DOLMANS INSURANCE BULLETIN

Welcome to the November 2023 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:

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REPORT ON

A Successful Defence of a Highways Act Claim Relating to a Kerb Upstand: Measurement Controversy and Dangerousness

DP v Rhondda Cynon Taf County Borough Council

Facts and Claimant's Allegations

Dolmans represented the Local Authority in a claim brought by DP who was at all material times a Police Officer. The Claimant asserted that, whilst cycling home from work following a shift, he sustained injury when the front wheel of his bicycle collided with a kerb upstand at the entrance mouth to a school.

The Claimant's pleaded claim was that he was cycling along the carriageway and, on noting a queue of traffic ahead caused by temporary lights/ road works, he decided it would be safer to pull over. His case was that he intended to dismount his bicycle and walk along the pavement passed the roadworks before re-mounting his bicycle and cycling to his home.

The Claimant described the area as a lengthy depression running along a line of kerb stones. As a result of the material on the carriageway wearing away from the kerb upstand, he asserted that the difference in height between the bottom of the carriageway and the top of the kerb upstand was around 2.5 inches or 65mm.

Breaches of the Highways Act 1980 and negligence were asserted. Nuisance was also pleaded.

There was no dispute that the Local Authority was the Highway Authority for the location.

Defence

The Defence denied that the location was dangerous and, therefore, Section 58 of the Highways Act and the Statutory Defence normally available to Local Authorities did not come into play; the Local Authority accepted that the location looked like it did and that it had done for some time, but argued that it was below the relevant intervention criteria.

The Claimant's measurements were not agreed.

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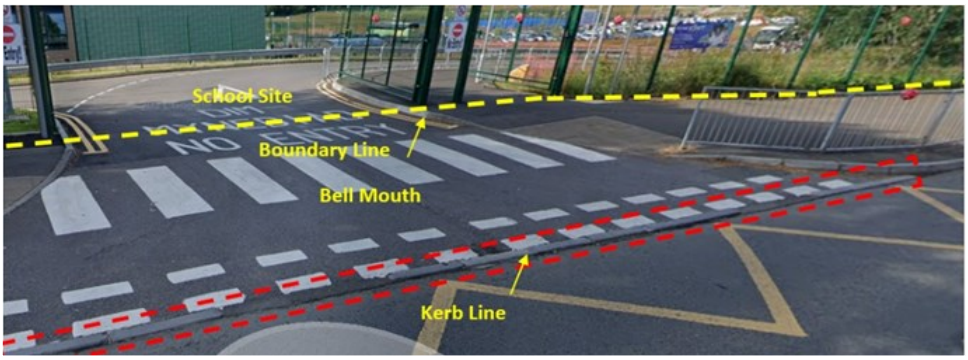
The primary position adopted in the Defence was that the kerb stand was a design feature of the carriageway, to assist with surface water run-off, and that the height of the kerbstone should be disregarded in terms of measurements. The carriageway adjacent to the kerb stand had eroded and it was the Defence's position that the correct measurement should be only the height of the erosion. If the Defence's position was accepted by the Court, the Defence was putting forward that the difference in height was actually 23mm, which was significantly less than that being put forward by the Claimant.

We consider that it is informative for readers to picture the type of kerb stand that was being dealt with in this claim, which is illustrated between the red dashed lines below:



CCTV

Unusually, the facts of the accident were not in issue. The Claimant's father had, following the accident, attended at the location and noted CCTV cameras on a house directly opposite the accident location. He secured a copy of the CCTV recording which clearly showed the Claimant's approach to the location, his turn into the entrance mouth to the school and his fall off the bicycle.

Measurement Issues

If the Claimant's methodology of measurement was accepted, with the Court taking into account the height of the kerb upstand, the claim would likely succeed. That measurement would have meant that the upstand was above the intervention level of the Local Authority. It would have brought with it the risk that upstands of this nature were to be considered in future claims, which was something the Local Authority wished to strongly resist.

If the Defence's methodology was accepted (i.e. measuring the area of erosion only), which we felt was the correct methodology, the height fell below the intervention criteria of the Local Authority for a carriageway of this classification.

