DOLMANS INSURANCE BULLETIN

Welcome to the October 2020 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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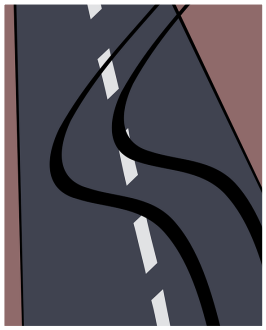
REPORT ON

Traffic Management on Resurfaced Highways and the Application of Section 58 of the Highways Act 1980

M J v Pembrokeshire County Council

In the recent case of *M J v Pembrokeshire County Council*, the Claimant pursued the Defendant Authority (represented by Dolmans) after losing control of her vehicle on a carriageway that she alleged was defective and dangerous contrary to Section 41 of the Highways Act 1980.

Whilst there may appear to be nothing unusual in such arguments, the circumstances of the alleged accident in this particular matter generated various issues that the Trial Judge needed to consider before giving his Judgment.



Background

The Claimant alleged that she was driving along the carriageway, when her vehicle skidded out of control due to loose chippings on the highway which was being resurfaced by the Defendant Authority at the time.

As a result, the Claimant alleged that she suffered an undisplaced fracture of the lower pole of the right patella and a posterior cervical sprain. In addition, she apparently suffered loss of earnings and had to receive care and assistance.

In addition to alleging breach of Section 41 of the Highways Act 1980, the Claimant also alleged that the Defendant Authority was negligent and/or was guilty of nuisance.

In particular, the Claimant argued that the loose chippings made the highway more dangerous than usual at normal traffic speeds. The Claimant alleged that there was no signage whatsoever in use prior to her alleged accident either warning her to slow down or that there were roadworks ahead.

Defence – The Issues

It was accepted that the accident had occurred and that the carriageway was being resurfaced at the time of the Claimant's alleged accident. The Judge found, therefore, that the highway must have been in a state of disrepair at the time of the Claimant's alleged accident. However, it did not necessarily follow, of course, that the highway was dangerous.

The Defendant Authority proffered that it had engaged a reputable and experienced traffic management contractor to provide all traffic management for the site, including appropriate signage. The Defendant Authority had not received any complaints and there had been no previous accidents. The Defendant Authority argued, therefore, that it had an effective system in place and that it had a Section 58 Defence. It was, however, for the Defendant Authority to prove this.

The Defendant Authority also argued that there was appropriate signage in place warning of the roadworks and of an advisory maximum speed limit of 10mph through the site. The Defendant Authority averred, however, that the Claimant's vehicle was travelling far in excess of this and the Claimant accepted that she was travelling at between 20mph and 25mph, although she reiterated that there were no speed advisory signs warning her to slow down.

Evidence – Focusing on the Issues

It was obvious to Dolmans that the Defendant Authority's evidence would need to be detailed and robust in order to convince the Trial Judge that the Claimant's version of events was incorrect; that there was appropriate signage in place and that the highway was not dangerous, despite the fact that it was being resurfaced at the time of the Claimant's alleged accident.

Before coming to a standstill, the Claimant's vehicle struck two kerbs before colliding with a hedge and stopping in a ditch. Fortunately, the Defendant Authority had the foresight to take photographs and prepare plans of the immediate aftermath, all of which were adduced in evidence. It transpired from these investigations that the Claimant's vehicle had travelled approximately 56 metres before coming to a standstill. The photographs taken at that time also clearly showed various signs in place, including signage advising of a maximum speed limit of 10mph, as did the police report prepared following the Claimant's alleged accident which Dolmans had obtained and which had been placed in the Trial Bundle.

The Claimant argued that these signs were erected immediately after her accident had occurred, before the photographs were taken and before the police had arrived at the scene. Indeed, the Claimant's husband and another witness provided Witness Statements alleging that there were no signs in situ prior to the Claimant's alleged accident. However, it transpired that the Claimant's husband had travelled along the carriageway in the other direction at a much earlier time before the resurfacing works had commenced. The Claimant's other witness did not attend Court. The Judge, therefore, placed little weight upon either of these witnesses' evidence.

