DOLMANS INSURANCE BULLETIN

Welcome to the December 2024 edition of the Dolmans Insurance Bulletin

In this issue we cover:

REPORT ON

Factual causation difficulties - the route to discontinuance

GG v Bridgend County Borough Council

FOCUS ON

The Lord Chancellor announces the new Personal Injury Discount Rate (PIDR) applicable from 11 January 2025

CASE UPDATES

- **Anonymity and reporting restriction orders**
- **Hire charges - MOT certificate - ex turpi causa - causation**
- **Late amendment of pleadings - substitution of parties - strike out**
- **Late service of Particulars of Claim - relief from sanctions - merits of the claim**

Dolmans would like to wish all of our readers a peaceful Christmas and extend best wishes for 2025, and to also thank all of our clients for their support during 2024

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

REPORT ON

Factual Causation Difficulties - The Route to Discontinuance

GG v Bridgend County Borough Council

The first hurdle that any Claimant in a civil claim must overcome is that of factual causation. The burden is, of course, upon the Claimant to prove that the accident occurred as alleged. When the circumstances of an alleged accident are somewhat confusing from the Claimant's own pleaded case, this presents an ideal foundation upon which the Defendant can potentially raise doubt about the circumstances of the Claimant's alleged accident and, hopefully, lead to the Claimant's claim being dismissed or discontinued when the Claimant's solicitors, and most notably Counsel for the Claimant, are presented with concise arguments and evidence that make progression of the claim extremely difficult.

Such arguments and evidence were adduced on behalf of the Defendant Local Authority in the recent case of *GG v Bridgend County Borough Council*, in which Dolmans represented the Defendant Local Authority.

Background and Allegations

The circumstances of the Claimant's case as pleaded were somewhat difficult to comprehend. The Claimant alleged in his Particulars of Claim that he stepped upon an area of missing tarmacadam surrounding a dropped gully/drain cover which collapsed, causing him to suffer personal injuries. It was not clear from the pleaded case as to whether the Claimant was alleging that the area of missing tarmacadam had caused his fall or the collapsed gully/drain cover.

The Claimant alleged that the said accident was caused by the negligence and/or breach of statutory duty (Highways Act 1980) of the Defendant Local Authority, its employees and/or agents. Nuisance was also pleaded.

Part 18 Request for Further Information

The Claimant had stated in his initial Claim Notification Form that he had tripped in a pothole, and further doubt was placed upon the circumstances of the Claimant's alleged accident given that there was a designated crossing point just 1 metre away from the location of his alleged accident. It was important, therefore, to ascertain whether the Claimant was stepping from the kerb/footway to cross the carriageway.

The Claimant was served with a Part 18 Request for Further Information and in his Response to the same provided a sketch plan showing his route of travel, whilst confirming that he was, indeed, stepping from the kerb/footway into the carriageway when the gully/drain cover collapsed causing his leg to enter the drain.

According to the Defendant Local Authority's witnesses, the Claimant's sketch plan indicated that he would have been more likely to have used the designated crossing point rather than attempt to cross the carriageway where alleged. Indeed, it was difficult to understand why the Claimant would have chosen to cross the carriageway as alleged from the direction of travel referred to in his Response to the Defendant Local Authority's Part 18 Request.

Factual Causation - Inconsistencies

The Claimant's copy medical records contained various inconsistencies as to the circumstances of his alleged accident. There were references in the Claimant's copy medical records to his having slipped and/or tripped due to a pothole. In addition, there were inconsistencies as to the location of the Claimant's alleged accident. References were made to the Claimant's alleged accident having occurred at home and that he slipped in a pothole in the backyard. However, the alleged defect was situated close to the rear of the Claimant's home.

An appropriate Civil Evidence Act Notice, referring to all of the inconsistencies within the Claimant's copy medical records, was served at the same time as the Defendant Local Authority's witness evidence.

Photographic Evidence

The Claimant's own undated photographs of the location of his alleged accident showed the gully/drain cover in place, with no visible evidence of the same having been displaced.

Indeed, the Highways Inspector who inspected the relevant location following receipt of the Claimant's Claim Notification Form confirmed that it appeared from his inspection that the gully/drain cover had not been moved for some time. There was still dirt surrounding the edge of the gully/drain cover and the said gully/drain cover was sitting in its frame, as was also evident from the Claimant's own photographs.

Evidence was provided by the Defendant Local Authority's witnesses that the gully/drain cover was heavy and if the same had fallen into the drain/chamber below as alleged, then it would have been difficult to lift this from the drain and place back in its frame. There was no evidence that the Defendant Local Authority had been requested to place the gully/drain cover back in its frame, which would have been expected had the gully/drain cover collapsed, as alleged.

