DOLMANS INSURANCE BULLETIN

Welcome to the December 2019 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**

DOLMANS REPORT ON

A FUNDAMENTALLY DISHONEST CLAIM

DJB v Newport City Council

We recently acted for the Defendant Local Authority in a claim where the sheer number of inconsistencies led to the Judge making a finding that the Claimant had been fundamentally dishonest and sought to deceive the Court on a number of issues.

Presentation of the Claim

The Claimant brought a claim for personal injury following an alleged accident he suffered when he was walking along the footway of Western Valley Road in Rogerstone, Newport.

The Defendant's first knowledge of the accident was upon receiving a telephone call from the Claimant on 21 March 2017. He contacted the Local Authority to complain about a large sheet of metal in the footway which caused him to slip and injure his knee. The Claimant reported that his accident occurred whilst he was walking home on 19 March 2017. The customer services operative made a note of what was discussed (the call was not recorded) and the Claimant requested a Third Party Claim Form in order make a claim.

The Claimant completed this form on 4 April 2017 and returned it to the Local Authority. Within that form the Claimant described how, on 19 March 2017, at approximately 6:15pm to 6:30pm, he was walking down the path on Western Valley Road when his foot slipped on a steel plate. The Claimant said his right knee gave way, causing it to lock and he suffered torn ligaments as a result. The Claimant alleged that his injury was caused by the Defendant because a non-slip plate had been installed in the footway. The Claims Handlers denied liability on the basis that the metal plate had never been identified as being defective or slippery and there was no record of any previous complaints or other accidents.

Two Accidents?

The Claimant instructed solicitors who presented a Claim Notification Form to the Defendant which stated that the accident occurred at 1:00pm on 13 March 2017. The Defendant reiterated their denial of liability and proceedings were commenced in February 2019.

The Particulars of Claim alleged that the accident occurred on or about 11 March 2017 and that the Claimant's fall was caused by the presence of the metal plate in the footway which was slippery and dangerous due to the presence of gravel, loose vegetation upon it and it being wet. We filed a full Defence and raised a Part 18 request of the Claimant with a view to clarifying the inconsistencies as to the date and time of the accident. We had suspicions that the Claimant had suffered two accidents and requested access to his medical records. The Claimant refused to answer the Part 18 Request on the grounds of the information sought and the premature nature of the Request.

Further Inconsistencies

In support of his claim for injury, the Claimant had procured a report from a medico-legal expert. That report stated that he was walking along the pavement on 13 March 2017, it was a dry afternoon, and when he stepped on a steel plate his right foot slipped on gravel on top of the plate and he jarred his knee. The medical expert stated that the Claimant did not fall to the floor, but his knee was painful and he had to hobble the remaining 400 yards home.

We obtained the hospital records which identified that the Claimant attended the Royal Gwent Hospital at 10:45am on 12 March 2017. The incident was noted as having occurred at 4:00pm on 11 March 2017. It was recorded that the Claimant slipped, fell and landed on his backside. His (right) knee was hyperextended and he had no pain initially. The Claimant was able to walk normally, but woke up with pain the following morning (12 March 2017) which was constant and worse on movement. The Emergency Consultations Department wrote to the Claimant's GP on 13 March 2017 to notify them of the Claimant's attendance at hospital with an initial complaint of knee pain (non-trauma). The letter noted that the Claimant had been diagnosed with a sprain/strain of knee and there was no reference whatsoever to any torn ligaments.

The parties exchanged Witness Statements. The Claimant's evidence was that the accident occurred at approximately 1:00pm on 13 March 2017. He said it was a dry day and he took two steps on the metal plate when his right foot slipped, causing his knee to lock and he fell to the ground landing on his bottom. Such a description was identical to the hospital record, but obviously contrary to what the Claimant had initially told the Local Authority as well as the alleged wet nature of the metal plate. The Claimant described being in immediate pain in his right knee and said he attended hospital the following day (14 March 2017) where he was diagnosed as having torn ligaments in his right knee. This was not verified by the hospital record.