The Defendant Authority and the traffic management contractor liaised closely throughout all aspects of the work and detailed Witness Statements were obtained from representatives of both organisations, indicating that the works were conducted safely. This evidence included a synopsis of the procedures and recommended practices in place when resurfacing highways, including the provision of signage that, according to the Defendant Authority and the traffic management contractor, was definitely in situ prior to the Claimant's alleged accident. Reference was also made to the fact that all relevant staff were fully trained to appropriate standards.

The Defendant Authority argued that the carriageway was completely safe for vehicular use, provided that drivers followed the signage and kept to the advisory speed limit of 10mph.

REPORT ON

Judgment – Deciding on the Issues

The Judge accepted that there was a great deal of common ground between the parties; there were roadworks in place, the Claimant was driving towards these roadworks, the Claimant's accident occurred whilst travelling through these roadworks and there were loose chippings on the surface of the carriageway.

The Judge referred to the photographs showing the skid marks that had been left by the Claimant's vehicle, finding as a fact that the Claimant's vehicle did loose traction and that he had to decide what caused this; the loose chippings, human error on the Claimant's part or both?

Given his finding that the road must have been out of repair because it was being resurfaced at the time, and if he found that there was no traffic management or signage in place, the Judge needed to decide if this caused or contributed towards the Claimant's alleged accident.

The Claimant remained adamant that there were no speed advisory signs in place, although she could not recall under cross-examination if there were roadworks warning signs in situ.

The Judge, therefore, found the Claimant's recollection of the traffic management system to be unreliable, particularly in relation to the signage and given that all the photographs before him showed the appropriate signage in situ.

The Claimant had conceded under cross-examination that she knew of the oncoming roadworks anyway, hence the Claimant appeared to be arguing at Trial that there was insufficient warning, as opposed to no warning, as originally alleged.

The Judge held that the Claimant's alleged accident occurred because she was driving too fast for the road conditions and failing to take account of the relevant signage, although he made no finding of fundamental dishonesty on the Claimant's part. The Claimant's claim was dismissed accordingly.

The Judge went further, however. In summing up, Counsel for the Claimant had referred the Judge to the decision in *Mills v Barnsley Metropolitan Borough Council (1992) PIQR 291* and reiterated the Claimant's argument that the loose chippings made the carriageway more dangerous than usual at normal speeds.

The Judge found the witness evidence adduced by the Defendant Authority, together with that by the traffic management contractor, to be very useful and impressive. Referring to Section 58 of the Highways Act 1980, the Judge held that it was obvious from the evidence that the Defendant Authority had taken such care to secure that the highway was not dangerous to traffic and reminded the Court that only vehicular traffic was expected. The Defendant Authority had not acted negligently, had a proper system in place and could rely upon its Section 58 Defence accordingly.

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FOCUS ON

Inquest Costs Recovery in Subsequent Civil Proceedings

Greater Manchester Fire and Rescue Service v Susan Ann Veevers (His Honour Judge Pearce, Manchester County Court, 25 September 2020, on appeal from Deputy District Judge Harris [2020] EWHC 2550 (Comm))

Background

Recovery of Inquest costs in subsequent civil proceedings arising out of a fatal accident, or some other similar tragic event leading to the death of an individual, is a subject which has achieved significant attention of the Courts in recent years. Frequently, following a fatal accident, the family of the deceased will instruct lawyers, early on, with a view to a civil claim and, ordinarily, the role of those lawyers is to represent the family at Inquest in order to understand the circumstances of the incident and, moreover, sometimes, to understand the very basis of the civil claim to be brought in due course.

On the other side of the litigation divide, frequently, another party in the Inquest (whether that be employer – as is frequently the case in my world, other driver – as is the case for those who deal with fatal road traffic accidents, or some other party somehow involved/owing a duty in the tragic events under scrutiny – deaths in social care settings for instance) is represented by insurers (and their lawyers) who may be faced with a claim from the family of the deceased in due course.

The issue which often arises (for insurers) is how best to insulate themselves from the potentially significant costs of the Inquest process – if they consider that liability in the context of any subsequent civil claim to be a foregone conclusion (which is a situation which most frequently arises in employer's liability situations).