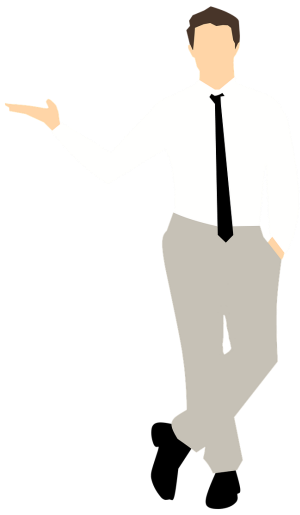
Measurements/Dangerousness

The accuracy of the measurements shown in the Claimant's said photographs were also disputed. No spirit level had been used and the measurements were shown from various angles. The edges of the straight edge utilised could not be seen and the said measurements did not factor in the dip in the carriageway to allow water to flow into the gully/drain. Indeed, it was not clear from the Claimant's photographs as to what exactly he was attempting to measure.

The Highways Inspector who attended the relevant location post-accident did not consider the said location to be dangerous, particularly as there was a designated crossing point just 1 metre away from the said location. It was argued, therefore, that it would be unusual for pedestrians to cross the carriageway at the location of the Claimant's alleged accident. The Highways Inspector did, however, request temporary repairs, although he made it clear in his witness evidence that this was merely as a matter of prudence in light of the Claimant's alleged accident. It does not follow, of course, that a location is dangerous merely because repairs are requested.

Discontinuance

Faced with the above arguments, the Claimant was unable to get funding for Counsel. It was apparent, therefore, that Counsel for the Claimant had considered all of the above arguments and was not prepared to represent the Claimant.



The Claimant offered a 'drop hands discontinuance', whereby he would discontinue his claim on the basis that each party bore their own costs.

As this was a QOCS matter and in light of the various inconsistencies, it was important, however, to ascertain the possibility of a finding of fundamental dishonesty on the Claimant's part when considering the Claimant's said offer as any such finding would dispel the usual QOCS costs order. Although finely balanced, the Local Authority was advised it was considered unlikely that a Judge would be prepared to make such a finding in this particular matter and that notification of an intention to raise fundamental dishonesty would focus the Claimant's mind upon rebutting any such arguments.

The Claimant's solicitors were advised, therefore, that no costs would be sought against the Claimant if he discontinued immediately and a Notice of Discontinuance quickly followed, resulting in substantial savings for the Defendant Local Authority by way of potential damages and costs.

Section 58 Defence

It should be noted that notwithstanding the above arguments regarding factual causation, the Defendant Local Authority averred that it had an appropriate Section 58 Defence.

The carriageway at the location of the Claimant's alleged accident was subject to regular inspections on a 6 monthly basis, as well as on a reactive basis. The said location had undergone such a scheduled inspection just 20 days prior to the date of the Claimant's alleged accident, when no defects were noted at the said location. Indeed, the relevant Highways Inspector for the area confirmed that there had been no previous issues with the gully/drain cover. The said Highways Inspector's records did show that he had picked up a defect for repair at a different location, indicating that he was vigilant during his inspections.

REPORT ON

There were no previous complaints and/or other accidents reported at the location of the Claimant's alleged accident during the 12 month period prior to the date of the same.

However, it seems that the factual causation arguments were at the forefront of the Claimant's mind and that of his Counsel when deciding to discontinue his matter.

Comment

A great deal of work, including an appropriate Part 18 Request for Further Information, detailed witness evidence, Civil Evidence Act Notice, not forgetting forensic exploration of the Claimant's pleadings, medical evidence and medical records, led to the Claimant effectively being backed into a corner with no apparent choice but to discontinue in the above matter.

Indeed, the Claimant's situation was untenable, a position that even Counsel for the Claimant appears to have recognised by refusing to represent the Claimant and, thereby, leading to discontinuance, with resultant savings for the Defendant Local Authority.

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
SOLICITORS

FOCUS ON

The Lord Chancellor Announces the New Personal Injury Discount Rate (PIDR) Applicable from 11 January 2025

Readers of the Dolmans' Insurance Bulletin will be aware from previous articles (particularly that in the October 2024 edition) that an announcement in relation to the PIDR was imminent, following the commencement of the consultation process in relation to the same earlier in the year. As part of that consultation process, a significant number of interested parties made submissions regarding the new PIDR, against the background of the then existing PIDR of -0.25% which had been in place since August 2019. Further, as part of the overall consultation process, the Lord Chancellor's Department received (for the first time) specialist advice in the form of a panel of experts formed on 21 July 2023.

