DOLMANS INSURANCE BULLETIN

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REPORT ON

Proceedings Issued Against the Wrong Defendant Through Mistaken Identity

CSS v Merthyr Tydfil County Borough Council

Dolmans represented the Local Authority in this claim which concluded with the Claimant's discontinuance as against the Defendant Local Authority in light of the Local Authority ultimately being able to prove a case of mistaken identity as against the Council.

Background

On 26 October 2017, a collision occurred along Queen Street in Bridgwater.

The circumstances of the collision were that whilst the Claimant's vehicle was parked and unattended, the Local Authority's Servant, Agent or Employee had reversed into the Claimant's vehicle, causing damage to the offside rear of the vehicle.

Prior to proceedings, the Local Authority questioned whether the registration given for the vehicle, namely CP66 JPU, being driven by the driver was correct.

CCTV captured the full incident on video, however the quality of the footage was poor and it was difficult to make out the numberplate.

As such, the Claimant pursued a credit hire claim totalling £3,783.43 for a 46 day period whilst the vehicle was repaired.

It was not pleaded that the Claimant was impecunious. The burden of proving impecuniosity was, of course, on the Claimant, and if they failed to do so they would only be entitled to recover the Basic Hire Rate (BHR).

The Claimant claimed a daily rate of £64.41 plus VAT. The Claimant's vehicle was a Suzuki Wagon and the vehicle hired was a Ford Fiesta Hatchback 1.6. A Suzuki Wagon falls within category S2 of the ABI maximum agreed settlement rates, which prescribes a daily rate of £40.26 plus VAT. A Ford Fiesta Hatchback 1.6 is not specifically listed, but, arguably, falls within category SP2 of the ABI maximum agreed settlement rates, which prescribes a daily rate of £91.50 plus VAT.

It should be noted that these rates are only intended as guidance for pre-action negotiations between insurers and do not apply once proceedings are issued. As such, Basic Hire Rate evidence would need to be obtained to dispute quantum.

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Defence

In most scenarios, liability will always attach to a Defendant who has collided with a Claimant's vehicle which was parked and unattended. However, on this occasion, liability was denied for the following reasons:

- The Local Authority averred that it had never retained the services of the individual named as its Servant, Agent or Employee within the proceedings;

- The accident location was in Bridgwater, some 80 to 90 miles from the Local Authority's district. As such, the Local Authority would have no reason for one of its Servants, Agents or Employees to be undertaking services in the area of Bridgwater;

- The hi-vis jacket worn by the driver did not have the Local Authority's logo on it.

Court Timetable

The claim was allocated to the Small Claims Track.

Each party was directed to file and serve any Witness Statements they intended to rely upon no later than 27 June 2024.

The hearing was to take place on 18 July 2024 at Taunton County Court.

Evidence

The burden was, of course, on the Local Authority to prove that it was not its Servant, Agent or Employee who was driving the vehicle. Whilst the arguments raised in the Defence seemed plausible, solid evidence would be required to prove a case of mistaken identity.

The Local Authority conducted wide ranging searches on their database to determine whether the named Servant, Agent or Employee had ever undertaken services on its behalf. The searches returned no 'hits' against the named driver, either as an Employee or an agency worker.

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The Claimant's solicitors subsequently disclosed a rental agreement between Day's Rental and the Local Authority. The agreement confirmed that the Local Authority had originally rented a vehicle with the vehicle registration number EK63 UUS, however this was temporarily replaced during the hire period with a vehicle with the vehicle registration number CP66 JPU, being that pleaded within the proceedings. This seemed to prove that the vehicle involved in the index accident was on hire to the Local Authority at the time.

However, it was noted that the rental agreement identified that the original vehicle on hire with vehicle registration number EK63 UUS was described as a Transit 350 LWB Diesel RWD H/R Van Tdci 125PS; H/R meaning high roof.

As such, it was assumed that any temporary replacement vehicle would also need to be a high roof vehicle.

The CCTV was reviewed and it was clear that the vehicle depicted within the footage was not a high roof vehicle. As the rental agreement had been disclosed shortly before the hearing, there was not adequate time to conduct enquiries with the DVLA, however there was now an even stronger belief that this was a case of mistaken identity.

