DOLMANS INSURANCE BULLETIN

Welcome to the July 2024 edition of the Dolmans Insurance Bulletin

In this issue we cover:

REPORT ON

Factual causation and other issues in highway tripping matters

S H v Bridgend County Borough Council

CASE UPDATES

- **Civil procedure - acknowledgment of service - claim forms - extensions of time**
- **Negligence - duty of care - special guardian - strike out**
- **Personal injury - damages - pre-existing conditions - genetic testing**
- **Statutory sewage undertakers - nuisance**

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

Factual Causation and Other Issues in Highway Tripping Matters

S H v Bridgend County Borough Council

The initial burden of proof upon a Claimant in a highway tripping claim is to convince the Trial Judge that their alleged accident occurred in the circumstances alleged and was caused specifically by the alleged defect.

If a Claimant is unable to satisfy the Judge in this regard, then factual causation is not proved and their claim effectively falls at the first hurdle.

This occurred in the recent case of *SH v Bridgend County Borough Council*, in which Dolmans represented the Defendant Local Authority, and serves as a timely reminder of the issues that often arise in highway tripping matters.

Background and Allegations

The Claimant alleged that he was returning to his car that was parked on the adopted carriageway when his foot entered a pothole, causing him to fall and sustain personal injuries.

The alleged pothole was located adjacent to a kerb and stone slab set into the carriageway, so there were other features in the immediate vicinity that could have potentially caused the Claimant's alleged accident. None of these were considered to be dangerous however.

The Claimant alleged that his said accident was caused by breach of the Highways Act 1980 and/or the negligence of the Defendant Local Authority, its employees and/or agents. Nuisance was also pleaded.

Factual Causation

Although the Claimant's copy medical records referred to him having suffered an accident, the circumstances and mechanics of the same, as explained to the treating doctor, were somewhat convoluted. Indeed, the Claimant's contemporaneous A&E records made no reference to the cause of the alleged accident.

As such, factual causation was disputed and the Claimant put to strict proof as to the exact circumstances of his alleged accident.

The Claimant disclosed photographs from which it was difficult to understand how his foot could have made contact with the trip edge as alleged. Indeed, from the direction in which he was allegedly walking, his foot would not have caught the alleged tripping edge.

Dangerousness

The Claimant argued that the said photographic evidence, together with a Google image of the relevant location, showed the carriageway to be in a dangerous condition. This was disputed by the Defendant Local Authority's witnesses, all of whom were from the Highways Department.

Indeed, according to these witnesses the Claimant's own photographs indicated that only the surface/wearing course of the carriageway was worn. As such wearing courses were laid to a certain depth, the Defendant Local Authority's witnesses were able to confirm with some certainty that the depth of the alleged pothole was well within the Defendant Local Authority's relevant intervention criteria. The Google image did not appear to show any worn areas at the relevant location.

The Claimant, when notifying the Defendant Local Authority, had referred to a specific measurement, which again was within the Defendant Local Authority's relevant intervention criteria and supported the comments made by the Defendant Local Authority's witnesses regarding the depth of the alleged pothole as indicated in the Claimant's photographs. The measurement stated by the Claimant when reporting his alleged accident was recorded within the Defendant Local Authority's relevant telephone attendance note that was exhibited to the Defendant Local Authority's witness evidence.

Following notification of the Claimant's alleged accident and although within the relevant intervention criteria, the Highways Officer who inspected the alleged defect exercised his discretion and requested that the same be repaired on a non-emergency basis. It was argued that it did not follow from this that the alleged defect was dangerous and that the same was repaired merely as a matter of prudence in light of the Claimant's alleged accident.

REPORT ON

Section 58 Defence

Even if the Claimant succeeded on factual causation and dangerousness, the Defendant Local Authority argued that it had an appropriate Section 58 Defence in this particular matter.

