DOLMANS INSURANCE BULLETIN

Welcome to the April 2025 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**

REPORT ON

Lack of Physical Intervention with Regards to a Pupil with Additional Needs - Negligent or a Breach of Duty of Care?

PL (a minor) v Cardiff Council

Dolmans recently represented the Defendant Local Authority in the case of *PL (a minor) v Cardiff Council* in relation to a claim for damages arising out of an injury sustained by the Claimant during an organised school trip to a local Country Park and Medieval Village in May 2023.

Proceedings were issued against the Local Authority by the Claimant's mother on the Claimant's behalf. The Claimant was age 12 at the time of the accident.

It was alleged that towards the end of the school trip, whilst the group were on their way back to the minibus, the Claimant was allowed to "wander off unaccompanied" and, thereafter, he climbed onto a static train cart which was present in the grounds of the Country Park/Medieval Village close to the car park. As the Claimant was climbing down from the train cart, he slipped and sustained an injury to his leg.

The Claimant has additional educational needs. He has BRAF gene difference, learning difficulties, high BMI and Cardiofaciocutaneous Syndrome. He also has behavioural difficulties. The Claimant's High School is a school specially equipped to teach pupils with moderate and severe learning difficulties and ASD. It was alleged that the nature of the Claimant's needs was such that the School should have ensured that the Claimant was adequately supervised at all times and that he should not have been able to wander off alone or climb onto the machinery.

It was further alleged that the School failed to physically prevent/restrain the Claimant from wandering off and/or climbing on to the machinery; failed to properly recognise the needs of the Claimant and ensure that he was provided with the correct level and type of care; failed to ensure that an appropriate/sufficient number of staff were present on the trip; failed to give any or any sufficient/clear instructions to the Claimant to prevent him from wandering off/climbing on the machinery; failed to undertake a suitable and sufficient assessment of the risks to the health and safety of pupils on the trip and given the nature of the needs of the Claimant there ought to have been a specific risk assessment relating to his health and safety; failed to give any or any sufficient training to members of staff and/or failed to ensure compliance with the same; in all the circumstances exposed the Claimant to a danger and/or trap and/or a foreseeable risk of injury.

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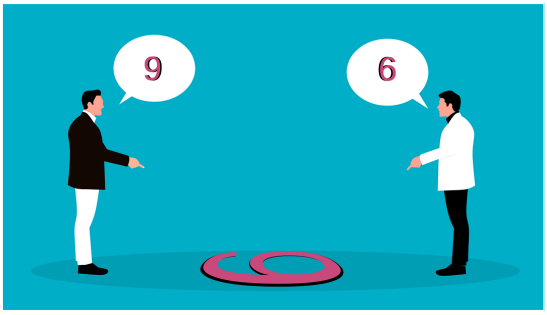
Circumstances of the Accident

Following the issue of proceedings, Dolmans identified that detailed investigations were required with the members of staff who were employed at the School, including not only those who accompanied the Claimant on the trip but also senior members of staff who were responsible for implementing the policies and procedures at the School in relation to pupils with additional needs.

During the course of these investigations, it became clear that there was a dispute as to some of the facts which were pleaded on behalf of the Claimant. The evidence obtained indicated that the School's position was that:



(a) As the Claimant and his classmates were heading towards the school minibus to go home, the Claimant saw other school age children playing on a large static metal train cart.

(b) The train cart was not cordoned off and there were no signs warning visitors not to climb on it.

(c) The Claimant did not "wander off". He was walking with two members of staff, who followed him when he went to walk towards the train cart. As they walked towards it, the members of staff attempted to prevent the Claimant from playing on the train cart by distracting him with "role play" techniques.

(d) The Claimant was not distracted by the members of staff and did, in fact, climb on to the train cart. However, he did not climb up high or inside it. The distraction techniques successfully prevented the Claimant from climbing inside the train cart.

(e) As the Claimant climbed back down from the train cart, he lost his footing, caught his leg on the train cart and suffered an injury.