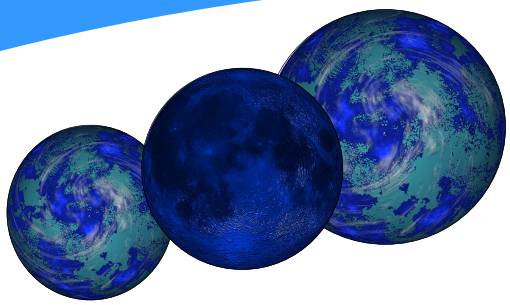
On 25 September 2024, the expert panel advising the Lord Chancellor provided its advice in the form of a 166 page report and, based upon that advice, on 2 December 2024, **the Lord Chancellor (Shabana Mahmood MP) has announced that the new PIDR for England and Wales is fixed at +0.5%.**

Shortly after, The Damages (Personal Injury) (England and Wales) Order 2024 (SI Number 2024 No. 1261) was published (albeit dated 28 November 2024). This Statutory Instrument is the means by which the new PIDR will be implemented from 11 January 2025.

This is the first time that a positive PIDR has been implemented in England and Wales for several years. Inevitably, in that context, it represents (limited) good news for Insurers and Defendants, as, generally, it will produce somewhat decreased multipliers – particularly in relation to cases where significant periods of future loss are applicable. Inevitably, any PIDR is a compromise and, like what has been said of all good compromises, engages a degree of disappointment on all parties involved.

As the advice of the expert panel put it, *"No single PIDR will be exactly right for all claimants …"*

FOCUS ON



Accordingly, the approach which was taken by the expert panel was to define three core claimant types "designed to reflect a range of key characteristics of "the claimant universe" by size and term of damages, by investment strategy and by other taxable income." The result of this approach is set out in the table below:

	Core claimant type		
	20-year	40-year	60-year
Investment term	20 years	40 years	60 years
Investment strategy	Cautious	Central	Less cautious
Lump sum size	£500k	£1m	£5m
Other taxable income p.a.	£30k	£7k	£7k

The expert panel then made several assumptions about the factors that influence claimant outcomes (such as tax, expenses and damage inflation) which, according to the panel, would be consistent with the core claimant types. These core assumptions, along with simulated investment returns produced by two different economic models, have then been used to produce the median net real returns for each of the above claimant types.

These are set out in the below table:

Core claimant type	Median net real return p.a.
20-year	0.7%
40-year	1.4%
60-year	1.0%

The expert panel report then stated:

"For a particular core claimant type, if the PIDR was set to the median net real return (and all other assumptions were borne out in practice), they would have a 50% likelihood of receiving at least sufficient compensation, and a 50% likelihood of under-compensation.

It is not possible to set the PIDR at a single level that has a relatively high likelihood of achieving sufficient compensation without there also being a chance of over-compensation. Nor is it possible to achieve the same likelihood of sufficient compensation across all claimant types."

FOCUS ON

However, the underlying aim of the panel was (unsurprisingly) to minimise the risk of under-compensation across the relevant claimant types. Interestingly, “under-compensation” within the expert panel report is defined as at or less than 90% of compensation which would have been arrived upon using the median return rate.

Accordingly, the expert panel recommended a range of PIDR of between +0.5% and +1.5%. Within that range, therefore, the Lord Chancellor has taken what might be considered a cautious approach in adopting the lowest recommended PIDR at +0.5%.

Within the expert panel report, the range of possible PIDRs from +1.5% to +0.5% are considered in detail, by reference to the underlying desire to err on the side of caution and ensure, overall, a greater likelihood of over rather than under-compensation. This part of the report (pages 7 to 9) makes for very interesting reading. It is worth, in that context, considering both extremes of the spectrum, if only because it might aid understanding of the ultimate decision taken regarding the PIDR.

In terms of a PIDR of +1.5%, albeit this was within the range of recommendations put forward by the expert panel, the following points were made within the report in support of the view that a PIDR of +1.5% does not satisfy the principles against which the panel assessed the options:

- None of the core claimant types have a 50% likelihood or more of achieving at least sufficient compensation.
- For all core claimant types, at this level of PIDR, there is also a “relatively high likelihood” (35% to 50%) of significant under-compensation.

