DOLMANS INSURANCE BULLETIN

Welcome to the November 2024 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:

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REPORT ON

To Drive or not to Drive - Driven Inspections in the Context of Defending Highways Act Claims

SP v CB Council

Facts and Claimant's Allegations

Dolmans represented the Local Authority in a claim brought by SP. SP asserted that whilst walking along a footway she tripped and fell. She described the defect as a "large depression". She stated that she sustained an injury to her hand and alleged psychological trauma.

The Claimant produced some photographs with basic and rudimentary measurements which were considered by the Local Authority to be inadequate and lacking any reliable and accurately recorded measurements that could be considered by the Court to be reliable. Her Witness Statement provided no further detail as to what she said the measurements of the "large depression" were, although in pre action correspondence her solicitors sought to allege that the defect was in excess of 40mm and, thus, in excess of the intervention level.

Breaches of the Highways Act 1980 and negligence were asserted.

There was no dispute that the Local Authority was the Highway Authority for the location.

Defence

The primary position of the Local Authority was that the location was not dangerous and, therefore, Section 58 of the Highways Act and the statutory Defence normally available to Local Authorities was not engaged.

However, in this case, the Local Authority's inspections were driven inspections which were also recorded. These were disclosed as it was considered that they would assist the Court by providing further dated evidence as to the condition of the highway/the accident location at the relevant dates of the videoed inspection, one of which was two days post the accident date. It was considered that they assisted with the Section 41 Defence.

There were three relevant recordings; one pre accident and two post accident. All recorded inspections were at differing dates during 2020 and, thus, during the Covid-19 pandemic and during social distancing restrictions. Driven inspections are the norm for the Local Authority and would usually have been undertaken by a two person crew; one driving and the other conducting the visual inspection. However, due to the Covid pandemic restrictions, only one inspector was permitted to be in the vehicle, who was driving and inspecting at the same time.

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There was also a complicating factor. Post notification of the accident, the Local Authority attended at the location and noted a defect to an area around 4 to 5 feet away from the accident location which the Authority did consider to be actionable. A Repair Order was raised 3 months after the accident date, but only 3 weeks after the Claimant reported her alleged fall to the Local Authority. It was also raised when there had been two further post accident date driven inspections and before the Local Authority was aware of the Claimant's alleged fall.

The Local Authority carried out a repair of the noted section and incorporated into the Repair Order the accident location.

Evidence Gathering and Witness Statements

Detailed witness evidence was secured from the Local Authority from the Principal Officer who attended post notification of the fall and who raised the Repair Order.

The defence maintained their position that the location of the Claimant's fall was not dangerous and, therefore, the claim should fall at the first hurdle. The Officer's Witness Statement set out in detail the adjacent location which was noted for repair post accident, and detailed the view of the Officer that the location of the Claimant's fall was included in the Repair Order simply due to the fact that a fall had occurred and it was convenient to carry out a repair whilst a wider repair was being undertaken.

The difficulty the Local Authority faced was that in accepting that the above defect which had been noted and repaired (to the different location), in effect laid the Authority open to an argument that the defect later noted (close to the accident location) had been "missed" when the two later driven inspections were carried out. One of those driven inspections was only 2 days after the Claimant's accident date. It potentially called into question the effectiveness of the driven inspections.

The Successful Outcome

The matter proceeded to a fully contested trial which took place over one day.

The defence expected the Claimant to seek to challenge the effectiveness of a driven inspection and indeed took that point stridently.

The Local Authority's witness performed well in defending the fact that when he attended and raised the Works Order in relation to the defect that the Claimant complained of it was not at the intervention level.

The driven inspection was heavily criticised by the Claimant as being inadequate on a general level which was made more ineffective by there being a one person crew.

After some argument, the Judge was persuaded not to criticise the driven inspection policy, but it became a focus of the Claimant's position at trial.

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Comment

This was an interesting case because whilst the Local Authority did not rely on a Section 58 defence, the Authority did rely on video footage taken from the scheduled inspections as evidence of the general condition of the highway and, therefore, relevant to dangerousness.

The case is also unusual as it was the first claim taken to trial for the Local Authority where Covid restrictions meant that the usual two person crew driven policy reduced to a one person crew. The Claimant challenged both this and the principle of driven inspections.

However, the case sounds a note of warning. The Trial Judge clearly had concerns about the effectiveness of such a system. This was particularly so here as there was an argument that the larger defect which was ordered to be repaired was probably missed at the pre accident inspection and no Repair Order was raised following two later scheduled inspections. Ultimately, however, following detailed argument, the Trial Judge chose not to criticise the driven inspection policy and found for the Local Authority, on Section 41, that the defect was not dangerous.

