewal of the Claimant's Application for permission to appeal from the decision of His Honour Judge Blohm KC dismissing her claim pursuant to section 57 of the Criminal Justice and Courts Act 2015. The Application was refused by Sheldon J on the papers, with full reasons, on 28 March 2025 (Order sealed 1 April 2025).

The Claimant had succeeded at a liability trial before Recorder Sharp QC, in a Judgment given on 12 April 2018. The Recorder found that the Claimant had been the subject of a course of conduct of harassment contrary to the Protection from Harassment Act 1997 ('the 1997 Act') and had been assaulted. This related to the treatment of her by the Defendant over five days in 2010 when the Defendant sought to evict the Claimant from a property in Bath. Damages were to be assessed at a separate trial.

While the Recorder had found that the Claimant had been harassed and assaulted, her claim for £2 million in compensation for psychiatric injury, injury to feelings and loss of earnings was dismissed at the quantum trial due to the fact that the Judge found that the Claimant had been dishonest in a fundamental way, leading to the dismissal of her claim and an Order for her to pay the Defendant's costs on an indemnity basis.

The Claimant sought permission to appeal. Three issues were raised upon appeal to be considered by the Court:

- The extent to which fundamental dishonesty must be pleaded and put;
- The extent to which the Court may draw inferences of dishonesty from the evidence, including evidential gaps; and
- Whether Vento damages fell within the scope of a Section 57 dismissal.

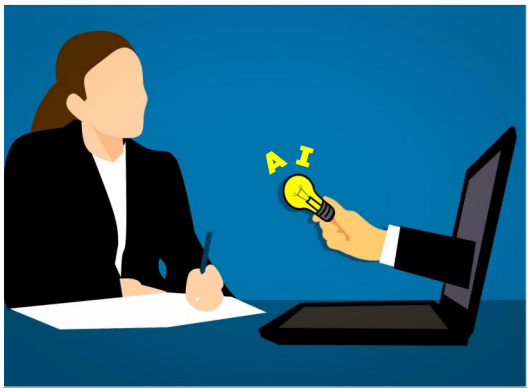
The Court determined these issues as follows:

(1) A defendant is not required to plead Fundamental Dishonesty in terms, provided that the claimant has sufficient notice of the dishonesty case to be met by the date of trial; *Howlett v Davies [2017] EWCA Civ 1696.*

(2) Whilst the burden of proving dishonesty lies with a defendant, that does not prevent a court from drawing reasonable inferences from the totality of evidence, including the evidential gaps which one would expect to be filled if the claimant's account was genuine. The Judge noted that Section 57 cases frequently depended on inference.

(3) An award of damages under the 1997 Act is a "statutory claim for anxiety caused by harassment". That is a claim for personal injury and part of the "primary claim" for the purpose of Section 57. Once fundamental dishonesty was established, Vento damages also fell to be dismissed.

In addition to addressing the above matters, the Judge found that the Claimant, who was representing herself in the appeal, had included AI generated authorities in her submissions, and the Judge issued a stern warning to lawyers who may have assisted a Litigant in Person in submitting fake citations generated by AI. While seeking permission to appeal, the Claimant filed Grounds of Appeal and a Skeleton Argument which included a reference to *Irani v Duchy Farm Kennels [2020] EWCA Civ 405*. The Court requested a copy of the authority, but none was provided. The Judge later revealed that the authority was bogus, likely created by AI.



This follows a pattern of cases in which the presentation of false authorities to the court has been heavily criticised. Additionally, the Claimant's Skeleton Argument included another fake reference to *Chapman v Tameside Hospital NHS Foundation Trust [2018] EWCA Civ 2085*, which was also fabricated. The Judge emphasised that relying on false citations is equally problematic when presented by a Litigant in Person, and though the sanctions may differ from those imposed on lawyers, there are still serious consequences for those involved.

CASE UPDATES

Costs - Service of Schedule of Costs

R (on the Application of Public and Commercial Services Union (PCSU)) v Secretary of State for the Home Department [2025] EWCA Civ 1759

The fact that a Costs Schedule had not been served did not justify depriving the successful party of a Costs Order.