At the date the Defence was drafted we had not seen a copy of the CCTV. Upon production of the CCTV a further issue arose; we felt that that the Claimant had not measured exactly where his wheel had hit the kerb but had (perhaps naturally) measured at the deepest point of the depression. We considered that the difference in levels at the actual point of impact was less as the erosion was not at a constant height along the whole of its length.

The Defence's position was that there was no precise measurement before the Court as to the difference in height at the point of impact. By the date of production of the CCTV, the location had been repaired and so measurements were not possible. The Claimant disputed the Defence's position, maintaining that his measurements were to the point of impact.

The Defence put the Claimant's measurements in issue.

The Injury

The Claimant fractured the neck of his hip and required a hip replacement with the insertion of metalwork. He also sustained a shoulder injury. He was off work for 3 months and on his return was on restricted duties. He claimed that, as he could not work on a frontline basis, he had not only lost earnings but had lost overtime and anti-social pay. He further stated that he had been transferred to office work on a permanent basis.

The Claimant claimed that this remained the position due to him remaining symptomatic.

The Claimant asserted that his shoulder injury, whilst being pre-existing, lasted for 9 months. He claimed that his hip injury was a very serious injury which had the potential to cause long term problems. The removal of the metalwork was recommended by his medical expert and it was considered that only at that point could a view be taken as to whether he could return to frontline duties as a police officer.

Claims were put forward in the Provisional Schedule of Loss for:

- Private treatment and therapy (which the Claimant had benefited from under the Police Rehabilitation Centre); the cost of which he was obliged to recoup.
- Care and Assistance.
- Gardening and DIY.
- The cost of removal of the metalwork on a private basis.
- Future surgery costs.
- Loss of earnings associated with future surgery.

- Loss of earnings, to include loss of increases of salary for the position the Claimant had held prior to the accident.
- Ongoing lost overtime and anti-social pay; the Claimant's position was that even with surgery he was unlikely to be able to return to frontline duties and so this was claimed until retirement.
- Disadvantage on the labour market on the basis that the Claimant stated that on his retirement from the Police Force he would have sought to have secured another job as, for instance, a delivery driver or porter, but he may have difficulty in so doing.
- A Provisional Schedule of Loss was served for just under £50,000 but this did not include the claim for ongoing loss of earnings which was "to be confirmed".

The claim, therefore, had the potential to be of high value.

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The Court Procedure

Budgets were served both on a full liability and split liability basis. The Claimant's budget for a full trial was £117,000 and for a split trial £74,500. The Local Authority's budgets were £80,000 for a full trial and £44,250 for a split trial.

The Court ordered a split trial and budgeted the Claimant's costs at £62,000. Directions were then given timetabling the claim to a Preliminary Issue.

The claim was fully contested and proceeded to a 2 day liability only trial.

Evidence Gathering and Witness Statements

Detailed witness evidence was secured from the Local Authority's Engineer and the Highway Inspector. The Inspector had, in fact, retired just prior to trial, however, it was fortunate that he was fully engaged in this claim and willing to attend Court.

The Defence maintained its position as set out above. As to the kerb upstand, the Defence continued to argue that the kerb between the main line of the carriageway and the bell mouth to the entrance to the school was a designed feature and its purpose is to indicate to vehicular traffic that they are crossing into an area predominantly used by pedestrians and to retain surface water run-off in the channel of the carriageway.

The Defence further relied on the British Standard Code of Practice which dealt with the construction of pavement and kerbs and which provided that crossing kerbs at vehicular crossings should be laid 25mm above the final road surface, unless otherwise specified.

The Local Authority's own Manual of Contract Documents for Highway Works detailed a +/- 6mm tolerance from design level, so the Defence further argued the above 25mm reference could read as between 19 to 31mm or, in the Defence's case, up to 31mm, and this upstand, as a design feature, should always be disregarded from the overall height measurement.

The Successful Outcome

As above, the matter proceeded to a fully contested trial which took place over 2 days.