This case, on the one hand, demonstrates that the principle of driven inspections can be successfully defended in the right circumstances and as at today that is an interesting point in and of itself. On the other hand, it is clear that the Trial Judge had some concerns as to driven inspections and, it is considered, that the underlying forensic approach taken to the evidence overall was instrumental in achieving the eventual successful outcome. Thus, cases involving driven inspections clearly require very careful evaluation but, equally, should not necessarily be dismissed as “lost causes” in the present world of pedestrian inspections.

A particular challenge in this case was presented by the reduction from a normal two person crew to one person due to Covid restrictions. Clearly, however, had it not been for the exigency of the pandemic restrictions in this context, the Trial Judge may well have been more unsympathetic in the context of a one person driven inspection, or, perhaps more cynically, would have had a factual basis to make an adverse finding that was, in the circumstances of the present case, lacking. That clearly needs to be kept in mind as the pandemic is put behind us.

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CASE UPDATES

False Imprisonment - Battery - Damages

FXS v The Mulberry Bush Organisation Limited
[2024] EWHC 2844 (KB)

The Claimant ('C') brought a claim for damages against the Defendant residential special school ('D'). The liability judgment was reported on in the June 2024 edition of the Dolmans' Insurance Bulletin. The Judge found that the use of a towel looped around the internal door handle of C's room and pulled to leaving a gap constituted unlawful imprisonment and that the use of three face down restraints, in contravention of D's policy, constituted battery. This judgment dealt with damages and costs.

C was not injured as a result of the face down restraints. The Court confirmed that damages for assault and battery can be awarded absent injury. Damages in this case were limited to injury to feelings (i.e. discomfort, disgrace and humiliation). The Judge considered that even if the member of staff was doing her best to keep C and others safe from harm, this did not render each face down restraint any less of a battery. Whilst C was frequently made subject to lawful physical interventions, being restrained face down was inevitably a degrading and humiliating experience. The Judge rejected a suggestion that the impact of a battery was lessened because C would have been physically restrained by some other legitimate method. The Judge further considered that the fact that the vast majority of physical restraints of C were proportionate had no bearing on quantum.

Expert evidence was to the effect that C was distressed by the restraints generally. There was no direct evidence that C found the unlawful restraints more distressing than the lawful restraints. However, C had specifically told his father that he had been restrained face down. The Judge was satisfied that C was distressed and humiliated by the experience of being restrained face down. The risks, lack of training and breach of D's policy were serious, justifying a substantial award. The Judge awarded £2,000 for each instance of battery, making a total of £6,000.

The Judge further awarded £4,000 by way of aggravated damages for D's failure to appreciate the significance and seriousness of a member of staff using such a restraint and being reluctant to acknowledge the breach of D's policy throughout the litigation.

CASE UPDATES

In relation to false imprisonment, the Judge noted that damages are intended to compensate for the loss of liberty, shock and humiliation. Loss of reputation was not relevant in this case. C was falsely imprisoned using the towel method on fourteen occasions. C would have experienced an 'initial shock' and would have found confinement distressing. Whilst the school was doing its best to keep C and others safe, confining him to his room was unlawful. C's challenging behaviour was not relevant for the purposes of assessing damages.

The Judge awarded £2,000 for one occasion when C was falsely imprisoned for nearly five hours and £300 for each of the further occasions, making a total of £5,900. A further £3,000 was awarded by way of aggravated damages as the school persisted with the towel method after objections were raised by C's father and a social worker and no advice was sought.

Accordingly, the total award for damages was £18,900.

In relation to costs, C was the successful party. Whilst C's Schedule of Loss and Damage totalled £172,776, D could have made an offer but did not. For C to recover any compensation the matter had to proceed to trial.

Whilst C did not succeed on his negligence claim, the Judge did not consider an issues based costs order appropriate. The face down restraints and towel method were central to the case and took up the majority of Court time and all three heads of claim were intrinsically linked.

C submitted that costs should be payable on the indemnity basis because D had made representations to the Legal Aid Agency to seek to have C's Legal Aid Certificate discharged. The Judge did not consider this justified indemnity costs. The Judge considered it entirely legitimate for a party to make representations to the Legal Aid Authority if it considers it appropriate.

Accordingly, D was ordered to pay C's costs of the claim on the standard basis.