This case concerned an appeal issued by PCSU against an Order of His Honour Judge Jarman KC, which was dismissed. The Respondent asked for an Order that the Appellant pay the costs of the appeal, to be assessed in detail if not agreed. No Costs Schedule was served by the Respondent at or before the hearing. The Respondent applied for its costs against the unsuccessful Appellant.

The Appellant resisted the Costs Order on the basis of the general rule under CPR PD 44 para.9.2 and para.9.5 that the Court had to make a summary assessment of costs at the conclusion of any hearing other than a fast-track trial of less than a day, and that the parties and their representatives were obliged to assist the Judge by preparing a written Statement of Costs; *Wheeler v Chief Constable of Gloucestershire [2013] EWCA Civ 1791, [2013] 12 WLUK 599*. The Appellant submitted that there should be no order as to costs since no Costs Schedule had been served; alternatively, the Respondent should be required to pay the costs of any detailed assessment.

Decision

The Court was not persuaded by the authorities relied upon by the Claimant which were cases that had proceeded in the Administrative Court and were not considered to be a guide to the practice in the instant Court.

So far as the Court was concerned, it was not uncommon for no Costs Schedule to be served by either party in an appeal which was listed for a full day, and in which it was expected that judgment would be reserved. Where it was clear that the rules required a Costs Schedule, one had to be filed; however, the fact that one had not been served was no reason to deprive the successful party of a Costs Order, to be assessed in detail if not agreed. The Judgment in *Wheeler* did not contain any decision about costs. It was possible that there were special factors in that case justifying a very unusual Order; *Wheeler* considered.

Where an Order was made in the Court of Appeal for one party to pay the other's costs, either side could protect their position in relation to the costs of the assessment by making an appropriate offer as to what it would be willing to accept or pay. Such an offer could be shown to the Costs Judge at the end of the detailed assessment process if it turned out to be effective.

Accordingly, the appeal in relation to the costs issue was dismissed and the Appellant was ordered to pay the Respondent's costs, to be assessed in detail on the standard basis unless agreed.

CASE UPDATES

Negligence - Strike Out - Illegality Defence

Lewis-Ranwell v (1) G4S Health Services (UK) Limited (2) Devon Partnership NHS Trust (3) Devon County Council [2026] UKSC 2

The Supreme Court has unanimously allowed the Defendants' appeal in relation to their Application to strike out the Claimant's claim for negligence on the grounds that it was barred by the illegality defence. The Court of Appeal's decision was reported upon within the February 2024 edition of Dolmans' Insurance Bulletin.

The Claimant has a diagnosis of schizophrenia and spent periods in psychiatric intensive care in 2016 and 2017. In 2019, the Claimant, in the course of a serious psychotic episode, attacked and killed three elderly men in the delusional belief that they were paedophiles. He was charged with murder, but found not guilty by reason of insanity. In the two days prior to the killings, the Claimant had been arrested twice by Devon and Cornwall Police. On the first occasion, the arrest was in relation to a suspected burglary. He was released on bail. The second arrest was for assaulting an elderly man whom he believed to be a paedophile. He was again released on bail. During both periods of detention, the Claimant had behaved violently and erratically and was apparently mentally very unwell. He was seen or spoken to by mental health professionals employed by G4S and the Health Trust. A face-to-face assessment by a mental health nurse and the need for a Mental Health Act Assessment by a mental health professional employed by the Council were discussed, but did not take place.

The Claimant commenced proceedings against G4S, the Police, the Health Trust and the Council, alleging that it should have been obvious to all concerned during both detentions that if he were released there was a real risk he would injure other people and that the necessary steps should have been taken to keep him in detention until it was safe for him to be released. The claims were advanced in negligence and under the Human Rights Act 1998 and sought damages for personal injury, loss of liberty, loss of reputation and pecuniary losses. The Claimant also sought an indemnity in respect of any claims brought against him as a consequence of his violence towards others during the relevant period.