Regarding a PIDR of +0.5%, the expert panel report made the following points:

- Such a PIDR engaged at least a 50% likelihood that all core claimant types received compensation that proves at least sufficient to meet their needs. Specifically, around 75% likelihood for the 40-year claimant, 65% likelihood for the 60-year claimant and 55% likelihood for the 20-year claimant.
- The 40 and 20-year claimants with around 15% likelihood that they are significantly under-compensated. This likelihood increases to around 25% for the 60-year claimant (but in no instance does it cross the 50% likelihood threshold – i.e. at no point is it more likely than not or equally likely that under-compensation would occur – cf. with the position discussed above relating to a PIDR of +1.5%).
- The 40 and 60-year claimants with a likelihood of significant over-compensation of between 40% and 45%. This likelihood is around 5% for the 20-year claimant.
- Only the 20-year claimant with a higher likelihood of being significantly under-compensated compared to significantly over-compensated, but with the difference between the likelihoods being smaller than under a PIDR of 0.75%.

Again, against this background, it is perhaps not surprising that the Lord Chancellor, a Labour Lord Chancellor, has opted for the "least-worst" option of a +0.5% PIDR. It is, nevertheless, interesting that a PIDR of +0.75% was not adopted given that the advice of the expert panel report was that this level of PIDR satisfied the majority of the principles of analysis, and, therefore, the justification for the lower +0.5% figure is because it has lower likelihoods of significant under-compensation (but note the risk of over-compensation within the 40 and 60-year claimant core groups). However, and again, this is the first positive PIDR in England and Wales for a considerable period.

Commentary

We now have certainty regarding the PIDR in England and Wales after a period of uncertainty and, therefore, speculation. Certainty – whether it is positive or negative – is what Insurers desire when it comes to the setting of premiums and management of books of claims.

Moreover, we have (a) a single PIDR (see comments below as to multiple rates for differing types of claimants) and (b) a consistent PIDR across all 3 "home" legal jurisdictions. Having analysed the advice of the expert panel, a cynic might suggest that the greatest influence on the Lord Chancellor in terms of sticking with a +0.5% rate is the fact that this would achieve consistency across England and Wales, Scotland and Northern Ireland.

It is of interest to note that the concept of multiple PIDRs for different types of claimant or claims (which is the position in other jurisdictions and which were examined as part of this consultation process) has been rejected entirely. Undoubtedly, a single PIDR makes administration of the system a whole lot easier for all concerned – but there remains an argument for differing discount rates applicable to different types of cases/heads of loss and, arguably, that approach "smooths" the underlying difficulties discussed above with regard to any "one size fits all" approach via a single PIDR. A single PIDR, undoubtedly, commends itself on grounds of user-friendliness, but that inevitably reduces precision and applicability across the full range of cases. Regardless, this approach has been rejected – at least until the PIDR falls to be considered once again.

The expert panel made the following comments as to dual or multiple PIDR rates:

"We do not recommend a dual rate either by term or heads of loss, primarily because the potential benefits to claimants do not currently justify the additional complexity and expense it would introduce to the claim process.

Evidence across all stakeholder groups (including those acting in the interests of claimant) also indicated a preference for retention of a single rate, compared to a dual rate by either term or heads of loss. This is largely because the expected negative impact on the claims process, as well as transition costs."

Generally, a positive PIDR assists defendants in reducing multipliers and, therefore, reducing reserves, as compared to negative PIDRs which we have been contending with for several years. Clearly, the imposition of this change requires that reserves and, where appropriate, monetary settlement offers are revisited. Where offers have been made consistent with the former PIDR, careful analysis will be required as to the same, particularly those offers which may have been made some time ago and, therefore, are underpinning potentially significant tranches of costs. A costs v benefits analysis will likely be required in such cases.

Certainly, however one regards the outcome (from either side of the claims divide between claimants and defendants) it at least brings the ability to move forward and it is possible that numbers of cases which were paused in terms of resolution – either by reference to offers or Joint Settlement Meetings or the like – can now move forward to resolution based on the certainty which is available via the formal imposition of the new PIDR. As touched upon already, the insurance market normally favours certainty over uncertainty, even if certainty could be regarded as a negative result. In this instance, one cannot see the change in the PIDR as bad news for defendants, quite the reverse.

It would be wrong to conclude this article without mentioning possible impact on Periodical Payments Order cases (PPO cases). For many years, when relevant developments have taken place in the catastrophic claims market, they have often triggered speculation as to whether there would be an impact – resultant from the development in question – upon PPO cases. Inevitably, this change to the PIDR and the potential perception that returns for (some) claimants are reduced may generate further interest in PPOs once again. There is certainly the potential for that. Equally, PPOs in general, it would be fair to say, have not gained the interest or fulfilled the promise which was held out for them. Thus, it would be unwise to assume any particular impact on PPO cases from this development. But, at the least, it is anticipated that PPOs may be seen as a means to reduce the impact (on certain claimants) of a positive PIDR.

