DOLMANS INSURANCE BULLETIN

Welcome to the August 2022 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

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REPORT ON

Accidents in Playgrounds - Foreseeability and Other Issues

EJC v Bridgend County Borough Council

In order to succeed, a Claimant pursuing allegations that a Defendant has been negligent and/or in breach of Section 2 of the Occupiers' Liability Act 1957 must prove, to the requisite standard, that the loss was reasonably foreseeable if care was not taken.

The issues become more complicated in cases involving schools, where Defendant Local Authorities invariably face specific allegations from pupils pursuing claims, such as lack of supervision. This was illustrated in the recent case of *EJC v Bridgend County Borough Council*, in which Dolmans represented the Defendant Local Authority.

Circumstances, Allegations and Preliminary Arguments

The Claimant, who was a minor at the time, alleged that she was playing with friends during lunch break on Astroturf at the Defendant Local Authority's school where she attended, when she tripped over some goalposts that had apparently been dismantled and were lying on the Astroturf surface. It was alleged that another pupil had dismantled the goalposts and had been lifting/playing with them immediately prior to the Claimant's alleged accident. The Claimant alleged that she did not see the goalposts, as they had been placed on white lines. As a result of her accident, the Claimant allegedly suffered personal injuries.

The Claimant alleged that the Defendant Local Authority was in breach of its statutory duty under Section 2 of the Occupiers' Liability Act 1957 and/or that it was negligent. The Claimant alleged that the goalposts were an obvious hazard and should have been made safe prior to the accident, that the area should have been better supervised and that pupils should not have been allowed to use the Astroturf area in the circumstances.

It was argued, on behalf of the Defendant Local Authority, that the Claimant's allegation regarding breach of the Occupiers' Liability Act 1957 should be dismissed because the accident did not arise from the state of the premises. Reference was made to the decision in *Yates v National Trust* [2014] EWHC 222 (QB), in which a distinction was drawn between accidents that arise as a result of the state of the premises – to which the 1957 Act does apply, and accidents that arise as a result of someone's activities on the premises – to which it was argued the 1957 Act does not apply.

The Defendant Local Authority submitted, therefore, that the case turned on whether the Defendant breached its common law duty of care to take such steps as are in the circumstances reasonable to ensure that a pupil is kept reasonably safe whilst on the school premises.

Goalposts – Fit For Purpose

Following the Claimant's alleged accident, the goalposts were inspected. They were found to be fit for purpose and in good working order. As a matter of prudence following the Claimant's alleged accident however, it was decided to bolt the goalposts together – which removed the design feature of their collapsibility, and to padlock the goalposts – which removed the ability to move the goalposts freely.

It was argued that there was, however, no duty to bolt the goalposts together before the Claimant's alleged accident and the fact that the Defendant Local Authority took such a step post-accident did not mean that it should have done so pre-accident.

Defendant's Evidence

Detailed Witness Statements were obtained from several witnesses on behalf of the Defendant Local Authority, from which it was apparent that the goalposts at the time were designed to be collapsible and moved around. There were three members of staff supervising the relevant area during the lunch break and there was an appropriate risk assessment in place at the time. There were no similar incidents recorded before or since the Claimant's alleged accident and, indeed, there had been no previous reports of pupils dismantling the goalposts. It was argued, therefore, that the Claimant's alleged accident was not foreseeable.

Foreseeability

Readers will recall that the issue of foreseeability was considered by the Court of Appeal in *Debell v Dean & Chapter of Rochester Cathedral* [2016] EWCA Civ 1094, in which Elias J stated "*the risk is reasonably foreseeable only where there is a real source of danger which a reasonable person would recognise as obliging the occupier to take remedial action".*

The Defendant Local Authority, therefore, argued that from the evidence, it was not, as a matter of fact, foreseen by the school that pupils might dismantle the goalposts of their own volition.

Applying the test in *Debell* for reasonable foreseeability, it was submitted that:

a) The goalposts posed no inherent danger. They were designed to be collapsible and were not defective at the time.

b) No previous incidents of 'horseplay' in which the goalposts were dismantled by pupils took place pre-accident.

c) Even if the goalposts were dismantled and lying on the ground, it would be very unlikely that someone would fail to appreciate their presence and attempt to run over them, as the Claimant did.

d) Equally, it would be very unlikely that someone would attempt to lift the goalposts whilst someone was running in close proximity.

The Defendant Local Authority argued that a series of unfortunate events giving rise to a very unlikely accident, as in this case, was insufficient to meet the test for reasonable foreseeability.