The Council, G4S and the Health Trust issued Applications to strike out the claims relying on the illegality defence (ex turpi causa principle), that is the court will not entertain a claim which is founded on a claimant's own unlawful act.

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By the time of the first instance hearing of the Applications, it was accepted that the strike out Applications could only be pursued in relation to the claim in negligence and not the claim under the 1998 Act. The Applications were dismissed at first instance on the grounds that, because of the verdict of 'not guilty by reason of insanity', the Claimant did not know that what he was doing was wrong and his conduct did not have the necessary element of 'turpitude'. The Court of Appeal dismissed the Defendants' appeal. The Defendants appealed to the Supreme Court.

The Supreme Court addressed the threshold question: in what circumstances is the illegality defence engaged? It would be unjust if every act by a claimant which involved some unlawfulness, however trivial, were to be a bar to an otherwise valid legal claim. The question is whether conduct is unlawful in the sense required for the application of the principle. In this case, the Court was confronted by a novel situation on which there was no direct authority. It was, therefore, necessary to proceed cautiously on a step-by-step basis, seeking to apply principles established in earlier cases and, where appropriate, developing them incrementally.

Whilst this case did not involve criminal offences in that the Claimant was found not guilty by reason of insanity, that was not a decisive consideration. There was no justification for allowing the distinction between diminished responsibility and insanity in criminal law to fetter the analysis of the availability of a defence in civil law. The conclusion of the majority of the Court of Appeal placed too much weight on the absence of moral culpability and failed to recognise that in a novel circumstance, such as this, the court should primarily address the question of the coherence of the law, which has been accepted as the rationale of the illegality defence in English law. The risk of producing inconsistency and disharmony in the law, and thereby damaging public confidence in the integrity of the legal system or otherwise bringing the law into disrepute in the eyes of the public, was of central importance in determining the threshold in this case.

The Claimant's acts were not justified by his insanity. He was simply excused criminal liability. Killing another human being without lawful justification breaches a fundamental moral rule in our society – you shall not kill. This is so even when the person who has killed bears no criminal responsibility for his actions. The Claimant had killed three men unlawfully and was the subject of an order of detention which the Court was required to make to protect the public as a result of the Claimant's actions and his continuing mental state which made him a danger to the public. By contrast with a negligent or other tortious act which engages the interests only of the parties to a litigation, the Claimant's actions in killing the three men, which manifested the danger which he posed to the public, engaged the interests of the State or the public interest.

The Court, therefore, concluded that the Claimant's killing of the three men was unlawful conduct for the purpose of engaging the illegality defence. Having concluded that the illegality defence was engaged by the present claim, it was necessary to apply the trio of considerations set out in *Patel v Mirza [2016]*.

Stage (a): the underlying purpose of the prohibition transgressed and whether that purpose will be enhanced by denial of the claim

Although the Claimant is spared criminal responsibility for his conduct and the law focuses on the protection of the public as opposed to punishment, his conduct is neither justified nor excused. The Claimant's conduct was unlawful and deserves to be condemned.

To allow the present civil claim to proceed would give rise to a series of inconsistencies which would damage the integrity of the law and the legal system. Considerations relating to the internal consistency of the law are necessarily closely bound up with public confidence in the integrity of the legal system. The inconsistencies identified by the Court in its judgment would necessarily be detrimental to the legal system and its coherence.

The Court highlighted in particular that, notwithstanding the fact that the Claimant is excused criminal liability, members of the public would be profoundly surprised and concerned if he were able to claim for the consequences of his wrongful act. The purpose of detaining the Claimant is to protect the public from the risk he poses for the future. To compensate him for this detention would be incoherent. The law would be giving with the right hand what it took away with the left. The public would also be rightly concerned that, in the case of the NHS Trust and Devon County Council, public money should be used to compensate the Claimant for the consequences of his wrongful acts.

Accordingly, for reasons of consistency and public confidence, the Court concluded that there were very weighty considerations supportive of the view that the underlying purpose of the prohibition transgressed would be enhanced by denial of the claim.

