

DOLMANS INSURANCE BULLETIN

**Welcome to the March 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, **Justin Harris, Partner**, at justinh@dolmans.co.uk

DOLMANS REPORT ON

QOCS DISAPPLIED IN A CLAIM STRUCK OUT DUE TO CONDUCT OF THE CLAIMANT

ES v Cardiff Council

The Qualified One-Way Costs regime (“QOCS”), as set out in CPR Parts 44.13 to 44.17, has been in operation since 1 April 2013. This provides that Orders for costs against a Claimant may not be enforced except in limited circumstances. The most well known exception is perhaps where a claim has been found, on the balance of probabilities, to be fundamentally dishonest.

However, there are other grounds where QOCS may be dis-applied. These exceptions are set out in CPR 44.15 and allows for Costs Orders made against Claimants to be enforced without the permission of the Court where the proceedings have been struck out on the grounds that:

- (a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
- (b) the proceedings are an abuse of the Court’s process; or
- (c) the conduct of the Claimant, or a person acting on the Claimant’s behalf and with the Claimant’s knowledge of such conduct, is likely to obstruct the just disposal of the proceedings.

Dolmans were recently successful in striking out a Claimant’s claim against the Defendant Local Authority and in securing an enforceable Costs Order against the Claimant, thereby dis-applying QOCS.



Circumstances

The Claimant’s claim arose out of an accident where she alleged that whilst running on a path which cut through one of the Local Authority’s parks, she tripped and fell in a pothole, sustaining injury.

Allegations were made under Section 41 of the Highways Act 1980 on the basis that the path was a highway maintainable at the public expense, or, in the alternative, pursuant to Section 2 of the Occupiers’ Liability Act 1957. Allegations of negligence were also made in the alternative.

Dolmans were instructed to represent the Local Authority following the issue of proceedings.

DOLMANS REPORT ON

Prior to filing and serving the Defence, the Defendant served a Part 18 Request for Further Information requiring the Claimant to 'pin her colours to the mast', in particular in respect of the location of her alleged accident. Such enquiries were raised due to the Claimant's Solicitors having sent photographs of up to 3 different defects and locations pre-action.

The Defence itself denied liability and put the Claimant to strict proof as to the alleged accident circumstances. In relation to quantum, the Defence noted that whilst the Claimant had presented to her medical expert as suffering from an injury to the left ankle as a result of the index accident, which was ongoing at the time of examination, the contemporaneous medical notes made no reference to her sustaining such an injury at the time of the alleged accident. In light of this, the Defence put the Claimant to strict proof that she did not seek to misrepresent the nature and extent of her alleged injuries to her medical expert, and reserved the Defendant's right, following cross examination at Trial, to argue that the Claimant had been fundamentally dishonest in the presentation of her claim.

Progression of the Claim

Prior to Directions being given, the Court made an Order allowing the Claimant's Solicitors to come off record as acting on behalf of the Claimant. The Claimant's home address was given as the address for service.

Dolmans subsequently wrote to the Claimant pursuing her for her Replies to the Defendant's Part 18 Request. In that letter, the Claimant was advised that she may wish to seek independent legal advice, in the event that she had not already instructed alternative solicitors, and she was directed to various website addresses which may assist. She was also advised that, alternatively, if she did not wish to proceed with her claim, she would need to file a Notice of Discontinuance with the Court. A weblink for the relevant form was provided in the letter.

The Directions Order subsequently provided by the Court required the parties to comply with standard Fast Track Directions, including a Direction requiring the Claimant to serve her Part 18 Replies by a certain date. The Court Order provided a clear warning in its preamble that the parties were to comply with the terms imposed in the Order, otherwise their case could be struck out.

The Defendant complied with the Directions with regard to disclosure, exchange of Witness Statements and Counter Schedule of Special Damages. However, the Claimant did not. Accordingly, we were instructed to make an Application to strike out the Claimant's claim.

Defendant's Application and Hearing

The basis of the Defendant's Application was that the Claimant's claim should be struck out in accordance with CPR 3.4(2)(c) in that there had been a failure to comply with a Court Order.