As such, further investigations were undertaken of Motorscan which confirmed that vehicle registration number CP66 JPU was, indeed, a high roof van.

A thorough review of the CCTV footage, using stills and blown-up imagery, produced a strong argument to suggest that the vehicle depicted within the CCTV footage perhaps had a vehicle registration number of CP66 JPV as opposed to CP66 JPU.

Again, further investigations were undertaken of Motorscan which described vehicle registration number CP66 JPV as a tipper vehicle, such matching the description of the vehicle depicted within the CCTV footage.

All the above evidence was put to the Claimant's solicitors and they were invited to discontinue the claim based on mistaken identity.

Outcome

It was clear that the Claimant's solicitors had realised their mistake and the Local Authority's argument that this was a case of mistaken identity was a powerful one. The correct vehicle registration number was CP66 JPV and it was clear that proceedings had been issued against the wrong Defendant. As such, the Claimant agreed to discontinue the claim before the hearing.

Conclusion

This case highlights the importance of a thorough investigation being undertaken, irrespective of the track to which a claim has been allocated and where the value of a claim may not be extensive. As a consequence, the Local Authority was able to avoid the excessive hire charges claimed, together with the fixed fees which the Claimant would have been entitled to had the claim succeeded. This was achieved by utilising widely accessible reference platforms which enabled a proportionate investigation to nonetheless be undertaken to achieve favourable savings for the Local Authority, whilst also protecting the Council's reputation.

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FOCUS ON

Family Foster Carers - Sexual Abuse - Vicarious Liability

DJ v Barnsley Metropolitan Borough Council and SG [2024] EWCA Civ 841

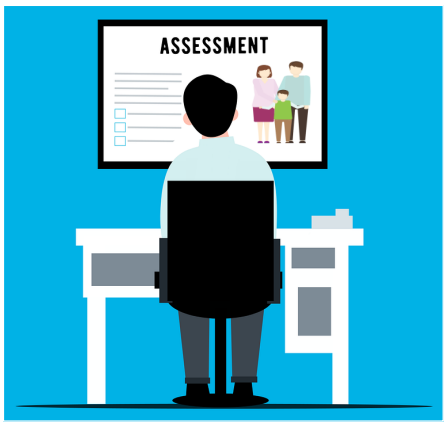
The Claimant ('C') appealed to the Court of Appeal against the dismissal of his vicarious liability claim for damages for personal injury against a Local Authority arising from abuse perpetrated by the Part 20 Defendant, Mr G, a family foster carer. The first instance decision was reported upon in the September 2021 edition of Dolmans' Insurance Bulletin and the first appeal in the August 2023 edition.

In *Armes v Nottinghamshire County Council [2017]*, the Supreme Court held that a Local Authority can be vicariously liable for torts committed against a child by a foster carer who is not related to the child, but left open the question whether vicarious liability can arise where they are related.

The events in issue in this case took place before the passing of the Children Act 1989. The Court noted that, under the prior statutory provisions, the term 'care' was used more broadly to describe all children cared for or accommodated by Local Authorities, whether or not they were subject to a Care Order.

The Facts

C's parents separated. C initially stayed with his father, but the Local Authority became involved in 1979 due to concerns regarding the father's itinerant lifestyle. During the course of Social Services' enquiries, Mr and Mrs G (C's maternal aunt and uncle), who had only met C recently, expressed an interest in looking after him. In January 1980, C went to live with Mr and Mrs G.



Mr and Mrs G applied to become G's foster carers and a fostering assessment was carried out. During the assessment, a police check revealed Mr G had been convicted in 1966 for 3 offences of unlawful sexual intercourse. Mr G advised that the offences were committed as a teenager and the girls in question had been his girlfriends. He had not disclosed them as he had not thought them relevant. The Social Worker accepted the explanation and noted that although it was not felt the offences stood in the way of Mr G fostering his 10 year old nephew, it may be that he would not be approved for any other child. Mr and Mrs G were approved as foster carers and, on 1 August 1980, C was received into care under s.1 of the Children Act 1948.