The said carriageway was subject to a scheduled and regular system of inspection and maintenance, as well as a reactive system. No defects were noted for repair at the location of the Claimant's alleged accident during the last scheduled inspection of the carriageway prior to the date of the Claimant's alleged accident and there had been no previous complaints and/or accidents reported at the location of the Claimant's alleged accident during the twelve month period prior to the date of the same.

Judgment

After considering the parties witness evidence, and particularly following cross-examination of the Claimant, the Trial Judge considered the Claimant's witness evidence to be at least partly inconsistent.

The Trial Judge agreed with the Defendant Local Authority's stance that there were other explanations for the Claimant's alleged accident, such as the adjacent kerb.

The Trial Judge referred to the Court of Appeal decision in *James & Thomas v Preseli Pembrokeshire District Council (1993) PIQR P114*, as had been cited on behalf of the Defendant Local Authority, and it was argued that the Claimant needed to satisfy the Court as to exactly where he fell and the cause of his alleged accident.

It was held that the Claimant had not proved that the alleged pothole had caused his accident and the claim was dismissed.

The Trial Judge did not, therefore, need to consider dangerousness and/or the Defendant Local Authority's Section 58 Defence.

Comment

Although dangerousness did not need to be considered, it was apparent that the Trial Judge was assisted by the Defendant Local Authority's evidence in that the Claimant's own photographs did not support his own measurements and that these, in fact, supported the Defendant Local Authority's view that the alleged defect was not dangerous. This, therefore, cast some doubt upon the actual cause of the Claimant's alleged accident, especially as there was an adjacent kerb where the difference in levels was higher than that of the alleged defect shown in the Claimant's own photographs.

Coupled with the Claimant's witness evidence, medical records and cross-examination as to the exact circumstances and mechanics of the Claimant's alleged accident, the Trial Judge accepted the Defendant Local Authority's arguments that cast doubt upon the cause of the Claimant's alleged accident.

As such and by the Trial Judge dismissing the Claimant's claim, the Defendant saved having to pay the Claimant's damages and costs accordingly.

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CASE UPDATES

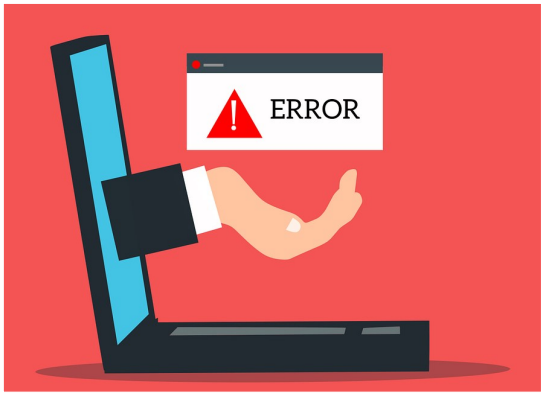
Civil Procedure - Acknowledgment of Service - Claim Forms - Extensions of Time

Occupiers of Samuel Garside House v Bellway Homes Limited [2024] EWHC 1579 (KB)

The Court was required to consider a number of practical points on the issue of service.

Facts

The Claimants brought an action for damages following a serious fire in a block of flats. There were two Defendants. Various extensions of time for service of the Claim Form were agreed and in November 2022 the Court issued a Consent Order specifying 4pm on 21 April 2023 as the time/date for service. Various attempts were made by the Claimants' Solicitors to serve a Claim Form, including via DX, e-mail and fax, late in the afternoon on 21 April 2023. An error message was received from the fax number.



The Claimants applied for a declaration that the Claim Form had been validly served and also that a further extension of time for service until 8 June 2023 had been agreed in correspondence. Alternatively, they applied for relief from sanctions and extensions of time for service of the Claim Form.

Issues

The Court was required to consider:

(1) Whether the time for serving the Claim Form was extended by agreement until June 2023.

(2) Whether the Court had jurisdiction to grant an extension of time and relief from sanctions.

(3) Whether defective or late service renders a Claim Form null and void.

(4) Whether permission is required to file Acknowledgments of Service out of time.