DOLMANS REPORT ON



The Application Hearing was heard by District Judge Wilson in Cardiff County Court. The Judge found that there had been a clear failure to comply with Directions and the Court timetable, and was satisfied that the test in CPR 3.4(c) had been met, and, thereby, struck out the claim.

In relation to costs, the Judge noted that QOCS applied. Whilst confirming that this was the usual position, the Defendant referred the Judge to the exceptions under CPR 44.15, which allowed the Defendant to recover its costs against the Claimant in certain circumstances. In particular, the Defendant relied upon CPR 44.15(c)(i), namely, the exception allowing the QOCS shield to be dis-applied where the claim was struck out on the basis that the Claimant's conduct was likely to obstruct the just disposal of the proceedings. It was argued that the conduct of the Claimant, in failing to comply with the Directions and in adducing no evidence in support of her claim, had obstructed the just disposal of the proceedings. It was further submitted that the Defendant had been entirely fair to the Claimant in suggesting that she obtain independent legal advice and how to discontinue her claim if she so wished. However, the Claimant had shown complete disregard for the Defendant and the Court process.

The Judge was persuaded by the Defendant's arguments and made a Costs Order in its favour. The Judge acknowledged that there had been "*a lamentable, regrettable and wilful non-compliance with a Court Order. The test in CPR 44.15 is not only met, but it is met by some distance. The Claimant's conduct is likely to have obstructed the just disposal of these proceedings.*"

Comment

Whilst it remains to be seen whether the Defendant will recover its costs from the Claimant, it was, nevertheless, a good result for the Local Authority, and ensured that no further wasted costs were incurred in defending the claim.

Whilst we will now never know the reasons for the Claimant's Solicitors applying to come off record as acting on the Claimant's behalf, we can only surmise that it was somewhat due to it being emphasised to them in the Part 18 Request that up to 3 different alleged accident locations had been put forward by the Claimant and/or the Defence reserving its position on fundamental dishonesty.

Once it became known that the Claimant's Solicitors were no longer acting on her behalf, we were mindful of the possibility that, at some stage, we would be instructed to apply to strike out the claim in the event she did not comply with Directions. With this in mind, we ensured that no criticism could be levied at the Defendant, either in its dealings with the Claimant or in adhering to Court Orders. This included advising the Claimant to seek independent legal advice or how to discontinue her claim should she no longer wish to proceed with it.

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DOLMANS FOCUS ON

WHIPLASH REFORMS DELAYED

Justice Secretary Robert Buckland QC MP has confirmed that the RTA whiplash reforms are being delayed until 1 August 2020. Initially, the implementation was scheduled for April 2019 before it was moved to the same month this year and now subsequently to August.

It is said that the reforms will provide a simple, user friendly and efficient online route to provide those affected by road traffic accidents with an opportunity to settle small claims for personal injury without the need for legal representation or to go to Court.



In his written statement to Parliament, Robert Buckland QC MP confirmed *“The Government has given careful consideration to whether implementing the whiplash measures in April remains practical, given the work that remains to be completed. We have listened to the arguments made by both Claimant and insurance representative bodies. As a result, the Government has decided that more time is necessary to make sure the whiplash reform programme is fully ready for implementation.”*

Further delay was not a surprise to many as work with the Civil Procedure Rules Committee (CPRC) needs to be concluded, given that the updates to the Civil Procedure Rules did not address the reforms at all. Changes to the pre-action protocol and the tariff of damages for whiplash injuries will need to be published before the reforms can be put in place.

In his written statement to Parliament, the Lord Chancellor also revealed that Alternative Dispute Resolution (ADR) will not feature in the new Official Injury Claim Service, which may put further pressure on the Court system.

The statement did reiterate the commitment to exclude vulnerable road users from the increase in the Small Claims Track limit to £5,000, as well as children and protected parties.

It is hoped, however, that the further delay will give businesses sufficient time to prepare for the changes.

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DOLMANS FOCUS ON

BEREAVEMENT DAMAGES INCREASED TO £15,120

The Government has decided to increase the sum awarded for bereavement in England and Wales from £12,980 to £15,120.