Looking at it from the other side of the fence – in what circumstances can the family of the deceased (and their lawyers) be satisfied that they need not attend the Inquest – the prospective Defendant having put matters in regard to liability sufficiently beyond doubt? Putting it another way, the Courts have been required to consider, over a significant number of cases conducted over a number of years, the question of in what circumstances the legal costs of attendance at an Inquest are properly recoverable in the subsequent civil claim.

A recent appeal decision of HHJ Pearce in Manchester County Court (*Greater Manchester Fire and Rescue Service v Susan Ann Veevers*) is, on one level, simply another such case. However, the circumstances are of interest both in terms of the ultimate result **and** the (unsuccessful in the event) efforts made by the Appellant/Defendant to avoid being liable for the (not insubstantial – see below) costs of the Respondent/Claimant's solicitors' attendance at an Inquest which lasted from 4 April 2016 to 18 May 2016.

FOCUS ON

Facts of the Case

On 13 July 2013, Stephen Alan Hunt ("the deceased"), a serving firefighter employed by Greater Manchester Fire and Rescue Service ("GMFRS"), tragically lost his life in the course of his employment in a fire at the premises of 'Paul's Hair World' in Oldham Street, Manchester. He died from hypoxia and heat exhaustion. The pleaded case against GMFRS was that it failed to take reasonable care to ensure that the deceased's use of breathing apparatus and full personal protective equipment did not exceed a maximum of 20 minutes and/or that a proper watch was kept upon him whilst using such equipment.

Within the proceedings, GMFRS admitted liability and compensated the Respondent/Claimant (the mother of the deceased) for her losses. It was also agreed, conventionally, that GMFRS would pay the Respondent/Claimant's legal costs. Such costs were referred for assessment.

During the assessment process, an issue arose as to whether the Respondent/Claimant was entitled to recover the costs of preparing for and attending the Inquest into the deceased's death. Those costs were claimed at circa £141,000 out of a total bill of, according to the Judgment, just over £334,000.

In a Judgment dated 11 May 2020, Deputy District Judge Harris, sitting as the Regional Costs Judge for Manchester, held that these costs were recoverable, in principle, subject to assessment of the same. The Appellant/Defendant appealed that finding and the matter came before HHJ Pearce.

Following the death of the deceased, Thompsons Solicitors, the Fire Brigade's Union solicitors, were retained to represent the Respondent/Claimant and "extensive investigations were undertaken" (according to the Judgment of DDJ Harris). These included correspondence with the Appellant/Defendant, the Coroner, the Health and Safety Executive and the Police in order to "try and establish a case and obtain details of the events leading to (the deceased's) death and the reasons for his death".

During the course of this process, it was discovered that there may be a criminal prosecution against two females, as it was alleged that they had started the fire. Moreover, there was the usual Inquest into the death of the deceased. It was asserted (on behalf of the Respondent/ Claimant) that both these sets of proceedings were "of vital importance to the (Respondent/ Claimant) and the dependents' case as the outcome of each would have a bearing on the identity of the potential Defendants and also on establishing liability against the Defendants".

Ultimately, the said criminal proceedings, which were commenced in January 2015, were later discontinued. Thus, the District Judge found *"only the Inquest remained for the conducting solicitor to obtain the information needed in order to bring a claim for the family …"*.

The Admission and Subsequent Correspondence

The reason an issue arose in this case was because the solicitors instructed on behalf of GMFRS (or rather their insurers) wrote a letter to the family's solicitors on 4 February 2016 (circa 8 weeks before the commencement of the Inquest – see above) setting out the position of GMFRS in relation to any subsequent civil proceedings, transparently, in an effort to limit exposure to costs in relation to the oncoming Inquest.

This letter contained the following passages (as quoted in the Judgment of HHJ Pearce):

"As the Inquest approaches, we have, like you, been supplied with a large number of reports and witness statements which in various way (sic) challenge and in minute detail the events which unfolded that day. GMFRS in consultation with their insurers … are acutely aware of the stress and strain which will be placed upon the family members of (the deceased) up to and including the Inquest itself. GMFRS family liaison officers have been in touch with the bereaved family and will continue to support them".

