motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
In this edition we cover:

case summaries

- **contributory negligence**

  Kyriacou v Finch [2021]

- **MIB - uninsured driver or uninsured car?**

  Colley v Shuker & Others [2020]

- **pedestrian visibility**

  Gary Vincent v (1) Gary Walker (2) Vidionics Security Systems Limited [2021]

- **QOCS and counterclaims**

  Sutcliffe v Ali [2021]

articles

- **The end of the road for Vnuk?**
- **'Whiplash reforms'**

spring 2021

DOLMANS
SOLICITORS

Kyriacou v Finch [2021]

The claimant suffered serious injuries as a result of being knocked off his scooter by an oncoming car. The claimant was travelling at over 50mph down a single carriageway and overtook a van when approaching a junction. The defendant was heading in the opposite direction, travelling at around 14mph, and started to make a right turn at the junction, when he collided with the claimant's scooter. The defendant stated that he had not seen the claimant's scooter until after the accident, and, as he approached the junction, he looked ahead and only saw the van. The claimant argued that the defendant was negligent because, when turning, he had cut the corner. A small amount of cannabis had been found in the claimant's bag after the accident and he did not have a license to ride the scooter. The claimant submitted that primary liability was established because the defendant had been negligent in that he had failed to keep a proper look out and had cut the corner. The claimant's case was that if the defendant had not breached these duties, then the accident would not have occurred.

Turning to contributory negligence, the claimant submitted this should be assessed at 60% to 66%. On the other hand, the defendant submitted that the accident was due primarily to the claimant's negligence, and that if he was liable then the claimant's contributory negligence should be assessed in the range of 85 to 90%. Expert evidence concluded that if the claimant had been travelling at 37mph or less, the accident would not have happened. It was held that the defendant had been negligent for failing to keep a proper lookout and was also negligent in cutting the corner, however a large proportion of culpability lay with the claimant, as the court found, on the balance of probabilities, that the claimant had cannabis in his blood, which inhibited his ability to drive. The claimant had also been driving at twice the speed limit and was driving dangerously in overtaking the van. Attempting the overtaking manoeuvre in close proximity to a junction was also found to have compounded the danger. He was found to be 80% contributory negligent.

Colley v Shuker & Others [2020]

The claimant was involved in a serious road traffic accident after his vehicle was struck by a motorcycle riding on the wrong side of the road. As a result, the claimant was left with severe life changing injuries. The claimant was, in fact, the passenger and although the vehicle was covered by a policy of insurance at the time of the accident, the driver was not insured to drive it, a fact which the claimant knew.

The insurers of the vehicle obtained a court order under Section 152(2) of the Road Traffic Act 1988 voiding the policy. This meant that the insurer had no obligation to pay and successfully resisted liability towards the claimant.

The claimant turned to the MIB as insurer of last resort. The case follows the establishment of the principle that there must be a provision for compensation to third party victims of motor vehicle accidents and that the MIB is the responsible emanation of the state for that purpose in the UK. The MIB denied that it was such an emanation for the purposes of a claim in the circumstances of this case and argued, first, that its duty under Article 10 of Directive 2009/103/EC to pay compensation where the general insurance obligation in Article 3 of that Directive has not been satisfied was limited to cases where there is an unidentified vehicle or an uninsured vehicle. In addition, the MIB also argued that the case fell within the exception in Article 10(2) of the 2009 Directive because the claimant voluntarily entered the vehicle which caused the injury when he knew the vehicle was uninsured. The judge held that the MIB was an emanation of the state and the claimant was able to rely upon Articles 3 (1), 10 and 12 of Directive 2009/103/EC to require the MIB, an emanation of the state and compensation body for the purposes of Article 10, to pay compensation in the circumstances of the present case and that the exclusion in Article 10(2) could not apply in that the fact that the accident was caused by a person known not to be insured does not mean that the accident was caused by an uninsured vehicle.

The exclusion is, therefore, where there is knowledge that the vehicle is uninsured, rather than the driver not being a named or an insured driver.