Bereavement awards in England and Wales are provided for under the Fatal Accidents Act 1976 in personal injury/clinical negligence actions involving a fatality and negligence of a third party to the following:

- A spouse/civil partner of the deceased.
- The parents of a deceased child up to the age of 18.

The change takes effect on 1 May 2020 and only applies where bereavement occurs after that date, which confirms that the current rate of £12,980 applies in every legal case involving a death before 1 May 2020.

There are no changes to those who qualify for the award, which confirms the position the Government held just some days ago where the Ministry of Justice confirmed that it had no plans to look more widely at the system for awarding bereavement damages to relatives.



It was speculated that Ministers may look again at the Scottish system, where claims are assessed on an individual basis, which saw damages set as high as £140,000 in one case. The change does, however, bring the position in England and Wales back into line with the position in Northern Ireland, where the bereavement award was increased to £15,100 on 1 May 2019.

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DOLMANS RECENT CASE UPDATE

Civil Procedure - Costs - QOCS

Michael Faulkner v Secretary of State for Business, Energy & Industrial Strategy

[2020] EWHC 296 (QB)

This claim concerned a personal injury claim, to which QOCS applied, where the Defendant argued that it should be able to set off an earlier Costs Order in its favour against its liability to pay the Claimant's costs.

The Claimant's personal injury claim related to injuries sustained during the course of his employment. The claim was defended and was discontinued shortly before Trial. The Defendant applied to set aside the Notice of Discontinuance in the hope of having the claim struck out, but the Application was refused. The Court awarded the Claimant his costs of resisting the Application. The Defendant applied for a Costs Order made in its favour at an earlier stage of the proceedings to be set off against the costs awarded to the Claimant. That then raised the issue as to whether the Defendant could seek to set off not just the sum awarded in the Costs Order, but all of the costs it had incurred for which the Claimant would be deemed to be liable by r38.6. The Claimant conceded that it could, but urged the Court not to order any set off.

The Court held that it had power to set off the Defendant's costs. Set off was not a form of enforcement; *Howe v Motor Insurers' Bureau (Costs) [2017] 7 WLUK 84.*

The next question was whether the Court could, or should, exercise its discretion against allowing such a set off. It was held that it was dangerous to attempt to lay down general rules concerning the exercise of a pure discretion. The purpose of affording the Court a procedural discretion was to provide the flexibility necessary to achieve the overriding objective of the CPR in circumstances of infinite potential permutation. The discretion to set off costs against costs was not to be exercised against the Defendant in every case in which it unsuccessfully sought to set aside a Notice of Discontinuance of a claim falling within the QOCS regime. Each case had to be decided on its own facts.



In the instant case, the Court refused to exercise its discretion. The Defendant's Application to set aside the Notice of Discontinuance was considered to be very weak and its bid to then strike out the resurrected claim was doomed to failure. There were tactical reasons for the Application, but it was deeply flawed. The resilience of the QOCS regime strictly limited the inroads that could be made into the scope of its application.

DOLMANS RECENT CASE UPDATE

Civil Procedure - Protective Costs Orders - QOCS

Charlotte Swift (Appellant) v Malcolm Carpenter (Respondent) & Personal Injuries Bar Association (Intervener)

[2020] EWCA Civ 165



An Appellant applied for a Protective Costs Order (PCO) in respect of her appeal against a refusal to make an additional award for special accommodation costs arising from injuries sustained in a road traffic accident.

The Appellant had sustained serious injuries in the accident, for which the Respondent was responsible, and was awarded over £4 million. The Judge found that the additional capital costs of the special accommodation that she needed would be over £900,000 more than the value of her existing home. However, the Judge declined to make any award in respect of the additional capital costs; based upon the approach in *Roberts v Johnstone [1989] QB 878*. The Appellant appealed.

The Personal Injuries Bar Association obtained permission to intervene in the Appeal as the issue was of wider interest.

The Court held that the general purpose of a PCO was to allow a Claimant of limited means access to the Court in order to advance their case without the fear of an Order for substantial costs being made against them; a fear which would inhibit them from continuing with the case.