We adduced evidence from three witnesses. The highways inspector stated that he had never found the metal plate to be slippery. The senior technical officer gave evidence that the metal plate had been installed in the footway to resolve drainage issues, no previous complaints or accidents had been reported and upon testing the plate following the accident he did not find it slippery or in any way dangerous. The Defendant's final witness was the customer services operative that spoke to the Claimant on 21 March 2017 who confirmed the accuracy of his note.

Trial

The claim was heard before District Judge Muzaffer in the Newport (Gwent) County Court on 15 November 2019. The Claimant was cross-examined at length regarding the time, date and circumstances of his accident. He was unable to explain the significant number of inconsistences across his own documents and gave the impression that he was being inconvenienced by being asked to do so. The Claimant's evidence was so poor that his Counsel invited the Judge to give an indication as to whether it was necessary to call the Defendant's witnesses to determine the claim.

We submitted that, in light of the Claimant's oral testimony, the issue of fundamental dishonesty was at the forefront of the Defendant's mind (given the significant costs that had already been incurred) and there were aspects of the witness evidence which were relevant to that issue. The Judge was bemused by the submission, noting that even the Claimant's Counsel had no confidence in his client's case, but wanted to hear from the Defendant's witnesses before delivering Judgment.

The Judge found that the Claimant had not proved his claim. Within his Judgment he described the Claimant as "*extremely arrogant and evasive"* and commented *"it was almost as if he saw no reason as to why it was necessary for him to trial the numerous and significant inconsistencies".* In contrast, the Judge had no reason to call into question the credibility of the evidence from the Defendant's witnesses. The Judge was not satisfied that the Claimant's accident occurred on 11 March 2017 and went onto say that even if it had, there was ample evidence that the Defendant had taken reasonable care throughout. He accepted that the metal plate was anti-slip and that the Defendant had a positive system of inspection.

DOLMANS REPORT ON

"The Claimant has not been Truthful"

The Judge was also satisfied, on the balance of probabilities, that the Claimant had acted dishonestly. He said his rationale was somewhat interlinked, but pointed to what he described as the "*remarkable level of inconsistency*" as to the time, date and circumstances of the accident with no explanation having been offered by the Claimant.

The Judge said it was certain that the Claimant had attended hospital on 11 March 2017, but did not know why, and it was unclear why he waited until 19 March 2017 to report the accident. He cited further inconsistencies as to whether the Claimant fell over, how he landed, the onset and description of pain and what had caused him to slip. The Judge concluded "*the only natural explanation is that the Claimant has not been truthful and has sought to deceive the Court on a number of issues".* He found that the Claimant had been dishonest and that this dishonesty had substantially affected the presentation of the claim.

The Judge ordered that Qualified One-way Costs Shifting (QOCS) be dis-applied, with the Claimant to pay the Defendant's costs, summarily assessed at almost £6,500.00, within 21 days. The Defendant has not received payment and is now seeking to enforce the Costs Order.

Comment

This was a very pleasing result for our client. The claim had been defended robustly from the outset and our concerns regarding the veracity of the claim proved to be correct. Although we invited the Judge to find that the Claimant had suffered two accidents, as the papers seemed to indicate, he did not feel that he needed to decide that issue specifically in order to find that the claim was fundamentally dishonest. The Judge was satisfied that the significant inconsistency in the Claimant's evidence was sufficient to make such a finding.

It is also noteworthy that the allegation of fundamental dishonesty had not been pleaded in the Defence and was raised, essentially for the first time, after the Claimant had given evidence. The Court of Appeal found in *Howlett v Davies & Anor [2017]* that insurers did not have to plead fundamental dishonesty to deprive a party of QOCS protection, but, in that case, the insurer had stated they did not believe the accident had taken place.

We had not gone quite that far, but the Judge noted that we had denied causation in the Defence, sought to address the inconsistencies in a Part 18 Request (which the Claimant refused to answer) and made the inconsistencies known in witness evidence. The Claimant had, therefore, been given 'adequate warning' that his credibility was being called into question.