"Our clients have made no assessment of the potential for liability to the estate and dependents of (the deceased), but they have instructed us to set out their position in relation to any potential claim which may be brought for the family of the deceased".

"Our clients are not in a position to consider an admission of liability and we have not undertaken a detailed forensic analysis of the potential for liability in any civil claim on their behalf".

"The purpose and objective in making the comments which we make below is to attempt to remove any additional stress from the family during and immediately after the Inquest".

(Emphasis added)

The letter then went onto repeat the basis on which the solicitors were instructed (by the insurers of GMFRS) and went onto state:

"We write in open correspondence in order to advise that our clients are willing to compensate the estate and dependents of (the deceased), pursuant to the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934, for any loss which they may prove to be attributable to the incident on 13 July 2013, together with payment of their reasonable costs".

"It is not our client's intention to allege contributory negligence or to seek any reduction of damages in this regard. We confirm that our clients will deal with the claims on a full basis".

There was then a further exchange of correspondence, in particular a letter from the solicitors on behalf of the family, which made the following points:

- It requested that GMFRS confirm in writing if there was to be any claim for apportionment in respect of potential liability of other parties, for example 'Paul's Hair World'.
- It indicated that a letter of claim would follow and with it an invitation for an admission of liability would be made *"because, as you are aware, the intention to pay compensation to the estate and dependents could be withdrawn at any time".*
- It confirmed (perhaps most importantly in the context of the subsequent Judgment) that the family's solicitors *"(would) continue to prepare for the Inquest as part of our liability investigations* ***until such time as liability is admitted*** *or my clients' claims are settled …"*.

(emphasis added)

In response, GMFRS' solicitors indicated that there was no need to prepare a letter of claim and went onto state:

"Obviously, our earlier correspondence makes it plain that the claims by the dependents and estate will be met without reduction".

The letter also indicated that 'Paul's Hair World' would be pursued separately.

In response to that, the family's solicitors indicated that they were happy not to send a letter of claim on the basis of the *"****offer to deal with any claim for compensation*** *without reduction for contributory negligence"*.

(emphasis added)

The Issues

As above, following this exchange (which, interestingly, was, seemingly, characterised later as a 'costs game' by counsel for the family at Inquest in a Reply to the Points in Dispute raised by the Appellant/Defendant), the family's solicitors attended the Inquest (together with counsel) and incurred over £100,000 in costs in so doing.

The issue for determination (both by the Deputy District Judge and, on appeal, the Circuit Judge) was whether these costs were "of and incidental to" the civil claim (and therefore recoverable as part of the overall costs of the same.

As above, there have been a number of cases on this point across a number of years. The Judgment of HHJ Pearce is worth reading for its helpful summary of and/or consideration of a number of these decisions. HHJ Pearce noted that the leading case on this point is *Ross v The Owners of the Ship 'Bowbelle' [1997] 2 Lloyds Rep 196* (being the litigation arising out of the Marchioness disaster on the River Thames in 1989 where 51 partygoers on the Marchioness pleasure craft lost their lives as a result of that boat being in collision with the very large sand dredger the Bowbelle).

In that case, a letter was sent to those representing prospective Claimants on behalf of the owners of **both** the Marchioness and Bowbelle (dated 13 October 1989; the incident took place on 20 August 1989) which stated:

"Our respective clients … jointly and severally agree by way of concession that, in respect of any claims for loss of life or personal injury caused by the collision between the two vessels on 20 August 1989, although they do not make any admissions whatsoever as to liability, they are prepared to deal with the Claimants without requiring them to prove negligence on the part of either or both vessels …".

This concession, jointly made, was made, however:

"… entirely without prejudice to our clients' rights against the other whether in respect of apportionment of liability for the collision … or otherwise …".

In that case, Clarke J agreed with Master Hurst (who carried out the initial assessment) that the letter contained a concession that was "of real significance"; since it meant that a Claimant with a potentially valid claim needed to do no more than issue a Writ to rely on the admission in order to obtain Judgment on liability.