It was held that a PCO should not be made in the instant case because:

- (1) PCO's were restricted to cases that raised public law issues which were of general importance and in which the Claimant had no private interest in the outcome. This restriction was intimately connected to the essential purpose of a PCO which was to enable the Applicant to present their case with a reasonably competent advocate without being exposed to such serious financial risks that would deter them from advancing a case of public importance.
- (2) A PCO should not be made in private litigation; *Eweida v British Airways Plc [2009] EWCA Civ 1025*.
- (3) Even if a more flexible approach could be taken, the Court would have refused to make a PCO because (a) the Appellant had sought to adduce expert evidence and the resulting additional costs were due to that tactical decision by the Appellant and (b) there was a significant delay in the application for a PCO and prior to the application the Respondent had incurred very substantial costs.

DOLMANS RECENT CASE UPDATE

Confidential Information - Data Protection - Disclosure

David Paul Scott v LGBT Foundation Limited

[2020] EWHC 483 (QB)

The Defendant, a charity, provided services including counselling and health advice. The Claimant, when seeking to access those services, completed a self-referral form which gave him an option to consent to information being disclosed to his GP. The form also confirmed that this information could be given without his consent if there was reason to be seriously concerned about his welfare. The Claimant provided the details of his GP in the form. He also indicated that he was having suicidal thoughts, had recently been self-harming and continued to suffer problems from drug use.

A health officer at the Defendant charity carried out an intake assessment on the Claimant with the view to deciding his support needs. The Defendant charity informed the Claimant that they would be contacting his GP because of concerns as to his welfare. The Claimant left shortly afterwards and did not use the charity's services. The Defendant charity disclosed to his GP verbally over the telephone their concerns, in particular his suicidal thoughts, self-harming and drug use, and this action was recorded into his GP records.



The Claimant alleged that this disclosure had caused him distress and financial loss. He brought a claim under the Data Protection Act 1998, a claim in breach of confidence and a claim under the Human Rights Act 1998.

The Defendant charity applied for Summary Judgment and/or for the claim to be struck out.

The claim was struck out.

In relation to the claim under the Data Protection Act, the verbal disclosure itself did not constitute the processing of personal data. The Court found that the Claimant's suggestion that the information had been "stored" in the health officer's mind with an intention of it being put into an automated record system in due course did not fit within the scheme of the Act. In any event, if the Act did, indeed, apply to the disclosure, the disclosure would have been lawful under the Act as "*necessary in order to protect the vital interests of the data subject*". The Claimant was considered to be at risk and had been told that disclosure may be made without his consent.

The claim for breach of confidence also failed. He had permitted disclosure by signing the form and had provided his GP's details. Also, the health officer had later told the Claimant that she would be contacting his GP and he had done nothing to prevent her.

With regard to the Human Rights claim, the Court found that the Defendant charity was not a "*public authority*" within section 6 of the Act. Whilst it was found that the charity sought to deliver services of public benefit and it received some public funding, this was not sufficient to render it a public authority. It had no statutory powers, duties or functions and was not in any way 'governmental'.

DOLMANS RECENT CASE UPDATE

Dissolved Company - Restoration - Strike Out

Cowley v LW Carlisle & Co Limited

[2020] EWCA Civ 227



The Defendant, LWC, was the Third Defendant in a claim for noise induced hearing loss brought by the Claimant, C. LWC had been struck off the register of companies and was dissolved on dates unknown. This was known to C's Solicitors when proceedings were issued. The proceedings were issued by the Court in September 2017 and C's Solicitors purported to serve the proceedings on LWC at its last known place of business in December 2017. At the time of service, C's Solicitors wrote a letter relying on the Court of Appeal's decision in Peaktone Ltd v Joddrell [2012] to the effect that proceedings which are served against a dissolved company can be retrospectively validated if the company is subsequently restored to the Register of Companies. The letter indicated an intention to lodge an Application to restore LWC to the Register and sought to rely on the letter on the issue of costs in the event that LWC made an Application to strike out the claim. Copies of the proceedings and letter were also sent to the insurers for the former LWC.