Peter Bennett
Partner
Dolmans Solicitors

For further information regarding this article, please contact:

Peter Bennett at **peterb@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

CASE UPDATES

Anonymity and Reporting Restriction Orders

PMC (a child) v A Local Health Board
[2024] EWHC 2969 (KB)

In clinical negligence proceedings, the Court was required to consider an Application for the Claimant ('C') (and his Litigation Friend) to be anonymised. After detailed consideration of the law in relation to making such orders, the Application was refused. The Judge raised issues with the wording of the standard form, PF10, used for making such orders and the Court of Appeal's decision in *JX MX v Dartford & Gravesham NHS Trust [2015].*

C claimed that clinical negligence around the time of his birth led to him developing cerebral palsy. Liability was admitted pre-action and substantial interim payments made. A Claim Form was issued in March 2023 seeking damages in excess of £10m. Particulars of Claim, containing extensive details of C's disability and the issues he confronts, were served in July 2023. In November 2023, by consent, Judgment was entered and the Court retrospectively approved the interim payments made pre-action, together with a further interim payment. In January 2024, the claim was transferred, by consent, to a District Registry, where directions were given for a quantum only trial in 2025. There had been no hearings prior to the anonymity Application, which was made in November 2024, as all previous Orders were made by consent.

C's Application sought an order in the standard format using PF10. An anonymity order to protect C's Article 8 right to private and family life was sought. The Application explained that it had been prompted by a journalist contacting C's solicitor in October 2024 saying that he had a copy of the Particulars of Claim and wanted to publish an article about the case. The solicitor had discussed this with C's mother (and Litigation Friend) who did not want to engage with the media, hence the Application.

The Application identified that C's mother had previously engaged with the same journalist and there were two articles online about C's injuries, his difficulties and how well he was doing, but they did not discuss the litigation.

An immediate interim anonymity order, without notice to the journalist, was sought. The Application relied upon the Court of Appeal's decision in *JX MX v Dartford & Gravesham NHS Trust [2015]*. The Judge refused to make an interim order as the journalist had not been notified of the Application.

Prior to the hearing of the Application, the Judge carried out a search on Westlaw which showed that information regarding C's surname, the Litigation Friend's full name, brief details of Orders made and dates of filing of Statements of Case were available to subscribers as a result of information that was also publicly available on the Court's electronic filing system.

CASE UPDATES

Further evidence filed for the purpose of the Application hearing identified additional media coverage in relation to medical negligence, which included details of C's case. C's solicitor had given an interview to the BBC referring generally to compensation payments in such cases. There was media coverage related to failings in the Defendant's maternity service and C's case was mentioned in an article on an independent review. The Judge noted that C featured prominently in all the media publications and was likely to be readily identifiable, particularly in the local area, as a very high profile victim of medical negligence.

The journalists involved in the media coverage did not oppose an order that protected the identity of C and his family, but requested that any order did not prevent reporting the name of the hospital, future phases of the litigation or any settlement due to the public interest.

The Judge noted that the starting point is open justice. Any order which withholds the name of a party in Court proceedings (or otherwise restricts the publication of what would normally be reportable details of a case) is a derogation from that principle and an interference with the Article 10 rights of the public at large. Any derogation from, or restriction on, open justice is exceptional and must be based on necessity. When deciding whether the Applicant has satisfied the burden of demonstrating that the relevant derogation from open justice is necessary, the Court must carefully scrutinise the evidence and ascertain the facts.

Derogations from open justice, including orders for anonymity (and corresponding reporting restrictions), can be justified as necessary on two principal grounds: maintenance of the administration of justice and harm to other legitimate interests. In the first category are cases such as claims for breach of confidence where, unless some derogation is made from the principles of open justice, the Court would, by its process, effectively destroy that which the claimant was seeking to protect. The second category, comprises cases where, if the derogation from open justice is not granted, the Court process will represent an interference with a Convention right that, for any qualified right, cannot be justified as necessary.

When assessing Convention rights, whilst the Court is carrying out a 'balance' between them, the Court must start from the position of the very substantial weight that must be accorded to open justice.

When approaching the jurisdiction and legal principles governing 'anonymity orders', it was important to appreciate that they have two distinct parts. Firstly, an order that withholds the name of the relevant party, witness or other person in the proceedings, and permits and directs that the withheld name is to be replaced with another name or cipher that will protect the identity of the relevant person ('a withholding order'). Secondly, an order that prohibits publication of the withheld information or any other information that would be likely to identify the person the Court has directed should be anonymised ('a reporting restriction order').