On that basis, the (significant) costs of attending the subsequent Inquest relating to the Marchioness victims were disallowed on the basis that they could not be regarded as costs of or incidental to the contemplated proceedings against the shipowners.

In some senses, therefore, the issue for both Judges in the *Veevers* case was whether or not the 'admission' made on behalf of GMFRS was sufficiently similar to the admission made in the Marchioness/Bowbelle case to ensure that the costs of the Inquest attendance were not of or incidental to the contemplated civil claim on behalf of the deceased.

Inevitably, on behalf of the family, it was asserted that the nature of the 'admission' outlined above was not sufficiently unequivocal to be considered to be on all fours with the admission made in the Marchioness/Bowbelle case. It was argued that the 'admission' made by GMFRS was actually (consistent with the correspondence) merely an 'offer' to deal with the claim – which could be withdrawn at any time (hence the subsequent indication that preparation for the Inquest would continue pending "an admission of liability").

Thus, it was submitted, sufficient doubt still existed to entitle the solicitors (and counsel) to attend the Inquest on behalf of the family (given the prejudice which would accrue otherwise to the family's claim). It was also submitted on behalf of the family that timing was important – the admission here was made at a point in time when significant preparation for the Inquest had already taken place and to fail to represent the family, at this late stage, based on the qualified admission (even if that was a suitable description) provided by GMFRS would be professionally inappropriate.

Judgment

Ultimately, both the Deputy District Judge and HHJ Pearce formed the view, contrary to the submissions made on behalf of GMFRS, that the 'admission' made on behalf of the Service was not, in fact, an admission; or perhaps, more accurately, was not an admission that was sufficiently unequivocal such that there was no risk (to the Claimant/Respondent) that an attempt to resile from the same might not be made.

In that regard, the formal procedure for resiling from pre-action admissions pursuant to CPR14.1A was considered in some detail.

On that basis, having regard to the facts of the case, the Claimant's/Respondent's solicitors were entitled to recover (subject to assessment as to the final amount) the costs of attendance at the Inquest.

Analysis and Comment

This case illustrates the explicit costs risk that institutional Defendants (and/or their insurers) face in the context of Inquest proceedings which likely take place in advance of a civil claim for damages.

The obvious point to make is that in the context of such cases where it is anticipated that there is a desire to avoid the risk of paying the costs of an Inquest attendance on behalf of the family 'on top of' routine costs generated by the civil claim, an early, and absolutely unequivocal, admission of liability needs to be made.

It should be added, in that context, and in parenthesis as it were, that in certain circumstances (notably, on the case law, Article 2 Inquests), even such an admission may not be sufficient to displace the 'need' for family legal representatives' attendance (because of the need to consider quantum in the context of or by reference to Article 2 findings).

Albeit timing did not form part of the Appellate Judge's reasoning (that is to say he was not visibly swayed by the argument deployed on behalf of the family that the 'late' timing of the admission should be viewed unfavourably for the Defendant/Appellant), it is clearly something which should, in my view, be considered – not least because Claimant solicitors will possibly be less inclined to make the argument if such an admission is made at a point before costs are actually being (or have been) incurred.

Clearly, in the context of the efforts made on behalf of the Appellant in this case, the residual question (particularly given the relevance of the admission in the *Bowbelle* case) is how does one construct an admission which is sufficiently robust (i.e. sufficiently unequivocal) such that it will be regarded as sufficient and on all fours with the admission in *Bowbelle*?. The best guidance that one could give in this context is to say (a) each case will turn on its own facts (obviously); what is sufficient in one case may be insufficient in another (b) the admission must clearly be such a thing and, therefore, at the risk of stating the obvious, one ought to seek to avoid language (if possible) such as "without making admission …" (see above) or similar and/ or (c) should be of a character that means any subsequent Application to resile pursuant to CPR14.1A would be difficult, if not impossible, to argue.

In this context, to some degree, timing becomes important once again because, inevitably, any future CPR14.1A Application would be extremely difficult if the family had undertaken no Inquest preparation and not attended the same in any real capacity (but, the contrary argument, in the event of an Inquest attendance, may well be possible).

