DOLMANS INSURANCE BULLETIN

Welcome to the October 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

Care Homes, Rugs and Risk Assessments

LV v Bridgend County Borough Council

The importance of risk assessments in care homes can never be underestimated, particularly as elderly residents often present with various mobility and other issues. However, it is equally important to ensure that tasks with which care workers are involved are also adequately risk assessed and, sometimes, there may, of course, be shared risks as between residents and care workers.

In the recent case of *LV v Bridgend County Borough Council*, in which Dolmans represented the Defendant Local Authority, the Trial Judge took account of all risk assessments before dismissing the Claimant's claim.

Background/Allegations

The Claimant was employed by the Defendant Local Authority as a care worker at the Defendant Local Authority's care home. The Claimant alleged that she caught her foot on a rug in a resident's room whilst serving food, causing her to fall and sustain personal injuries.

The Claimant alleged that the Defendant Local Authority was negligent and/or in breach of the Occupiers' Liability Act 1957.

The Claimant also attempted to rely upon various Workplace Regulations.

Enterprise and Regulatory Reform Act 2013

Pursuant to the Enterprise and Regulatory Reform Act 2013, the Defendant Local Authority argued that the Claimant could not bring a claim for breach of the Regulations cited in the Particulars of Claim and it was denied that any breach of the said Regulations, which was denied, was evidence of negligence itself. It was also denied that any alleged breaches of the various Regulations were evidence of the common law duty of care and/or gave rise to an actionable claim in damages. The legal and evidential burden was on the Claimant to prove negligence.

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Reasonable System, Training and Risk Assessments

It was averred on behalf of the Defendant Local Authority that the Claimant's workplace was safe and that the Defendant Local Authority had an adequate and reasonable system in place to ensure the safety of its employees.

The Claimant was provided with, and completed, various training courses prior to the date of her alleged accident. From these training courses, the Claimant was aware of the need to report any issues.

There were appropriate risk assessments in place, to include a risk assessment relating specifically to any tripping risks for the particular resident. These risk assessments were updated regularly; the risks to the resident ranking as 'medium'.

It was argued that the Claimant should have assessed any potential risks by way of dynamic risk assessment.

A general risk assessment relating to residential care workers was also in place and all risks therein were assessed as low risks. This was also updated regularly and, from this particular risk assessment, it was incumbent upon all staff to undertake visual checks of residents' rooms. The Claimant was aware of this.

Specific Risk Assessment

The rug in question was provided by the family of the resident over three years prior to the date of the Claimant's alleged accident and, as such, no admissions were made as to the status of the said rug that was not supplied by the Defendant Local Authority.

The resident's room had a vinyl floor covering and the Defendant Local Authority did not encourage residents to have rugs. However, residents were entitled to make their own decisions. If a resident wanted a rug and understood the risks, then the Defendant Local Authority argued that it was not in a position to deny the resident's wish.

The resident in this particular matter was adamant that they wanted to keep the rug. Notwithstanding, therefore, that it had not supplied the said rug, the Defendant Local Authority undertook a specific risk assessment of the rug when provided by the family and prior to the same being placed in the resident's room.

Following such risk assessment, all staff, and therefore the Claimant, were advised to monitor the resident's mobility, continually review the risk assessment and monitor the condition of the rug to ensure that the same was in good condition.

Again, it was argued that the Claimant should, therefore, have assessed any potential risks at the time of her alleged accident by way of dynamic risk assessment.

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Reactive System

In addition to the above, the Defendant Local Authority also had a reactive system in place. The Defendant Local Authority had no record of any complaints and/or other accident in relation to the alleged rug during the twelve month period prior to the date of the Claimant's alleged accident.

Indeed, the Claimant had attended upon the resident on a regular basis prior to the date of her alleged accident without incident and had never raised any complaint regarding the said rug.

The elderly resident had also managed to negotiate the room on a daily basis with a Zimmer frame for over three years since the rug was installed without any incident whatsoever.

The rug was subsequently removed, merely as a matter of prudence in light of the Claimant's alleged accident, and not due to any safety concerns. It was argued that it did not follow that the rug was dangerous because it had been subsequently removed. The resident had lived safely with the said rug for over three years prior to the date of the Claimant's alleged accident.

