DOLMANS INSURANCE BULLETIN

Welcome to the October 2019 edition of the Dolmans Insurance Bulletin

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RECENT CASE UPDATE

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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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DOLMANS REPORT ON

A FOCUSED DEFENCE VERSUS AN UNNECESSARILY OVERCOMPLICATED CLAIM

RP v Rhondda Cynon Taf County Borough Council

Defendant Authorities are often faced with Claimants who attempt to unnecessarily 'over-complicate' the basis upon which their claims are pursued, presumably in the hope that the matter might settle or enough mud will stick at trial and result in victory.

Dolmans are always alive to this and were so in the recent case of *RP v Rhondda Cynon Taf County Borough Council*, in which Dolmans represented the Defendant Authority.

Background

On the face of it, this was a relatively straightforward highway tripping case. The Claimant alleged that on/around 24 February 2015, at approximately 2:45pm, she was walking her dog along the Defendant Authority's footway, when she tripped and fell over a raised pavement slab, allegedly sustaining personal injuries.

There was some confusion as to the exact location of the Claimant's alleged accident and the Claimant provided measurements of both an alleged trip and a dip in the footway. Factual causation was, therefore, in dispute.

Dangerousness – The Evidence

The Claimant and her witnesses alleged that the footway was in a poor state and had been for several years, although it was argued on behalf of the Defendant Authority that it did not follow from this that the location was dangerous. Indeed, the Defendant Authority's measurements suggested that the location was not dangerous.

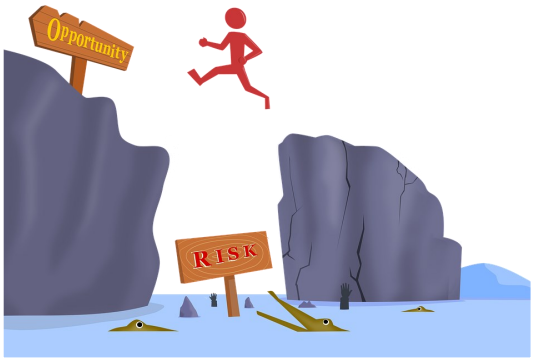
The Claimant provided measurements of the alleged trip and a dip, although both sets of measurements were within the Defendant Authority's relevant safety defect criteria.

The Claimant went further, alleging that since her accident she was aware of two other people who had apparently fallen on the same defect. Neither were named nor gave evidence however, and it was argued, on behalf of the Defendant Authority, that this was hearsay evidence in any event.

The Defendant Authority's witnesses kept their evidence simple and succinct. The relevant Highways Inspector, for example, admitted that it could well be that the alleged defect had been there for several years, although he was adamant that the alleged defect was not dangerous. There was also no record of any previous complaints and/or accidents at the relevant location during the 12 month period prior to the date of the Claimant's alleged accident.

Section 58 Defence – Likely to Fail

Given that the Defendant Authority's witness evidence was that the alleged defect was not dangerous and had never been actioned/noted for repair, it followed that any Section 58 Defence was likely to fail in the event that the alleged defect was found to be dangerous.



Expert Engineering Evidence – Refused

In an attempt to maximise her chances of success, the Claimant attempted to adduce expert engineering evidence, which suggested that the footway was dangerous.

The Claimant's Solicitors argued that the expert engineer's report was favourable to the Claimant. The report suggested that the Defendant Authority had incorrectly interpreted the relevant Code of Practice that its highways maintenance policy was aligned to and that this particular alleged defect should have been recorded as a Category One defect for repair. The Defendant Authority disagreed and its Highways Maintenance Manager was prepared to contradict the Claimant's stance, if required.

In any event, Dolmans, on behalf of the Defendant Authority, opposed the inclusion of the Claimant's expert engineering evidence in such a Fast Track matter. The Claimant's Solicitors, therefore, made an Application to adduce this expert evidence, which was dismissed by the Court and the Claimant ordered to pay the Defendant Authority's costs of the Application.

Complicating the Issues Further

Without her expert engineering evidence, the Claimant's Solicitors then attempted to adduce documents, including a Section 38 Agreement relating to Standard Specification for Residential, Industrial and Commercial Estate Roads, which they said suggested that the surface level of pavements *"shall not deviate from the design levels by more than 20mm"*. The Defendant Authority's measurements were well within the relevant intervention level of 40mm for this particular footway, albeit that the Claimant also disputed this criteria.