The Child Care Act 1980 came into force in April 1981. In November 1983, the Local Authority passed a resolution assuming parenting rights in respect of C under the 1980 Act. This was rescinded and a further resolution passed in January 1984 vesting parental rights in C in the Local Authority and his birth parents.

There were regular social work visits and reviews until C turned age 18 in 1988. C continued to live with Mr and Mrs G until 1991.

In 2019, C issued proceedings, in which he alleged that he was sexually abused and assaulted on a regular basis by Mr G between 1980 and 1986 and that the Local Authority was vicariously liable for the abuse and assaults. The question of whether the Local Authority could be vicariously liable in these circumstances was heard as a preliminary issue. At first instance, the Judge held that the Local Authority was not vicariously liable for the sexual abuse perpetrated by Mr G and C's appeal was dismissed. This decision was upheld on appeal. C appealed to the Court of Appeal.

The Submissions

The single ground of appeal was that the Judges below were wrong to conclude that the relationship between the Local Authority and Mr G was not one capable of giving rise to vicarious liability. C alleged that it was wrong to say that Mr and Mrs G were not recruited and selected by the Local Authority as they applied to be foster carers and were assessed. No training was given because the Local Authority concluded it was not required. It was wrong to find that the Gs were carrying on their own activity distinct from the statutory obligations of the Local Authority because it overlooked the fact that the decision as to whether C remained with the Gs was made by the Local Authority, not the family. The Gs' apparent motives should not have been given determinative weight and the Judge below had wrongly focussed on the relationship between the Gs and C rather than between the Gs and the Local Authority. C submitted there was nothing to distinguish the present case from *Armes*.

The Local Authority submitted that the case was distinguishable from *Armes* because in that case the foster carers were unrelated to the claimant; here the Gs acted principally in the interests of the family. Mr G was looking after his nephew and, in those circumstances, Gs' relationship with the Local Authority was not akin to employment.

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The Decision

In assessing whether the Local Authority's relationship with the Gs was akin to employment, the Court of Appeal concluded that C's residence with the Gs fell into three phases.

The first phase covered the initial 7 months. The initial placement was a temporary, informal family placement approved and facilitated by the Local Authority pursuant to its duties under s.1 of the Children and Young Persons Act 1963 to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into care. C was not 'in care' and the Local Authority had no statutory responsibility for him or rights in respect of him. The Court of Appeal concluded that during this phase the Gs' care for C was not integral to the Local Authority's business and the relationship between the Local Authority and the Gs was not akin to employment.

The Court concluded that the position was different in the second and third phases.

The second phase was from 1 August 1980, when C was received 'into care' under s.1 of the Children Act 1948 and 'boarded out' with the Gs pursuant to the Boarding Out of Children Regulations 1955. The third phase was from November 1983, when the Local Authority passed a resolution assuming parental rights. From 1 August 1980, like the authority in *Armes*, the Local Authority was under a statutory duty to care for C. The care of children, like C, who had been received into its care was the Local Authority's 'relevant activity' and, from that point, the Gs were looking after C as foster carers. The Court found that the Gs were recruited and selected as C's foster carers to enable the Local Authority to discharge its statutory duty towards C. The Local Authority could have concluded that the Gs were not suitable to be foster carers. The exercise undertaken by the Local Authority was one of assessment and selection as foster carers, rather than ratification of the pre-existing arrangement.

The Court concluded that whilst the Gs did not receive any specific training to become foster carers, this carried no material weight. The Local Authority took the view they did not require it.

Regular social work visits took place. Gs' care was monitored and supervised. There were regular reviews. The Local Authority gave directions about family contact.

The Court found that the preponderance of factors pointed clearly to the relationship between the Local Authority and the Gs being akin to employment.

Given this finding, this was not one of those doubtful cases where it was necessary to check whether the justice of the outcome was consistent with underlying policy. However, doing so, the Court concluded that it was. The 5 'incidents' identified in *Various Claimants v Catholic Child Welfare Society [2012] (the Christian Brothers case),* which usually make it fair, just and reasonable to impose vicarious liability, were all satisfied. The Judges below had found that the torts were not committed as a result of activity being taken by the employee on behalf of the employer. The Court of Appeal disagreed.

