motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
In this edition we cover:

case summaries

- **causation**

  Farah v Abdullahi & Others [2020]

- **contributory negligence**

  Sagal Adam Warsama v London Fire Brigade [2020]

- **costs**

  Siu Lai Ho v Seyi Adelekun [2020]

  Alan Ryan v Karl Hackett [2020]

- **issue-based costs orders**

  Camilla Bonsor v Bio Collectors Limited [2020]

- **unlawful taking**

  Sharaz Sarfraz v (1) Shakeeb Akhtar (2) ERS Syndicate Management Limited [2020]

- **"use" of vehicle**

  Neil Carroll (a protected party suing by his mother and litigation friend, Catherine Carroll) v (1) Michael Taylor (2) Michael Doyle (3) EMMS Taxis Limited (4) QBE Insurance (Europe) Limited [2020]

- **void or voidable insurance**

  R v Chief Constable of North Wales [2020]

summer 2020

article

- **bereavement damages increased to £15,120**

DOLMANS
SOLICITORS

DOLMANS SOLICITORS

Farah v Abdullahi & Others [2020]

The claimant was one of a group of men who had been drinking and fighting in the street in the early hours of the morning. The first defendant deliberately drove his Ford car at the group, who took evasive action.

The claimant sustained a fracture to his right tibia and there was an issue as to how and when the claimant sustained that injury. As the claimant was taking evasive action and/or was struck by the Ford, he ended up in front of a Mercedes which had stopped just behind him and then accelerated away with the claimant's body across the windscreen and bonnet. The Mercedes accelerated to a speed of about 27mph and then braked sharply so that the claimant was propelled backwards and onto the ground, where his head struck the tarmac. There was an issue as to whether the claimant had jumped off the car and whether he had suffered a diffuse axonal injury to his brain. Subsequently, the Ford was driven at the claimant who was lying on the ground, striking the claimant at a speed of 20 to 21mph and continuing down the road for 33 metres with the claimant underneath the car. The claimant was left with multiple injuries and the court was required to determine issues of liability and causation relating to those injuries.

It was held that the claimant's right tibial fracture was sustained as a result from the initial glancing blow from the Ford. The claimant had not jumped from the Mercedes and the driver of the Mercedes had not deliberately intended to injure the claimant. He did not expect the claimant to be on his bonnet when he drove off and his actions were consistent with panic or hastiness, and a wish to get away, without caring about the risk of injury to the claimant. The driver of the Mercedes was clearly aware of the claimant's presence and braked sharply in order to get him off, which was his aim, rather than to injure the claimant. As for the brain injury, the claimant was conscious before he was struck by the Ford and the rotational forces on the claimant's head when he struck the tarmac were not sufficient to have caused the diffuse axonal injury. The court held that the brain injury was sustained when the claimant was struck by the Ford with forces of a significantly higher magnitude than had previously been the case. As such, the driver of the Ford (the first defendant) was liable for all of the claimant's injuries and faced a charge of attempted murder.

Sagal Adam Warsama v London Fire Brigade [2020]

The claimant claimed damages for serious personal injury and losses arising from a road traffic accident, when the nearside wing mirror of a moving fire engine came into contact with her head whilst she was present on the carriageway.

The fire engine was on an emergency call out, but the claimant was intoxicated and had called the police as a result of a separate incident. When she heard the siren, she stepped out onto the road as she heard the siren thinking it was the police responding to her call. The driver's evidence was that he applied his brake after seeing the claimant crossing the thick white line separating the main carriageway from the bus lane, but thought that she would not move beyond the white line, so he had not applied emergency braking for fear of skidding. However, an eyewitness confirmed that the claimant had staggered sideways between the parked vehicles in the bus lane and into the middle lane before moving back towards to the pavement and being hit by the fire engine.

It was held at trial that the driver of an emergency vehicle owed the same duty of care to the public as a civilian driver when responding to an emergency. Of course, the statutory speed limit was disapplied under the Road Traffic Regulation Act 1967 s.87, but it was held that the fire engine was travelling too fast in the circumstances as it was a busy road and there were large groups of people around. Further findings of negligence were also found against the driver in that he should have started braking as soon as he saw the claimant emerging from the parked cars and had he done so, the accident would have been avoided. However, 50% contributory negligence was found against the claimant whereby she had placed herself in a dangerous position and her conduct impeded the legitimate and important public work of those tasked with attending emergency call outs.

Siu Lai Ho v Seyi Adelekun [2020]

The claimant issued a personal injury claim under the pre-action protocol for low value personal injury claims in road traffic accidents. The defendant denied liability, and the claim exited the protocol and was allocated to the fast track. The claimant applied to reallocate the claim to the multi-track, but, before the application was heard, the defendant made a part 36 offer and agreed to the matter being reallocated to the multi-track. The part 36 offer stated that the defendant would pay the claimant's costs in accordance with CPR r.36.13, such costs to be assessed if not agreed. The claimant accepted the offer and a consent order was signed by the parties, which included an agreement that the defendant would pay the claimant's reasonable costs on the standard basis, to be assessed if not agreed. However, the parties could not agree on costs, with the defendant arguing that the fixed costs regime under part 45 applied. A deputy district judge agreed, but the decision was subsequently reversed by a circuit judge.