CASE UPDATES

Held

(1) There was no sufficient agreement for an extension of time of the time period set out in a Court Order agreed between the parties. Under CPR r2.10, a variation to a rule or Court ordered time limit could occur by the parties' written agreement. Under r2.11, agreed extensions of r7.5 time limits were permitted. However, the correspondence between the parties was not sufficient to constitute a written agreement with regard to either Defendant and there was no clarification of the precise date agreed.

(2) The Court lacked jurisdiction to grant relief for late service and could not exercise it in favour of the Claimants, as the Claimants could have served the Claim Form by numerous different methods prior to 21 April 2023. The Court held that delivery of the Claim Form to the specified DX address would, in principle, have been appropriate for service on the First Defendant (the DX address was included on the firm's original notepaper and subsequent notepaper excluding it had clearly been used in error). However, the Claim Form had not been served in time (by 4pm on 21 April 2023). It had been left in reception for collection by the DX courier, which was usually after office hours (after 4pm). Leaving material in reception could not amount to "*delivering to … the relevant service provider*" under CPR 7.5(1). 'Electronic' service comprises "*Sending the e-mail or other electronic transmission*". This must be seen in the context of other parts of CPR 7.5(1) framed in terms of what the serving claimant themself had to do (not what others, such as the Post Office, have done). No objection had been taken to the Claimants seeking to rely on service by fax, however the Claimants had not discharged the burden of showing that, on the balance of probabilities, their fax machine had sent the Claim Form into the transmission network. Even if there had been jurisdiction, the discretion would not have been exercised in the Claimants' favour.

(3) Defective or late service does not automatically render a Claim Form null and void (*Hoddinott v Persimmon [2007] EWCA Civ 1203, Pitalia v NHS [2023] EWCA Civ 657 and R (Koro) v County Court at Central London [2024] EWCA Civ 94*) or cause it to be automatically struck out. It continues in existence unless the Court makes an order declining or refusing to exercise jurisdiction (where a consequential striking out order can be made under CPR 11). Such an order will only be made if there is an acknowledgment of service from a relevant Defendant and a subsequent CPR 11 application. If there had been an acknowledgment of service but no application within the 14 days provided for by r.11, there would be a statutory waiver by the Defendant of the service points, unless relief from sanctions was obtained. In this case, there were no acknowledgments of service and no applications by either of the Defendants.

(4) Permission is required to file acknowledgments of service out of time. It was for the Defendants to decide whether to apply to file acknowledgments of service out of time and to make a jurisdiction challenge.

The Claimants' applications were refused.

CASE UPDATES

Negligence - Duty of Care - Special Guardian - Strike Out

Hamilton v The London Borough of Sutton
[2024] EWHC 1675 (KB)

The Claimant ('H') is the maternal uncle of a child ('HBC') who lives with H pursuant to a Special Guardianship Order (SGO). H's claim against the Defendant Local Authority was struck out. H appealed against the finding that the Local Authority owed no duty of care to H in the period before the SGO was made and whilst HBC was subject to an Interim Care Order obtained by the Local Authority.

H alleged that the Local Authority had negligently failed to properly assess HBC's developmental progress and, as a result, failed to recognise (or potentially concealed) that HBC's behaviour was abnormal. Two years after the SGO was made, HBC was diagnosed with ASD, ADHD and global developmental delay. H alleged that if the Local Authority had complied with its duty of care to him as a potential special guardian and provided an adequate analysis of HBC's developmental issues he would not have accepted the guardianship, and that he had suffered psychiatric injury and financial loss as a result of the Local Authority's breach of duty. The Local Authority admitted that upon the making of the Interim Care Order it owed a duty of care to HBC, but denied that it owed a common law duty of care to H.