The Court concluded that once C was received into care and the Gs were approved as foster carers, their care of C was integral to the Local Authority's business of discharging its statutory duties towards C. Motive was not relevant to determining whether the relationship between the Local Authority and the foster carer was 'akin to employment'.

Accordingly, the Court held that, at all material times, after 1 August 1980, the relationship between the Local Authority and the Gs was akin to employment. C's appeal was allowed.

Comment

The Court of Appeal made clear in its Judgment that it had reached its decision on the specific facts of this case and they were not laying down a general rule that a Local Authority will always be vicariously liable for torts committed by foster carers who are related to the child. Further, their decision was not intended to give any indication about the circumstances in which vicarious liability might arise under the present legislation. Accordingly, each case will need to be considered on its own specific facts.

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CASE UPDATES

Costs Budgeting - Costs Management Hearing - Costs

Worcester v Hopley
[2024] EWHC 2181 (KB)

This Judgment related to the specific issue of what costs order should be made following a Costs Management Conference.

This is a clinical negligence claim. In accordance with a practice adopted by the Kings Bench Division Masters, case management was separated in time from costs management. A Case Management Conference took place in April 2024 and directions were given. The parties then had a short period to adjust their budgets to reflect the directions given and continue negotiation of budgets. A Costs Management Conference was listed for 15 May 2024.

Prior to the Costs Management Conference, the Defendant's budget was agreed, but the Claimant's was not. The Claimant's estimated costs in the budget were £342,263. At the hearing, the Claimant's estimated costs were reduced by 53.35% to £159,675, which was 3.58% above the sum that had been offered by the Defendant. The Defendant sought an order for its costs of the Costs Management Conference or, in the alternative, no order for costs. The Claimant asserted that this was no different to any other costs management hearing and the usual 'costs in the case' order should follow. Costs of the hearing on 15 May 2024 were reserved and a separate hearing to determine this issue took place on 16 July 2024.

The Judge confirmed that it was correct in principle that it would not be appropriate to regularly depart from an 'in the case' costs order following 'ordinary' costs management just because a party had seen their budget reduced. However, in this case, the Court had listed a separate hearing for the exclusive purpose of costs management with an expectation that the intervening period should prompt the parties to reconsider their respective positions. A party who proceeded to a separately listed costs management hearing with an overly ambitious budget should not assume that there would not be potential costs consequences. The Judge disagreed with the Claimant's submissions that securing at least something in excess of what the Defendant had offered established 'success' and so should avoid adverse costs.

Taking account of the specific points and arguments dealt with at the costs management hearing, the Judge was not persuaded that the process was routine and not out of the ordinary. The overall conclusion was that the Claimant's Precedent H was unreasonable and unrealistic in terms of proportionality. It led to a polarised approach between the parties that prevented settlement and necessitated a separate hearing. The Judge made an Order that there be no order for the costs of the costs management hearing on 15 May 2024. The Claimant should pay the Defendant's costs of the hearing on 16 July 2024. It was further ordered that the Claimant's costs management costs, such as may come to be assessed in the event that the Claimant recovered costs upon success, were reduced by 15%.

CASE UPDATES

Fundamental Dishonesty - Dismissal of Claim Under Section 57(2) - Substantial Injustice

Shaw v Wilde
[2024] EWHC 1660 (KB)

Background

The Claimant's claim arose out of a road traffic collision. The Claimant suffered serious injuries to both of his legs and arms when his motorcycle collided with the Defendant's car. The Claimant had to undergo 23 surgical procedures as a result of his injuries.

Liability was admitted after proceedings were issued, but the Defendant subsequently obtained permission to raise allegations of contributory negligence, which was tried as a preliminary issue. The contributory negligence allegations were dismissed and the Claimant stood to recover 100% of his damages.

A Claim Form was issued on 31 July 2019. A provisional Schedule of Loss sought to recover £6,465,578 plus the cost of future aids and equipment. In September 2020, the Claimant sought an interim payment of £1.5 million to fund continued rehabilitation, single storey accommodation in an affluent area and a Land Rover Discovery or Mercedes GLE as recommended in a transport report. However, by that stage, the claim had become much more complex after allegations of fundamental dishonesty were raised. Surveillance evidence had been obtained by the Defendant which revealed the Claimant walking 900 metres without a stick (having previously indicated his mobility was limited to 200 metres with a stick), shopping using a mountain bike, driving an SUV and mountain biking at a remote location which was well known for sport climbing. The Claimant was only seen using a stick on one occasion.