Gary Vincent v (1) Gary Walker
(2) Vidionics Security Systems Limited [2021]

This case involved a claimant, a pedestrian, who issued proceedings against the driver of a car following a road traffic accident in which the claimant was hit as he crossed the road in the dark. The claimant was wearing dark clothes and the pedestrian crossing was controlled by automated traffic lights. At the time of crossing, the lights were green for cars to proceed. An eyewitness gave evidence that the claimant had not been looking as he crossed the road and the claimant accepted that he was not paying attention when he crossed. However, the claimant submitted that the fact that the driver had not observed him before he stepped into the road was an indication that the driver was not looking properly and that a reasonable and careful driver on approach to a pedestrian crossing should have been scanning both sides of the road.

The driver told the police that he had been driving at 45 to 50mph and had applied emergency brakes as soon as he saw the claimant step into the road. He argued that the claimant's dark clothes obscured his presence until after he stepped into the road and that his reaction time had been very fast.

The speed limit on the road was 50mph and two accident reconstruction experts gave evidence as to the visibility of the claimant and the speed of the car. The experts' joint statement was key and it was agreed that the driver was probably travelling at a speed of 39 to 41mph when he first saw the claimant and that he probably eased his foot off the accelerator as he approached the crossing, as was his usual practice. The court was not satisfied that the claimant would have been visible and affirmed that even if the driver had seen the claimant, he could not reasonably have anticipated that the claimant would ignore the pedestrian crossing traffic lights and step into the road without looking. The claim was dismissed, the court finding that the driver had not driven at excessive speed or failed to scan the road adequately as he approached the pedestrian crossing.

Sutcliffe v Ali [2021]

The claimant made a claim for personal injury following a road traffic accident. The defendant denied liability, blaming the claimant for the accident. The defendant also counter-claimed for their personal injury. The matter proceeded to trial before HHJ Gargan in the County Court at Middlesbrough, who found that the accident was caused solely by the defendant's negligence and, accordingly, the defendant was ordered to pay the claimant's damages and costs. The issue for the court to decide was whether the counter-claim entitled the defendant to claim QOCS protection, such that the order for costs could not be enforced.

The judge considered different authorities and identified two previous, contradictory decisions at circuit judge level. The judge preferred the approach in *Waring v McDonell [2018]* and found that the defendant could not benefit from QOCS protection. His rationale was based on comments made by HHJ Venn in *Waring v McDonell [2018]* that the Jackson reforms were not intended to provide defendant insurance companies with a defence to a claim for costs where they could persuade their insured to bring claims for personal injury. He said that to allow a counter-claiming defendant to avoid paying costs would encourage defendants to raise weak or tenuous claims and give rise to considerable satellite litigation. Therefore, in his judgment, the defendant was not to be viewed as an unsuccessful claimant in the proceedings, but rather as the unsuccessful defendant in the claim, even though he was the unsuccessful claimant in his own injury claim. It followed that the claimant was permitted to enforce the costs order against the defendant.

The End of the Road for *Vnuk*?

Readers will be aware of *Vnuk v Zararovalnica [2014]* in which the European Court of Justice concluded that the concept of 'use of vehicles' under Article 3(1) covered any use of a vehicle. This required compulsory insurance for a wider range of vehicles on private land, including ride-on lawnmowers, tractors, quad bikes and mobility scooters, and resulted in EU law being inconsistent with the Road Traffic Act 1988. However, on 21 February 2021, the Secretary of State for Transport announced that motor insurance law in the UK will no longer follow the *Vnuk* decision, in welcome news for insurers and their policyholders.

The Department for Transport has confirmed that legislation will be amended so that compulsory motor insurance will not extend to either a) various non-standard motor vehicles or b) the use of cars on private land. Motor sports will also be removed from the scope of compulsory cover. Mark Shepherd, Assistant Director, Head of General Insurance, at the Association of British Insurers said:

"We welcome the Government's plan to scrap this unnecessary requirement. This should happen as quickly as possible. There would have been no easy way to monitor compliance and enforcement for those using their vehicles on private land. It would also have been difficult to establish the circumstances of any claim, so increasing the scope for fraud, that ultimately ends up being paid for by motorists through their insurance premiums."

It is thought that the end of *Vnuk* in the UK will ensure that every British driver will be spared an estimated £50 annual increase in insurance premiums. The decision will also have important implications for the emergence of e-scooters which, on the face of it, may be exempt from compulsory insurance requirements. However, we understand the Department for Transport will make a final decision once the current e-scooter trials have concluded.