The Claimant gave detailed evidence referring to the location as "the dangerous defect" throughout his evidence. As a police officer he was experienced in giving evidence.

The Claimant admitted that he had been new to cycling, after a 30 odd year break, but was seeking to improve his fitness for a charity run (a half marathon). He conceded that the bicycle was relatively new and he had ridden it on around 8 occasions prior to the accident. He further conceded (unfortunately for him) that he had the bicycle adapted to include cleats prior to taking delivery of the same, that he had not had any formal training etc in the use of cleats and that he had never used cleats before purchasing the bicycle. It happened that the Judge was a keen cyclist and the Claimant was asked a number of questions as to his decisions on purchasing the bicycle and, in particular, adding cleats.

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The Defence had always thought it highly unlikely that the Claimant intended to, as he claimed, dismount the bicycle and then walk along the length of the roadwork before re-mounting. It felt even less likely that he would do this with cleats. The Defence felt it far more likely that he intended to circumvent the cars waiting ahead and cycle along the pavement. He denied this and, obviously, any such concession would in effect have meant him admitting that he was cycling along a pavement contrary to the Highway Code (bearing in mind he was a police officer). The Defence's case was that the footage showed no evidence of the Claimant slowing at all, which was supportive of its position that the Claimant never intended to dismount.

The Court accepted, on a wide evidential basis, the position of the Local Authority. It found that there was no evidence of the Claimant slowing and that the accident had not occurred where the Claimant had measured the difference in height. The Claimant's decision to add cleats was commented on as "surprising".

The Court found that the overall area was an "unremarkable scene" with the carriageway in a generally good condition. The Court considered the area of erosion to be a long but thin strip adjacent to the kerb stand, that this was not an area where pedestrians would walk and, with it being immediately adjacent to the kerb stand, it was not a line cyclists would normally take along the carriageway. Any difference in height was, in the Court's view, at the "*cliff edge*" of the kerb and any wheeled cycling travelling across it would never encounter the full difference in level given that both the wheels of a bicycle are rounded as was the edge of the kerb upstand.

The Court considered the risk to users of the highway to be of a very low order and that the Claimant had not satisfied the Court that the defect was dangerous. The claim was dismissed. A significant amount of costs and damages were avoided.

Comment

This was an interesting case as, unusually, the accident was capable of close analysis due to the availability of the CCTV footage. However, CCTV is increasingly featuring in claims as more and more properties benefit from video doorbells and other similar apparatus.

Further, had the Claimant's case been accepted, a design feature on a highway would have been taken into account when determining dangerousness and height measurements. It was important for the Local Authority to present as full a defence as possible to the Court and we wished to further that position as far as possible. Had there been an adverse finding there was a real concern that features like this could be considered by the Court to be included in measurement evidence, which was an outcome the Local Authority strongly wished to resist.

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CASE UPDATES

Costs Budgeting - Surveillance Evidence

Yelland v Space Engineering Services Limited
[2023] EWHC 2823 (KB)

In this personal injury claim a CCMC was held on 30 June 2020 at which costs were budgeted for all phases except PTR, Trial Preparation and Trial. In July and August 2021, the Defendant, 'D', covertly obtained surveillance evidence. On 12 April 2022, a second CCMC took place. The PTR, Trial Preparation and Trial phases were budgeted and extra budget was added for anticipated expert evidence in respect of psychology / psychiatry. At the time of this second CCMC, the Claimant's ('C') experts' reports had not yet been served and C was unaware of the surveillance evidence.

On 4 November 2022, C's psychiatric expert evidence was served. On 1 December 2022, D disclosed the surveillance evidence. The full unedited surveillance was disclosed on 21 December 2022.

On 16 January 2023, D applied to rely on the surveillance evidence and revise its budget. C also sought to revise his budget relying on the surveillance evidence as a 'significant development' pursuant to CPR 3.15A. An Order was made by consent permitting reliance on the surveillance evidence. C submitted that D could not revisit its Cost Budget as the requirements of CPR 3.15A were not met in relation to D. The issues were:

(1) What does 'promptly' mean in CPR 3.15A in circumstances where surveillance has taken place and a period of time has elapsed between the surveillance taking place and the commencement of the process to vary the budget?; and

(2) What is the meaning of the bold text (Judge's emphasis) in CPR 3.15A(6) which states '*Where the Court makes an Order for variation, it may vary the budget for* ***costs related to that variation which have been incurred prior to the Order for variation but after the Costs Management Order***.'