During the trial, the accuracy of the evidence about the Claimant's condition and function was hotly disputed. A Reply to the fundamental dishonesty defence was served by the Claimant and was expansive. It included the suggestion that the Claimant had miscalculated walking distance and was mistaken, rather than dishonest, and that the surveillance footage of him waking unaided and cycling to another shop on his bike both represented the only occasions on which he had made those journeys.

The Claimant's medical records were found to contain "reliable evidence" about the injuries the Claimant had suffered (which were undoubtedly significant), the treatment he had received in the subsequent years and the chronology of the operations he had undergone. In response to criticism that his care claim was grossly exaggerated, the Claimant indicated he had been guided by his care expert. However, the Claimant accepted that he had not always been accurate in some of the information he had provided, although he maintained that this had been due to mistakes, rather than a lack of honesty.

The Defendant's insurers continued their covert surveillance of the Claimant, even after the allegations of fundamental dishonesty had been raised. This created a situation of a "mission creep" where a much broader attack was made upon the Claimant's honesty as compared with what had been pleaded, but this did not trouble the Court. The Judge found that the information was within the Claimant's own knowledge and he had been put on notice that his credibility was under attack generally by the Defendant (in an e-mail which had been sent in December 2020 in which the Claimant was invited to reflect on his claim and to withdraw his Application for an interim payment if he considered the evidence he was presenting in support was misleading).

Judgment

The Judgment in this case is extensive and covers important points, the full detail of which are beyond the scope of this article. The pertinent points from the Judgment, however, are set out below.

The Judge calculated that the appropriate award of damages in respect of the Claimant's claim was £1,212,389.94 plus interest (as opposed to the £6.6 million claim presented by the Claimant).

The Judge found that the Claimant's presented accounts of his condition were untrue and misleading. He found that when the Claimant had made an Application for an interim payment in November 2020, he knew he was capable of walking much more than 200 metres without a walking stick. He also knew he could do much better than he had told the medical experts. He knew that the account of his care needs (advanced in July 2020) were significantly overstated. He knew he could drive an un-adapted vehicle. He knew that the excuses he gave in his Amended Reply, the Re-Amended Reply and in his Witness Statement were misleading and untrue.

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The Judge found that the Claimant's conduct was dishonest by the standard of ordinary decent people. The Claimant had lied about his mobility and function. These were central issues to quantum. They were not incidental or collateral. The effect of the lies on the pleaded claim was 'striking'. Taking all of the evidence into account, the Judge concluded that the Claimant's dishonesty was "fundamental".

Having made this finding, the Judge was obliged to dismiss the Claimant's claim, unless the Claimant could persuade him that he would face "substantial injustice".

Section 57(3) of the Criminal Justice and Courts Act 2015 defines substantial injustice as meaning 'more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty'. His Honour Judge Sephton stated the definition was not 'ambiguous, obscure, or absurd' and it should be given its ordinary meaning. It is a matter of simple statutory interpretation.

Section 57(2) confers a broad discretion when determining whether a dishonest claimant will suffer substantial injustice.

It is necessary for the Court to consider the effect of deprivation of legitimate damages and that the substantial injustice must arise 'as a consequence of the loss of those damages'. Thus, the Court must ascertain the consequences to a dishonest claimant of losing his valid damages. The Judge rejected the Claimant's argument that in high value cases loss of legitimate damages alone may be sufficient for substantial injustice.

The Judge identified the following consequences for the Claimant should his claim be dismissed:

- He may have to repay interim payments of £150,000.
- There may be a costs liability to the Defendant.
- His earnings potential was significantly reduced. He was now in the same position as someone who was similarly injured but who had no legal claim to pursue and would have to rely on 'the same state support as the victim who has no solvent tortfeasor to sue'.
- He may have incurred debts in the expectation of a damages award which he would now be unable to repay.
- He would need to rely on the state for his care, and items such as orthotics, 'just as the victim who has no solvent tortfeasor to sue would have to do'.