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REPORT ON

Supervision

In dealing with the Claimant's allegations regarding alleged lack of supervision, the Defendant Local Authority referred to the decisions in *Dyer v East Sussex County Council [2016] 12 WLUK 476* and *Palmer v Cornwall County Council [2009] EWCA Civ 456*. Both cases also involved accidents that arose during school during break time.

The Defendant Local Authority invited the Court to find that the level of supervision at the time was adequate, with three supervisors in the relevant area at the time of the Claimant's alleged accident. In *Palmer*, for example, there was only one supervisor present. Indeed, there was no evidence that had there been greater supervision the accident could have been avoided, unlike in *Palmer* where there was such evidence. In addition, the Defendant Local Authority's evidence indicated that a supervisor was quickly on the scene following the Claimant's alleged accident.

The Court was also invited to dismiss the Claimant's suggestion that the Astroturf area should have been closed at the time. The area offered considerable amenity to pupils, allowing them to play ball games and run around generally. It was reiterated that the area did not pose a danger to pupils.

Judgment

The Trial Judge preferred the Defendant Local Authority's arguments and evidence.

The Trial Judge found that the goalposts were designed to be dismantled, were fit for purpose, had been dismantled by other pupils and the Claimant's alleged accident occurred within a very short time thereafter. There were no previous accidents and an appropriate risk assessment was in place. There were three supervisors in place and the Trial Judge was satisfied that no additional supervision would have prevented the Claimant's alleged accident.

Referring specifically to the decision in *Debell*, the Trial Judge held that the alleged accident was not reasonably foreseeable and was an unfortunate accident. As such, the Claimant's claim was dismissed.

Comment

Faced with numerous allegations and issues, the Trial Judge in this particular matter was assisted by robust arguments and case authorities raised on behalf of the Defendant Local Authority. These, bolstered by strong witness evidence and a specifically pleaded Defence, resulted in the Claimant's claim being dismissed and considerable savings for the Defendant Local Authority.

Tom Danter
Associate
Dolmans Solicitors

For further information regarding this article, please contact
Tom Danter at **tomd@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

RECENT CASE UPDATES

Civil Procedure - Costs - Fixed Costs - Expert Evidence

Glendining v McCarthy
(Unreported) 5 May 2022

This case related to the assessment of costs in a personal injury road traffic claim which was settled by way of a Part 36 Offer. The claim had dropped out of the Portal, but Part 7 proceedings had not been started. The Court was asked to determine the disbursements which were recoverable because the Claimant had obtained an orthopaedic report and a psychological report, but did not obtain a fixed costs medical report from a GP. The issue for the Court to determine was whether the Claimant was in breach of the Protocol.

The first issue was whether the Claimant had suffered a soft tissue injury to which the provisions of the Protocol would apply. The Judge held that it was a soft tissue injury and the fact that the Claimant's solicitor may not have known it was when the orthopaedic expert was instructed was not the test. The definition of a soft tissue injury was as per the Pre-Action Protocol, 16A.

The second issue was whether a psychological report was necessary. The orthopaedic expert had commented that the Claimant had lost confidence in driving, but that comment upon this lay outside his field of expertise and that should an opinion be sought, he suggested one be obtained from a clinical psychologist. This was not a straightforward referral to a psychologist. The Claimant's case was similar to a lot of cases where there was travel anxiety and, based upon the psychological report obtained, the Claimant did not have a recognised psychological symptom, but this formed an aggravating feature of the soft tissue injury that did not go beyond the soft tissue injury to become more than a minor secondary injury. The issue of travel anxiety could easily have been dealt with in a GP report.

The Court held that the Claimant had failed to comply with the Pre-Action Protocol by obtaining the first report which was not a fixed costs medical report from a GP or an accredited medical expert selected for the claim via Medco Portal, as was mandatory under paragraph 7.8(a), and by going ahead to obtain orthopaedic and psychologist reports.

It was a serious breach to bypass or ignore the Protocol, and to obtain additional reports, and there was no good reason for it. The Court emphasised the importance of complying with the Protocol and in the interests of the overriding objective of saving costs. The Defendant had been prejudiced by not being able to challenge the instruction of the two experts.

The reports could not be justified and the cost of the psychological report was disallowed.