Duty of Care

It was accepted that the Local Authority/School owed the Claimant a duty of care whilst he was on the trip.

It is well-established that the permissible conduct for a teacher is to be judged using the *Bolam* test; as was made clear by the House of Lords in *X and Others v Bedfordshire County Council [1995] 2 A.C. 633* and by the Court of Appeal in *Chittock v Woodbridge School [2002] EWCA Civ 915*.

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Breach of Duty

The Claimant bore the burden of proof in respect of their claim, and it was for the Claimant to prove that no other reasonable school/teacher would have taken the same action as the members of staff did on that day.

Whilst a large number of allegations were raised against the Local Authority/School, in essence the Claimant's case was that:

(1) The Claimant should have been physically restrained from climbing on to the train cart;

(2) The Claimant should have been told "no";

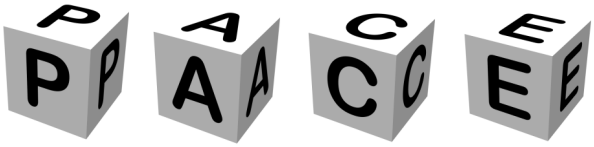
(3) The trip and/or the Claimant was not sufficiently Risk Assessed; and/or

(4) The Claimant was improperly supervised.

Physical Restraint

Detailed evidence was obtained and served on behalf of the School which set out the School's policy in relation to the physical restraint of pupils generally and in relation to the Claimant specifically.

Physical restraint was the School's "very last resort" policy. The School was a non-physical intervention school and instead implemented "PACE" (Playfulness, Acceptance, Curiosity and Empathy) techniques, which is a modern approach to behavioural management designed to support positive outcomes for children. PACE is a recognised practice amongst the teaching community. The Claimant's mother's evidence that she was unaware of the PACE techniques employed by the School was strongly disputed. The policies employed at the School were said to be well-known to all parents and PACE was identified as one of the School's front-line policies. No issue had ever been raised before by the Claimant's mother in respect of PACE.



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In addition, the School produced an abundance of documentation which assessed and monitored the Claimant's specific needs and the care he required, including:

- The Claimant's PBS (Personal Behavioural Support) plan, which identified that when the Claimant went off baseline, PACE techniques were used as secondary prevention. Physical intervention was only required as a very last resort. This plan had been prepared based on the School's experience of the Claimant and dealing with his additional needs. This was a thorough document.
- The Claimant's personal Risk Assessment, which identified relevant risks and control measures for the Claimant specifically.
- The Claimant's IDP (Individual Development Plan), which highlighted that, whilst non-verbal, the Claimant did communicate well and respond to communication. This document did not exist at the time of the accident, but provided additional and useful information on the Claimant's behaviours and ability to understand and respond to communication.
- A person-centred annual review, which also identified that communication with the Claimant was effective and that his progress was good.

All of the aforementioned documentation demonstrated that whilst the Claimant did have behavioural issues at times, and did present a risk to himself and others owing to his particular needs, the School had identified those risks, identified effective control measures, had taken steps to deal with those behaviours when they occurred and regularly monitored the Claimant, and the School's policies were rooted in a considered and thoughtful approach to the Claimant's particular needs.

The witness evidence Dolmans prepared on behalf of the member of staff who was present on the trip and the more senior members of staff (the Head of School and the Deputy Executive Headteacher of the Learning Federation under which the School fell), who were responsible for overseeing the policies and practices at the School, was that the techniques outlined in respect of the Claimant worked well prior to the incident in May 2023.

In relation to the incident in May 2023, the School's position was that there was not such an imminent risk of physical injury in the circumstances which presented that physical restraint of the Claimant was justified. Other children were playing on the train cart and there was no indication that the train cart itself was unsafe (given it was not cordoned off or warned against). Further, the Claimant was a large student, who could be aggressive and physical, and there would have been a risk of harm to both the Claimant and the members of staff who were on the trip if they had attempted to physically restrain him.