The Judge specifically took into account the extent of the Claimant's dishonesty and the blameworthiness which should be attached to it. He found that the Claimant was put on notice that his honesty was in issue by the Defendant's email in December 2020, however he did not change course and the Application proceeded. The Judge found that after this email, if not before, the Claimant was aware of the consequences of presenting a dishonest claim. Despite that, he did not admit his lies and, in fact, he continued to lie. As stated in the Judgment, 'he was unrepentant'.

The Court found that the Claimant had been fundamentally dishonest and was disinclined to entertain substantial injustice for the following reasons:

- At the very least, the Claimant would have been aware of the consequences in proceeding with a dishonest claim after the Defendant's email of 4 December 2020.
- Despite that specific email warning, the Claimant "told important lies about his condition".
- "Rather than admit his error, the Claimant persisted in his lies".
- "He gambled that his lies would not be found out or that the Court would excuse them".
- It was accepted dismissal of his claim would cause the Claimant "significant financial hardship".

The final line of the lengthy Judgment simply reads: "Mr Shaw has only himself to blame".

Witness Statements - Business and Property Courts - PD57AC

Fulstow and Woods v Francis
[2024] EWHC 2122 (Ch)

The Claimants claimed declarations as to their beneficial interest in shares in a company held by the Defendant. There was no dispute that the Claimants had made payments. The dispute related to what the payments were for.

The case is of interest to practitioners in the Business and Property Courts in relation to the manner in which the Judge dealt with issues relating to Witness Statements relied upon by the Claimants which failed to comply with PD57AC.

PD57AC has applied to trial Witness Statements for use in the Business and Property Courts since April 2021. Further guidance is provided in the Statement of Best Practice and case law.

CASE UPDATES

The Judge found that it was plain that the three Witness Statements in question had not followed PD57AC. Examples of the failures to comply included a failure to include the witnesses' confirmation of compliance, one of the Witness Statements did not include a Solicitor's Certificate of Compliance; none of the Witness Statements included a list of documents to which the witness was referred; two of the Witness Statements were a recitation of events based on the documents, sought to argue the case and commented on other evidence in the proceedings; similar wording was used in two of the Witness Statements, suggesting the absence of independent creation as the result of an interview formed of open questions. The Defendant's Solicitors had pointed out some of the failings to the Claimants in February 2024 and provided them with an opportunity to file fresh, compliant Witness Statements, but the Claimants did not take this opportunity.

Unusually, the Claimants had waived privilege in a significant quantity of correspondence between them and their Solicitor, which allowed the Judge to see the process adopted in preparing the Witness Statements. This showed that the Solicitor had sent one of the witnesses an aide memoire, which the Judge considered contrary to the PD57AC regime of not asking leading questions. It would have had the effect of altering or influencing the witness' recollection and was a clear breach of PD57AC. Part of one of the Witness Statements had also been copied from the pleadings, rather than being an independent recollection. The Judge considered that one of the Witness Statements was based heavily on advice received from the Solicitor as to what to say, and was not an independent recollection of events. It was a carefully constructed analysis of the documents then available to the Claimants. Another of the Witness Statements was copied from this Witness Statement and, therefore, did not represent an independent recollection of events. The third Witness Statement was the result of what the witness had been told by the first witness to say, and again was not an independent recollection.

The Judge concluded that he was unable to give the three Witness Statements any weight in the proceedings.

At the start of the trial, permission was sought by the Claimants to adduce two further Witness Statements, which were also found to be non-compliant. Whilst these Witness Statements included a list of documents to which the witness had been referred, it referred to statements, pleadings and the parties' initial and extended disclosure. The Judge considered this blatantly non-complaint and amounted, in effect, to saying 'we've looked at everything', as opposed to identifying the documents in a way they could be located easily at trial. Permission to rely on these further Witness Statements was refused.

In those Witness Statements, which included a Solicitor's Certificate of Compliance, the Judge found the declaration to be false. The Witness Statements were clearly and obviously not compliant with PD57AC and any solicitor properly practising in the Business and Property Courts ought to have known that.

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

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