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DOLMANS RECENT CASE UPDATE

Civil Procedure - Inspection - Without Prejudice Communications

(1) BGC Brokers LP (2) Martin Brokers Group (3) BGC Services (Holdings) LLP v (1) Tradition (UK) Limited (2) Anthony John Vowell (5) Michael Anderson

[2019] EWCA Civ 1937

The Claimant appealed against an Order that it provide for inspection of an un-redacted copy of a Settlement Agreement that it had reached with the Third Defendant, to the First, Second and Fifth Defendants. This Appeal, therefore, was concerned with the applicability of the doctrines of without prejudice privilege and litigation privilege to an Application for inspection of a Settlement Agreement.

The Claimant carried on business as inter-dealer brokers, and was a rival broker of the First Defendant. The Second Defendant worked for the First Defendant, and the Third Defendant was a broker who worked for the Claimant.

During 2016 and 2017, the Third Defendant had supplied the Second Defendant with confidential information relating to his work with the Claimant. The Claimant issued a claim against all the Defendants. The Third Defendant attended interviews with the Claimant on a 'without prejudice and confidential' basis. Those interviews resulted in a Settlement Agreement, in which the Third Defendant represented that he had fully disclosed all the confidential information he had supplied to the other Defendants, as set out in the Schedules to the Settlement Agreement. He also acknowledged that if he breached his representations, the Claimant would be entitled to take action against him for breach of the Settlement Agreement.

The Claimant submitted that the Defendants should only be provided with a redacted copy of the settlement and not any agreement or communications that were also antecedent to the Settlement Agreement as these had been made on a without prejudice basis and, therefore, subject to without prejudice privilege and litigation privilege.

The Court of Appeal held that in relation as to whether **without prejudice privilege** applied, the issue was the purpose of the relevant communication. Here, the relevant communication related to the Settlement Agreement. The purpose of that communication was not to negotiate, but to settle the dispute between the Claimant and the Third Defendant. It was, therefore, not covered by without prejudice privilege.

DOLMANS RECENT CASE UPDATE

In relation to **litigation privilege**, for litigation privilege to apply the relevant communication had to have been made for the sole or dominant purpose of conducting adversarial litigation in progress or in contemplation of proceedings. On the face of the Settlement Agreement, the antecedent communications were incorporated into the agreement by the Claimant so as to obtain the benefit of the Third Defendant's representations and warranties that he had disclosed a full and frank account of all the confidential information he had given to the Second Defendant. Therefore, the Claimant would be able to sue the Third Defendant if those representations and warranties were inaccurate. Accordingly, the antecedent communications were incorporated to 'police' the Settlement Agreement, which was a different purpose to the purpose of evidence gathering that had informed the making of the antecedent communications. Accordingly, litigation privilege did not apply.

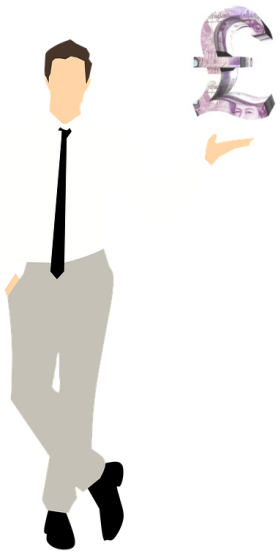
Appeal dismissed.

Clinical Negligence - Interim Payments - Costs

RXK (A Child Proceeding by her Mother & Litigation Friend, GXK) v Hampshire Hospitals NHS Foundation Trust

[2019] EWHC 2751 QB

During the course of a high value clinical negligence claim, the Claimant applied for a further interim payment on account of costs.



The Court had already ordered the Defendant Trust to make interim payments on account of damages and costs in the claim where liability was admitted and it was common ground the extent of the damages that should be awarded to the Claimant would not be known for some time. The instant Application was made requesting the Court to use its discretion under CPR r.44.2 to grant a further £150,000 on account of costs. The Application attached a short Schedule of Costs to date, but gave no other information about the case and did not mention that the Claimant had received some public funding from the Legal Services Commission.