C submitted that D had not made its application to vary 'promptly' and should have served its surveillance evidence before the second CCMC. The Judge disagreed. To have revealed surveillance before the initial reports by experts in the main specialism had taken place would run contrary to established principles which allow surveillance evidence and it being withheld until the Claimant has 'nailed his colours to the mast'. In this case obtaining the expert evidence unaffected by knowledge of the surveillance was a part of that and revealing the surveillance by including it in the budget for the second CCMC would have defeated that. D sought a variation of the budget very soon after the proper point at which the surveillance was disclosed.

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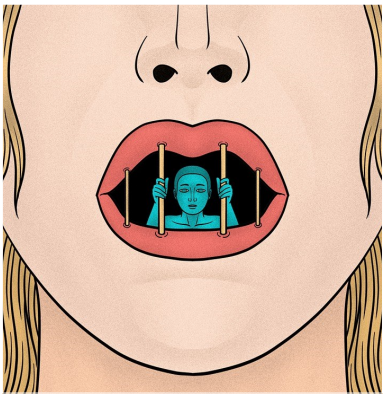
In relation to CPR 3.15A(6), the costs of the surveillance had been incurred before the Costs Management Order made on 12 April 2022. C submitted that those costs were, therefore, not within the scope of the Court's powers to vary the budget. D took a more purposive approach to the construction of the rule and submitted that the Costs Management Order made on 12 April 2022 related to costs of psychiatric evidence, PTR, Trial Preparation and Trial only and not phases in which any costs relating to surveillance had been incurred (which had been budgeted previously on 30 June 2020 before the surveillance was obtained). The Judge agreed with D's construction. The restriction on the Court's power to vary a budget only in relation to costs 'after' the Costs Management Order is a reference to costs relevant to the phases which were subject to costs management in that previous Order.



Whilst this was sufficient to dispose of the issue in this case, the Master went on to say that if it had been the case that phases relevant to surveillance had been costs managed by the Costs Management Order made on 12 April 2022 she would have found that a purposive construction would allow the Court to vary the budget nonetheless for those surveillance costs pre-dating the Costs Management Order. It would not have been consistent with public policy as to keeping surveillance secret until the appropriate moment to construe the rule as meaning that where, for good reason, certain costs are not included in a proposed variation the Court is then debarred from making a later variation.

The Master suggested the Rules Committee may wish to address this issue for clarity.

Costs - Interim Payments - Multiple Applications

Shaun Trotman (a Protected Party) v Master Brickwork London Essex Limited [2023] EWHC 2791 (KB)

This Judgment was about the question of whether a party who has the benefit of a Costs Order can receive, before commencing detailed assessment proceedings, more than one order for a payment on account of costs under that Costs Order. The Judgment finds that a receiving party is entitled to make a second application for an interim payment on account of costs.

The Claimant sustained very serious injuries as a result of an accident at work. Liability was originally denied, but was then settled out of court on the basis of a 60/40 split between primary liability and contributory negligence. The liability settlement was approved and, as part of the order sought at the Approval Hearing, the Claimant accepted an interim payment on account of costs in the sum of £65,000.

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By way of an Application dated 7 February 2023, the Claimant sought a further interim payment on account of costs in the sum of £215,000. The Application annexed a breakdown of the total costs estimated by the Claimant to have been incurred and subsequently a detailed Bill of Costs was served in the sum of around £400,000.

The Defendant objected to the Claimant's Application on the basis that the Court's jurisdiction under CPR Rule 44.2(8) was limited to the making of a single order for a single payment before detailed assessment proceedings had been commenced. In any event, the Defendant submitted that this was an unacceptable 'second bite at the cherry' even if there were a discretion to allow such an application, and that by consenting to the original payment of £65,000 the Claimant was accepting that that sum was 'a reasonable sum' in accordance with the rules.