Communication with the Claimant – the Claimant should have been told 'no'

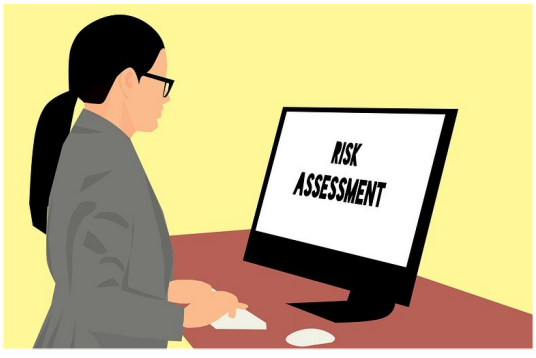
The Claimant's mother asserted that the PACE techniques were not sufficient, especially because the Claimant did not listen to commands and that a teacher should have stood in front of the Claimant and told him 'no' using simple and clear instructions so that he could understand. The Claimant's mother said that the situation should never have got so far as for the Claimant to be able to climb up onto the train cart.

However, the evidence Dolmans adduced from the members of staff at the School was that the Claimant's mother had never raised any issues or concerns with the way that the Claimant was being disciplined/behaviourally managed at school. This was despite the fact that the Claimant's mother had either seen the Claimant's educational plans, or at least had the opportunity to see them. Further, whilst the Claimant was largely non-verbal, it was well-documented that he responded to verbal communication, and that "role play" and the PACE techniques worked well to bring him back to baseline.

Risk Assessments

The trip had been risk assessed and was one which had occurred multiple times before, on the same, or similar, risk assessment, without issue. The Risk Assessment did not specifically identify or deal with any risks posed by the train cart.

Unfortunately, the member of staff who had completed the Risk Assessment for the trip (and previous trips) was not available to be interviewed regarding the Claimant's claim or to give evidence regarding the Risk Assessment carried out, having emigrated to Australia. However, the Head of School had signed off the Risk Assessment and gave evidence that the train cart had never posed a problem before, that relevant control measures for general slips/trips/falls were implemented within the Risk Assessment and their view was that the Risk Assessment was entirely appropriate, even though it did not specially deal with the train cart.



As set out above, there were comprehensive risk assessment/behavioural support plans in place for the Claimant. All members of staff at the School were aware of these plans and the steps/methods outlined in the plans were regularly put into practice within the School.

Supervision

The trip consisted of 12 pupils and 6 members of staff (comprising 1 Lead Teacher and 5 Teaching Assistants).

Contrary to the Claimant's allegations, the evidence Dolmans adduced from the member of staff who was present on the trip was that the Claimant was being directly supervised by two members of staff at the time of his accident. The Head of School gave evidence that the level of supervision which was in place for the trip was more than an appropriate level of supervision in the circumstances, taking into account the Claimant's (and the other pupils') additional needs.

Foreseeability

It was submitted on behalf of the Local Authority/School that the risk of the Claimant being injured on the train cart was not reasonably foreseeable in any event.

The test for foreseeability is that set out in *Bolton v Stone [1951] AC 850*. In such cases, the court is not considering the *possibility* of injury, but the reasonable foreseeability of injury.

The train cart had never caused issue before, other children were playing on it (and stock images of the train cart on the website for the Country Park showed children in it), it was not cordoned off and there were no warning signs. Accordingly, it was asserted that there was not such an imminent risk of harm that it was foreseeable that intervention, of a physical nature, was reasonably necessary.

Trial

Ahead of Trial, detailed witness evidence was prepared and served on behalf of the Local Authority in support of their Defence to the Claimant's claim and all the witnesses attended the Trial in January 2025 to give oral evidence. Following the presentation and cross-examination of such evidence, the defence invited the Court to find that the members of staff at the School acted in a way commensurate with a reasonable body of teachers.

This position was accepted by the Trial Judge.