Stage (b): Any other relevant public policies which may be rendered ineffective or less effective by denial of the claim

The Court agreed with the Claimant's submission that it is, in general, in the public interest that the courts should adjudicate civil wrongs. It also accepted that permitting civil claims has the effect of opening up for examination the standards of care provided and what may have gone wrong in individual cases. This may encourage providers to provide better care for the mentally ill and to enhance standards. However, alternative procedures exist, such as inquests and public inquiries, which are better suited for these purposes. In the present case, an inquest into the deaths had been opened.

The Court considered the policy considerations at stage (a) in favour of denying a civil claim, founded as they were on the need to maintain the integrity of the legal system, greatly outweighed those at stage (b) in favour of permitting a claim.

Stage (c): the proportionality of denying a civil claim

At this stage of the *Patel* analysis, the question was whether denial of the claim would be a proportionate response to the illegality. The brutal killing of three innocent men was of the utmost seriousness. The conduct was central to all heads of loss claimed and the effective cause of such loss. The Claimant's acts amounted to unlawful killing. Denial of the claim would not be a disproportionate response to the illegality.

Accordingly, the Defendants' appeal was allowed.

Occupiers' Liability Act 1957 and 1984 - Duty of Care

Lillystone v Bradgate Education Partnership
[2025] EWHC 3341 (KB)

The Claimant seriously injured his hand climbing a school gate to fetch a football. His claim was dismissed after the Trial Judge ruled it was his "choice" to climb the gate.

The Claimant had been playing football with friends around Wreake Valley Academy ("the Academy) in April 2019. The Bradgate Education Partnership ("the Partnership") is the Trust which runs the Academy. The 37 year old kicked the ball over a 4.5 metre fence surrounding the pitch and into adjacent playing fields. The pitch was surrounded by a high fence. There was a further perimeter fence between the Academy's premises and the adjacent playing fields which were also owned by the Partnership, and which were accessible to the public. A gate in the perimeter fence was kept locked apart from when the fields were used for school lessons. The Claimant scrambled over the 2.1 metre locked gate, but during this he seriously injured his hand on a "burr" of metal protruding from the top of the gate as he dropped down. The Court heard that the injury was caused by the downward force of his body as he jumped, with the Judge finding that "even a blunt burr would cause an injury" due to the force involved. A friend of the Claimant climbed the same gate moments later to provide help and managed to do so without sustaining injury.

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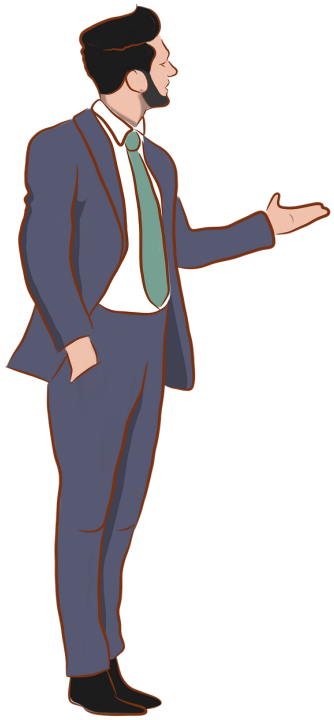
The Claimant brought a claim for damages for the personal injuries and losses he had sustained, arguing that the Academy/the Partnership failed to provide safe access to retrieve lost balls or warn about the dangers.

At first instance, the Claimant's claim was dismissed (in March 2024). The Trial Judge found that the Claimant had not been a trespasser but a lawful visitor throughout. He held that the Partnership had not owed the Claimant the ordinary occupier's duty under the Occupiers' Liability Act 1957 because the Claimant had willingly accepted the risks in question, such that s.2(5) of the OLA 1957 applied. In case he was wrong in finding that the Claimant was not a trespasser, he went on to consider the position under the Occupiers' Liability Act 1984 and concluded that the "burr" was not a danger that the Partnership would have had reasonable grounds to believe existed and that the danger was not in the state of the gate but in the act of climbing it.