'Whiplash' Reforms

Following numerous delays, the Government has confirmed that the reforms contained within the Civil Liability Act 2018 will be effective from 31 May 2021. Changes to the Civil Procedure Rules to support these reforms have been published.

The reforms will see:

(1) The increase in the Small Claims Track (SCT) limit for personal injury claims arising out of road traffic accidents on or after 31 May 2021 from £1,000 to £5,000.

(2) Set tariffs valuing pain and suffering for whiplash injuries with no pre medical offers permitted.

(3) The operation of an online portal set for use by claimants in person.

Amongst a few other exceptions, the reforms will not apply to those described within the Pre-Action Protocol (PAP) as vulnerable road users, protected parties or someone under the age of 18 at the time the claim is commenced. Vulnerable road users include, inter alia, motor cyclists, their pillion passengers, cyclists and pedestrians. Whilst claims from minors will still be subject to the newly proposed tariffs, they will not be subject to the increased SCT limit and their claims will be pursued through the existing claims portal.

Despite the reforms being commonly referred to as the "Whiplash reforms", it should be noted that the amendments contained within the Civil Liability Act 2018 are not restricted to whiplash claims alone. The reforms and the use of the new online portal will encompass claims for any other injuries sustained, providing that the overall claim for injury is valued at no more that £5,000.

The overall SCT limit will remain at £10,000 and claimants will submit their claim for personal financial loss through the portal at the same time as their claim for injury, having regard to the upper limit.

Whilst legal expenses for claims captured by these reforms will no longer be recoverable, it is unlikely to see an end to claimants pursuing their claims through representation. There are reports of many firms adapting to these changes by seeking to move into Defined Benefit Arrangements with their clients, which would entail them recovering a proportion of any recovered damages directly from them.

Whiplash for the purpose of these reforms is defined within the PAP as meaning:

"*An injury or injuries of soft tissue in the neck, back or shoulder suffered because of driver negligence as defined in section 1 of the Civil Liability Act 2018 and as further applied by section 3 of that Act to claims where the duration of the whiplash injury or any of the whiplash injuries –*

(a) does not exceed, or is not likely to exceed, two years; or

(b) would not have exceeded, or would not be likely to exceed, two years but for the claimant's failure to take reasonable steps to mitigate its effect."

Newly published draft statutory instruments have set out the tariff levels at which claims for whiplash will be compensated.

Duration of Injury	Amount – Regulation 2 (1)(a)	Amount – Regulation 2 (1)(b)
Not more than 3 months	£240	£260
More than 3 months, but not more than 6 months	£495	£520
More than 6 months, but not more than 9 months	£840	£895
More than 9 months, but not more than 12 months	£1,320	£1,390
More than 12 months, but not more than 15 months	£2,040	£2,125
More than 15 months, but not more than 18 months	£3,005	£3,100
More than 18 months, but not more than 24 months	£4,215	£4,345

Regulation 2 (1)(a) allows for whiplash injury alone, whereas Regulation 2 (1)(b) includes an enhanced award where the whiplash injury is accompanied by a minor psychological injury.

The tariffs are in stark contrast to the valuations contained within the Judicial College Guidelines, which are currently used to assist with the assessment of damages. Current guidelines suggest an award of up to £2,090 where a full recovery is made within 3 months (compared to £240 under new tariff with no psychological injury). Where a full recovery was made between 3 months and 1 year, the valuation bracket was between £2,090 and £3,710. This is now capped at a maximum of £1,320 (where there is no psychological injury).

The Regulations also allow for a claimant to seek an uplift on the tariffs of up to 20% in "exceptional circumstances". Any uplift would apply to the whiplash and minor psychological elements of injury only. The claimant will have the opportunity to explain to the medical expert if their whiplash injury was exceptionally severe or that the impact of the circumstances of the whiplash injury were exceptional. Time will tell as to the extent of claims where 'exceptional circumstances' will be alleged and how compensators and the judiciary may consider the merits of these.

Recently, the Secondary Legislation Committee of the House of Lords noted criticism of the level of tariffs made by the Motor Accident Solicitors Society, but referred to a letter issued by the Ministry of Justice (MoJ) which addressed these. They said:

"The MoJ letter is a robust response that makes clear that these matters were fully debated during the passage of the 2018 Act and the issues were decided by Parliament. We note that illustrative tariff rates were available when the Bill was in progress, which we regard as best practice, and so the House was clear that it was agreeing to a substantial reduction in awards. We also note that the 2018 Act includes a number of provisions which require review of how this scheme operates and that it can be modified if unintended consequences are found."