Naturally, given that latter point, before engaging in such an admission, given the impact of the same, the party in question must be absolutely clear that liability will be established. If there is any doubt as to that, a different course may need to be taken. But, in taking that course, it **MUST** be properly understood that an explicit (and potentially significant) costs risk arises as regards a subsequent civil claim.

Accordingly, it pays to ensure that appropriate detailed legal advice is sought at the earliest opportunity in fatality cases. The obvious underlying issue in this case is the tension between the reasons lying behind a Defendant's attendance at Inquest (which may have little to do with civil liability, but have a wider context in terms of reputational risk, criminal liability and/or prevention of future deaths) and a Claimant's attendance at Inquest (which may or may not be seen as a wider need for attendance beyond simple assistance to a subsequent civil claim).

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RECENT CASE UPDATES

Civil Procedure - Court of Protection - Hourly Rates

PLK & Others
[2020] SCCO 13080340

The High Court discussed the appropriate method of assessment of hourly rates claimed by Court Appointed Deputies managing the affairs of protected parties in the Court of Protection. The Court had consolidated the assessments in four cases that were chosen to represent the costs claimed by Deputies in different parts of England in the management of the affairs of Protected Parties who had sustained significant brain or birth injuries.

It was the Deputies' case that the Court's current approach which, broadly speaking, relied on the application of the Guideline Hourly Rates ("GHR") approved by the Costs Committee of the Civil Justice Council was, by 2020, incorrect or unjust. Instead, the assessment of COP work should be predicted on a more flexible exercise of the discretion conferred by CPR 44.3(3) whereby the GHR were utilised as merely a "starting point" and not a "starting and end point".

Having reviewed the available evidence, the Master held that while the Court had no power to review or amend the GHR (that was the exclusive preserve of the Civil Justice Council), the failure to review the GHR since 2010 constituted "a seriously problematic omission" where the GHR formed the "going rates" on assessment. In 2020, the GHR could not be applied reasonably or equitably without some form of monetary uplift that recognised the erosive effect of inflation and other commercial pressures since the last formal review in 2010. Accordingly, Costs Officers conducting Court of Protection assessments should exercise some broad, pragmatic flexibility when applying the 2010 GHR to the hourly rates claimed.

To assist with the practical conduct of the CPO assessments, the Court produced a table which demonstrated the effect of a 20% uplift of the 2010 GHR as a practical attempt to assist Costs Officers and avoid unnecessary delay. The Master determined that that approach could be adopted immediately and was applicable to all outstanding bills.

Damages – Accommodation Claims

Swift v Carpenter
[2020] EWCA Civ 1295

The Claimant, 'C', suffered serious injuries in a road traffic collision for which the Defendant, 'D', was responsible. C had to undergo an amputation of her left lower leg and had significant disruption of the right foot. The Judge at first instance found that the additional capital costs of the required special accommodation C required would be £900,000 more than the value of C's existing home. The Judge held that she was bound by the approach in ***Roberts v Johnstone [1989]*** which, combined with the negative discount rate, produced a negative sum and, accordingly, the Judge made no award in respect of this head of loss. C appealed.

The first issue for consideration on the appeal was whether the Court was bound by the decision in *Roberts v Johnstone*. If the answer to that issue permitted the Court to re-examine the approach in *Roberts v Johnstone*, then the issues were: should the Court award the full capital value of the incremental sum required or, alternatively, should the Court award that sum, but reduced to reflect the value of the notional reversionary interest? If the latter approach was correct, how should the Court value the reversionary interest?

The Court of Appeal held that whilst *Roberts v Johnstone* did apply to this case, it did so in the form of authoritative guidance given the specific conditions prevailing at the time of the decision. In the context of modern property prices and a negative discount rate, the approach in *Roberts v Johnstone* no longer achieved fair and reasonable compensation; accordingly, the Court could revisit and alter such guidance. It was not appropriate to award the full capital value of the incremental sum required, which would produce a potential capital windfall (most likely to C's estate after her death), as it was possible, adopting a pragmatic approach, to make a fair and reasonable award whilst at the same time taking reasonable steps to avoid over-compensation. That approach (to valuing the notional reversionary interest) comprised a market valuation of the current value of the reversionary interest based on a discount rate of 5%. Applying that approach in this case gave the value of the reversionary interest to be £98,087. Deducting that from the identified sum of £900,000 required to purchase the required accommodation resulted in an award of £801,913.