It was held that the Court's discretion as to costs under r.44.2 was very wide. However, r.44.2(8) only allowed the Court to make an interim payment on account of costs where it had made a Costs Order which could be subject to Detailed Assessment. Therefore, the Claimant should have made an Application for a Costs Order down to a specific date and an interim payment on account of those costs, and the Court would normally expect the parties to present it with sufficient information to carry out that exercise.

DOLMANS RECENT CASE UPDATE

In the instant case, the Claimant had failed to adequately address or to present sufficient information to enable the Court to take into account the factors set out in r.44.2(4) and (5) and amounted to no more than an impassioned appeal for more money.

It was, however, acknowledged that there was a need for solicitors engaged in heavy and protracted litigation to expect adequate cash flow and, consequently, the parties were permitted to file a further Witness Statement and apply to re-list the Application. Further, in his Judgment, the Judge approved and re-iterated the County Court decision of *Hull v East Yorkshire Hospitals NHS Trust [2019]*, in which HHJ Robinson held that the Court can order a payment on account of costs even where there will not be a Detailed Assessment until the end of the case some years away.

Costs - Part 36 Offers - Fixed Costs

Siu Lai Ho v Seyi Adelekun

[2019] EWCA Civ 1988

The Court of Appeal held that fixed costs still applied to a case where an offer of settlement did not expressly refer to costs being fixed.

The Appellant was a Defendant to a personal injury claim. The claim had been issued under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. As liability was not admitted, the claim exited the Protocol and was allocated to the fast track. The Respondent applied to reallocate the claim to the multi-track. Before the hearing of the Application took place, the Appellant made a Part 36 offer of £30,000 and agreed to the matter being reallocated. The offer letter stated that if the offer was accepted, the Appellant would pay the Respondent's costs in accordance with CPR 36.13 and that "*such costs to be subject to Detailed Assessment if not agreed*". The day after the offer was made, the Appellant agreed to the matter being moved from the fast track to the multi-track. The matter was never re-allocated. The offer was then accepted by the Respondent.

The parties signed a Tomlin Order which stated that the Appellant would pay the Respondent's *"reasonable costs ... on the standard basis, to be subject to Detailed Assessment if not agreed"*.

The parties did not agree on costs. The Appellant considered that the fixed costs regime applied. At first instance, the District Judge held that the action was subject to the fixed costs regime.

The Respondent appealed and was successful in front of a Circuit Judge.

The Appellant sought to appeal this decision.

The Court of Appeal did not accept the approach of the Circuit Judge. It held that the offer letter, properly construed, did not offer to pay conventional rather than fixed costs. Rule 36.20 dealt with costs consequences of a Part 36 offer where Part 45 s 111A applied (as was the case here), whilst Rule 36.13 dealt with costs consequences of a Part 36 offer in other cases. The fact that the offer letter referred to Rule 36.13 instead of Rule 36.20 was of no great significance. A simple reference to Rule 36.13 probably would not suffice to take the case out of the fixed costs regime. If a party to a claim that no longer continued under the Protocol offered to pay costs on a basis that departed from Part 45, the offer was incompatible with Part 36 and could not be an offer under that part. While the letter's reference to *"Detailed Assessment"* was not ideal if the Appellant had intended the fixed costs regime to apply, it was not wholly inapposite; the fixed costs regime did involve an assessment of some kind. The Court of Appeal added that a Defendant wishing to make a Part 36 offer on the basis that the fixed costs regime will apply would, of course, be well-advised to refer in the offer to CPR 36.20, and not CPR 36.13, and to omit any reference to the costs being *"assessed"*.

As a fall-back position, the Respondent sought to argue that notwithstanding its acceptance of the Part 36 offer prior to re-allocation, the claim should now be re-allocated to the multi-track with a direction to dis-apply the fixed costs regime with retrospective effect. The Court of Appeal dismissed this argument. Even if it had been open to the Court to reallocate the claim and dis-apply the fixed costs regime, there was good reason to refuse it as it had been no part of the Settlement Agreement that the regime should be displaced.