The Claimant appealed on five grounds:

- Ground 1: The Judge's decision was irrational and contained inconsistencies of reasoning.
- Ground 2: The Judge erred in not finding that the injuries flowed from the lack of safe means of retrieving the ball.
- Ground 3: The Judge erred in not addressing the Claimant's claim that the Partnership had breached its duties by not conducting an adequate risk assessment.
- Ground 4: The Judge erred in failing to find that the Partnership should have avoided creating a danger.
- Ground 5: The Judge erred in concluding that the risks had been willingly accepted by the Claimant for the purposes of section 2(5) of the 1957 Occupiers' Liability Act.

The Claimant also applied to submit fresh evidence concerning signage installed after his accident that stated "do not climb" and provided a telephone number to be called for ball retrieval.

In response, the Partnership invited the Court to uphold the Judge's decision for the reasons he gave and for further reasons:

Reason 1: No duty was owed to the Claimant in respect of the risks associated with climbing the gate under either the 1957 or the 1984 Occupiers' Liability Acts because (i) there was no danger due to the state of the premises or to anything done or omitted to be done on them; (ii) the Partnership owed no duty to protect the Claimant against obvious risks; and (iii) the Claimant willingly accepted the risks of injury through climbing the gate in an exercise of his own free choice.

Reason 2: Further, or alternatively, the Claimant was, contrary to the Judge's finding, a trespasser when he climbed the gate, but that the Partnership owed him no duty under the 1984 Act.

Reason 3: The Judge had erred in finding that the Partnership did not have in place adequate measures for the retrieval of escaped balls and invited the Court to conclude that it did, in fact, have in place such measures.

Outcome

The fresh evidence which the Claimant sought to adduce about the "do not climb" signs had been available at trial. It was held that the installation of the signage did not amount to a tacit admission that the previous arrangements had been inadequate; *Cockerill v CXK Ltd [2018] EWHC 1155 (QB), [2018] 5 WLUK 355* applied. The fresh evidence would not have had an important influence on the Judge's decision. It was not admitted; *Ladd v Marshall [1954] 1 W.L.R. 1489, [1954] 11 WLUK 110* followed.

Dismissing the appeal, Mrs Justice Hill concluded: "*The Judge's decision is upheld for the reasons he gave for finding that the Respondent owed the Appellant no duty under the 1957 Act. In addition, I uphold his decision on the further, alternative, basis that the Appellant was a trespasser but no duty was owed to him under the 1984 Act; and because even if a duty was owed under either Act, the Respondent had adequate measures in place for the retrieval of lost balls … Further, I uphold the Judge's finding that the cause of the Appellant's injury was his choice to adopt the dangerous manoeuvre of climbing the gate, and then the downward motion as he descended it, rather than any breach of duty by the Respondent*."

CASE UPDATES

With regard to s.1(1) of the 1957 Act and s.1(1) of the 1984 Act, the Court found that the Trial Judge had been entitled to conclude that the danger had arisen through the Claimant's decision to climb over the gate, thereby indulging in an activity that had inherent dangers, and not through any danger in the gate itself. The "burr" was not sharp and posed no risk to normal gate users. There was no danger due to the state of the premises. As such, the threshold test was not met so as to impose on the Partnership any duty relating to the "burr" on the gate and/or the risks of climbing over the gate. It would be a circular argument to say that a failure to stop people from climbing over the gate was an omission which gave rise to a duty to take steps to stop people from climbing over the gate; *Tomlinson v Congleton BC [2003] UKHL 47, [2004] 1 A.C. 46, [2003] 7 WLUK 986* followed.

The risks of climbing the gate were obvious. The Partnership owed no duty to prevent the Claimant from climbing the gate or to warn him against those obvious risks; *Tomlinson* followed. Further, the Judge had been right to hold that s.2(5) of the 1957 Act applied. The Claimant had willingly climbed the gate, underestimating the risks; *Bunker v Charles Brand & Son Ltd [1969] 2 Q.B. 480, [1968] 12 WLUK 103* considered.