RECENT CASE UPDATES

Personal Injury - Provisional Damages - Substitution of Parties

Power v Bernard Hastie & Company Limited & Others
[2022] EWHC 1927 (QB)

This was an asbestos claim in which, in 1993, a Provisional Damages Order (PDO) was made against five Defendants for the asymptomatic pleural plaques and early asbestos the Claimant had developed as a result of being exposed to asbestos whilst working for them, on the assumption that he would not develop certain conditions or diseases identified in a Schedule. The Claimant died in October 2017 as a result of developing the conditions and/or diseases identified.

The Claimant's nephew and Executor of his Estate applied for an Order that he be substituted as the Claimant so that he could apply for further damages under the terms of the PDO.

It was held that the statutory framework did not limit the right to claim further damages under a PDO to the Claimant personally and there was nothing in the framework which prevented this right being transferred to a third party. The Order stated that the Claimant may make an application for further damages. If it had been intended to limit the right to the Claimant personally, then different words would have been used.

The Order provided that any application made be made without time limit. The application did not, therefore, have to be made within the Claimant's lifetime. In any event, it was open to the Court to grant an extension of time. Once Judgment was given for provisional damages, the Claimant had a continuing residual right to seek further damages in accordance with the PDO and the rules of the Court. That right transferred to the applicant in accordance with Section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

The Claimant's nephew, as the Claimant's Executor, was, therefore, to be substituted as the Claimant within the proceedings.

Service of Claim Form - Prospective Application for Extension

ST v BAI (SA) t/a Brittany Ferries
[2022] EWCA Civ 1037

On 16 March 2018, the Claimant, ST, was the victim of a sexual assault in her cabin on board a ferry operated by the Defendant, 'BAI'. She issued proceedings in negligence against BAI on the basis that her cabin door lock was faulty allowing an unknown assailant to enter the cabin. Damages for personal injury and losses were claimed. The relationship between the parties, governed by the Athens Convention 2002, was subject to a 2 year limitation period.

ST had instructed solicitors in December 2019 and a Letter of Claim was sent on 12 December 2019. Liability was denied in January 2020. Proceedings were issued on 14 February 2020. BAI was domiciled in France. Pursuant to CPR 7.5(2), proceedings had to be served by 14 August 2020.

RECENT CASE UPDATES

Following the issue of proceedings, a copy of the Claim Form was provided to BAI's solicitors, at their request, for information purposes. ST was not in a position to serve the Claim Form as Particulars of Claim and medical evidence were outstanding. Obtaining medical evidence was complicated by Covid-19. On 14 May 2020, ST's solicitors asked BAI to agree an extension of time for service. There was no substantive response. On 3 June 2020, ST applied for an extension of time to serve Particulars of Claim until 14 December 2020, which was granted on the papers.

ST asked BAI's solicitors on a number of occasions during June/July 2020 to confirm whether they were instructed to accept service of the Claim Form. On 15 July 2020, BAI's solicitors advised that proceedings would have to be served out of the jurisdiction. Counsel was instructed to draft Particulars of Claim. Medical evidence was received on 16 July 2020 and sent to BAI's solicitors on 22 July 2020.

On 23 July 2020, ST's solicitors spoke to the Foreign Process Service, but had concerns about the impact of Covid. Accordingly, on that day, they engaged Portsea International Security & Intelligence Agency to effect service. Whilst initially indicating that service could be achieved in time, the Agency advised, on 4 August 2020, that service could not be effected in time due to the holiday season without incurring fees in the region of £2,000 plus translator's fees. On 4 August 2020, ST applied for an extension of time for service of the Claim Form until 14 December 2020. An Admiralty Registrar granted the extension on the papers on 5 August 2020.

On 11 December 2020, the Claim Form (which had been amended), Particulars of Claim, a Schedule of Loss and the Order dated 5 August 2020 were served. BAI applied to set aside the Order extending time.

BAI's Application was heard by the Admiralty Registrar, who upheld his decision. However, on appeal, the Admiralty Judge overturned the decision. ST appealed.

The Court of Appeal noted that there is 'clear water' between the test to be applied on an application for an extension of time to serve a Claim Form i) before and ii) after the expiry of time for service under CPR 7.5. Specifically, a Court can allow an application to extend time prospectively without being satisfied that the Claimant has taken 'all reasonable steps' to comply with CPR 7.5. As ST's application was made prospectively, it was inapposite to speak of a 'failure' to serve within time. Rather, ST needed a prospective extension of time.