Appeal allowed.

Costs - Pre-Action Protocol for Low Value Personal Injury Claims (Employers' Liability and Public Liability) Claims

Scott v Ministry of Justice

SCCO 05.12.19

The Claimant, 'C', was employed by the Defendant, 'D', as a prison officer. C was injured by a prisoner who resisted when C restrained him. C's claim was based on the failure of D to realise and record the prisoner's propensity to violence. C's solicitors sent a Letter of Claim in April 2015 stating that C was bringing a claim under the Pre-Action Protocol for Personal Injury Claims, but making no mention of the EL/PL Protocol.

DOLMANS RECENT CASE UPDATE

In July 2016, the primary limitation period was due to expire, so C issued protective proceedings. The Claim Form was endorsed with the following statement *"I expect the total claim to recover not more than £5,000"*. C served Particulars of Claim in October 2016. At about the same time, the endorsement of value on the Claim Form was amended to in excess of £30,000. D served a defence denying liability. In November 2016, C made a Part 36 offer of £30,000, which was not accepted. In February 2017, D made a Part 36 offer in the sum of £15,000, which C accepted. The issue between the parties was whether the EL/PL Protocol (and, therefore, CPR Pt 45) applied so as to restrict D's costs liability to fixed costs.

There were two issues before the Court. First, whether the claim was excluded from the EL/PL Protocol by reason of C's injury having been caused by a 'vulnerable adult', thereby engaging the exception in paragraph 4.3(8) of the protocol which reads *"This Protocol does not apply to a claim … for damages in relation to harm, abuse or neglect of or by children or vulnerable adults"*. Second, whether C elected not to apply the Protocol by reason of him having placed too high a value on the claim.

C's position was that the prisoner was a 'vulnerable adult'; he caused C 'harm' and, therefore, the EL/PL Protocol did not apply. The Court noted that it was implicit in this analysis that the word 'harm' means, or is capable of meaning, personal injuries per se. The Court rejected this finding that the meaning of the phrase *'harm, abuse or neglect*' means abuse, neglect or other such harm.

As regards the meaning of the phrase 'vulnerable adult', the Protocol relies on the definition in paragraph 3(5) of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which provides "'*vulnerable adult' means a person aged 18 or over whose ability to protect himself or herself from abuse is significantly impaired through physical or mental disability or illness, through old age or otherwise"*. The Court held that the question of whether a person was a vulnerable adult would depend on the circumstances and a person's status could change. In order to bring a claim within the vulnerable adult exception, the context in which the claim was being brought had to sensibly support such a conclusion. The fact that paragraph 4.3(8) used the words *"in relation to"* meant that the putative vulnerability needed to be in some way relevant to the claim. If the basis of the claim was that a person had been subjected to abuse or neglect, such a conclusion would naturally follow. If, on the other hand, the putative vulnerability was merely incidental to the claim and was relied upon solely for the purposes of avoiding the operation of Part 45, then the opposite conclusion would tend to follow. In this case, the prisoner had recently lost his son and was very agitated. However, there was no evidence that that impaired his ability to protect himself from abuse. The prisoner was being restrained, but it was impossible to characterise the lawful and proper restraint of a prisoner as being an act that made him a vulnerable adult. Indeed, the prisoner had refused to comply with a lawful order given by a prison officer; it would be contrary to common sense to suggest that the fact that he subsequently had to be restrained should, of itself, make him vulnerable.

Accordingly, the Court held that the exception in paragraph 4.3(8) did not apply.

As regards the issue of whether C unreasonably valued the claim at more than £25,000, C's solicitor's position was that at the time of the Letter of Claim, it was entirely reasonable to conclude that the value of the claim would exceed £25,000. Whilst it was difficult to reconcile that with the statement on the original Claim Form that the value was limited to £5,000, the Court was satisfied that C's solicitor's file confirmed that there was an intention to review the endorsement as to value once C had received his expert evidence and counsel had advised in conference.

