DOLMANS INSURANCE BULLETIN

Welcome to the August 2019 edition of the Dolmans Insurance Bulletin

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REPORT ON

- Expert engineering evidence in Fast Track highways matters - *Leila Rad-Andrews v Rhondda Cynon Taf County Borough Council*

RECENT CASE UPDATE

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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

EXPERT ENGINEERING EVIDENCE IN FAST TRACK HIGHWAYS MATTERS

Leila Rad-Andrews v Rhondda Cynon Taf County Borough Council

The Courts are usually quick to dismiss any attempt to adduce expert engineering evidence in highways matters, particularly those that have been allocated to the Fast Track.

The Court did, however, allow such expert evidence in the recent case of *Leila Rad-Andrews v Rhondda Cynon Taf County Borough Council*, where Dolmans represented the Defendant Authority.

Background

The Claimant alleged that she was walking up an incline along an un-gritted tarmac footway when she slipped and fell on black ice, and was likely to prove that her accident had occurred in the circumstances alleged based upon contemporaneous records and documents.

The Claimant alleged that the surface of the footway had previously consisted of paving slabs, but had been replaced using tarmac approximately one month prior to her accident.

It was alleged that the Defendant Authority had breached its statutory duty pursuant to Section 41 and Section 41A of the Highways Act 1980 and/or was negligent.

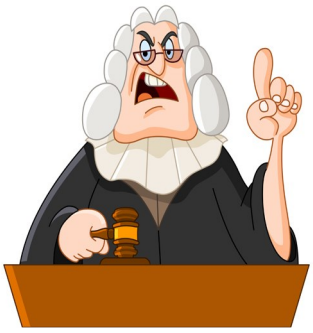
In essence, the Claimant alleged that the surface of the footway was not appropriate as the tarmac surface rendered the highway more slippery than it was previously.

The Claimant also alleged that the presence of ice on the surface of the footway rendered the Defendant Authority in breach of its duty to ensure, so far as is reasonably practicable, that safe passage along the highway was not endangered by snow or ice.

Permission to Adduce Expert Engineering Evidence

The Judge considered that expert engineering evidence was needed in this particular matter so that the Court could understand how the tarmac performed differently to the previous slabs in winter conditions, and granted permission for a joint expert engineers report to be obtained on that basis.

The Judge was persuaded by the fact that the alleged accident had taken place soon after the surface was changed, despite there being no other accidents at the relevant location.



The parties were also given permission to forward questions to the said expert, if necessary.

Expert Engineer's Report

The joint report subsequently provided was favourable to the Defendant Authority.

In summary, the report considered the following salient points:

(1) The Polished Stone Value (PSV) of the previous slabbed area was 40 to 45, whereas the PSV for the replacement area (dense asphalt concrete surface course material) was 60 or more. Hence, the new material was more effective than the older slabs.

(2) An anti-slip coating is not required and would only have increased the PSV to 70 in any event.

(3) The site does not appear to be on any significant pedestrian desire lines.

(4) The choice of surface construction (as above) was not dangerous.

(5) Although there is justification for a risk assessment relating to the gradient of the footway (at this particular location), there was no need for any other risk assessment, and any risk assessment of the footway would not have recommended any additional measures in any event.

(6) The type of footway surface is relevant to the formation of black ice, but the Defendant Authority's winter maintenance policies were reasonably practicable to discharge its duty in this regard under the Highways Act 1980.

Questions

Being faced with the above report, the Claimant's solicitors chose to put questions to the expert. However, the expert's responses did little to assist the Claimant's case.

The expert's responses to these questions confirmed the following:

(1) It appeared that although the increase in volume of voids in the surface dressing increased the likelihood of ice formation, this also, however, assisted with skid resistance/PSV values.

(2) Although slurry surfacing would reduce the risk of slipping on ice and improve slip resistance, the expert was unaware of its use on any footway in the UK and a more economical/practical approach was the use of the 6mm dense asphalt concrete surface course.