In March 2018, the insurers wrote to C's Solicitors stating that LWC was dissolved and, therefore, proceedings could not be served upon them. On 27 April 2018, solicitors instructed by the insurers purported to lodge an Acknowledgement of Service on behalf of LWC indicating an intention to contest the jurisdiction on the basis that, in the absence of a restoration of LWC to the register, the proceedings were a nullity. On 2 May 2018, the solicitors issued an Application Notice for an Order striking out the claim as against LWC, pursuant to CPR 3.4(2), as an abuse of process and/or for an Order pursuant to CPR 11(6) for a declaration that the Court had no jurisdiction or would not exercise its jurisdiction against LWC. The Application was heard on 31 May 2018. C's Solicitors had not taken any action to apply to restore LWC by the time of the hearing. The District Judge struck out the claim against LWC.

C appealed on the grounds that if the District Judge, in making his Order, had sought to act under CPR 11, he had been wrong to do so as the procedural requirements of that rule had not been observed, and if the Judge had been acting under CPR 3.4(2)(c), he was wrong to have done so on an Application by the non-existent company and was wrong, in any event, to strike the claim out.

The Appeal Judge found that the District Judge had not decided the matter on the basis of an absence of jurisdiction under CPR 11, but that he had acted instead pursuant to the strike out power under CPR 3.4. It remained open to the Court to exercise its case management powers to strike out a claim on the basis that the purported Defendant did not exist and no sensible steps had been taken on C's behalf to procure the company's restoration to the register. The Judge found that, under CPR 3.4, the District Judge had exercised that discretion and had not erred in principle in making the Order that he did.

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C appealed to the Court of Appeal submitting that the District Judge had been wrong to strike out the claim under CPR 3.4 in a case where the proper challenge was under CPR 11 and the provisions of that rule had not been complied with within the requisite time limits. It was argued that if the provisions of CPR 11 were not complied with, in a case of a jurisdictional challenge, it was not open to subvert those requirements by the backdoor by invoking the power under CPR 3.4.

The Court of Appeal noted that in *Peaktone* the company had been restored to the register by the time the Application was made to the Court, and the effect of the Companies Act 2006 s.1032(1) and the Restoration Order had been to retrospectively validate the action. Here, the company had not been restored. C's submissions proceeded on the basis that the Judge should have found that valid service had been effected on LWC, but that LWC did not exist and there had been no valid service. The only question that arose, therefore, was whether the District Judge was entitled to strike out the claim under CPR 3.4 and whether he was correct to do so. The District Judge had been entitled to consider how best to progress the case in the exercise of his case management powers. He was entitled to exercise his power to strike out the claim and had not erred in doing so where no timely steps had been taken by C to restore the company.

The Court gave guidance on what should be done by insurance companies facing such a situation; *"We think that the wise course would be for such an insurer to notify the Claimant of the dissolution of the company (if he or she did not know of it already) and to invite/require him or her to make an Application for restoration of the company to the register and to apply to the Court seized of the main claim for a stay of the substantive proceedings in the interim. In the absence of co-operation in this respect on the part of the Claimant, the insurer should write to the Court notifying it of the situation and asking it to consider making an order for a stay of its own motion until notified of any order for restoration. Following such a stay, if nothing is done after a sensible time, it would (we think) be open to the insurer to invite the Court (of its own motion) to strike out the proceedings."*

Exiting RTA Protocol - Fixed Costs

Alan Ryan v Karl Hackett

[2020] EWHC 288 (QB)

The Claimant sustained personal injuries in a road traffic collision and submitted a Claim Notification Form in accordance with the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents via the online Portal. Liability was admitted by the Defendant. It later became apparent that the injury, which was initially thought to be relatively minor, was, in fact, greater in value, following the Claimant obtaining medical reports which suggested that it would take him over a year to recover from it. The Claimant sought an interim payment of £10,000 whilst the claim was still in the Portal. Thereafter, the Claimant's Solicitors notified the Defendant that the claim had exited the Portal, believing in error that the interim payment had not been paid on time, ie within 10 days of receiving the Interim Settlement Pack. However, the interim payment had, in fact, been made and received within the relevant period.