CASE UPDATES

Withholding orders are part of the general powers of the Court to regulate proceedings. If a withholding order is made, this will usually prevent the withheld name being 'discovered' as a result of the proceedings. However, such an order, on its own, will not prevent the relevant person being publicly identified if their identity is known or can be discovered. For that reason, it is unusual for the Court to make a withholding order without also imposing a reporting restriction. If the Court intends to prohibit publication of the name (or other identifying material) which is subject to the withholding order, then, providing it has jurisdiction to do so, it must also impose a separate reporting restriction order.

The Judge concluded that there is no inherent common law power to grant reporting restrictions orders. Before making such an order, the Court must identify the statutory basis upon which it is to be made. However, even if a statutory basis to make a reporting restriction is found, applications for such an order may be refused on the ground that having regard to the way that proceedings have been conducted, in open court, with no restriction on access to the parties' names, or because of other material lawfully available in the public domain, it is simply 'too late' to seek anonymity. If a party to litigation has not taken steps to seek a withholding order and corresponding reporting restrictions at the outset of the proceedings, they are likely to find that it is simply too late to do so once the name has become embedded in the public domain as a result of the natural (and entirely predictable) incidence of reporting of Court proceedings.

The Judge considered that applicants for anonymity orders have a duty to ensure that the Court is fully appraised of the extent to which material sought to be protected has been published and is available in the public domain. The Court must consider whether the effect of the order, if granted, would be either to require third parties to remove publications from online platforms or represent a significant restriction on future reporting. A reporting restriction order is supposed to be prospective, not retrospective. A retrospective order would have very serious Article 10 implications. Even if the Court takes care to prevent an order having retrospective effect, in some cases the pre-existing publicity will make it difficult to publish further reports, even on an anonymised basis, without breaching the order due to the risk of jigsaw identification. This must be fully considered in any balancing process before any reporting restriction is granted.

In considering the Court of Appeal's decision in *JX MX*, the Judge noted that this has been the main authority upon which reliance is placed to support the making of applications for anonymity orders in cases where the Court is asked to approve a settlement of a civil claim but the Court of Appeal did not directly address and resolve (as it was not an issue on the appeal) the jurisdiction to make the order sought, in particular the jurisdiction to make any reporting restriction order. The decision appeared to have proceeded on an assumption that there was jurisdiction without identifying it. Further, *JX MX* did not assist with how the Court should resolve the issue of pre-existing publicity, which was central to the decision in C's case.

CASE UPDATES

The Judge was satisfied that in this case, because C is a child, there was jurisdiction to make a reporting restriction order under section 39 Children & Young Person Act 1933. However, the Court was required to consider the issues of necessity and proportionality before making an order.

Factors in favour of granting anonymity were that C is a child, the remaining phases of the litigation were likely to involve consideration of intensely private and medical information and C is vulnerable because of his age and disabilities. Factors against were the significant weight to be attached to open justice. The pre-existing media coverage, and the fact that earlier phases of the litigation had been conducted without anonymity, meant that there now existed, in the public domain, readily available online material that would undermine (and might render ineffective) any anonymity order.

The Judge considered the fact that the journalists did not oppose the grant of anonymity was a neutral factor. The media organisations had likely failed to appreciate the full implications of the order sought on their ability to report in terms of the risk of jigsaw identification.

The Judge concluded the factors relied upon by C were very weak. They did not provide clear and cogent evidence that demonstrated it was necessary to displace the usual principles of open justice. On the contrary, the amount of material about C and the claim available in the public domain, most of it placed there voluntarily as a result of interviews by C's side or as a result of conduct of proceedings without any anonymity order having been granted, made any effort to anonymise C at this stage both unjustifiable and futile. It was very clear that, if granted, the order would represent a significant interference with the media and the public's rights under Article 10.

Accordingly, the Judge refused to grant the anonymity order sought or any order imposing reporting restrictions on identifying C in these proceedings.

The Judge went on to identify problems with the use of the standard form PF10 and the need for parties to understand what orders were being sought, the basis for them and the jurisdiction to make them. The Judge considered there are few, if any, cases in which the court can simply be asked to make an order in the terms of PF10 and careful consideration of each of the paragraphs of the order is required.

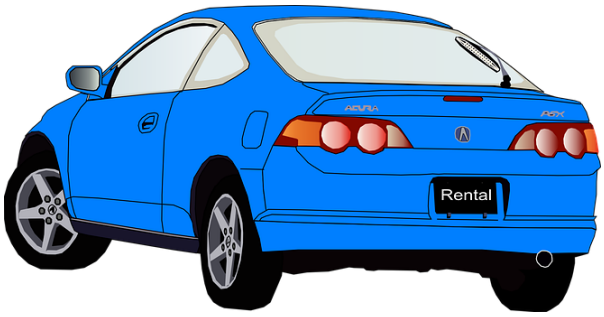
C has been granted permission to appeal.