This was appealed at the court of appeal, who held that the defendant had not offered to pay standard rather than fixed costs, and the parties had not contracted out of the fixed costs regime, thereby, making a costs order in the defendant's favour. The defendant then argued that it was entitled to set off its costs of the appeal against the order for the fixed recoverable costs of the claim. However, the claimant argued that the case fell within the scope of the qualified one-way costs shifting (QOCS) regime. The court of appeal found that it was bound by the case of *Howe v Motor Insurers' Bureau (Costs) [2017] 7 WLUK 84* and, accordingly, the court held it was appropriate to allow the defendant to set off the costs due against their liability to the claimant for the costs of the claim generally.

Alan Ryan v Karl Hackett [2020]

The claimant submitted a claim in accordance with the pre-action protocol for low value personal injury. Liability was admitted. It was thought that the injuries would resolve over the course of a year, but it transpired that it would take much longer. The claimant requested an interim payment of £1,000 and later notified the defendant that the claim had exited the portal. This was on the basis that the interim payment had not been made within 10 days of receiving the interim settlement pack.

In fact, the interim payment had been made, and received, within the relevant period. In any event, the claim proceeded outside the portal and part 7 proceedings were issued, with the valuation of the claim increasing over time. A part 36 offer was accepted by the claimant and the matter was concluded. However, in relation to costs, the defendant argued that fixed costs should apply as the claim should have remained in the portal. The judge declined to award fixed costs, stating that the claim became more valuable and would have inevitably left the portal at some point. The defendant appealed the decision and submitted that the judge gave no weight to the fact that the claimant's error in exiting the portal when he was not entitled to do so deprived him of any opportunity to settle the claim within the portal.

It was held that the position on the facts meant it was inevitable that once the claimant thought that his claim was worth more than the protocol limit, the protocol would have been exited. The judge also considered, and rejected, the argument that the defendant might, within the portal, have offered a settlement figure that the claimant might have accepted. The claimant was not limited to receiving only fixed costs.

Camilla Bonsor v Bio Collectors Limited [2020]

The claimant was injured in an accident involving the defendant's lorry. The court found that the defendant's employee had driven the lorry negligently and caused the claimant's injuries.

The defendant was vicariously liable to pay the claimant's damages and costs. The claim had also included allegations against the defendant concerning three pieces of equipment that should have been fitted to the lorry, namely proximity sensors, a lens and a speaker warning. The parties' experts pointed out that these features were not required by law and the claimant abandoned the sensor and speaker arguments, but maintained the lens allegation. The court found that the claimant did not prove breach of duty or causation in respect of the lens and the defendant sought an issue-based costs order limiting its liability to 80% of the claimant's costs. The claimant argued that the allegation relating to the lens had not taken up significant time or expense and there was no reason to depart from the usual rule that costs follow the event. The draft judgment determined that the lens allegation was a discrete issue that had added sufficiently to the length of the trial and the litigation time on the issue represented 8% of the claimant's total costs. The claimant submitted that the time spent only represented 2% of her total costs and, in any event, the court did not have to consider whether to make an issue-based costs order where the successful party had been unsuccessful on a discrete issue.

It was held that an unsuccessful discrete issue did not automatically give rise to an issue-based costs order. However, it was unreasonable for the claimant to pursue the lens allegation which was based on unsatisfactory and insufficient evidence. Moreover, the sensor and speaker allegations were abandoned at a late stage of the proceedings. The lens allegation had resulted in a material increase in trial time and increased costs.

The court held that it was practicable to award a proportion of the costs, and taking a figure in between the draft judgment and the claimant's analysis, applying a broad-brush approach, the appropriate reduction was 10% of the total costs.

Sharaz Sarfraz v (1) Shakeeb Akhtar (2) ERS Syndicate Management Limited [2020]

The claimant, defendant and another man got into the claimant's car after an evening of drinking. The defendant took the keys from the claimant's pocket and drove, with the claimant in the passenger seat. The defendant drove at an excessive speed and crashed. The claimant suffered a traumatic brain injury and brought a claim on the basis that the insurer had a contingent liability to satisfy any judgment that might be obtained against the defendant.

The insurer applied to strike out the claim on the ground that its contingent liability was excluded by s.151(4) of the Road Traffic Act 1988. An "excluded liability" meant a liability in respect of injury to anyone who allowed himself to be carried in the vehicle and had reason to believe that the vehicle had been stolen or unlawfully taken.