On the appeal, it was common ground that H needed to establish a relevant assumption of responsibility (*CN v Poole BC [2019]*). H submitted that the assumption of responsibility could be inferred from the manner in which the Local Authority's social worker and foster carers behaved towards him and the nature and extent of the statements they made to him. H relied on *Hedley Byrne & Co Ltd v Heller [1963]*, submitting that a duty of care arose as the Local Authority's employees had made statements and provided information regarding HBC's health and development. H submitted there was at least a real possibility of establishing at trial that the Local Authority had assumed a responsibility towards him as a prospective guardian to perform their functions with reasonable care, including the writing of the Court report and health care plan detailing HBC's current health and developmental status, before the SGO was granted as it must have been appreciated that he would rely upon those documents before deciding whether to enter into the guardianship.

CASE UPDATES

H further submitted that when a Local Authority processes special guardianship applications it assumes responsibility for evaluating and deciding on the suitability of potential special guardians for the wellbeing of the child involved. Social workers in this role undertake the responsibility to gather and share pertinent information about a child's wellbeing before an SGO is granted. This includes information regarding a child's medical history and medical assessment. This process ensures potential special guardians are adequately informed. By assuming this responsibility social workers establish a duty of care both towards the child and the prospective guardian. H sought to rely upon the decision in *Phelps v Mayor of London Borough of Hillingdon [2001]*. H further alleged that the agreement as to financial provision before entering into the guardianship was a contract, or akin to a contract, which gave rise to a liability to pay damages for negligence or fraudulent misrepresentations.

The Local Authority maintained that no duty of care was owed to H. A duty of care was solely owed to HBC and the existence of a duty to any other person, specifically a potential guardian, could be in conflict with that duty. Further, the Local Authority had not entered into a contract in relation to special guardianship. It was fulfilling its obligations (including to provide a financial support package) arising from the duties to HBC and the requirements under statutory regulations.

The Judge noted that the major difficulty with H's pleaded claim and submissions was that he could not point to what the Local authority did (giving rise to an assumption of responsibility) which it did not do due to its duty of care owed to HBC. The assessments of HBC's health and development were a regulatory obligation by virtue of the Local Authority's duties under the Interim Care Order. Nothing was done on the facts of this case which could be considered a service to H. When H made an application for an SGO there was an obligation upon the Local Authority to provide a report to the Court and provide H with relevant information, but this arose solely by virtue of the performance of its functions and did not of itself give rise to an assumption of responsibility. H's inability to identify anything done by the Local Authority other than in compliance with its duties to HBC was fatal to the argument that the Local Authority assumed a responsibility to H.

H's argument that there was a freestanding cause of action based on misrepresentation did not take matters further, as an assumption of responsibility was still required.

The first instance decision that there was no contract was correct. Nor could the procedure be properly framed as akin to a contract. The Local Authority was obliged to provide information about HBC's development and an appropriate financial package. It was up to H to take a decision as to whether to continue with his SGO application to the Court and the decision whether or not to make an SGO was that of the Court, not an agreement reached between the parties.

In relation to the further factor raised by the Local Authority which they submitted pointed away from the existence of a duty of care, that being the potential for conflict between a duty owed to HBC and a duty owed to a prospective special guardian, whilst the Judge accepted as a general proposition that there was the potential for conflict, on the facts of this case, there was no obvious conflict between the interests of HBC and H before the SGO was made. However, as consideration of the conflict would only come into play if a duty of care would ordinarily arise, which the Judge had found it did not on the facts of this case, it was not necessary for the Judge to determine this issue.

The Judge, accordingly, concluded that the first instance decision to strike the case out had been right and dismissed H's appeal.

Personal Injury - Damages - Pre-existing Conditions - Genetic Testing

Clarke v Poole
[2024] EWHC 1509 (KB)

Background

The proceedings related to a personal injury claim arising out of a road traffic accident in which the Claimant sustained complex and lifechanging injuries. Liability was admitted and Judgment entered in favour of the Claimant. The Claimant's Provisional Schedule of Loss valued the claim at about £22.5 million, with just over £15 million of that being the claim for future care for which the lifetime multiplier was about 50.