It was open to the Judge on the evidence to conclude that the Claimant could have chosen to leave the ball or to abandon the game rather than climb the gate. The existence of those choices meant that the Partnership had not created a "trap", such that in reality he had no alternative but to climb the gate; *Tomlinson* considered. The Judge's decision on that issue was not inconsistent or irrational.

The Judge was entitled to conclude that the Partnership had not created an obvious danger to evening footballers by the existence of the perimeter fence and that the danger in this case was the act of climbing, and that was not a danger they had created.

The Claimant had exceeded his licence to play on the pitch. He had been a trespasser when climbing over the gate. That the Claimant's actions had been foreseeable did not mean he had had an implied licence so to act; *Harvey v Plymouth City Council [2010] EWCA Civ 860, [2010] P.I.Q.R. P18, [2010] 7 WLUK 893* followed. Section 1(3)(a) of the 1984 Act was not satisfied because the Partnership had not known of the danger presented by the burr and had not had reasonable grounds to believe that it existed, and s.1(3)(c) was not satisfied because climbing the gate was not a risk which they could reasonably be expected to protect the Claimant against.

The Judge should have found that the measures in place had been adequate.

Appeal dismissed.

CASE UPDATES

Part 36 - Liability Offers - Unjust

Smithstone v Tranmoor Primary School
[2026] EWCA Civ 13

The Claimant, who was a 10 year old pupil at the material time, suffered a minor injury when his fingers became trapped in a door at the Defendant school. The claim was commenced in October 2018 under the applicable pre-action protocol for low value personal injury cases, which provides for fixed costs. On 13 December 2018, before any medical report had been served, the Claimant made a Part 36 offer to settle liability on a 90/10 basis. The Defendant rejected the offer.

Proceedings were issued. Liability was denied and allegations of contributory negligence made. The case was allocated to the Fast Track and listed for Trial in November 2020. On 18 March 2020, the Claimant made a Part 36 offer in the sum of £3,500.

On the day of the trial, the Defendant's witness failed to attend court. Instead of proceeding with the trial, a damages settlement was agreed in the sum of £2,650. The parties asked the Judge to approve the settlement (as the Claimant was a child) and to determine costs. The Defendant contended that the Claimant should recover fixed costs. The Claimant submitted there were exceptional circumstances, such that the case fell outside of the fixed costs regime by virtue of CPR 36.17. In particular, the Claimant submitted there was a lack of negotiation or engagement from the Defendant or response to the Claimant's Part 36 offers.

CPR 36.17 provides, inter alia, that where, upon judgment being entered, judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer, the court must, unless it considers it unjust to do so, order that the claimant is entitled to the costs benefits set out in CPR 36.17. When considering whether it would be unjust, the court must take into account all the circumstances of the case, including any Part 36 offers and whether the offer was a genuine attempt to settle the proceedings. In relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.

CASE UPDATES

The Judge decided that the fixed costs regime applied. Whilst there were perhaps matters on which the Defendant ought to have engaged further, liability and quantum were in dispute and the settlement sum was lower than ever proposed by the Claimant. The Court duly issued a Form N24 General Form of Judgment or Order, ordering that the Claimant may accept the sum of £2,650, the Defendant shall pay the Claimant's fixed costs in the sum of £7,114.50 and the Defendant shall pay both the damages and costs by 18 December 2020.

Over 3 years later, the Claimant was granted permission to appeal against the costs decision. The Appeal Judge upheld the decision, concluding that he was bound by the decision in *Mundy v Tui UK Ltd [2023]* to the effect that a 90:10 liability offer is not an offer to settle that falls within the provisions of CPR 36.17.

The Claimant appealed to the Court of Appeal on the grounds that the Judges below had erred in failing to award the Claimant all, or any, of the consequences under CPR 36.17 when the Order made by the Judge was a judgment which was at least as advantageous to the Claimant as the Claimant's Part 36 offer and there was no finding that such consequences would be unjust. The Claimant further submitted that the decision in *Mundy* was wrong and should be overruled and that the Defendant's actions in running the case to a full trial on liability without making any offer on liability constituted circumstances justifying the use of the escape clause in CPR 36.17 where it would be 'unjust' to confine the Claimant to fixed costs.

