DOLMANS INSURANCE BULLETIN

Welcome to the September 2017 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 SOLICITORS

DOLMANS REPORT ON

ARE HIGHWAYS SCHEDULED FOR RESURFACING INHERENTLY DANGEROUS?

JTF (A Minor) v Rhondda Cynon Taf County Borough Council

Claimants often argue that a highway listed for resurfacing is inherently dangerous. The recent decision in *JTF (A Minor) v Rhondda Cynon Taf County Borough Council* (in which Dolmans represented the Defendant Authority) shows, however, that the two are not inextricably linked so far as the Courts are concerned.

Background

The Claimant (who is a minor) alleged that on 8 October 2015, he tripped over a loose and raised paving stone on the footway.

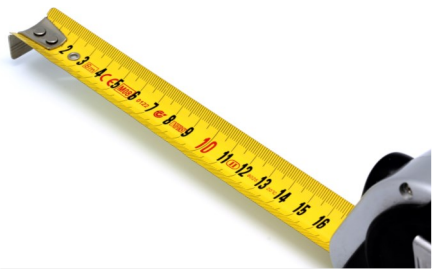
As a result, the Claimant alleged that he had suffered a laceration injury to his nose. The Claimant limited the value of his claim to £5,000.00 accordingly.

The Claimant pursued his claim through his mother (and Litigation Friend), who was also his main witness.

Allegations

It was alleged that the Defendant Authority was negligent and/or in breach of Section 41 of the Highways Act 1980. Further, and/or in the alternative, it was alleged that the alleged defect constituted a nuisance and that the Defendant Authority had created or permitted the alleged nuisance.

Arguments and Evidence



The Claimant's Solicitor served a Witness Statement with photographic evidence that indicated a difference in levels of between 11mm and 24mm. The photographs also showed that there were several other loose and raised paving stones along the relevant footway.

The footway in question is classified as a 'local access footway' and, therefore, scheduled for inspection on an annual basis. The safety defect criteria for defects (in relation to such footways) for potholes and trip hazards is 45mm for Category One defects and 35mm for Category Two defects. The safety defect criteria for subsidence or raised areas is 15% and rocking paving slabs is +/- 40mm.

From the outset it was pleaded in the Defence that the Claimant's own photographs (which were annexed to the Claimant's Particulars of Claim) indicated a difference in levels that was within the Defendant Authority's relevant safety defect criteria.

The footway was resurfaced shortly after the Claimant's alleged accident (between 2 November 2015 and 13 November 2015) as part of a special repair scheme. The Defendant Authority continued to argue that the relevant location was not dangerous, particularly based upon the Claimant's own photographs and measurements. The Claimant argued the contrary and invited the Court to find the location was dangerous, particularly in light of the fact that the footway had been resurfaced so soon after the Claimant's alleged accident.

Section 58 Defence

The footway was last inspected prior to the date of the Claimant's alleged accident on 24 October 2014, when no actionable defects were noted at the relevant location. There had been no similar complaints and/or alleged accidents during the 12 month period prior to the date of the Claimant's alleged accident. Although 'on paper', therefore, the Defendant Authority had a Section 58 Defence, it became apparent that the Defendant Authority's so-called 'special defence' would stand or fall depending upon the Court's finding as to dangerousness; the Highways Inspector maintaining that the alleged defect at the time of the Claimant's accident was within the relevant safety defect criteria and was not actionable in any event.

Decision

The District Judge found that the alleged defect was not dangerous and dismissed the Claimant's claim. In so doing, the District Judge cited the Court of Appeal decisions in *Mills v Barnsley* and *James v Preseli District Council* (both 1992).

Readers are reminded that Lord Justice Steyn in *Mills v Barnsley* advised against the encouragement of mechanical jurisprudence in deciding whether or not a defect in the highway is dangerous; finding that the test of dangerousness is one of reasonable foresight of harm to users of the highway and that each case will turn on its own facts.