The Master held that the existing case law was not as useful as may appear. However, the case of *Blackmore v Cummings (Practice Note) [2009] EWCA Civ 1276* assumes there is a power to make a second order, and the case was decided on questions of exercise of discretion whether or not to do so. Although the 'second order' question was not in issue in this case, the Master found that the fact that such a Senior Court did not express any qualms over jurisdiction was indicative of there at least being a practice that such applications are permissible.

The Master held that there were very good reasons as to why Rule 44.2(8) exists in the form which it does. Early payment of costs, which will inevitably be due, serves the end of limiting the scope for overly protracted assessment later, enables a party not to be kept out of their money and reduces later applications for interim costs certificates once detailed assessment proceedings have been commenced. Those strong policy considerations still retain their force where a second or later application is made. Further, the wording of Rule 44.2(8) does not state that only one such order may be made for an interim payment on account of costs.

As to the notion of 'a reasonable sum', the Master found that this must mean that the Court must order a sum and that such sum must be reasonable in amount. The Master found that it could not be understood as meaning either that only one sum may ever be ordered under Rule 44.2(8) or that there is conceptually one, and only one 'reasonable sum', such that to make a later additional order must mean that later order is larger than 'the' reasonable sum.

Accordingly, the Court held that CPR Rule 44.2(8) permits more than one order for an interim payment on account of costs.

CASE UPDATES

Highways Act 1980 - Breach of Section 41 - Verges - Cycleways/Footways

Demetrios Karpasitis v Hertfordshire County Council
[2023] EWHC 2614 (KB)

On 22 April 2020, the Claimant went on a ride on his mountain bike. He followed a familiar route, which took him onto a path to the east of the A10 dual carriageway in Hertfordshire. It was separated from the A10 by a grass verge. Up to a certain point the path was signposted as a shared footpath and cycle path. Thereafter, the path narrowed from 2.5m to approximately 1m. There was no sign denoting the changed use of the path.

As the Claimant was returning home, along the same path, he encountered a jogger. He took the decision to overtake the jogger, which required him to cycle on the grass verge to the right of the path. The Claimant was travelling around 10mph. There was a hole in the verge which the front wheel of the Claimant's bike hit, causing him to be thrown off and to sustain serious injuries.

The Court provided directions for a split trial.

The Claimant alleged that the Defendant Council were liable for his accident as a result of:

(1) A breach of Section 41 of the Highways Act 1980, and

(2) A breach of duty of care owed at common law.

The Claimant gave oral evidence as to the circumstances of his accident and was found to be a sincere witness who was trying to do his best to recall the material facts.

Breach of Section 41

The Claimant's allegations under Section 41 were primarily based on an allegation that the Defendant Council failed, adequately or at all, to heed the "obvious" risk that the hole posed to users of the cycleway/footpath given (1) the designated use of the path as a cycleway/footpath, (2) the narrow width of the cycleway/footpath, (3) the "obvious" interaction which was likely to occur between cyclists and pedestrians, (4) the "obvious" need for cyclists and/or pedestrians to move onto the grassed area adjacent to the cycleway/footpath in order to let others pass and (5) the proximity of the hole to the cycleway/footpath (0.7m) and the size and depth of the hole.

The Claimant also alleged that the Defendant Council failed to devise, institute and/or enforce any, or any adequate, system of inspection of the highway.

CASE UPDATES

Status of the footway

The first issue for the Court to determine was the status of the highway. The Defendant Council asserted that the path was a footpath rather than a shared use cycleway/footpath.