Fundamental Dishonesty - Wasted Costs

Williams-Henry v Associated British Ports and Another EWHC 2415 (KB)

The Defendant's Application for wasted costs, in a claim where the Claimant's claim was dismissed for fundamental dishonesty, was also dismissed. Briefly, the Claimant sustained a brain injury having fallen from a pier and brought a personal injury claim against the owner of the pier, Associated British Ports ("the Defendant"). At trial, the Judge found that the Claimant had lied throughout conversations with medical experts and in a Witness Statement.

CASE UPDATES

The Defendant applied for a £300,000 Wasted Costs Order against the Claimant's Solicitors, arguing that they were negligent and acted unreasonably in their failure to produce proper standard disclosure; failure to read documents; failure to draft proper Witness Statements; failure to cross check what the Claimant told them against source documents; failure to properly advise the Claimant on the risk that she would be found fundamentally dishonest; failure to engage in ADR properly; failure to terminate their own retainer and failure to act on instructions.

All the allegations were denied by the Claimant's Solicitors, although they could not fully respond to the same as the Claimant did not waive privilege over all advice she was given by her Solicitors and Counsel. The Claimant's Solicitors denied continuing the claim just for their own profit and raised the fact that the Claimant disputed the fundamental dishonesty allegation and sought to prove quantum; the multidisciplinary team considered the Claimant was genuine, the Claimant was supported by her medico-legal experts and the case was far from hopeless; there was no evidence of impropriety or negligence.

Having summarised the statute, the Civil Procedure Rules relating to Wasted Costs Orders (WCO's) and the case law on how those are to be interpreted, Mr Justice Ritchie set out 10 factors for considering whether a WCO was appropriate:

(1) Summary process – the WCO jurisdiction is a summary jurisdiction generally but not always dealt with at the end of a case. It is not intended or allowed to become satellite litigation. It must be used or managed in a proportionate manner in relation to time and costs.

(2) There are two stages – accusation then defence. The Court has to determine whether the relevant substantive and procedural thresholds have been satisfied by the applicant such that the court can go on and consider whether it is just to impose the WCO.

(3) Sufficient particularity – At stages 1 and 2, the applicant is required to set out the allegations that the solicitors have acted improperly, unreasonably or negligently (IUN) with sufficient particularity and to identify the wasted costs which were allegedly caused by the IUN and the sums involved.

(4) Improper conduct – This covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct and conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion.

(5) Unreasonable conduct – this covers conduct which is vexatious or designed to harass the other side rather than advance the resolution of the case. Conduct is not unreasonable simply because it leads to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation.

(6) Negligent conduct – this may involve duty, breach, causation and damage, so an actionable breach of the legal representative's duty to his own client but goes no wider than that. Negligent conduct is not limited to professional negligence.

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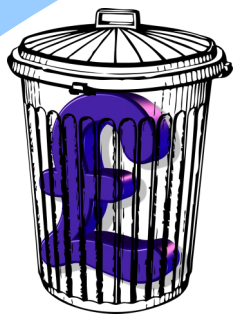

(7) Proof and privilege – WCO's have often been characterised as applying to obvious errors. If privilege is not waived, then the court generally assumes that the lawyer acted on instructions and the advice given was not improperly, unreasonably or negligently so given. In any event, it is not unreasonable or negligent to pursue a hopeless claim or hopeless defence for a client who wishes to do so.

(8) The hopeless case principle - A lawyer is not acting improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail.

(9) Causation – the applicant must identify the costs which it has incurred and prove on balance that the solicitors IUN caused those costs such that they were "wasted".

(10) It is just? – After all the other thresholds are satisfied, the court should stand back at both stages and determine, in all the circumstances, whether it is just to make a WCO. This is a matter upon which the court is permitted a wide-ranging judicial discretion.

The Court held that the Defendant's WCO Application rested on a wide range of allegations of negligence and unreasonable behaviour (but not impropriety). This was a firm indicator that the allegations were probably not within the summary jurisdiction covered by WCO's. When descending into the detail of each allegation, they all fell apart, save for one – the failure to draft a proper Witness Statement.

More cautious legal representatives would have acted differently on the Witness Statement drafting and on whether to press on to trial, but that was not the test. The Court found that the drafting of the Claimant's Witness Statement was poor practice and prima facie unreasonable or negligent, despite it being what the Claimant wanted it to say.

The decision whether to terminate the CFA retainer with the Claimant was a human and commercial one for the Claimant's Solicitors and not a matter of professional regulation or a matter for the Court or the Applicant to comment on or criticise. The Court rejected the Defendant's submission that the Claimant's Solicitors "should" have terminated the retainer. What they had to do was to be very careful not to mislead the Court in the face of very clear documentary evidence that the Claimant had contradicted herself many times. The Claimant's Counsel was very careful during the whole of the trial to tread a wholly professional line in representing her.