In *James v Preseli*, it was, of course, held that if the particular spot where the alleged accident occurred was not dangerous, then it is irrelevant that there were other spots nearby that were dangerous or that the area as a whole was due for resurfacing. It was also held that although in one sense it is reasonably foreseeable that any defect in the highway (however slight) may cause an injury, that is not the test of what is meant by dangerous in this context. It must be the sort of danger that a Defendant Authority may reasonably be expected to guard against.

In view of the District Judge's conclusion on dangerousness, it was, of course, unnecessary for her to consider the Defendant Authority's potential Section 58 Defence.

Tom Danter
Associate
Dolmans Solicitors

For further information regarding this article, please contact
Tom Danter at **tomd@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

DOLMANS RECENT CASE UPDATE

Costs Budgeting - Hourly Rates

Bains v Royal Wolverhampton NHS Trust [2017] Unreported

In the August edition of the Dolmans' Insurance Bulletin, we reported the case of *RNB v London Borough of Newham [2017]*, in which the Master held that where the hourly rates for incurred costs were reduced on Detailed Assessment, the hourly rates in respect of budgeted costs should be similarly reduced, as it is only on Detailed Assessment that a paying party has an opportunity to challenge the rates and this was a "good reason" to depart from the costs allowed in the Claimant's last approved budget.

However, in a Detailed Assessment in the case of *Bains v Royal Wolverhampton NHS Trust*, District Judge Lumb (sitting as the Regional Costs Judge in Birmingham) expressly disagreed with the *RNB* decision. Judge Lumb reportedly held that to reduce hourly charging rates for budgeted costs to the same levels as those allowed for the incurred costs, thereby causing a potential departure from the budgeted phase totals, would be to second guess the thought process of the Costs Managing Judge and would impute a risk of double jeopardy into the Detailed Assessment. The Costs Managing Judge was not fixing hourly rates, but may have had regard to them when setting a reasonable and proportionate allowance for each phase of the budget. Absent cogent evidence to the contrary, the Costs Judge simply could not know. The clear philosophy and guidance from the Senior Courts in *Merrix* and *Harrison* was to simplify and reduce the scope of Detailed Assessments. The "good reason" bar was a high one.

In the circumstances, the issue of hourly rates is again in flux.

Personal Injury - Health and Safety at Work

Ruth Christine Mullen v Samantha Kerr (Defendant) and South Eastern Education & Library Board (Third Party) [2017] NIQB 69

A car driver brought third party proceedings against the South Eastern Education & Library Board which owned and occupied a nursery school, car park and private access road. The driver had struck and injured a pedestrian who was walking on the access road at a point where there was no footpath or area demarcated exclusively for pedestrian use. The driver admitted liability for the accident, but brought third party proceedings against the Board alleging that the design of the road was negligent, that the Board was in breach of the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993 by failing to organise the workplace so that pedestrians and vehicles could circulate safely and that the Board had failed to carry out a risk assessment as required by the Management of Health and Safety at Work Regulations (Northern Ireland) 2000.

The road in question was subject to very light vehicular traffic. The pedestrian was familiar with the road. It was not considered that its layout posed a risk to her health and safety. The Board was not in breach of its duties under the Occupiers Liability Act 1957 or under the 1993 Regulations.

It was held that even if a footpath or exclusive pedestrian area had been provided, pedestrians probably would not have used it because it was so rare for vehicles to use the road that both pupils and adults would have walked on the road and the collision would still have occurred.

The Board should have carried out a risk assessment, however, and had it done so it would probably have simply erected more warning signs and that would probably not have prevented the collision. Therefore, the failure to carry out a risk assessment was not causative.

Judgment in favour of the third party.

Provisional Damages - Psychological Condition

XX v Whittington Hospital NHS Trust [2017] EWHC 2318 (QB)

The Claimant suffered as a result of the Defendant's negligence in failing to detect signs of cancer. She developed invasive cancer of the cervix, for which she required chemotherapy treatment that led to infertility and severe radiation damage to her bladder, bowel and vagina. Liability was not in dispute.