D submitted that the fact that the Claimant accepted a Part 36 offer of only £15,000 implied that the true value of the claim was less than £25,000. The Court was, however, satisfied that C accepted D's offer because he had concerns about whether he would succeed on liability. As such, the fact that the offer was accepted shed little light on C's full liability valuation of the claim.

Accordingly, it was found that C did not unreasonably value the claim at more than £25,000.

D further submitted that C had acted unreasonably and/or improperly by endorsing the Claim Form with a value of less than £5,000 in circumstances in which C's solicitors believed that the value of the claim was likely to be considerably more and had, thus, attempted to mislead both the Court and D. The Court dismissed this argument. The conduct complained of was not misconduct (or even close to being misconduct). There was no intention to mislead anyone. C's solicitors had at all material times intended to review and revise the Claim Form once they had received the expert's report and taken Counsel's advice. The Claim Form was a holding measure.

Accordingly, it was held that the costs should be assessed without reference to CPR Part 45.

Noise Induced Hearing Loss - Adverse Inferences

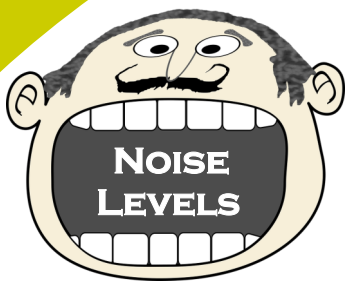
MacKenzie v Alcoa Manufacturing (GB) Limited

[2019] EWCA Civ 2110

This Appeal considered the circumstances in which it is appropriate to draw an inference adverse to the operator of a factory in industrial deafness cases where there was noise in the workplace and no noise survey is available.

The Claimant, 'C', brought a claim for damages for noise induced hearing loss. 'C' had worked at the Defendant's ('D') factory between 1963 and 1976 and alleged that his injuries were caused by D's failure to carry out a noise survey to ensure that he was not exposed to unsafe levels of noise. D did not disclose any noise surveys and D's List of Documents did not list any documents relating to noise surveys as having been carried out but no longer retained. A single joint engineering expert was instructed. His evidence was to the effect that based on his experience of a similar factory, it was unlikely that C was regularly exposed to levels of noise in excess of 90dB(A).

DOLMANS RECENT CASE UPDATE



At Trial, C's Counsel submitted that as no noise surveys had been produced, an adverse inference should be drawn pursuant to *Keefe v Isle of Man Steam Packet Company Limited [2010]*, in which the Court of Appeal said *"If it is a Defendant's duty to measure noise levels in places where his employees work and he does not do so, it hardly lies in his mouth to assert that the noise levels were not, in fact, excessive. In such circumstances, the Court should judge a Claimant's evidence benevolently and the Defendant's evidence critically ..."*. The Trial Judge did not draw the inference adverse to D because he accepted that documents relating to the noise survey may have been lost and because he found that the expert engineering evidence did not support the case that C had been subjected to tortious levels of noise. C successfully appealed. The Appeal Judge held that D was under a duty to conduct noise surveys from 1970 onwards and there had been no good grounds for distinguishing *Keefe*. He ordered that the case be remitted for an assessment of damages. D appealed to the Court of Appeal.

The Court of Appeal allowed the Appeal. In order to consider whether *Keefe* should have been applied to this case, it was necessary to consider when the common law duty to carry out a noise survey arose in relation to this factory; whether there was a failure to carry out a noise survey; and, in any event, whether the Trial Judge was entitled to rely on the engineering evidence. It was accepted that the Appeal Judge had been inadvertently misled regarding the date by which a noise survey should have been carried out. The Court of Appeal confirmed that a common law duty to carry out and act upon a noise survey arose in around 1973 or 1974. It was common ground at the hearing of the Appeal that, to the extent that the order remitting C's case to the County Court for an assessment of damages had covered the whole period of his work at the factory, namely from 1963, it should be amended to provide that damages should be assessed for the period from 1973 or 1974 to 1976 only.