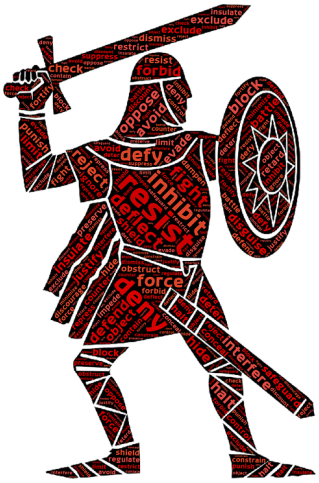
(3) There was justification for a risk assessment of the slope (but nothing else), although even if risk assessed, no additional measures would have been recommended.

Claim Discontinued

Despite her attempts to undermine the expert engineer's evidence, the Claimant had no real option but to discontinue her claim against the Defendant Authority, which she did prior to Trial.

Conclusion

Fortunately, the expert engineering evidence in this matter favoured the Defendant Authority and as this had been obtained on a joint basis with subsequent questions, the Claimant's claim was effectively defeated by the strength of this evidence.



It should be remembered, however, that it is unusual for expert engineering evidence to be allowed in a Fast Track highways matter and that the Court will consider the specific facts when considering any Application to adduce such evidence.

The Court, in this particular matter, considered that it would be assisted by expert engineering evidence when determining liability, given the change in highway surfaces prior to the Claimant's alleged accident. Ultimately, this particular evidence proved to be an effective weapon in the Defendant's armoury.

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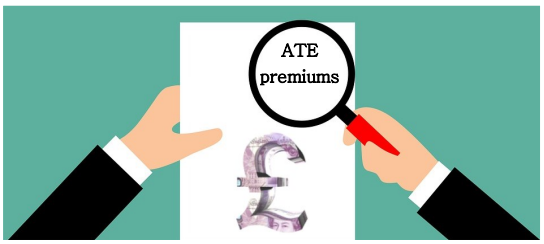
DOLMANS RECENT CASE UPDATE

Assessment of Costs - ATE Premiums - Proportionality

West v Stockport NHS Foundation Trust; Demouilpied v Stockport NHS Foundation Trust
[2019] EWCA Civ 1220

Whilst these joint Appeals dealt with reasonableness and proportionality of ATE premiums in clinical negligence claims, the Court of Appeal also provided general guidance on the proportionality test.

The Claimants', W and D, claims settled without proceedings being issued. D's claim settled for £4,500. His Bill of Costs was £18,376. W's claim settled for £10,000 and her Bill of Costs was £31,714. Both had taken out block rated ATE insurance. The recoverable part of the premium in each case was £5,088. On assessment, the Defendant successfully challenged the reasonableness and proportionality of the ATE premiums, which were reduced to £650 for D and £2,500 for W. This was upheld on Appeal. D and W appealed to the Court of Appeal.



The Court of Appeal held that in relation to challenges to the reasonableness of an ATE premium:

- Disputes about the reasonableness and recoverability of ATE premiums were not to be decided on a case-by-case basis. Questions of reasonableness were settled at a macro level by reference to the general run of cases and the macro economics of the ATE insurance market.

- Issues of reasonableness went beyond the dictates of a particular case and included the unavoidable characteristics of the ATE insurance market.

- District and Cost Judges did not have the expertise to judge the reasonableness of an ATE premium, except in very broad-brush terms, and the viability of the ATE market would be imperilled if they regarded themselves as better qualified than the underwriter to rate the financial risk faced by the insurer.

- It was for the paying party to raise a substantive issue as to the reasonableness of an ATE premium, which could generally only be resolved by expert evidence.