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The claim proceeded outside the Portal and the Claimant subsequently issued the claim under CPR Part 7. The Defendant admitted liability, but disputed causation and quantum. The claim was allocated to the Multi Track due to its value.

The substantive action concluded when the Claimant accepted a Part 36 offer of £20,000.

In relation to costs, the Defendant argued that the Claimant was only entitled to fixed costs available under the Portal. Although the Master found that the Claimant's error in exiting the Portal when he was not entitled to do so amounted to unreasonable conduct, he dismissed any argument of limiting the Claimant to fixed costs, finding that, in terms of damages, the claim would have inevitably exited the Portal validly at some point in any event.

The Defendant appealed, arguing that the Master gave no weight to the fact that the Claimant's unilateral exiting of the Portal deprived the Defendant of any opportunity to settle the claim within the Portal.

On appeal, the question to be decided was whether the Master was entitled to reach the decision he did. His decision was an exercise of discretion and the appellate Court could only interfere if the Master had exceeded the generous ambit within which reasonable disagreement was possible, erred in principle, left out of account some feature that he should have considered or had been wholly wrong. His Honour Judge Stewart found that the Master had identified six factors supporting his conclusion, warned himself against speculation and based his findings on the uncontested facts in the Bill of Costs, Replies and Skeleton Arguments. The Master had determined that the relevant considerations had been met and had based his decisions on as much evidence as possible. He had considered whether it was inevitable that at some stage the claim would have exited the Portal in any event. He had also considered and rejected the argument that the Defendant might, within the Portal, have offered a settlement figure that the Claimant might have accepted. Although he did not specifically address the burden of proof, it was clear from his terminology that the burden and standard of proof were fully satisfied.



Sexual Abuse - Consent - Vicarious Liability

London Borough of Haringey v FZO

[2020] EWCA Civ 180

The Claimant, FZO, claimed damages for personal injury, loss and damage consequent upon sexual abuse and assaults committed by a PE teacher at the school where he was a pupil from 1980 to 1982, and again for a short period in 1983/4. The Claimant turned age 18 in September 1984. It was alleged that the assaults continued up to and including 1988. FZO continued to have contact with the teacher until 2011. In 2011, FZO suffered a major mental breakdown.

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He reported the abuse to the Police in 2012 and the teacher pleaded guilty in 2014. A Letter of Claim was sent in August 2015. Proceedings were issued in 2016 against the teacher and the Local Authority, LA, on the basis that the LA was vicariously liable for the teacher's actions. The LA accepted vicarious liability between 1980 and 1982, while FZO was a pupil, but maintained that he had consented to all activity thereafter. A limitation defence was raised.

At Trial, the Judge exercised her discretion to disapply the limitation period and held that FZO had submitted to the sexual activity, rather than giving true consent, because he had been groomed into a relationship of dependency. The later assaults occurring after FZO left school were simply a continuation of what had happened while he was a pupil at the school and were indivisible from that. The LA was, accordingly, vicariously liable for the whole period. Damages of £1.1 million were awarded. The LA appealed against the Judge's findings on limitation, consent, vicarious liability and causation.

The Court of Appeal dismissed the Appeal. The Judge had not erred in her approach to limitation. She had given cogent and convincing conclusions and fully considered the s.33 factors. As regards consent, the Court of Appeal held that conditioned consent resulting from the grooming process was not true consent. Accordingly, the Judge was right to hold that FZO's submission to the teacher's acts was not the same as consent. The Court of Appeal accepted that each non-consensual sexual act would have been potentially a separate tort, but the Court accepted the Judge's finding that the grooming which had occurred whilst FZO was a pupil continued to be operative upon him after he left the school, such that his participation in subsequent sexual activity was submissive rather than consensual, and, accordingly, the finding of vicarious liability for the whole period was justified. Whilst some reservations were expressed in relation to causation issues, there was no justification for interfering with the Judge's findings.



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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
- 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,
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