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The Judge found that the Claimant's behavioural and support plans were comprehensive, reasonable and effective for keeping him safe whilst in the School's care, and these were implemented at the time. To expect more of the members of staff on the day in question would be to expect more than a reasonable standard. To make any other finding, and to find that the Local Authority were liable for the Claimant's injury, would effectively mean that the School ought to physically intervene at any time that any *possibility* of physical injury arises and that any other approach would be negligent.

The Judge was satisfied that all appropriate assessments of the Claimant had been undertaken and of the trip. The Judge did not accept that the fact that the train cart was not expressly identified in the Risk Assessment made the Risk Assessment inappropriate or should result in a finding of breach. The train cart was not barriered off and there were no signs telling people not to climb on the train cart. It was held that a specific assessment would not have made a difference. The Judge noted that there were a number of hazards at the park which had not been specifically risk assessed.

The Judge found that there was no evidence that the Claimant was allowed to wander off, as alleged, and accepted the evidence adduced by the Local Authority that the Claimant was accompanied by two staff members.

The Judge was also satisfied that as the Claimant and the two assistants walked alongside the train cart, there were pupils from another school in the train cart which drew the Claimant's attention to the train cart and the members of staff encountered the situation without any forewarning. The distance between the point at which the Claimant had noticed the train cart and the train cart itself was described as being around 20 to 30 feet. This was considered to be a short period of time for the Claimant to reach the train cart from the path and probably "only a matter of seconds". The Judge was satisfied that during this period the members of staff sought to engage the Claimant in the PACE approach and to try and distract him and they continued in verbally seeking to distract him. Despite this, the Claimant went up the step on the train cart and put his leg onto the top, but did not get inside it.

The time for physical intervention would have been, if not instantaneously, only a few seconds. The risk posed to the Claimant was not considered sufficient to warrant the need for an immediate physical intervention within this timeframe. The train cart was a static piece of equipment. The members of staff had, as the Claimant started walking towards it, used the appropriate techniques. Whilst these techniques did not initially work, the techniques were appropriate, and the risk presented was not such as to require immediate physical intervention. It was noted that the Head of School had given evidence to the Court that they would not have acted differently to the members of staff on the day of the incident.

The Judge, therefore, found that the actions of the Local Authority's members of staff fell within the reasonable ambit of what could be expected of a school. The situation which presented to the staff on the day in question was different to the example put forward on behalf of the Claimant at Trial of the Claimant approaching a road with fast cars where immediate action was required. The static train cart did not represent the same risk.

The Judge fully accepted the evidence provided on behalf of the Local Authority that physical intervention in the circumstances of this case could have resulted in a deterioration of the situation and increased the risk both to the Claimant and to the members of staff. The same situation could have arisen if the members of staff sought to stand in front of the Claimant and block him and told him 'no'.

The Claimant's claim was, therefore, dismissed.

Comment

Whilst the Judge had every sympathy for the Claimant and his family for the injury which the Claimant had sustained, which was shared by the members of staff at the School, the fact that he had suffered an injury was not sufficient for his claim to succeed and sound in damages. The Claimant had failed to prove that the care taken by the members of staff was outside the skill and care of a reasonable school and staff. The Claimant did not adduce any expert evidence, nor any document, which sought to provide any alternative standards in teaching generally or specifically for children with learning disabilities. The only evidence relating to this issue was contained in the evidence Dolmans prepared on behalf of the Local Authority which set out that the School had a clear and considered policy as to how children in its care were to be dealt with, and specifically the Claimant, and the Judge was satisfied that the School took all reasonable steps to prevent reasonably foreseeable harm.