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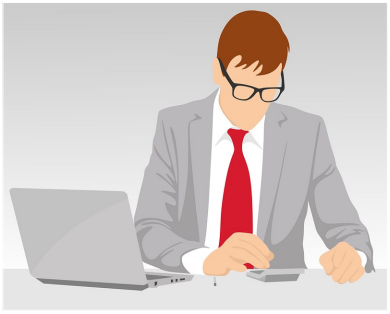
Whilst ATE insurance was critical to access to justice, premiums were not automatically to be regarded as reasonable and the following guidance was to be followed:

- If the ATE policy was bespoke, the grounds of challenge were relatively wide. However, sustainable challenges to block-rated policy premiums were much more restricted; they would usually have to relate to the market and expert evidence would be necessary. If the paying party was relying on a cheaper policy, the expert's report would have to confirm that it was directly comparable.
- A simple comparison between the value of the claim and the amount of the premium was not a reliable measure of reasonableness.
- If the Judge considered that a genuine point of substance had been raised by the paying party, the matter could be determined in the usual way.

A block-rated ATE premium that had been assessed as reasonable could not be assessed as disproportionate. ATE insurance was critical to accessing justice in clinical negligence claims and, in a block-rated policy, the amount of the premium bore no relation to the value of the claim. When considering proportionality, Judges had to disregard items of cost that were fixed and unavoidable or which had an irreducible minimum, and without which the litigation could not have been progressed.

The Court considered that there was a lack of consistency in the way Costs Bills were assessed. While Judges should not be forced to follow inflexible or overly-complex rules, the appropriate approach was as follows:

- The Judge should go through the Bill line-by-line assessing the reasonableness of each item. If possible, appropriate and convenient, the proportionality of any particular item should be assessed at the same time.



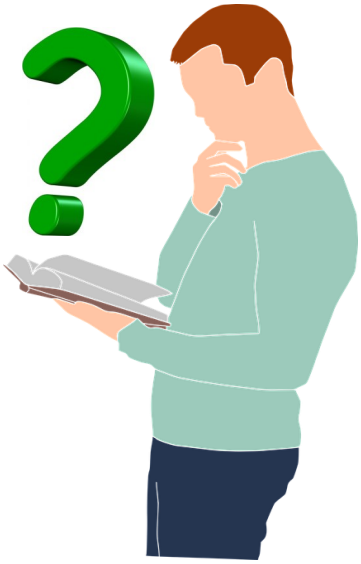
- The foregoing exercise would produce a total figure which the Judge considered to be reasonable. The proportionality of that figure had then to be assessed by reference to r.44.3(5) and r.44.4(1). If it was proportionate, no further assessment would be required. However, if it was disproportionate, a further assessment would be necessary.
- The further assessment should not be line-by-line, but should consider categories of cost, specific periods where particular costs were incurred, or particular parts of the profit costs. The Judge had to consider whether the costs were disproportionate and make appropriate reductions if so. However, any reductions should exclude unavoidable costs, such as Court fees, and the reasonable element of the ATE premium in clinical negligence cases.

- Once those proportionality reductions had been made, the resulting figure would be the final amount of the costs assessment. There would be no further proportionality review.

The Court of Appeal allowed both Appeals as an assessor's report had demonstrated that the premium was reasonable.

Civil Procedure - Application to Set Aside Judgment in Default

Esther Lucy Clements Smith v Berrymans Lace Mawer Service Company (1) Berrymans Lace Mawer LLP (2) [2019] EWHC 1904 (QB)



The High Court was required to consider an Application by the Defendant to set aside Judgment in default of a Defence, for a sum to be determined. The decision raised issues of interpretation in relation to Parts 12, 13 and 3 of the CPR and as to the Application (or inapplicability) of the *Denton* (relief from sanctions) case law on the facts. The Claimant's claim was for damages for personal injury in excess of £3 million.