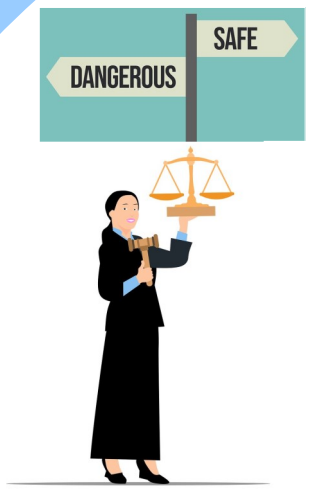
Having considered all of the evidence, the Court found that the path had been formally designated by the Defendant Council as a footway and that status had not been varied by the Defendant at any time. There was other evidence that it was a footway, in particular its narrow width, its slightly undulating nature and the lack of signposts (along the section of path where the Claimant's accident occurred) and/or markings indicating that it was a shared cycleway and footway. The mere fact that cyclists used the path and the lack of an "End of Route" marking or sign was insufficient to change its status.

Was the highway in disrepair?

In deciding whether there was a danger, the Court held that it was entitled to take into account the reasonable expectations of the public as to the standard of maintenance of the highway surface: *Griffiths v Gwynedd CC [2015] EWCA Civ 1440.* Although road verges may constitute part of the highway, a different standard will normally apply to verges as opposed to the carriageway itself. In a case in which there was no footway adjoining the verge it was held that the purpose of verges is to support the carriageway, not to provide a safety buffer for overrunning vehicles: *King Lifting Ltd v Oxfordshire CC [2016] EWHC 1767 (QB).*

Whether the defect presented a danger was primarily a question for a highway inspector's judgement. They were assisted by the Defendant Council's Defect Management Approach ('DMA'), which was consistent with the Well-Managed Highways Infrastructure Code of Practice, but it merely provided guidance and did not release the Highway Inspector from his duty of making an individual assessment.

The issue of whether the duty to repair under Section 41 had been satisfied required consideration of whether the Defendant had put the highway in such good repair as rendered it reasonably passable for ordinary traffic without danger caused by its physical condition and whether it had maintained and repaired the highway so that it was free of danger to all users who used the highway in the way normally to be expected of them. Foreseeability of harm alone was insufficient to establish dangerousness; the danger created must be the sort of danger which an authority may reasonably be expected to guard against, which can include consideration of the reasonable expectations of the public as to the standard of maintenance of the highway surface.



The Court found that the defect in the grass verge was dangerous as at the date of the Claimant's accident and called for repair, albeit it was not urgent, for the following reasons:

(1) There was persuasive evidence that footways are often used by cyclists and specific evidence that this occurred at the accident location.

(2) It was clearly foreseeable that pedestrians and/or cyclists may choose to go onto the grass verge.

(3) The verge was by the side of a footway, not just on the side of a carriageway, and there was a real risk that a pedestrian might step into the hole or a cyclist may cycle into it from the footway, notwithstanding its proximity to a road sign.

(4) The Defendant's Highway Inspector and the Contract Manager for grass cutting in the area were clear that if there was a substantial hole present it would be a Category 1 defect and had to be repaired quickly.

(5) It was the kind of damage that members of the public would reasonably expect would be remedied.

Causation

The Court found that causation in respect of both the statutory and common law claims was made out.

If a 'No Cycling' sign had been erected, the Court found that the Claimant would not have attempted to cycle on the footway where his accident happened.

Section 58 Defence

The Defendant Council's general policy of biannual walked inspections of the footway and verge was accepted as being in accordance with national guidance and lawful. The burden on the Defendant, therefore, was to establish that those inspections had been carried out competently.

The Defendant employed an experienced Highway Inspector and whilst he declined to attend Court to give oral evidence (due to the fact that he had retired by the date of trial), the Court found that the hole which caused the Claimant's accident was probably not present on 13 February 2020 (the date of the last inspection). There was contemporaneous documentary evidence that an inspection had been performed on this date, which did not detect a hole, although it noted other defects. That alone was persuasive evidence that an inspection was performed on 13 February 2020 and no hole was found.

There was no other reason to consider that the Highway Inspector's inspection was anything other than competent. Accordingly, the Defendant had satisfied the burden of proving the Section 58 Defence.