According to the Defendant Authority's Highways Maintenance Manager, the Claimant's Solicitors had, however, misinterpreted these documents, which related to the specification for new construction/adoption of new footways and had no relevance at all to existing footways as in this case or the Defendant Authority's defect intervention criteria.

Case Dismissed

After hearing the Claimant's and Defendant's witness evidence, the Trial Judge dismissed the Claimant's claim.

The Judge found that the Claimant had not been able to prove the exact circumstances of her alleged accident, and, even if she had, the alleged defect was not dangerous. As such, there was no breach of duty by the Defendant Authority.

Conclusion

This case illustrates that it is not always beneficial for a Claimant to overcomplicate his/her case unnecessarily and that this can sometimes backfire.

By keeping the Defence focused on the relevant issues and the Defendant Authority's witness evidence equally focused, Dolmans was able to present the case to the Court succinctly.

Ultimately, this assisted the Trial Judge to concentrate on the relevant issues and, indeed, he was particularly complimentary about the manner in which the Defendant Authority's witnesses had adduced their evidence.

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DOLMANS RECENT CASE UPDATE

Civil Procedure - Defences - Delay - Extensions of Time

Joan Angela Kember (as Personal Representative of the Estate of Leonard John Kember (Deceased), his Dependents and on her own Behalf) v (1) Croydon Health Services NHS Trust (2) King's College Hospital NHS Foundation Trust [2019] EWHC 2297 (QB)

This case concerned an Appeal against the Court's refusal to grant the Appellant Trusts their Application for an extension of time for filing a Defence and for relief from sanctions.

The Respondent had brought a claim against the Appellants under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976.

Proceedings were issued in June 2018. A series of extensions of time were granted until March 2019 for the service of the Defence. The Appellants, however, failed to file a Defence within the agreed timescale. They applied for an extension of time 1.5 hours past the deadline. That Application was not received by the Court, so they issued a further Application in April 2019, together with an Application for relief from sanctions. The Witness Statement in support of the Application sought to persuade the Court that the delay, of only 1.5 hours, was not serious or significant and that there was a good reason for the delay (the claim was a complicated clinical negligence claim).

At first instance, the Master held that the delay was serious and significant, that there was no good reason for the breach and that the relief from sanction Application had not been made promptly.

On Appeal, the Appellants submitted that they had not needed to make an Application for relief from sanctions as CPR r15.4 did not prescribe the consequences of a failure to serve a Defence in time, nor was there any Order which stipulated a sanction in the event of a failure in compliance.

It was held:

(1) The appropriate focus before the Master should have been on the Application for an extension of time for service of the Defence, adopting the three stage test in *Denton v TH White Ltd [2014] EWCA Civ 906*. There was no need for an Application for relief from sanction. It was conceded that the breach was serious and significant and that there was no good reason for the breach. Therefore, the only real question was whether, when considering all of the circumstances, the Master misdirected himself by focussing on the Application for relief from sanction and, if so, whether it was a material misdirection such that the ruling could not stand.

(2) The Master had erred in approaching his stage 3 assessment against a finding that there had been a delay in making the relief Application. He should have approached the analysis on the basis of his finding that an extension of time Application had been made promptly. However, the timing of the Application was only one of the considerations which influenced the Master's ruling. The Master also took into account the effect of the delay on the litigation as a whole and by inference the prejudice to the Claimant in an already stale claim. He also took into account the history of delay in serving the Defence with multiple extensions being granted. More significantly, however, was his scathing criticism of the conduct of the litigation by the Defendants.

(3) Given the critical comments made by the Master in relation to the conduct of the claim as a whole, even if he had concentrated on the Application for an extension of time, the Court was sure that he would have refused the Application. At stage 3, he was fully entitled to consider the breach in context; whether it was done at stage 1 or 3 made no difference. Although the Master had misdirected himself on a point of law, his misdirection was not material and his decision was not wrong.

Appeal dismissed.

Costs - Fixed Costs Regime - Counsel's Fees

Scott Dover v Finsbury Food Group plc
[2019] EWHC B11 (Costs)

The Court found that Counsel's fees can be recoverable in a case that had started under the Pre-Action Protocol for Low Value Personal Injury Claims, but subsequently settled for a sum exceeding £25,000.

The issue arising in the case was whether the costs of Counsel advising on quantum at a conference was recoverable as a disbursement under Section III of CPR 45, and, if so, the amount of any such costs, in particular whether they were limited to £150 plus VAT in accordance with CPR45.23B.