The parties were agreed that there should be an award of provisional damages in respect of the risk of small, but, undoubtedly, real and significant, radiation enteritis.

As a result of the failure to diagnose, the Claimant suffered from mild depression and anxiety, which had largely been successfully treated, however, there was a risk that the Claimant might, if a planned surrogacy pregnancy was not successful, revert to ruminative and intrusive thoughts resulting in a condition worse than to begin with. The medical expert suggested that whilst a response to failed surrogacy might be catastrophic, the condition would not be long lasting with treatment. The Court was required to determine whether provisional damages should be awarded in respect of the risk of a deterioration in the Claimant's psychological condition.

The test for determining whether an award of provisional damages is appropriate is threefold:

(1) Whether the risk of deterioration is real rather than fanciful.
(2) Whether the deterioration will be serious.
(3) Whether the case is a proper one in which to depart from the normal rule of awarding damages on a once and for all basis at the date of trial.

The Court held that applying those tests, the risk of deterioration at 30% to 40%, even though it only arose if the surrogacy failed, was real rather than fanciful. However, the Court took the view that a deterioration that may be severe, but which is likely to be temporary and treated successfully in about a year, could not be properly regarded as serious under the test. As such, this was not one of the rare cases where the normal rules for the awarding of damages should be displaced. It was held that the Claimant could be properly compensated within the normal rules. The Court, therefore, did not exercise its discretion in favour of an award of provisional damages regarding the risk of a possible psychological injury.

Sexual Abuse - Vicarious Liability

Various Claimants v Barclays Bank plc [2017] EWHC 1929

The Claimants comprised 126 job applicants and employees of the Defendant bank. As part of the bank's application process, they had been required to attend a medical assessment with a doctor nominated by the bank. The medical assessments took place at the doctor's home between 1967 and 1984. The Claimants alleged that they were sexually assaulted by the doctor. The doctor was deceased. In claims for damages against the bank, the Court was required to determine, as a preliminary issue, whether the bank was vicariously liable for the sexual assaults committed by the doctor. The bank disputed vicarious liability on the grounds that the doctor was not an employee of the bank and his examinations were not part of the bank's business and he was not integrated into the bank.

The Judge confirmed that vicarious liability depended on a two stage test : (1) Was the relevant relationship one of employment or "akin to employment"? (2) If so, was the tort sufficiently closely connected with that employment or quasi-employment?; *Cox v Ministry of Justice [2016]* followed.

The Judge found that on the facts of this case, both stages of the test were satisfied. In particular, the medical examination and subsequent report to the bank were performed for the benefit of the bank and on its behalf. The bank chose the doctor; prospective employees were given no choice. The bank made arrangements for the examinations and the Claimants felt compelled to attend because they understood that it was an essential stage of the bank's recruitment process. They had no other reason to be examined by the doctor and the examination was paid for by the bank. It was for the bank's benefit to ensure that its employees had the health to carry out its work. The bank directed the doctor to perform a physical examination, which included a chest measurement. The Claimants were young women who saw the doctor alone in his room and were asked to remove clothing.

Given the factual circumstances, the bank had created a risk of the tort allegedly committed by the doctor. The sexual abuse took place when the doctor was engaged in duties at the time and place required by the bank. It was inextricably interwoven with the carrying out of his duties.

The Judge was also satisfied that it was just and fair to hold the bank vicariously liable for any assaults that the Claimants might prove to have been perpetrated by the doctor. The action against the bank was the only legal recourse now available to the Claimants.

Accordingly, the preliminary issue was decided in favour of the Claimants.

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

Amanda Evans at **amandae@dolmans.co.uk** or
Judith Blades at **judithb@dolmans.co.uk**

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- Corporate manslaughter
- Data Protection
- Defending claims – the approach to risk management
- Display Screen Regulations – duties on employers
- Employers' liability update
- Employers' liability claims – investigation for managers and supervisors
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- 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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Melanie Standley at **melanies@dolmans.co.uk**