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Common Law Claim

The Court held that for liability in common law to arise the Defendant Council must have committed a positive act which adversely affected the risk to users of the highway: *Thompson v Hampshire County Council [2004] EWCA Civ 1016; Gorringe v Calderdale MBC [2004] UKHL 1 WLR 1057; Yektin v Mahmood [2010] EWCA Civ 776; Robinson v Chief Constable of West Yorkshire [2018] UKSC 4*. It was noted that there is no authority suggesting that misfeasance or an omission by the Defendant gives rise to a common law duty of care.

In this case, the footway was converted into a shared use footway and cycle path south of the accident location, but at the accident location itself it remained a footway. The width of the path narrowed significantly from 2.5m to 1.2m and became slightly undulating due to tree roots.

The presumption in the Highway Code (which was relevant evidence if not determinative) was that a footway is just that, unless a marking or a sign expressly authorises cycling. Rule 13 of the Highway Code makes it clear that it is mandatory to sign routes if pedestrians are to share them with other road users. Therefore, unless there is a sign permitting shared use, the footway remains for pedestrians only. There is no general positive duty to sign the end of a cycle route as excessive signage is thought to clutter up routes: see *Department for Transport's Local Transport Note 02/08 paragraph 3.1.3*.

The Court found that that there was no evidence that the Defendant had committed any positive act and omitting to erect a sign indicating that cycling was not permitted was an omission. In any event, if there was a positive act of constructing a shared facility without erecting a sign prohibiting cycling at the accident location this was not negligent given that the general presumption is that paths cannot be used for cycling absent express permission; that the use of end signs is discretionary; that the change in width of the path, together with its undulations, were sufficient to indicate to a reasonable cyclist that the path was no longer one which could be used for cycling.

There was, therefore, no negligence on behalf of the Defendant.

The Claimant's claim against the Defendant Council was, therefore, dismissed.

Contributory Negligence

The Court held that a cyclist cannot expect that a grass verge will be maintained so as to be free of undulations and bumps. The Claimant was travelling at 10mph which was found to be excessive for the conditions and the sharp right hand turn that he made was a manoeuvre which he should have avoided because it made it difficult for him to see the route ahead. The Claimant ought to have taken more care to give himself time to look out for defects and to be able to avoid them. The Claimant's actions were negligent and had contributed to the accident. If the Claimant had succeeded in his claim he would have been liable for contributory negligence to the extent of 33%.

CASE UPDATES

QOCS - Credit Hire Charges - Mixed Claims

Amjad v UK Insurance Limited
[2023] EWHC 2832 (KB)

The Court allowed the Claimant's appeal against a decision lifting the QOCS cap under CPR 44.16(2) and gave guidance on the correct application of the exceptions to QOCS therein.

The Claimant ('C'), a taxi driver, was involved in a road traffic accident on 4 July 2019. C brought a claim for damages for personal injuries, recovery and storage charges and the cost of hiring a replacement vehicle from a credit hire company ('CHC') for the 3 to 4 month period it took the Defendant's insurer to pay an interim payment for the vehicle repairs. The cost of repairs was £5,231. The CHC hire charges were circa £51,600. C asserted impecuniosity to justify the hire charges.

A Directions Order was made on 20 October 2021 requiring C to disclose by 29 December 2021 proof of income for the 3 months prior to the RTA and from the RTA to February 2020. Although there had been no prior Disclosure Order, this was made in the form of an Unless Order debarring C from relying upon impecuniosity in the event of failure to comply. C disclosed documents. The Defendant ('D') raised no issue about the disclosure provided until serving a Skeleton Argument for trial in July 2022. Accordingly, C had pursued the credit hire claims to trial.

On the first day of the trial, D submitted that C had failed to plead impecuniosity properly and had breached the Disclosure Order. The Trial Judge agreed and debarred C from asserting impecuniosity. D, therefore, had no liability for the CHC charges. Judgment was given for the sum of £10,029.64. C had failed to beat a Part 36 offer made by D in the sum of £15,700; the relevant period for acceptance of which had expired on 14 May 2020. Accordingly, the Judge ordered D to pay C's costs to 13 May 2020 and C to pay D's costs from 14 May 2020. The Judge granted D permission, pursuant to CPR 44.16(2), to enforce the Costs Order against C up to a maximum of £15,000 – i.e. in excess of the damages awarded. C appealed against the lifting of the QOCS cap.