The relevant facts/sequence of events were as follows:

- On 30/09/18, the Defendant made an Application for an extension of time for filing their Defence (until 30/11/18).
- The agreed time for the Defence to be filed expired on 04/10/18, and on 17/10/19 the Claimant issued a Request for Judgment in Default.
- On 07/11/18, Court staff refused to issue the Defendant's Application for an extension and returned it asking for a Private Room Appointment Form (PRA) to be provided. The PRA was received at Court on 22/11/18 and the Defendant's Application was then issued on 26/11/18. On the same date, the Court staff appeared to have produced a note concerning the Claimant's Application to enter Judgment with a request to the Master as to whether Judgment should be entered. The note did not refer to the Defendant's Application for an extension having been issued. The Defendant's Application was listed for a hearing on 19/12/18, with a hearing date of 15/02/19.
- On 28/12/18, the Defendant's Defence was received by the Court.

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- On 02/01/19, the Master directed Judgment in Default "unless this has already been disposed of by consent". Neither the completed PRA form nor the Defence were placed on the Court file, nor any entry made on the Court computer regarding the Defence (until February 2019).

- On 15/01/19, Judgment in Default was entered against the Defendant.

- On 15/02/19, the fact that a Defence had been filed was entered into the Court system by staff, although no copy of the Defence was actually on the Court file.

- On 13/02/19, the Defendant lodged an Application to set aside the Default Judgment. The Application was returned by Court staff due to the absence of a PRA form. The PRA form was received at Court on 14/03/19 and the Defendant's Application was listed for a hearing on 05/04/19.

The issues for the Court to determine were:

(1) Should the Judgment in Default be set aside as of right under CPR 13.2(b)? In particular:

(a) Is it open to the Court to enter a Default Judgment where a Defence has, in fact, been filed prior to Judgment (albeit without the extension Application having been determined)?

(b) Has the relevant time for doing so expired under the Rule when there is an outstanding Application for an extension of time?

(c) Does 'failure' to disclose (a) or (b) above affect matters?

(2) If the answer to (1)(a to c) is "no" on all points, is the Court to set aside Judgment:

(a) Under CPR 13.3(a) and 13.3(2) on the basis of merits and promptness?

(b) Under CPR 13.3(b) and 13.3(2) on the basis that there is 'some other good reason' to do and promptness?

(3) Even if Rule 13.3 applies and is considered, is it also the case that the Application to set aside Judgment should be treated as an Application for relief from sanctions and, hence, engage the evidential burdens for a decision applying the *Denton* criteria under CPR 3.9 (*Denton v TH White [2014] EWCA Civ 906)*?

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The Master held, in relation to issue (1)(a), that where, as in this case, a Defence was filed prior to the point at which the Court came to apply Rule 12.3, the Court did not have jurisdiction to enter Default Judgment. Accordingly, it was held that the Default Judgment must be set aside as of right.

In view of this finding, it was acknowledged that, strictly, the Master did not need to decide the other arguments, however, the Master expressed her view of the other issues raised as follows:

- Issue (1)(b) – Would it have made any difference if the Claimant (as the Defendant alleged) failed to disclose relevant facts, such as the existence of an Application to extend time or the fact that a Defence had been filed? The answer was no, unless there had been some positive deception (which was not the case here). There is no duty on a Claimant constantly to monitor the Court's own files so as to ensure that when a Request for Judgment is made the Court has the most up-to-date filing information.

- Issue (2) – These issues were not considered further given the finding of the Master in relation to issue (1).

- Issue (3) – The Master provided an obiter view on issue 3 in case there was a successful appeal of her decision on issue (1) and held that there was no basis for holding that the *Denton* line of authority applied so as to require an Application for relief from sanctions under Rule 3.9 where there is no provision or Order which provides for a sanction consequent upon a breach.

On the question of whether the Application was made 'in time', based on the requirement in CPR 23 that evidence must be filed with an Application and not somewhat after it, the Master held that this tended to elevate CPR 23 to a status which it does not have. CPR 13 is a code which exists to govern Applications to set aside Judgment in Default and that approach is consistent and required by CPR 13.1 which does not state that evidence must be filed with the Application, only that the Application must be supported by evidence. It would, in any event, have been a disproportionate approach to deem the Application ineffective for such a relatively technical breach if it had been a breach.