It was agreed that the defendant had taken the car without the claimant's authority, such that s.151(4) potentially applied, and the hearing proceeded on that basis. The insurer argued that "unlawful taking" was a reference to the offence of taking a motor vehicle contrary to the Theft Act 1968, s.12, and that taking the keys and getting in the car was sufficient to exclude liability. The claimant argued that s.151(4) focused attention on the status of the vehicle and it could not be said to have been "taken" until it had moved.

It was held that the primary offence under s.12 was only committed once the offender took the vehicle. Accordingly, the car could not be said to have been "unlawfully taken" until it was driven away, and taking possession of the keys and sitting in the driver's seat were all acts that fell short of actually taking the vehicle. That was sufficient for the insurer's application to fail, such that their contingent liability was not excluded. There was no reasonable opportunity after the car was driven off for the claimant to alight before the accident. In any event, the claimant had not "allowed" himself to be carried in the car and his sole purpose of getting in the car was in order to prevent the defendant from taking it. The insurer's application was refused.

Neil Carroll (a protected party suing by his mother and litigation friend, Catherine Carroll) v (1) Michael Taylor (2) Michael Doyle (3) EMMS Taxis Limited (4) QBE Insurance (Europe) Limited [2020]

This case involved a claimant who had been out with friends drinking alcohol until the early hours and in order to get home had flagged a taxi down.

Unbeknown to the claimant, the taxi driver had no intention of taking him to his final destination. Instead, the taxi driver watched the claimant try and enter his pin number into two different cash points, before taking off in his taxi with the stolen bank card.

The claimant was abandoned and called his girlfriend, who drove to the cashpoint to collect him, however, the claimant did not wait and started walking home. Unfortunately, on his way home, the claimant fell off a motorway bridge, suffering catastrophic injuries. As a result of his injuries, the claimant issued proceedings against not only the taxi driver, but also the taxi driver's insurer. The key point was whether the insurer was liable for the claimant's injuries pursuant to the Road Traffic Act 1988 s.145(3)(a) as being injury to a person arising out of the use of the vehicle on a road and/or liable under the insurance policy.

The judge, applying the principles derived from *Dunthorne v Bentley [1996] RTR 428, CA* held that it was 'very clear' that the claimant's injuries had nothing whatsoever to do with "the use of the vehicle on a road" in the context of section 145(3)(a) of the Road Traffic Act 1988 because his journey in the taxi ended when he got out to use the cashpoint and the claimant broke the causal chain in deciding to walk home after he was abandoned by the taxi driver instead of waiting for his girlfriend to collect him.

In addition, the taxi driver's insurance policy was limited to use of the vehicle for social/ domestic purposes, use for the insured's business or use for the carriage of passengers for hire and reward. The fact that, from the taxi driver's perspective, the purpose of the journey was to steal from the claimant meant that the taxi driver was using the taxi for a criminal purpose and not one of the permitted uses under his insurance policy, confirming the insurer was not liable under the policy for the claimant's injuries because the injuries had not "arisen out of the use of the taxi" and there was no causal link so as to fix the insurer with liability under the Road Traffic Act 1988 s.145(3)(a).

R v Chief Constable of North Wales [2020]

The claimant and her husband were German nationals and had parked their vehicle on an industrial estate whilst looking for a petrol station on 28 October 2019. They were approached by a police officer who seized the vehicle after the claimant was unable to provide any documentation to show it was insured.

The claimant later sought to recover the vehicle and produced a certificate of insurance taken out on 11 November 2019. The police officer made enquiries with the insurance company and it became apparent that the claimant had not disclosed that she had driving convictions, the vehicle was not registered and that the purpose of obtaining the insurance was to secure the release of the vehicle. The officer refused to accept the certificate as valid on the basis that the claimant's non-disclosure had "invalidated" the policy. The police officer refused to release the vehicle and the insurance company informed the claimant on 12 May 2020 that it was avoiding the policy. The defendant had since disposed of the vehicle at auction. The claimant applied for a judicial review of the decision and the issue was whether a certificate of motor insurance which could be avoided for non-disclosure was, nevertheless, a 'valid' certificate of insurance within the meaning of the Road Traffic Act 1988.

It was held that the policy of insurance was voidable, but was not avoided until 12 May 2020. The policy had remained in force until that date and, at the time the certificate was presented to the police, it was a valid certificate. The officer had taken into account immaterial matters when making his decision and the court held that the claimant should have been permitted to recover the vehicle from custody. The police officer's decision that the certificate of insurance was invalidated when presented was quashed. The disposal of the vehicle was extremely surprising and the court held that damages could be recovered in judicial review proceedings, which were to be assessed.

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 took effect from 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 has held 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.

If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

Simon Evans at simone@dolmans.co.uk

Capital Tower, Greyfriars Road, Cardiff, CF10 3AG

Tel : 029 2034 5531
Fax : 029 2039 8206

www.dolmans.co.uk

This update is for guidance only and should not be regarded as a substitute for taking legal advice

© Dolmans