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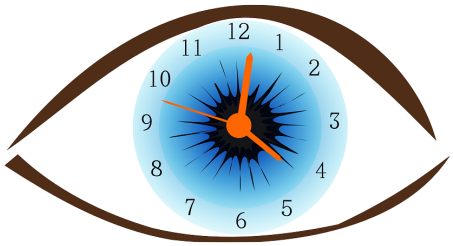
CASE UPDATES

Costs Budgeting - Late Service of Budget - 'Inaccurate' Budget - Relief from Sanctions

Hunt v Oceania Capital Reserves Limited & Others
[2025] EWHC 837

The Second and Third Defendants in this case applied for relief from sanctions, having filed their costs budget late.



Costs budgets were due to be filed by the parties on 4 February 2025. The Claimant filed their budget at 3:00pm. The Second and Third Defendants filed their budget at 4:30pm and their budget was, therefore, deemed served the following day.

The delay in the service/filing of the budget by the Second and Third Defendants was not viewed as serious or significant. However, in a Skeleton Argument served in advance of the Costs and Case Management Conference, the Claimant highlighted problems with the Second and Third Defendant's budget, in that the figures on the front page did not match those on later pages and on the front page the figures bore striking similarity to the figures in the Claimant's budget. It was submitted on behalf of the Claimant that the Defendants had reviewed the Claimant's budget and altered the Second and Third Defendants' budget in order to closely match it. It was also submitted (entirely reasonably according to the Court) that the Second and Third Defendants' representatives had adapted an old budget without any genuine consideration of its appropriateness to the case.

Having received the Claimant's Skeleton Argument, a Witness Statement was served on behalf of the Second and Third Defendants seeking relief from sanctions for the late service of the budget. That Witness Statement sought to explain the lateness of the Second and Third Defendants' budget, but did not address the more pertinent points raised by the Claimant concerning the obvious inaccuracies in the budget served and the striking similarities of the figures in the parties' budgets.

At the subsequent Costs and Case Management Conference, the Court declined to deal with the issue of relief from sanctions, but gave the Second and Third Defendants the opportunity to deal with the issues raised by the Claimant. The Defendants were directed to file and serve an Application seeking relief from sanctions, together with a Precedent R and a Witness Statement addressing the points raised in the Claimant's Skeleton Argument.

In the Witness Statement subsequently filed, the only acknowledgment that there were incorrect figures in the Defendants' budget was blamed on a 'laptop malfunction'. There was no acknowledgement of the fact that the figures were apparently copied from the Claimant's budget. There was no acknowledgement of the other points about the detail of the figures, as set out in the Claimant's Skeleton Argument.

Held

In dealing with the relief from sanctions Application issued on behalf of the Second and Third Defendants, the Court made the following findings in relation to the three-stage *Denton* test:

Was there a serious and significant breach?

The relevant breach was not the delay in the filing/serving of the costs budget but the fact that the costs budget was "incoherent" and suffered from the defects which had been identified by the Claimant. The costs budget contained figures which the Second and Third Defendants accepted were incorrect, not least because they had filed a revised budget on which they sought permission to rely instead.

The Precedent H budget was filed and served with incorrect figures, apparently closely based upon another party's budget and, yet, verified by a Statement of Truth. The evidence provided suggested that the person who completed the document did not believe that the figures shown in the budget were correct or contained an accurate statement of incurred costs, and a fair and accurate statement of estimated costs. The Judge found that somebody had deliberately inflated the figures on the front page of the Second and Third Defendants' budget to match those in the Claimant's budget.

It was held that a party who files an accurate and correctly completed document late commits a less serious and significant breach than a party who files an inaccurate and incorrectly completed document at the same point. Because the Second and Third Defendants' budget contained figures which were admitted to being incorrect, the Judge considered the breach to be serious and substantial. It was held that where a Statement of Truth is signed on a document which is so fundamentally flawed, this constitutes a very serious breach.

Why the default occurred

The evidence filed did not acknowledge the extent of the problem with the budget filed/served, let alone explain how the figures in the budget came to be inserted in it. Even accepting that there had been a real hardware failure in the period when the budget was being prepared on behalf of the Second and Third Defendants, it was held that this did not explain how the figures mirroring the Claimant's budget came to be included. On the evidence, the real problem seemed to have arisen in the hour or two before the budget was filed. No explanation was provided as to what happened in that period. While it was clear that the technical problems experienced undoubtedly contributed to the problem, the evidence served by the Second and Third Defendants did not address the most significant issues at all.