The Claimant had sustained an injury at work when his hands were sucked into an extractor above a bread making machine on which he was working. He sustained an injury to his right hand which required surgical intervention. He was off work for 3 months.

The claim commenced by way of a Claim Notification Form, to which the Defendant failed to acknowledge in time, thereby resulting in the claim exiting the Portal. Liability was subsequently admitted, subject to medical causation. Expert medical evidence on behalf of the Claimant was obtained, which concluded that the Claimant would remain disabled and that no improvement was expected.

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Counsel advised on the value of the claim in conference. The claim was subsequently settled for £70,000 (prior to it being allocated to the Multi-Track).

In the Claimant's Bill of Costs, Counsel's fee was claimed of £650. In the Points of Dispute, the Defendant disputed the entitlement to this fee on the basis that no such fee was payable under the relevant provisions in a claim which had exited EL/PL protocol if incurred after the claim had left the protocol, as the costs were deemed to be included within the fixed fees. In the alternative, it was contended that if Counsel's advice was recoverable in principle, then the costs should be limited to £150 plus VAT.

The central provision to the dispute was CPR 45.29I - headed "Disbursements" - which allows for the recoverability of disbursements in a claim which started under the EL/PL Portal, including the "*costs of any advice from a specialist solicitor or counsel*" [2(c)] and "*any other disbursements reasonably incurred due to a particular feature of the dispute*" [2(h)].

At first instance, the Costs Officer rejected the Defendant's submissions and found that Counsel's fee was recoverable, albeit it was reduced from £650 to £500. The Defendant appealed this decision.

The following arguments were relied upon by the Defendant and dealt with on Appeal:

- **CPR 45.29I (2)(c) only preserves the recoverability of Counsel fees incurred <u>before</u> the claim leaves the Portal**

The Appeal Judge rejected this argument. Such a restriction is not set out in the provisions. The more workable reading, consistent with the aims that underlie the scheme, is that there is no such temporal restriction. If there was such a restriction, this would suggest that the other disbursements allowed under CPR 45.29I – such as medical records and medical expert evidence – would also be subject to this restriction and recoverable only before the claim left the Portal, which the Judge felt could not be right.

The Judge added that the "*exceptional circumstances*" provision of CPR 45.29J did not apply in this case.

- **The fee is not recoverable as CPR 45.23B and Table 6A only allows for its recoverability where damages had an upper limit of £25,000 (here the case was settled in excess of this at £70,000)**

The Judge found that it could not have been the intention of the Rules Committee to allow a fee for a claim with a value of less than £25,000, but not one in a claim exceeding this sum. Where a case had exited the Portal due to its value being in excess of £25,000, it was difficult to see, given the likely complexity associated with higher value claims, that it must have been intended that costs of any independent advice would be so limited.

Therefore, the provisions of CPR 45.23B and Table 6A did not prevent the recoverability of Counsel's fee.

- **Is the disbursement caught by CPR 45.29l 2(h)], ie - a disbursement reasonably incurred due to a particular feature of the dispute?**

The Judge found that given 2(c) dealt with the cost of any advice from Counsel, it could not have been intended for such fees to then be covered by 2(h); if it is not caught by 2(c), then it follows it should not be caught by 2(h). However, given the Judge found that Counsel's fee fell within 2(c), there was no need to deal with the wording and intention of 2(h).

However, if he was wrong on that point, he found that Counsel's fee would fall within 2(h) in the alternative, on the basis that a claim, which in all probability would have been allocated to the multi-track, would fall within the requirement of "*due to a particular feature of the dispute*".

The Judge, therefore, concluded that the Costs Officer had been correct in allowing the fee, to be assessed. The Judge did not consider the figure of £150 at Table A (to be read with CPR 25.23B) applied to cases which had exited the Portal. Accordingly, he upheld the assessed figure of £500 plus VAT.

Evidence - Covert Recordings of Medical Examinations - Admissibility

Mustard v (1) Flower (2) Flower (3) Direct Line Insurance
[2019] EWHC 2621 (QB)

The Claimant, 'C', was involved in a road traffic accident when her stationary vehicle was struck from behind by a vehicle driven by the First Defendant. Liability was not in issue. The severity of the impact was in issue. C had a complex medical history. She claimed to have sustained a sub-arachnoid brain haemorrhage and a diffuse axonal brain injury in the accident, leaving her with cognitive and other deficits. However, there were marked differences between the experts as to her presentation and the interpretation of her medical records, imaging and history.