The Master acknowledged that the Judgment in this case is "virtually bound to be appealed", since the facts appear to be unique and, arguably, not directly covered by any binding authority. To pre-empt the outcome of the decision, the Master granted the Claimant permission to appeal and, subject to any Order of the Court of Appeal to the contrary, she directed that an Appeal lies to that Court in view of the absence of high authority and the mixed nature of first instance decisions on the issues raised.

DOLMANS RECENT CASE UPDATE

Civil Procedure - Inquest Costs in Civil Claims

(1) Diana Fullick (2) Clara Fullick (3) Denise Bacchus v Commissioner of Police of the Metropolis [2019] EWHC 1941 (QB)

The Respondents' relative had gone voluntarily to a police station as a witness to a crime. Whilst there, she fell ill and died 8 days later. An inquest was held to establish the cause of death. Starting on 10 October 2016, the inquiry had lasted 7 days, with the jury delivering a verdict that the deceased's death had resulted from methadone and alcohol intoxication, coupled with inadequate police policies, procedures and training. In the meantime, in March 2016, protective court proceedings for damages were issued alleging breach of Article 2 of the HRA, negligence and misfeasance in public office. These proceedings were stayed pending the outcome of the inquest.

The civil claim settled for just over £18,000 in March 2017 prior to the Particulars of Claim being served.

When assessing the Respondents' costs, the Deputy Master awarded all the costs of and relating to the inquest as costs in the civil claim in the sum of £88,356.22. The Commissioner appealed.

On appeal, the Court was not persuaded that the level of costs recovered was disproportionate to the settled damages, even though the figures were approximately £100,000 apart. The case had not been just about the money. The settlement of the claim gave rise to an agreement to revise policies, protocols and training which should avoid for the future the situation which arose in J's case. Those issues were of wider public interest than the interests of the Respondents. Further, if steps taken in inquest proceedings were relevant to the civil claim in question, the costs of taking them would be recoverable. The Deputy Master had not erred in finding that the costs of attending the first pre-inquest review hearing (as this had been the first opportunity for the Respondents to "engage" with issues of concern) and the second pre-inquest review hearing (when the Respondents were able to put questions to the pathologist) were reasonably and proportionately incurred, or the costs of attending the inquest hearing itself, as it had held the police to account in some measure for the relative's death. Given those factors, save in respect of two items, it could not be said that the decision of the Court below that the costs were proportionate was perverse or one that was not open to the Deputy Master.

The two items in question (on which the Deputy Master had erred) related to time on documents, namely 72 hours of Grade A fee earner's time and 25 hours of Grade D time in respect of "civil claim documents work". These items did not set out the categories and numbers of documents which were relevant to the civil claim, and, therefore, the Deputy Master was not in a position to assess whether those costs were proportionately or reasonably incurred or were proportionate and reasonable in amount. Those items should be re-assessed with a view to ascertaining how much of the work was relevant to the civil claim and whether it was proportionate in terms of its utility and amount.

Appeal allowed in part.

Civil Procedure - Pre-Action Admissions - Withdrawal

Newham London Borough Council v Arboleda-Quiceno
[2019] QBD Lawtel 31/07/2019

The Court was required to consider the Defendant's Appeal against a Master's decision to refuse permission to the Defendant to withdraw a pre-action admission by its insurer.

The Claimant's claim arose out of an accident in 2015, in which the Claimant sustained an injury to his knee whilst playing football on an astroturf pitch in the Defendant local authority's recreation grounds. The Letter of Claim alleged that there was a hole in the astroturf and the local authority were in breach of their duty of care as there had been inadequate inspection and maintenance of the pitch. Details of the Claimant's injuries were provided and it was stated that the value of the claim would be more than £50,000.