As the Admiralty Judge had accepted, the Admiralty Registrar had correctly identified the law. Contrary to the Judge's understanding, it was clear that the Admiralty Registrar considered the reason for needing an extension to be difficulties with, not impossibility of, service. The Registrar evaluated the strength of the reason as 'middling', but, nevertheless, still a good reason. The Judge was wrong to find that conclusion had no reasonable foundation in the facts. On the facts, there were undoubtedly difficulties with service. The Admiralty Registrar was entitled to take the view that it was reasonable for ST's solicitors to make a prospective application for an extension rather than pay the fee that was being quoted to effect service in time. It could reasonably have been concluded that such expenditure would have been challenged as disproportionate in any costs assessment by BAI.

Whilst ST's solicitors had not commenced enquiries for service abroad until 3 weeks before service was due, in normal times that would have been sufficient. There was no explanation for the delays on the part of BAI's solicitors to respond to enquiries regarding whether they were instructed to accept service and this could be seen as tactical manoeuvring. Whilst other Judges might have reached a different conclusion, the Admiralty Registrar's evaluation fell squarely within the range of reasonable assessments open to him. In those circumstances, it did not fall to the Admiralty Judge to carry out the calibration exercise afresh. The Admiralty Registrar's decision was not plainly wrong and ST's appeal was, therefore, allowed.

Service of Claim Form - Retrospective Application for Extension

Walton v (1) Pickerings Solicitors (2) F Brophy [2022] EWHC 2073 (Ch)

The Claimant, 'W', attended the Royal Courts of Justice, in person, on 20 July 2020 to issue his Claim Form. He paid the fee and was given a receipt. W elected to serve the Claim Form himself as Particulars of Claim had not yet been prepared. Service was required to be effected by 20 November 2020. For the purposes of the application, it was assumed that limitation expired on 20 July 2020. As a result of the impact of Covid on the Court's workings, the Court was unable to provide W with a sealed copy of the Claim Form whilst he was there. The Court retained the Claim Form which was to be returned to W once sealed. W notified the Defendants that the Claim Form had been issued.

Particulars of Claim were finalised on 13 November 2020. W had not received the sealed Claim Form. On 17 November 2020, W served the unsealed Claim Form with the Particulars of Claim. The following day, the Defendants asked for a copy of the sealed Claim Form. W tried to contact the Court, but had difficulties getting through until 25 November 2020, when he discovered the Court had no record of the claim. It appears the Court had lost the Claim Form. The Court agreed to issue and seal a Claim Form and backdate it to 20 July 2020, but W was asked to provide a new version of the Claim Form in a different format. On 7 December 2020, W received the sealed Claim Form and served it on the Defendants. On 17 December 2020, W applied for an extension of time for service of the Claim Form. This was refused. W appealed.

Pursuant to CPR 7.6(3), where a Claimant applies for a retrospective extension of time to serve a Claim Form, the Court may only make such an Order if (a) the Court has failed to serve the Claim Form or (b) the Claimant has taken all reasonable steps to comply with CPR 7.5 but has been unable to do so. In either case, the Application must be made promptly.

W sought to argue that the Court's obligation to return the sealed Claim Form to him could be interpreted as an indirect failure to serve the Claim Form falling within (a) above. The Judge rejected this. W had elected to serve the Claim Form himself. However, the Judge noted that CPR 7.5 requires service of the sealed Claim Form. Thus, CPR 7.6(3)(b) only required W to take all reasonable steps to serve the Claim Form once the sealed claim form was in his possession. The Judge found that in the absence of the sealed Claim Form, W could not fall foul of this condition. The Judge further found that once W received the sealed Claim Form, he acted promptly in making the Application.

However, the Judge held that even if the Claimant met the threshold criteria under CPR 7.6(3), the Court still had a discretion whether or not to grant an extension. On the facts of this case, the Judge held that the discretion should not be exercised. W had left it to the last minute before expiry of limitation to issue a Claim Form. He chose to take responsibility for service. W took no action to find out where the sealed Claim Form was until prompted to do by so by the Defendants. When W did contact the Court, the matter was resolved within 3 weeks. W could have made an Application for a prospective extension of time. The sealed Claim Form differed from the unsealed Claim Form sent to the Defendants. If the extension were granted, the Defendants would potentially be deprived of their limitation defences. Whilst the Court was at fault for losing the original Claim Form, the other factors outweighed the Court's mistake.

The Judge further found that the Court had no power under CPR 6.15 to make an Order permitting service of a document other than the sealed Claim Form or for treating the service of a document other than the sealed Claim Form as good service.

Accordingly, W's appeal was 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**

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