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All the circumstances of the case

This was not a case where prior breaches were relied on. The real issue was about the integrity of the budgeting process. Questions also arose as to how other phases within the budget had been revised since the Costs and Case Management Conference. No insight into this had been provided. The Judge did not consider that the Court could have any confidence that the revised budget properly reflected the statement in the Statement of Truth.

Taking into account all of the above, and particularly the absence of any explanation for the contents of the first Precedent H filed/served by the Second and Third Defendants, the Judge reached the conclusion that the Application for relief from sanctions should be dismissed. That conclusion was not disproportionate. For relief to be granted, this would effectively be to sanction both a serious breach and, more significantly, a wholly unsatisfactory response to the breach which had occurred. It would also permit the Second and Third Defendants to rely on a budget which the Court had no confidence had been properly prepared. This would undermine the administration of justice.

The Second and Third Defendants' Application for relief from sanctions was, therefore, dismissed.

Highways Act 1980 - Traffic Calming Measures - Hazards/Danger

Sebastian Braithwaite v London Borough of Lewisham
[2025] EWHC 782 (KB)

Background

This was an appeal against a decision at Trial in November 2024 dismissing the Claimant's claim against the London Borough of Lewisham. The basic facts of the case were not in dispute. The Appellant, a motorcyclist, was involved in an accident when he collided with a traffic calming measure, known as a 'build-out', while making a right turn. Although it was dark, the street lighting was adequate. The speed limit of the road in question had been 20mph since 2016.

At the time of the accident, there were two illuminated one-way signs at the junction of the roads. The broken lines across the mouth of the junction were, however, faded. When it was originally constructed, the build-out had incorporated four wooden bollards to help identify the presence of the build-out, however the Claimant's case was that these had rotted and then been removed. The Claimant's case was that he did not see the build-out until he was about to collide with it.

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Post-accident, the layout of the accident locus was changed and a post with a one-way arrow was re-positioned to the edge of the build-out. The area was further and radically changed late in 2024 to create a cycle lane.

The main issue for the Court to determine upon the appeal was whether the build-out was a dangerous hazard and a real source of danger. The Court also considered the duty of care owed by the Highway Authority to road users and whether there was a breach of the duty to maintain the highway under Section 41 of the Highways Act 1980.

Decision

The Claimant's appeal was dismissed and the Trial Judge's findings were upheld, namely:

(1) The build-out was not a trap or a real source of danger for reasonably careful motorcyclists. The Claimant's case was effectively "based on" *Yetkin v Mahmood [2010] EWCA Civ 776* and it was recognised that the London Borough of Lewisham would only be liable if it was proved that they had created a night-time danger or a dangerous trap to motorcyclists by erecting the build-out in the context of the highway geography without adequate warnings or mitigating features. It was, however, the Trial Judge's finding of fact that the street geography and furniture did not entice carriageway users into a trap or draw them onto a hazard. After assessment of all the available photographic, witness and expert evidence, the Trial Judge very carefully considered all aspects of the design, condition and environment of the build-out before arriving at a highly fact specific evaluative judgment. The Trial Judge's finding that the build-out was "there to be seen" was wholly unobjectionable. The build-out was not concealed and was edged in granite kerb edging which was a different colour to the asphalt of the road surface. The build-out was in no way "disguised". The build-out was also in a 20mph zone and was one species of traffic management measures, amongst many, that populate the suburban streets of southeast London. The build-out complied with "*such regulatory requirements and guidance as were applicable*". The junction was well used. The Trial Judge was fully entitled to reach the view that the build-out was not a real source of danger.