In pre-action correspondence, the Defendant's insurer admitted liability.

In 2018, the Claimant filed Particulars of Claim and a Schedule of Loss claiming nearly £3 million. The local authority applied to withdraw the admission and denied liability, alleging that the claim was fundamentally dishonest, that the Claimant had simply jumped and landed awkwardly and that he had been on a different pitch than the one alleged.

Both parties adduced evidence in the form of Witness Statements from people who had been at the ground at the time of the Claimant's accident. The Application to withdraw was considered by the Master on the papers, applying the CPR PD 14 para 7.2 factors.

The Master refused to allow the local authority to withdraw the admission on the grounds of the particular prejudice to the Claimant, the interests of the administration of justice and the fact that the evidence supporting the Defence of fundamental dishonesty was weak. She also found that the Claimant's claim had not fundamentally changed since the Letter of Claim.

It was held:

(1) The Master had not been wrong to conclude that the Claimant's claim was not of a different size or character; *Wood v Days Healthcare UK Ltd [2017] EWCA Civ 2097*. The Letter of Claim had indicated that investigations into the Claimant's injuries were pending and identified that there was no clear prognosis.

(2) Having determined that the Defence of fundamental dishonesty had a realistic prospect of success, the Master had erred in going onto consider inconsistencies in the evidence and to determine that it was weak. There was a limit on the type of examination that should take place at an interlocutory stage. The local authority's evidence raised questions about the Claimant's case and there were dangers in trying to undertake a nuanced assessment on the papers. The Master had conducted a mini-Trial without considering all of the evidence and without being able to hear from witnesses.

(3) It was for the Court to remake the decision on the basis of the prejudice to the Claimant and the administration of justice. There was no specific evidence that the Claimant would be prejudiced and it would be an affront if the Claimant was compensated where there was doubt over the reliability of his account; *Woodland v Stopford [2011] EWCA Civ 266* considered.

The Defendant was permitted to withdraw the admission.

Non-Party Access to Documents Filed in Court

Cape Intermediate Holdings Ltd v Dring
[2019] UKSC 38

The Court of Appeal's decision in this case was reported in the August 2018 edition of Dolmans Insurance Bulletin.

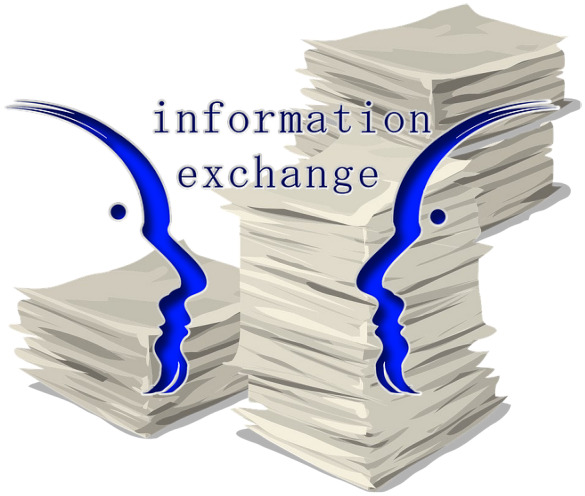
The Respondent, D, acted for a group which provides help and support to asbestos victims and is involved in lobbying and promoting asbestos knowledge and safety. D sought access to documents which had been filed in the course of product liability proceedings brought against the manufacturer of asbestos products, Cape, by the insurers of companies who had been held liable for their employees' exposure to asbestos dust. The proceedings had been settled at the end of the Trial, but before Judgment was given. Pursuant to CPR 5.4C, a non-party may obtain from the Court records a copy of a Statement of Case and a Judgment or Order given or made in public and, pursuant to CPR 5.4C(2), may, if the Court gives permission, obtain from the records of the Court a copy of any other document filed by a party or communication between the Court and a party or another person.