The Defendant submitted that there was no 'judgment' such as to engage CPR 36.17. An agreed global settlement was put to the Judge by both parties for approval under CPR 21.10. In any event, the agreed global settlement was not '*at least as advantageous to the Claimant'* as the Claimant's Part 36 liability offer. Further, it was submitted that the 90:10 liability offer was a tactical approach and it would be unjust to permit the consequences of CPR 36.17(4) to accrue in the context of a low value money claim where liability was not subject to separate determination and the 90:10 offer was not a genuine attempt to settle the proceedings.

The issues for determination by the Court of Appeal were thus:

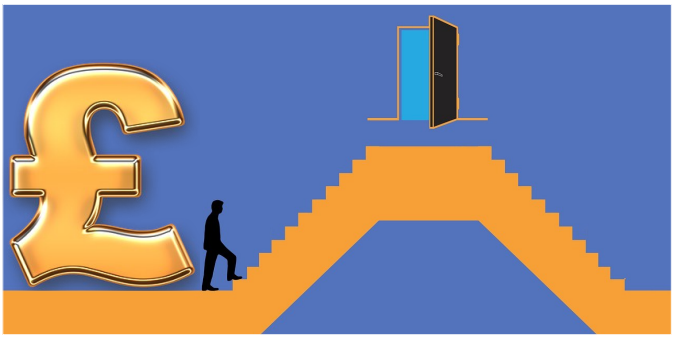
- Was there a "*judgment*"?
- If so, can a 90:10 offer engage the provisions of CPR 36.17(4)?
- If so, on the facts of this case, was the outcome "*at least as advantageous to the Claimant as the proposals contained in the Claimant's Part 36 offer*"?
- If not, is it unjust to confine the Claimant's solicitors to recovering fixed costs? (Alternatively, if the Claimant has succeeded thus far, is it nevertheless unjust to require the Defendant to pay additional sums?)

The Court concluded that the Judge's Order was both a judgment and an order and any attempt to distinguish between the two terms in describing it was misconceived.

In relation to whether a 90:10 offer can engage CPR 36.17, the Court noted that the Judge in *Mundy* did not appear to have been referred to relevant authorities confirming that such liability offers were effective under Part 36 and, on the facts of *Mundy* itself, it was not surprising that the Judge did not find for the Claimant on the costs issue. However, insofar as the Judge in *Mundy* '*may have suggested (obiter) that a 90:10 liability offer is ineffective as a matter of principle to engage CPR 36.17*, the Court of Appeal disagreed and overruled *Mundy* on this issue of principle. The Court stated: '*Whether litigation is complex and of high value, or straightforward and of relatively modest value, the courts should, and the Civil Procedure Rules do, encourage settlement of specific issues where the case as a whole cannot be settled. The 90:10 offer was in my view to be treated as a genuine offer to compromise*.'

However, on the facts of this case, the difficulty for the Claimant's solicitors was that liability was never determined. The Court noted that if the Defendant had admitted liability or the first instance Judge had tried the case and found the Defendant 100% liable, there would have been a case for awarding the Claimant costs, pursuant to CPR 36.17, relating to the issue of liability from the date of the Claimant's 90:10 offer. But that was not what happened. It could not be said that the outcome of the case was a finding, even on liability, more advantageous to the Claimant than a 90:10 apportionment of liability. Accordingly, the Court concluded that CPR 36.17(4) did not apply on the facts of this case and the first instance Judge was right to decide that the Claimant's solicitors were limited to recovering fixed costs.

The Court also rejected the Claimant's submission that this was an unjust result. The Defendant's refusal to admit liability or to engage in settlement negotiations before reaching the door of the court was not in itself a reason for departing from the fixed costs regime. The burden of showing that the usual consequences of Part 36 will be "unjust" presents a "*formidable obstacle*".



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

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