CPR 44.16(2) provides:

"Orders for costs made against the Claimant may be enforced up to the full extent of such Orders with the permission of the Court, and, to the extent that it considers just, where:

(a) the proceedings include a claim which is made for the financial benefit of a person other than the Claimant …; or

(b) a claim is made for the benefit of the Claimant other than a claim to which this section applies.

(3) Where paragraph (2)(a) applies, the Court may, subject to rule 46.2, make an Order for costs against a person, other than the Claimant, for whose financial benefit the whole or part of the claim was made."

CASE UPDATES

Issues in the appeal were:

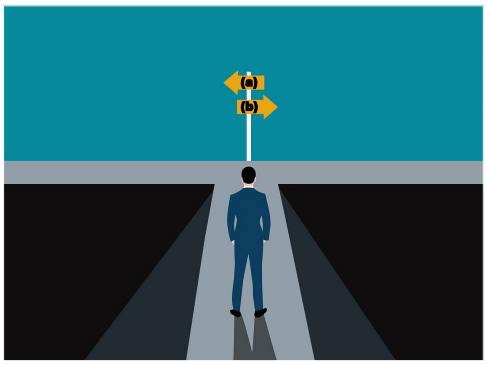
(1) Was the Trial Judge wrong to rule that CPR 44.16(2)(a) applied?

(2) Was the Trial Judge wrong to rule that CPR 44.16(2)(b) applied?

(3) Was the Trial Judge wrong to rule that the claim was not a PI claim in the round?

(4) Did the Trial Judge mis-apply the law or make an error of law when approaching the justice of lifting the QOCS cap protecting C to around £5,000 above the damages and interest award?

The Judge stated that under CPR 44.16(2) the costs cap may only be lifted when 'gateways' (a) or (b) therein are found to be proven on the balance of probabilities. Each gateway is opened by consideration of who benefits from the relevant head of claim. The Judge considered that in a case involving CHC charges the Court is required to determine who gains the 'benefit' of an award of CHC charges – the Claimant or a third party – and the 'gateways' are mutually exclusive.



The Trial Judge erred in law by finding that both gateways (a) and (b) applied. On the correct analysis, only (a) applied. The CHC would have gained the whole of the benefit of any award under the terms of the CHC agreement.

As gateway (a) was open, the Court was then empowered to consider making a non-party Costs Order against the CHC. However, in this case, D did not ask the Trial Judge to do so and so the Trial Judge did not do so. The Trial Judge was wrong to then lift the QOCS cap under (a) as the Court was not empowered to do so.

The failure to make a non-party Costs Order did not permit or facilitate the Court to apply gateway (b) instead. The Trial Judge was wrong to find that (b) applied as well as (a) because he had decided that the CHC benefitted from the CHC charges claim and not C.

In the event that he was wrong on this, and the Court could find that both C and the CHC 'benefitted' from the CHC charges claim in this case, the Appeal Judge went on to consider the position under gateway (b).

If gateway (b) did apply, the Trial Judge failed to consider the relevant factors for the correct characterisation of the proceedings as a whole when he found that this was a non-PI claim. On the facts of this case, the Judge considered that D should have raised their assertion that C had failed to comply with the Disclosure Order a few weeks after disclosure was given. Had D done so the issue would have been resolved before trial and the trial would have proceeded with the CHC charges struck out at an interlocutory stage. The trial would then have been about the injuries, basic hire rate charges for a short period before repairs were done, recovery and storage charges. The proper characterisation of the proceedings for trial would then have been, in the round, as a PI claim. The neutral costs position under QOCS would then have been the starting point and, most probably, the end point because D would have had to show exceptionality, which, on the facts of this case, D could not do.

In the event that the proceedings were properly characterised as a non-PI claim, the Trial Judge failed to consider the relevant factors, and in particular causation, in determining whether it was just to lift the enforcement cap. On the facts of this case it was not.

Accordingly, the Judge held that the QOCS cap should not have been lifted and the appeal was allowed.

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

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