CASE UPDATES

Hire Charges - MOT Certificate - Ex Turpi Causa - Causation

Ali v HSF Logistics Polska Sp. Z O.O
[2024] EWCA Civ 1479

The Defendant's ('D') lorry negligently drove into the Claimant's ('C') parked car, causing damage which rendered it undriveable. While the car was being repaired, C hired a replacement vehicle on credit hire. Total hire charges were £21,588.72.



Whilst there was no evidence that C's car had been unroadworthy prior to the accident, the last MOT certificate for the car had expired 4½ months before. The Trial Judge found that C had been 'careless' in this respect and there was no evidence that he had intended to obtain a new MOT certificate.

D disputed the claim for recovery of hire charges and averred, inter alia, that as the car did not have a valid MOT during the period of hire, the claim for hire charges was ex turpi causa. A separate 'causation defence' was pursued asserting that because there was no valid MOT, C had suffered no compensable loss. That is, in the absence of a valid MOT, it was not possible at the time of the accident for C to lawfully drive the car on the road. Therefore, it was not a reasonable act of mitigation of his loss to hire a replacement vehicle. C had no loss of use claim because he did not have a vehicle which he could lawfully use on the road and he was not entitled to be put in the position of having a car which he could legally use on the road whilst his car was being repaired.

The Trial Judge found that C had been using the car regularly for work and domestic purposes and, subject to the defences raised, it was reasonable for C to hire a replacement vehicle. The Trial Judge held that the doctrine of ex turpi causa did not preclude recovery of the hire charges, but accepted the causation defence. This decision was upheld on C's first appeal. C appealed to the Court of Appeal.

The Court of Appeal concluded that there was a fatal flaw at the heart of D's submissions on the causation defence, comprising the assertion that C had suffered no loss as a result of D's tort. This error stemmed from a failure to appreciate the nature of a claim for 'loss of use'. Relevant case law explains that the loss being compensated is inconvenience; the lack of advantage and inconvenience caused by not having the use of a car ready at hand and at all hours for personal and/or family use. The fact that a claimant does not have a valid MOT certificate for the car does not alter the fact that they have been deprived of its use or the fact that this deprivation would have caused inconvenience but for the hiring.

The absence of a valid MOT meant that when satisfying his need for convenient transport, C had been committing an offence and exposing himself to the risk of prosecution. The Trial Judge's finding that the hire charges claim was not barred by the principle of ex turpi causa was clearly right. The criminal offence of failing to obtain an MOT certificate is a relatively minor offence. It would be disproportionate to refuse the claim on the grounds of ex turpi causa.

The Court considered that D's causation defence was ex turpi causa by another name and without the essential requirement of proportionality. The argument underlying D's causation defence was not that C had suffered no loss of use, but that damages ought not to be recovered for loss of use where the use of the original vehicle would have had adverse legal consequences for C as a matter of criminal law. The causation defence was not a proportionate response to this.

Accordingly, C's appeal was allowed

As it was not raised in this case, the Court left open the issue of whether there may be relevant arguments to be had in other cases in relation to the issue of reduction of damages to reflect the chance of criminal prosecution and/or fine and disqualification.

Late Amendment of Pleadings - Substitution of Parties - Strike Out

Powszechny Zaklad Ubezpieczen v Alton [2024] EWCA Civ 1435

The Claimant was injured in a collision with a lorry with a Polish number plate. The Claimant's solicitors wrote to InterEurope AG European Law advancing the claim and asking for details of the Insurer. Liability was admitted, but the identity of the Insurer was not provided. Proceedings were issued in the County Court with InterEurope named as the Defendant. The claim was, therefore, issued against the wrong party.

A Defence was filed which denied liability on the basis that InterEurope was not the Insurer of the vehicle (but their Claims Handler).

The Claimant sought, and was granted, permission to amend the Particulars of Claim to substitute the Polish Insurer as the Defendant. However, that amendment did not correctly identify the relevant provision/cause of action against the Insurer.

The Defendant sought to strike out the claim and a District Judge allowed the Application.

CASE UPDATES

The Claimant sought permission to appeal and to (further) amend the Particulars to plead the correct cause of action against the Insurer. The Claimant's appeal was successful in setting aside the striking out. It was held that the decision to strike out the claim was a disproportionate response and outside the Judge's reasonable discretion.

The Defendant appealed to the Court of Appeal.