(2) The London Borough of Lewisham was not obliged to construct or maintain the build-out on the road to take into account the fact that motorcyclists, such as the Claimant, would show a lack of care in driving at significantly excessive speed and ignoring the measures which were in place on the approach to the build-out. The Trial Judge found that the Appellant was travelling around 30mph before he took his hand off the throttle and slowed to take the right turn. It was, however, likely that he was still travelling at around 20 to 25mph at the time that he took the turn. There could be no realistic criticism of the Trial Judge's findings on speed. Were a highway authority to have to take into account a lack of care of a less than careful road user, it would mean that it would be very difficult to construct many traffic calming measures.

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(3) The Appellant's excessive speed and inattention were the primary causes of the accident.

(4) There was, in any event, no breach of the duty to maintain the highway under Section 41 of the Highways Act 1980. This ground of appeal was flawed as a matter of well settled and unequivocal legal principle. There is no duty on a highway authority to "maintain" road markings: *Gorringe v Calderdale [2004] UKHL 15.* Whilst the markings on the road had faded, Counsel for the Claimant could point to no authority to support the proposition that a failure to re-paint a white line at a junction mouth constituted a failure to maintain for the purposes of Section 41 of the Highways Act 1980.

(5) The Trial Judge was correct in their analysis of the relevance of the post-accident changes made in relation to the layout of the area. As Lord Justice Steyn stated in *Mills v Barnsley Metropolitan Borough Council [1992] 2 WLUK*, in respect of what appeared to be an attempt at a post-accident repair of a pavement: "*In any event, if there had been a subsequent attempt to repair, it would in the circumstances of this case have told us nothing about the issue of dangerousness".* Once an accident has occurred, a local authority, an occupier or an employer may feel compelled to take action. However, beyond informing the issue of practicality (and cost) if, as was not the position in this case, these factors are in issue, any steps have limited relevance to the issue of whether the state of affairs at the material time was in breach of duty or not.

RTA Protocol - Allocation to Multi Track - Late Acceptance of Part 36 Offer

Attersley v UK Insurance Limited
[2025] EWHC 884 (KB)

The Court was required to decide whether the Claimant was entitled to fixed costs or costs assessed on the standard basis up to the expiry of the relevant period of a Part 36 offer, which was accepted late.

The Claimant ('C') claimed damages for personal injury following a road traffic accident. C's claim commenced in March 2018 under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol'). Liability was initially disputed. The claim exited the RTA Protocol in April 2018. In April 2019, the Defendant ('D') admitted liability. C issued proceedings in February 2021, claiming damages up to £150,000. On 4 March 2021, D filed a Defence admitting liability and made a Part 36 offer of £45,000. In January 2022, the claim was allocated to the Multi Track. In May 2022, D applied to amend its Defence to allege fundamental dishonesty related to quantum. The Application was due to be heard in August 2021, but before this occurred C accepted D's Part 36 offer on 8 July 2022.

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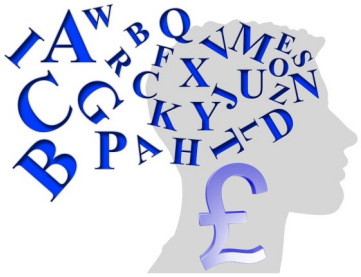
C submitted she was entitled to costs assessed on the standard basis in accordance with CPR 45.29B (in force at the time); D submitted C was only entitled to fixed costs pursuant to CPR 36.20 (as then in force). At first instance, it was held that fixed costs applied. C appealed.

CPR 45.29B was amended following the decision in *Qader v Esure Services Ltd [2016]* to exclude cases started under the RTA Protocol from fixed costs once they are allocated to the Multi Track.

CPR 36.20 applied to claims which no longer continue under the RTA Protocol. CPR 36.20(4) provided that where a defendant's Part 36 offer was accepted after the relevant period, the claimant will be entitled to the relevant fixed costs for the stage applicable at the date on which the relevant period expired.