However, the Court held there was no sufficient basis available for the Appeal Judge to overturn the finding of fact made by the Trial Judge that there was no breach of duty on the part of D because noise surveys might have been lost. This was especially so where despite the facts that the factory had continued to operate and D had had a registered office until recently, it was common ground that the absence of noise surveys was explicable because of the passage of time. The Court recommended that in future cases where it is relevant to determine whether a noise survey has been undertaken in the past it would be helpful if both parties addressed that in pre-trial questions about the existence of documents or in the evidence at Trial. This would help to avoid a situation where the Trial Judge is left to deal with the factual finding about whether a noise survey was carried out on the basis only of submissions about Lists of Documents. The Court further held that the Trial Judge was entitled to accept the engineering evidence and avoid resort to inferences, even if they might otherwise have been drawn. The approach taken by the Appeal Judge to the adverse inference risked elevating the decision in *Keefe* to a rule of law, rather than an example of the proper approach to finding facts in a particular case where the evidence showed that the defendant had failed in its duty to carry out noise surveys and the Claimant had been deprived of the opportunity to prove his case.

DOLMANS RECENT CASE UPDATE

Psychiatric Harm - Secondary Victims - Striking Out

(1) Balbir Kaur Paul (on her own behalf and as Administratrix of the Estate of Parminder Singh Paul) (2) Saffron Olivia Kaur Paul (a Child by her Litigation Friend, Balbir Kaur Paul) (3) Mya Paul (a Child by her Litigation Friend, Balbir Kaur Paul) v Royal Wolverhampton NHS Trust

[2019] EWHC 2893 (QB)

The Second and Third Claimants (C2 and C3) sought damages for psychiatric injury caused by witnessing the death of their father in January 2014. Their father had type II diabetes and a number of complications, and it was the Claimants' case that there had been failures in the care given to their father when he was seen for cardiac symptoms in November 2012. It was asserted that had a coronary angiography been carried out at this time, it was unlikely that the fatal heart attack would have occurred in January 2014 as this would have shown that their father had significant coronary artery disease, such that he would have been offered coronary revascularisation. The Claimants provided evidence that witnessing their father's death had caused them to suffer PTSD.

The Defendant NHS trust applied to strike out the claims of C2 and C3 on the grounds that they could not be secondary victims because the Claimants had to be in close proximity in space and time to the relevant event caused by the Defendant's breach of duty. The Claimants' case was based on witnessing their father's collapse from a heart attack and there was no suggestion that they had witnessed the events during their father's hospital admission over 14 months earlier.

It was held that the Courts had confined the right of action of secondary victims by means of strict control mechanisms, even if the law appeared arbitrary. C2 and C3 could establish that they fell within each of the control mechanisms except that of 'proximity'.

The question was whether C2's and C3's father's death was capable of being the relevant 'event' for deciding the proximity question. The Court held that their father's death from a heart attack could not amount to a relevant event for the purpose of the proximity test. To focus simply on the death as being the first point at which the consequence of the Defendant's negligence became apparent was not an approach which was supported by the authorities. There had to be a proximate connection in space and time that allowed the Court to impose a duty of care as a necessary condition of legal proximity.

Accordingly, the Court held that the secondary victim claims were bound to fail and C2's and C3's claims were struck out.

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DOLMANS

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- Display Screen Regulations – duties on employers
- Employers' liability update
- Employers' liability claims – investigation for managers and supervisors
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- Flooding and drainage – duties and powers of Highway Authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the Highway Authority in respect of highway waters
- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
- The Jackson Reforms (to include : costs budgeting; disclosure of funding arrangements; disclosure of medical records; non party costs orders; part 36/Calderbank offers; qualified one way costs shifting (QWOCS); strikeout/fundamental dishonesty/fraud; 10% increase in General Damages)
- Liability of Local Education Authority for accidents involving children
- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

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