The Court was unpersuaded that any of the accusations against the Claimant's Solicitors were proved on a prima facie basis. The Judge noted the need for the Applicants to set out the allegations of IUN with sufficient particularity and identify the wasted costs allegedly caused by the IUN and the sums involved, at least in general terms, at stage 1 of the WCO procedure. The Defendant failed to be specific about the wasted costs until the hearing. That was unsatisfactory and relevant when determining the justice of making a stage 1 order leading to a WCO.

The Defendant's Application was, therefore, dismissed because they had not made out either unreasonable behaviour or negligence on a prima facie basis (save in relation to the one Witness Statement); they had failed to comply with the procedural requirements for simple, clear allegations; and had failed to satisfy the requirement for clear identification of the allegedly wasted costs, the sums claimed and had not established the necessary causal link. Further, proportionality and the justice of the case required the Application to be dismissed.

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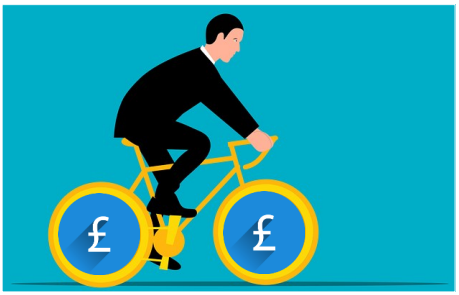
Negligence - Causation - Hazard

Robertson v Cornwall Council
[2024] 2830 (KB)



This case was an appeal from an Order made in the Truro County Court in which the Claimant's claim for damages for personal injury sustained as a result of a bicycle accident was dismissed. The case does not make dramatically new law, but it is a timely restatement of an important principle - that a claimant has to show which exact part of a defect caused their accident and that that part has to be hazardous, as per the Report On in this edition.

The Claimant and his wife were keen and experienced cyclists. They were cycling along a road which had a cycleway off to the left. At the time of the accident, the cycleway was not flush with the surface of the road and there was a kerb over which bicycles had to pass in order to join the cycleway from the road.

The Claimant lined up his bicycle to cross the road onto the cycleway. The Claimant's wife (who was cycling in front of him) heard the sound of him falling and saw him lying unconscious in the road. The Claimant had no recollection of the accident itself.

The Claimant brought a claim for damages against the Defendant as the Highway Authority. The Claimant's case at trial was based on misfeasance in that the raised kerb was a hazard or a trap which had been created in breach of the Defendant's duty. However, no measurements of the gap or the drop between the cycleway and the road had been carried out at any point on the kerb. Rather, the Trial Judge was asked to examine photographs of the junction between the road and the cycleway.

There was also no objective evidence – by way, for example, of a recognised standard – of what gap between a road and cycleway (if any) would generally be regarded as amounting to a hazard to bicycles. It was also clear from the photographs that the extent to which the kerb stood proud of the road was not uniform. At each of the extremities it appeared that there was a significant gap, but the gap gradually narrowed from both ends of the kerb towards the middle. It was found that the gap towards the middle was "nowhere near" as severe as it was at either end.

The Claimant's claim was dismissed at trial on two grounds:

- The Trial Judge found that the gap was nowhere near as severe towards the middle of the crossover between road and cycleway as it was at either end, and it was, in fact, fairly close to flush towards the middle of the junction; and

- The Claimant had not proved causation in that he failed to prove that he lost control due to a raised kerbstone. There was no direct witness and he himself suffered from amnesia. There were many reasons why he may have fallen.

On appeal, the Claimant argued:

(1) The Trial Judge erred in law and was wrong not to conclude that the accident was caused as alleged by a hazard on the highway.

(2) The Trial Judge erred in law and was wrong not to conclude that the accident was caused by a trap on the highway created by the Defendant.

(3) To the extent that the Court did not conclude that the kerb running across the entrance to the cycle path constituted a hazard, it was wrong to do so.

The Claimant's case was put on the basis that the Trial Judge's reasons for his decision were inadequate. That was not accepted by the Appeal Court. A fair reading of the Judgment was that it had not been shown, on the balance of probabilities, that the raised kerb was the cause of the Claimant's accident at all, but, even if it had, the kerb was not a hazard throughout the whole of its length and it had not be shown, on the balance of probabilities, that the cause of the Claimant's accident was part of the kerb which was sufficiently raised to constitute a hazard. That point appeared to have been at the heart of the dismissal of the claim.

On the causation point, the Appeal Court agreed with the Claimant – there really was no other explanation offered for the loss of control and, on the balance of probability and as a matter of common sense, it was accepted that the Claimant lost control due to this lip. If causation had been the only reason for the Trial Judge dismissing the claim, the Appeal Court may well have overturned the finding.