The Defendant sought an order for the Claimant to undergo neurophysiological testing to determine if she was suffering from active/symptomatic myotonic dystrophy (MD), a genetic disorder causing muscle loss and weakness, or whether the symptoms complained of by the Claimant were caused by the Defendant's negligence and the injuries sustained in the accident. It was known that the Claimant's mother had asymptomatic MD and the medical experts were agreed that there was a 50:50 chance of the Claimant having the gene. Accordingly, the Defendant argued that, even without the accident, the Claimant would have developed MD symptoms affecting her ability to work and of her requiring substantial care.

CASE UPDATES

The Claimant had consistently refused testing for MD. The Claimant's case was that she did not have the MD gene or, even if she did, she was asymptomatic, or had such low level symptoms that MD would have had no material effect on her health.

The Defendant applied for an order that the Claimant's personal injury claim, or at least all claims for any future loss, be stayed unless the Claimant submitted to the testing.

Issues

(1) Whether the interests of justice necessitated the neurophysiological testing proposed by the Defendant.

(2) Whether a blanket stay on all future losses pending testing was just and proportionate.

Held

The Court had to ask itself the overarching question of whether it was just and proportionate to order a stay unless the Claimant underwent medical testing. When determining that issue, the starting point was whether the Defendant had shown that, absent the Claimant's objections, it was in the interests of justice for the testing to be carried out. The appropriate test involved an evaluative stage, balancing the competing arguments put forward in favour of and against medical testing.

If it was in the interests of justice, and if the Claimant had put forward a substantial objection which was more than imaginary or illusory, the Court then had to balance the parties' competing rights, namely the Defendant's right to defend themselves in the litigation and the Claimant's right to personal liberty. When carrying out that balancing exercise particular weight should be given to any of the Claimant's concerns where testing was invasive and/or involved pain/discomfort or the risk of physical/psychological harm. Such concerns were not necessarily determinative but the Court had to consider carefully the terms of any stay proposed to ensure that it was proportionate to the reasons for, and likely consequences of, any testing; *Laycock v Lagoe [1997] P.I.Q.R P518.*

If the Claimant's objection was imaginary and illusory, then the outcome of the application had to favour the Defendant.

CASE UPDATES

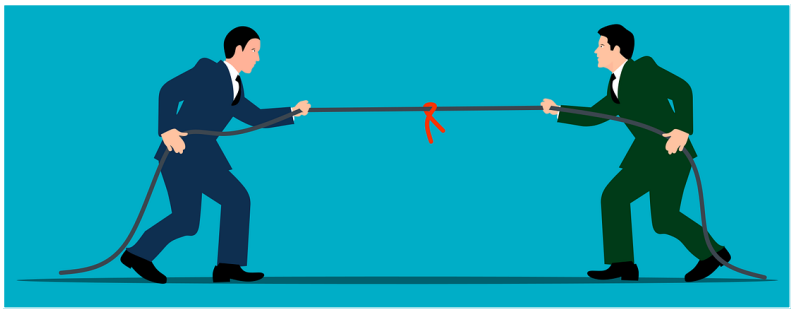
The Court acknowledged the potential adverse psychological impact of an MD diagnosis on the Claimant and held that a blanket stay on all future losses, unless the Claimant underwent testing, would be significantly wider than necessary to ensure that the Defendant was not unduly disadvantaged by the Claimant's refusal to undergo testing. There was a significant claim for future loss of care and a limited potential claim for loss of earnings. It was difficult to see why it would ever be just or proportionate to deprive the Claimant of the damages to which she would have been entitled, even if the results of the testing were positive and the Defendant's experts were correct. On the limited medical evidence, there remained a real dispute as to the likely prognosis of any active MD.

The Court held that the appropriate order was that the Claimant's claim for damages for future loss would be stayed until either:

(1) She underwent neurophysiological testing with a view to determining whether she had active symptoms of MD; or

(2) She conceded, for the purposes of the litigation only, that she had active symptoms of MD and that damages should be assessed on that basis.