DOLMANS RECENT CASE UPDATE

The Master hearing the Application at first instance gave a wide interpretation to the 'Court records' and ordered disclosure of Witness Statements, including exhibits; expert reports; transcripts; disclosed documents relied on by the parties at Trial; written Submissions and Skeletons. The Court of Appeal set aside that Order, holding that CPR 5.4C was more limited, but the Court had an inherent jurisdiction under which further documents could be obtained. The Court of Appeal ordered disclosure of all Statements of Case, Witness Statements, expert reports and written Submissions and ordered that the Application be listed before a High Court Judge to decide whether any other documents sought should be provided. Both parties appealed.

The Supreme Court set out the approach to be taken on such Applications. It noted that CPR 5.4C(2) appeared to provide a broad power to allow a non-party to obtain copies of documents from the records of the Court. However, current practice as to what was kept in the records of the Court could not determine the scope of the Court's power to order access to case materials in particular cases. Courts and Tribunals have an inherent jurisdiction to determine what the principle of open justice requires in terms of access to documents or information placed before the Court. The default position is that the public should be allowed access not only to the parties' written Submissions and Arguments, but also to the documents which have been placed before the Court and referred to during the Hearing. However, there was no right to be granted access (save as granted by the rules). An Applicant must explain why they sought access and how granting access would advance the open justice principle. The Court must then carry out a balancing exercise between, on the one hand, the purpose of the open justice principle and the potential value of the information in advancing that purpose and, on the other hand, any risk of harm disclosure would cause to an effective judicial process or the legitimate interests of others. Also relevant would be the practicalities and proportionality of granting the request. It was desirable that the Application be made during the Trial and the Applicant would be expected to pay the reasonable costs of access.

Applying that to the instant case, the Order that the Court should provide D with documents pursuant to CPR 5.4C(1) and that the Appellant should provide D with copies of the Witness Statements, expert reports and Submissions would stand. The Order that the matter be listed before a Judge to determine whether any other document sought should be provided would be replaced by an Order that the Court determine whether the Appellant should be required to provide a copy of any other document placed before the Judge and referred to in the course of Trial in accordance with the Supreme Court's decision.



DOLMANS RECENT CASE UPDATE

Part 36 Offers - Fixed Costs - Exception

Deborah Gibbons v Rotherham, Doncaster & South Humber NHS Foundation Trust [2019] Lawtel 6 WLUK 677

The Claimant was successful in her claim for damages against her Defendant employer following an assault on her by a vulnerable adult. She had not commenced her claim under the Pre-Action Protocol for Low Value Personal Injury as she considered that her claim fell within the exception at paragraph 4.3.8, which states the pre-action protocol - and fixed costs regime - does not apply to a claim for damages in relation to harm, abuse or neglect of or by children or vulnerable adults.

The Claimant had also made Part 36 offers of £2,500 and £1,750, both expressed to be subject to a nil deduction by the Compensation Recovery Unit.

The Defendant argued that the claim did not fall within the exception (and, therefore, fixed costs applied to the case) on the basis that the exception was intended to cover a scenario where the vulnerable adult was the Defendant, and not in this case where the Defendant was the Claimant's employer.

The Defendant also argued that the Claimant's Part 36 offers were uncertain and conditional since the size of the CRU claim was uncertain.

The Court found that there was a very clear relationship between the instant claim for damages and the harm caused by a vulnerable adult. Therefore, the claim did fall within the para.4.3.8 exception.

In relation to the Claimant's Part 36 offers, the Court found that the offers were valid and costs consequences would follow as the assessed damages were in excess of both offers. There was a provision under para.36.8 allowing the offeree to request clarification, and if the offeree failed and to provide adequate information, the consequences of Part 36 could be avoided. As the Defendant had failed to avail itself of those opportunities, there was no reason why the Part 36 consequences should not follow.

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- Defending claims – the approach to risk management
- 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

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