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According to the Defendant's ('D') experts, C had suffered no, or only minor, brain injury. C's experts said that she had suffered a serious brain injury with subtle manifestations. C's Solicitor advised her to record the examinations by D's medical experts on a digital device. C recorded the consultations by two of D's experts covertly. In the case of a further of D's experts, 'T', C asked if she could make a recording. T agreed that the clinical examination could be recorded, but not the neuropsychological testing. C accepted this but, on her account, mistakenly failed to turn the recording device off during the testing.

D was aware of C's Solicitor's practice of asking clients to record examinations by the other side's medical experts and had invited C to record her examinations by her own experts, but C did not do so.

D applied for an Order pursuant to CPR r.32.1(2) excluding the evidence of covert recordings and setting aside lengthy Part 35 questions put to its experts by C. D submitted that the covert recordings were unlawful under the Data Protection Act 2018 (DPA) and the General Data Protection Regulation 2016/679 (GDPR), and gave rise to an unequal playing field, given that only D's experts had been recorded. C opposed the Application and adduced a Statement from her own neuropsychological expert which asserted that the covert recordings revealed that T had made serious errors in her administration of the neuropsychological testing such as to render it of doubtful value.

The Master rejected the submission that the covert recordings were a breach of the DPA or the GDPR. Article 2(c) of the GDPR provided that the Regulation did not apply to the processing of personal data by a natural person in the course of a purely personal activity. Recording a consultation with or examination by a doctor fell into that category. The fact that C supplied the recordings to her legal advisers did not alter that conclusion. Further, the data related to the patient, not the doctor. Therefore, while the covert recordings lacked courtesy and transparency, they were not unlawful.

The recording of T's evidence was probative and highly relevant. T's conduct of her examination of C and her administration of the neuropsychological tests had been brought into doubt and it would be highly artificial for C or the experts to give evidence without reference to those matters.

C's stated reason for wishing to record her examinations with D's experts was to protect her interests, having regard to the vulnerabilities she maintained had resulted from the accident. It was understandable that such motivation, if genuine, applied with particular force to D's experts and not her own. D had not pointed to any aspect of the examinations by C's experts that had raised a query that a recording would assist in resolving. Accordingly, the "level playing field" point was merely theoretical.

The Master held that the balance favoured admitting the covert recordings evidence.

The Master disallowed C's Part 35 questions. The questions were wholly disproportionate, were overwhelmingly not for the purposes of clarification and amounted to cross-examination. Omissions in the experts' reports were best addressed by supplementary reports or Joint Statements, which would render many of the questions redundant.

The Master made obiter comments that it was in the interests of all sides that examinations conducted by medical experts in personal injury claims were recorded in order to provide a complete and objective record of what occurred in the event of disputes. Such recordings should be made in accordance with an agreed industrywide protocol and be subject to appropriate safeguards and limitations on use.

Legal Advice Privilege - Waiver

Addlesee & Others v Dentons Europe LLP
[2019] EWCA Civ 1600

The Claimants, 'C', were a group of investors who had invested in a scheme marketed by a company which had since been dissolved. C alleged that the scheme was fraudulent and issued proceedings against the Defendant, 'D', the solicitors who had represented the company. C sought disclosure of documents which had passed between the company and D. It was accepted, for the purposes of the Application, that the documents had attracted legal advice privilege when they came into existence. The issue for consideration by the Court was whether legal advice privilege, having attached to a communication by reason of the circumstances in which the communication was made, the communication remained privileged unless and until privilege was waived; or whether the privilege is lost if there is no person entitled to assert it at the time when a request for disclosure is made. At first instance, the Master held that it did. The Master distinguished the case from the decision in *Garvin Trustees Ltd v Pensions Regulator [2014]*, in which it was held that legal advice privilege had not survived the dissolution of a Northern Irish company on the basis that there was still a possibility of restoring the dissolved company in this case to the register. C appealed.

The Court held that legal advice privilege, once established, remains in existence unless and until it is waived. It is established as a result of the purpose for which, and the circumstances in which, the communication was made. Whether there was no one who could now waive it, or whether there was someone who could have waived it but had not done so, did not matter. The Court overruled the decision in *Garvin*, thus finding that the Master had been right to refuse disclosure, but for different reasons.

The Master had ordered C to pay 80% of D's costs. C argued that D should not have actively contested the Application. The Court dismissed this argument. It was the lawyer's duty to assert privilege. If, in order to fulfil that duty they incurred costs, they were simply fulfilling that duty.

Appeal dismissed.

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

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