The Court of Appeal held that the Judge should have considered whether a defect in the pleading could have been remedied and imposed an unless order providing for strike out unless a timely application to amend was made. The Judge did not advert to, or take account of, the balance of prejudice to the Claimant of being deprived of her claim if it were struck out and the prejudice to the Defendant in having to meet it if it were not struck out. These were not the only factors to be taken into account, but they were the important ones.

The balance of prejudice had militated strongly in favour of dismissing the strikeout Application. If struck out, the Claimant would lose a claim for which liability was unlikely to be an issue, to put it at its lowest, and the quantum of which was to a large extent simply not admitted rather than denied. By contrast, the Defendant would suffer no prejudice by reason of the defective pleading cured by amendment and would have the opportunity to revisit such amendment on limitation grounds when the Application to amend was heard. Any costs prejudice could be addressed by a costs order.

The Judge was clearly entitled to reach the conclusion that the claim should not be struck out. His reasoning disclosed no error of principle and was not outside the generous ambit of his discretion. Accordingly, the Defendant's appeal was dismissed.

Late Service of Particulars of Claim - Relief from Sanctions - Merits of the Claim

Bangs v FM Conway Limited
[2024] EWCA Civ 1461

In this case which highlights the critical importance of procedural compliance in litigation, the Claimant issued proceedings against two Defendants. Proceedings were issued and served. However, no Particulars of Claim were served within the required 14 days. The Defendant successfully applied to strike out the claim. The Claimant applied to set aside the Order striking out.

At first instance, the Claimant's Application was successful. In taking into account "all the circumstances of the case", the Judge found that the Defendant had made an admission (although this was later withdrawn) and the merits of the case merited relief from sanctions being granted.

CASE UPDATES

On appeal to the Court of Appeal, the primary issue was whether the High Court was correct in granting relief from sanctions for the late service of the Particulars of Claim. The Court of Appeal examined the application of the Denton principles, focusing on the severity of the breach, the reasons for it and all the circumstances of the case. However, the appeal also scrutinised the High Court's consideration of the merits of the underlying claim without proper notice to the Appellant.

The Court of Appeal overturned the decision granting relief from sanctions.

The position regarding the relevance of the merits of the underlying claim could be summarised as follows:

(1) Although the Court will want to know what the case is about, the general rule is that the merits of the underlying claim are irrelevant when the Court has to make a case management decision (including whether to grant relief from sanction).

(2) There is an exception to this general rule if a party wishes to contend that its case is so strong that it would be able to obtain summary judgment in its favour.

(3) Even when a party does not wish to contend that it would be able to obtain summary judgment, the merits of the underlying claim should only be taken into account when this can be readily demonstrated, without detailed investigation.

(4) Because a party responding to a procedural application will not generally be required or expected to deploy its case on the merits of the underlying claim, a party who wishes to contend that the merits of its case satisfy the summary judgment test must give clear notice of that contention sufficiently in advance of the hearing to enable the other party to decide what evidence on the merits it wishes to deploy.

(5) Even when such notice is given, the other party will not be expected to deploy evidence to the full extent that it would do at trial.

In the present case, the Claimant's solicitors did not give any notice in advance of the hearing that it would be contended that the merits of the claim were so strong that it was suitable for summary judgment. The Judge's consideration of the merits of the underlying claim caused an injustice to the Defendant. As the Judge's view that the Claimant had a very strong case on liability was decisive in his decision to grant relief from sanction, the appeal had to be allowed.

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

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

TRAINING OPPORTUNITIES

At Dolmans, we want to ensure that you are kept informed and up-to-date about any changes and developments in the law.

To assist you in this, we can offer a whole range of training seminars which are aimed at Local Authorities, their Brokers, Claims Handlers and Insurers.

All seminars will be tailored to make sure that they cover the points relevant to your needs.

Seminars we can offer include:

- Apportionment in HAVS cases
- Bullying, harassment, intimidation and victimisation in the workplace – personal injury claims
- Conditional Fee Agreements and costs issues
- 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
- Flooding and drainage – duties and powers of landowners and Local Authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage
- Flooding and drainage – duties and powers of Highway Authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the Highway Authority in respect of highway waters
- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
- The Jackson Reforms (to include : costs budgeting; disclosure of funding arrangements; disclosure of medical records; non party costs orders; part 36/Calderbank offers; qualified one way costs shifting (QWOCS); strikeout/fundamental dishonesty/fraud; 10% increase in General Damages)
- Liability of Local Education Authority for accidents involving children
- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

If you would like any further information in relation to any of our training seminars, or wish to have an informal chat regarding any of the above, please contact our Training Partner:

Melanie Standley at **melanies@dolmans.co.uk**