The decision reflects the Court's consideration of the competing rights of the parties and the need for a proportionate approach to testing. It was not just that the Claimant should be entitled to pursue her claim in full if the Defendant was to be deprived of the opportunity of carrying out tests which would identify whether she had active symptoms of MD. A stay on the basis proposed was the least restrictive order that could be made and should not unduly pressurise the Claimant to undergo the tests.



CASE UPDATES

Statutory Sewerage Undertakers - Nuisance

The Manchester Ship Canal Company Limited v United Utilities Water Limited [2024] UKSC 22

The Supreme Court held that the Water Industry Act 1991 did not prevent the owner of a watercourse from bringing claims in trespass and nuisance against a sewerage undertaker who had made unauthorised discharges of untreated effluent into the watercourse, even if the discharges were not the result of negligence or deliberate misconduct.

The Appellant canal owner ('MSCC') is the owner of the beds and banks of the Manchester Ship Canal. The Respondent statutory sewerage undertaker's ('UU') sewerage network includes c. 100 outfalls which discharge into the canal. When the sewerage system is operating within its hydraulic capacity, the discharges are of surface water or treated effluent. When the system's hydraulic capacity is exceeded, some of the outfalls discharge foul water into the canal. It was not suggested this was caused by negligence or deliberate wrongdoing.

MSCC threatened to bring a claim against UU for trespass and nuisance. UU asked the Court to make a declaration that MSCC had no right of action. The question before the Courts was whether the claim would be inconsistent with and, therefore, barred by the statutory scheme for regulating sewerage established by the Water Industry Act 1991. The High Court concluded that it would and made a declaration that where a discharge into the canal from sewers vested in UU contravened sections 117 (5) and/or 186(3) of the 1991 Act, MSCC may not bring an action in trespass or nuisance against UU in respect of such discharge absent an allegation of negligence or deliberate wrongdoing on the part of UU leading to the said discharge.

This decision was upheld by the Court of Appeal. MSCC appealed to the Supreme Court. The Supreme Court allowed the appeal.

The Supreme Court indicated that the starting point is that the owner of a canal or other watercourse has a property right in the watercourse, including a right to preserve the quality of the water. That right is protected by the common law. The discharge of polluting effluent into a privately owned watercourse is an actionable nuisance at common law if the pollution interferes with the owner's use or enjoyment of its property. The issue was, therefore, whether the 1991 Act excluded common law rights of action in nuisance and trespass, which was a question of statutory interpretation.

CASE UPDATES

A body which exercises statutory powers, such as a sewerage undertaker, is liable in the same way as any other person if it is responsible for a nuisance, trespass or other tort, unless either it is acting within its statutory powers or has been granted some statutory immunity from suit. The Court held that the 1991 Act does not expressly authorise UU to cause a nuisance or to trespass by discharging foul water through the outfalls into the canal. Further, the polluting discharges could not be regarded as having been impliedly authorised by Parliament as they were not the inevitable consequence of a sewerage undertaker's performance of its statutory powers and duties. In the present case, the discharges could be avoided if UU invested in improved infrastructure and treatment processes.

UU sought to rely on the House of Lords' decision in *Marcic v Thames Water Utilities Ltd [2003]*, submitting that MSCC had no cause of action because the only way to avoid the discharges of foul water into the canal would be to construct new sewerage infrastructure and the decision in *Marcic* established that Parliament's intention was that the construction of new sewerage infrastructure should be a matter for the Secretary of State or the regulator, not the courts. The Supreme Court rejected this argument and distinguished *Marcic*. The Courts below had interpreted *Marcic* as excluding common law claims in all cases where the underlying cause of the nuisance was the inadequacy of the sewerage infrastructure. That was a misreading. In *Marcic*, the Claimant's claim was that the undertaker should have built more sewers. The duty to build more sewers arose only under s.94(1) of the Act, and s.18 of the Act provided an exclusive remedy for breach. In contrast, MSCC's case herein was not based on s.94(1), or any other requirement enforceable under s.18, it was based on independent common law causes of action in trespass and nuisance.

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

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