The Court did indicate that there may be cases where this guidance is inappropriate. This would include, for example, cases with short life expectancies.

D has sought permission to appeal to the Supreme Court.

Employers Liability – Vicarious Liability – Practical Jokes

Chell v Tarmac Cement & Lime Limited
[2020] EWHC 2613 (QB)

The High Court has rejected a claim that a company was responsible for its employee injuring a site fitter during a practical joke that went wrong.

The Claimant was employed by Roltech Engineering Limited ("Roltech") as a site fitter and, from December 2013, his services were contracted out to the Defendant, Tarmac Cement and Lime Limited ("Tarmac"), whereby they were working at a site controlled and operated by the Defendant. In addition, the Defendant employed its own fitters to work alongside those supplied by Roltech.

RECENT CASE UPDATES

On 4 September 2014, the Claimant was working on site when he bent down to pick up a length of cut steel. One of the Tarmac fitters had brought two pellet targets and put them on a bench close to the Claimant's right ear. Then, as a practical joke, he hit them with a hammer causing a loud bang, which resulted in the Claimant suffering a perforated eardrum, noise induced hearing loss and tinnitus. The Tarmac employee was dismissed. The Claimant brought a claim in negligence against Tarmac directly and also against Tarmac as being vicariously liable for the actions of their employee.

The claim failed at first instance. The Defendant's denial that the actions of their employee were within the course of his employment, 'horseplay' not being part of an individual's employment, was accepted. It was asserted (and accepted by the Court) that the employee's actions were wholly outside the scope of any reasonable foreseeability, risk assessment, HSE guidelines or his employment and that his actions were of his own volition, without any sufficient connection to his employment to make Tarmac liable.

That decision was upheld on Appeal.

Vicarious Liability

On Appeal, it was held that the Trial Judge had correctly applied the law on vicarious liability by adopting the two-stage test set out in *Lister (2001)* (what functions or 'fields of activities' had been entrusted by the employer to the employee and was there a sufficient connection between the position in which the employee was employed and the wrongful conduct to make it right for the employer to be held liable?).

The Judge had correctly found that the following factors did not support a finding that the Defendant's employee's actions were within the field of activities assigned to him:

(1) The pellet target was brought onto the site by the employee. It was not work equipment.

(2) It formed no part of the employee's work to use, let alone hit, pellet targets with a hammer.

(3) What he did was unconnected to any instruction given to him in connection with his work.

(4) The employee had no supervisory role in relation to the Claimant's work and at the material time he was meant to be working on another job in another part of the site.

(5) The striking of the pellet targets with a hammer did not in any way advance the purposes of the Defendant.

(6) In those circumstances, work merely provided an opportunity to carry out the prank rather than the prank in any sense being in the field of activities that the Defendant had assigned to their employee.

The decision of the Supreme Court in *Morrisons v Various Claimants [2020] UKSC 12* (which was not available at the time of the original decision) gave even more weight to the decision reached by the Trial Judge.

Breach of Duty

On the direct breach of duty issue, the Trial Judge was right to state that 'horseplay, ill-discipline and malice were not matters which the Court would expect to be included within a risk assessment".

Tarmac was an employer who took its health and safety responsibilities seriously and, in that context, it was expecting too much of an employer to devise and implement a policy or site rules which descended to the level of horseplay or the playing of practical jokes.

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- Employers' liability claims – investigation for managers and supervisors
- Flooding and drainage – duties and powers of landowners and Local Authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage
- 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

If you would like any further information in relation to any of our training seminars, or wish to have an informal chat regarding any of the above, please contact our Training Partner,
Melanie Standley at **melanies@dolmans.co.uk**