It was common ground that if C had accepted the Part 36 offer within the relevant period, she would only have been entitled to fixed costs. The issue was whether the dicta in *Qader* and the subsequent amendment of CPR45.29B had the effect of disapplying CPR 36.20.

C's appeal was allowed. The Judge held that the effect of *Qader* was clear, the fixed costs regime is disapplied retrospectively on allocation to the Multi Track. Where an ex-Protocol case is allocated to the Multi Track, it comes out of Section 111A by the wording of CPR 45.29B and CPR 36.20 does not apply. Accordingly, CPR 36.20 did not apply to this case at the time when the Part 36 offer was accepted. C was entitled to her costs to be assessed on the standard basis up to the end of the relevant period in accordance with CPR 36.13.



Settlement - Capacity - Court's Inherent Jurisdiction

Forsyth v Howson & Allianz Insurance Plc
[2025] EWHC 653 (KB)

The Court was required to consider an unusual Application by the Defendants ('D') who sought, against the wishes of the Claimant ('C'), the Court's approval, pursuant to its inherent jurisdiction, of a settlement reached.

C was injured in a road traffic accident. His injuries included a moderate to severe traumatic brain injury. C brought a claim for damages and proceeded throughout without a litigation friend. Liability was tried as a preliminary issue and judgment entered for 25% of damages to be assessed. In July 2024, D made a Part 36 offer of £250,000. The evidence before the Court was that C's Solicitor and Counsel were of the view the offer was too low and should not be accepted. The minimum C's Counsel would be prepared to recommend in an approval advice would be £275,000 with an award of provisional damages. Notwithstanding that advice, C had accepted D's Part 36 offer.

CASE UPDATES

The medical evidence in the case was clear to the effect that C had litigation capacity. However, there was disagreement between the experts on whether C had financial capacity. C's Solicitor intended to obtain further evidence on financial capacity in the light of the size of the settlement and make an Application to the Court of Protection if appropriate. D's concern was such evidence might indicate C did not have capacity to accept the Part 36 offer, which would lead to the settlement unravelling unless it had already been approved by the Court pursuant to its inherent jurisdiction. Alternatively, D argued the decision to accept the Part 36 offer was a significant financial decision, so the evidence on financial capacity undermined the assertion that C had litigation capacity insofar as it related to acceptance of the offer.

The Court noted that there had been a number of previous decisions in which the inherent jurisdiction had been used to approve a settlement where there was doubt about capacity and both parties sought approval. This case differed because C did not support the request for approval and had reached the settlement against Counsel's advice.

Given the clear medical evidence, there was no basis for a trial of litigation capacity.

There was no legal opinion on the merits of the settlement before the Court. D's Counsel advised that his valuation of a reasonable settlement figure was £216,000 on a final basis and proposed he could provide a note on the merits of settlement for the Court to be satisfied the settlement should be approved. The Judge declined this proposal, particularly given C's Counsel's differing opinion.

D submitted that it was unfair for C to effectively stymie the Court from exercising its inherent jurisdiction where that exercise was necessary to protect D's position and give finality to the parties. Whilst the Judge appreciated D's wish for finality, she concluded this was not a case where the inherent jurisdiction should be invoked because:

(1) This was not a case where a trial of litigation capacity might be directed. In practical terms, given the clear medical evidence, the parties had already secured finality by the acceptance of the offer. If there was a risk of the settlement unravelling, it was very small.

(2) C opposed an inherent jurisdiction approval. It was not appropriate to foist upon C, who had litigation capacity, a process designed to protect him when he did not want or need it.

(3) To be able to proceed to consider approval the Court would have to consider how, if at all, it could be put in the position that it would be if conducting an approval under CPR Part 2. This raised questions about the extent to which a capacitous claimant can or should be compelled to engage in an exercise which generally required disclosure of a privileged advice.

(4) Even if the Court were able to find some way of doing this, there remained a significant risk that approval of the settlement would be declined given it was accepted against C's Counsel's advice.

Accordingly, D's Application was dismissed.

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

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