It was not accepted, however, that the only conclusion open to the Trial Judge was that the whole length of the kerb constituted a hazard, trap or danger simply because it was not flush with the road. The question was whether the kerb, in whole or in part, was a hazard and it was disputed by the Defendant that any state of affairs other than the cycleway being flush necessarily amounted to a hazard. No evidence of a relevant, universally applicable standard or scientific or other expert evidence was put before the Trial Judge to assist him in making a judgment. The Appeal Court held that the Trial Judge was entitled to conclude, in the context of the evidence as a whole, that the Claimant had not shown that this was the case.

The Trial Judge was also entitled to take the view that the overall effect of the evidence, of achieving a "gold standard", was not the same as saying or accepting that any other state of affairs was necessarily a hazard in law. The degree of risk posed by the kerb depended on a number of factors, including the speed and angle of approach, the height of the kerb, the type of bicycle wheel and whether the surface was dry or wet.

The fact of the fall did not necessarily prove that the Claimant had crossed at a hazardous point in the kerb. The Trial Judge was to make findings based on his assessment of the evidence. The photographs on which the Claimant relied were not of the highest quality for the purposes of making an assessment and the Appeal Judge could see why the Trial Judge was not prepared to accept the Claimant's argument that the kerb constituted a hazard or trap for the purposes of a claim in negligence.

The Claimant's appeal was dismissed.

CASE UPDATES

Police - Assault and Battery - Use of Taser

Afriyie v Commissioner of Police for the City of London [2024] EWCA Civ 1269

The Claimant ('C') successfully appealed against the dismissal of his claim for assault and battery against the Defendant police force ('D') arising out of the use of a taser.

C was driving his car when he was stopped by D's officers on suspicion of driving at excessive speed. C was asked to provide a sample of breath using a breathalyser device. Four attempts registered as insufficient. C was told he was under arrest for failing to supply a sample of breath, cautioned and a police officer took hold of his arm. C pulled away and protested. A police officer ('P') drew out his taser and activated the laser sight. Two other police officers took hold of C's arms, but C pulled away and began talking to his friend who had been a passenger in the car. C was repeatedly told by officers to put his hands out to be handcuffed. After 20 seconds, C folded his arms and continued to speak to his friend. P discharged his taser. C fell backwards, striking his head. C suffered a minor traumatic head injury and moderate PTSD.

P completed a Use of Force form recording the threat assessment as '*significant physical threat posed due to subject's aggressive attitude, stance and general agitation*'.

The section of the Authorised Police Practice relating to tasers noted the risk of head injury from an uncontrolled fall and provided that a taser should only be used as a proportionate response to an identified threat and should not be used to gain compliance not linked to such a threat.

C brought proceedings against D for damages for assault and battery and misfeasance in public office. C claimed, inter alia, that the use of a taser amounted to unreasonable force. The Trial Judge dismissed the claim, finding that the use of a taser was lawful and objectively reasonable in all the circumstances. C appealed against the dismissal of his claim for assault and battery.

The Court noted that D had to show that he honestly and reasonably believed that it was necessary to defend himself or another and that the force used was reasonable in all the circumstances. This involved an assessment of the proportionality of the force used. This was not just whether the use of force was reasonable in the circumstances as P believed them to be. The question was whether the degree and nature of the force was reasonable. This involved a consideration of how proportionate that response was to the overall circumstances facing P.

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C did not challenge the Trial Judge's finding that P held an honest belief that it was necessary to use force. Given the Trial Judge's findings of fact, it was not appropriate to interfere with the Trial Judge's determination that P's belief that it was necessary to use force was objectively reasonable. However, the Court of Appeal took a different view in relation to the issue of whether the force used, namely the use of a taser, was objectively reasonable. The Trial Judge had not considered the proportionality of using a taser in the circumstances as she found them to be.

The Trial Judge had referred to P making a split second decision as to whether to engage C in further negotiation or discharge the taser. The Court considered that the Trial Judge was wrong to say that the situation, as shown on the body worn video footage, involved a split second decision. C had been standing facing and talking to his friend for at least 20 seconds before the taser was discharged. Objectively, P was not faced with or forced into a split second decision. Further, the binary choice identified by the Trial Judge did not involve any consideration of whether using a taser per se was reasonable. Even if further negotiation with C would be futile, that did not mean it was proportionate to use a taser. The Court concluded that the use of a taser was not objectively reasonable in the circumstances, notwithstanding P's honest belief as to the need to use force.

Appeal allowed.

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

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