As indicated earlier, claimants can also pursue a claim for non-whiplash injury through the portal. These will not, as matters stand, be subject to a similar tariff system. Apart from minor psychological injuries, which are covered by the tariffs, any other injury will be valued as now by reference to the Judicial College Guidelines.

It is envisaged that there will be test cases taken before the judiciary seek an adjudication on the process for valuing non-tariff injuries. Prior to then, this could be a battleground where the injured party seeks enhanced awards for additional injuries due to the reductions brought into play by the tariffs for the whiplash and minor psychological elements.

There are concerns from compensators that they may see a rise in the use of rehabilitation and claims for ankle or wrist injuries, or even tinnitus. Such claims, if successful, would boost the damages awarded, and in some cases may result in a valuation above the £5,000 element of the SCT limit, bringing claimant costs back into consideration. If at any time the claimant or the compensator notifies the other side through the portal that they consider the value of the overall claim is now worth more than £10,000 or the claim for injury is more than £5,000, then the new PAP will cease to apply. In such circumstances, the claimant can exit the newly designed portal and enter the current one and proceed under its prevailing governing rules (subject to its own limits).

Any claims captured by these reforms will be managed through a new portal created by the Motor Insurers Bureau (MIB). Much effort has been placed in its creation to ensure it is user friendly and informative, with claimants in person in mind.

Compensators will have 30 business days (40 if the MIB is acting) to respond with their position on liability. If a response is not forthcoming, the compensator is deemed to have admitted liability.

In the event of a dispute on liability, either in full or in part, the portal guides the claimant, should they choose, through the issuing of proceedings for a determination by the court. If a finding on liability, either in full or in part, is made against the defendant, then proceedings are stayed and the claim returned to the portal to proceed to the medical evidence stage. Unlike the current regulations, these new procedures are designed to keep as many claims as possible within the portal regime.

A claim may leave the portal process should the compensator allege fraud or fundamental dishonesty. This will need to be supported by a Statement of Truth.

Once liability has been admitted/found against the defendant, then a medical report will be obtained via MedCo through the portal. A medical report will be required for every claim which involves a whiplash element. No offers for a whiplash injury may be made without sight of a medical report.

Upon sight of the medical report, the claimant will determine whether they are ready to disclose it to the compensator or obtain a further report. A further report should only be obtained if justified, for instance where it is recommended by the medical expert or that the claimant has not recovered within the prognosis period. It is the intention that most claims will only require one report.

Unlike arrangements under the current portal, the compensator will now make the first offer, which must be made within 20 business days of receipt of the medical report(s). The offer must be broken down between the fixed whiplash tariff amount, the offer for any damages for non-whiplash injuries and the offer for each item of other protocol damages. Any deductions must be stipulated, such as contributory negligence, failure to wear a seatbelt or the recoverable benefits due to the DWP which may be offset against the claimed damages.

Each party can make up to 3 offers or counteroffers in total through the portal. All offers and counteroffers must be supported by a Statement of Truth. It is expected that each party should respond to offers or counteroffers from the other within a maximum of 10 business days.

If quantum cannot be agreed, then the claimant may proceed to issue proceedings. The stage 3 procedure would appear to be largely similar to how it is now, save that there is no requirement upon issue for the compensator to release payment for the total amount of their last offer at the outset.

Comment

These are seismic changes for the industry and claimants alike. The true scale is unlikely to be clear until after the 31 May 2021 and the satellite litigation which is likely to ensue. In the meantime, the regulations and PAP will be scrutinised in detail by compensators and those that represent claimants alike.

The overarching aim of the reforms is stated to be to reduce fraudulent and exaggerated claims and to control claims costs without compromising access to justice. Let us all hope that these aims remain in sharp focus in what is bound to be an interesting period as the industry adjusts to a new 'new norm'.

If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

Simon Evans at simone@dolmans.co.uk

Capital Tower, Greyfriars Road, Cardiff, CF10 3AG

Tel : 029 2034 5531
Fax : 029 2039 8206

www.dolmans.co.uk