Indeed, the rug in question was checked following the Claimant's alleged accident and was found to be in good condition with no damage. It was reiterated that the rug was not considered to be dangerous and was only removed as a precautionary measure.

Claimant's Arguments

In response to the Defendant Local Authority's various risk assessments and under cross-examination, the Claimant argued that she considered that nothing is a hazard until it becomes a hazard and agreed that there was nothing inherently wrong with the rug.

The Claimant alleged that cleaners at the care home had previously complained about the rug. However, no evidence was adduced from any of the said cleaners. Following additional cross-examination, it transpired that the cleaners had apparently merely complained that the rug was difficult to lift when cleaning the room, not that it was in any way hazardous or presented a tripping hazard.

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Judgment

Liability, including factual causation, remained in dispute throughout this matter and the Claimant was put to strict proof as to the circumstances of her alleged accident.

The Trial Judge held that the Claimant was unclear as to the exact mechanics of her alleged accident. He also preferred the Defendant Local Authority's evidence and arguments as to any breach of duty.

The Trial Judge found, on a balance of probabilities, that the rug had been in situ for over three years without any previous incidents, that the cleaners had not previously complained about the safety of the rug and that the Claimant was familiar with the rug having negotiated the same many times previously without incident.

In dismissing the Claimant's claim, the Trial Judge held that the rug was not a hazard, having been in place for over three years and having been regularly risk assessed. The Trial Judge commented that the risk assessment relating to the elderly resident had found there to be only a medium risk and the risk to an able-bodied care worker would, therefore, be even less than this.

Comment

Although the Trial Judge in this matter was not convinced by the exact circumstances of the Claimant's alleged accident, he went on to deal with breach of duty and was particularly assisted by the various risk assessments that the Defendant Local Authority had undertaken and kept updated regularly.

This matter was borderline Multi Track in terms of value; the Claimant having made a relatively late and reduced Part 36 offer in the sum of £20,000 which was rejected. The successful outcome of this particular matter, therefore, resulted in substantial savings in damages and costs for the Defendant Local Authority, as well as justifying the various systems in place.

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FOCUS ON

Personal Injury Discount Rate Review: England and Wales - Update

Readers will recall that the ongoing Personal Injury Discount Rate Review was covered within the January 2024 edition of the Dolmans' Insurance Bulletin. This update is designed to provide a brief overview of the current position and news from other jurisdictions which may be of relevance to the likely announcement to be made regarding the Discount Rate.

Readers will remember that, on 16 January 2024, the Ministry of Justice (via the then Conservative Government) launched a call for evidence regarding the second review of the Discount Rate. That review needed to be commenced by 15 July 2024. On 15 July 2024, the new Labour Lord Chancellor (Shabana Mahmood MP) made a statement to the London Stock Exchange indicating that the review would begin immediately. The existing legislation requires that the review is concluded within 180 days and, therefore, must be completed (giving rise to any new Discount Rate) by no later than 11 January 2025.

Accordingly, personal injury practitioners can look forward to this important development appearing in the immediate post-Christmas and New Year period. Jokes about New Year hangovers are immediately obvious, but perhaps inappropriate.

By way of reminder (if required) the Personal Injury Discount Rate has been –0.25% since August 2019, effectively meaning that multipliers are predicated upon the basis of a lack of returns on future investments and, therefore, enhancing personal injury damages being recovered and/or paying less regard to accelerated receipt. It will be recalled that between 2001 and 2017 the Discount Rate was +2.5%. In 2017 the then Lord Chancellor (Liz Truss – remember her?) amended it from +2.5% to –0.75%.

Submissions to the current review process have been made by appropriate special interest groups, including, predictably, the Association of Personal Injury Lawyers (APIL), the Association of British Insurers (ABI) and the Federation of Insurance Lawyers (FOIL). Inevitably, in that context, views have been polarised along predictable lines. In April 2024, APIL indicated to the Ministry of Justice that, in their view, the discount rate must not be approached as though it were "a hypothetical maths problem" (Law Society Gazette, 16 April 2024). APIL's President (Jonanthan Scarsbrook) stated:

"The Civil Liability Act requires the assumption that damages are invested in a portfolio which is less risky than that of the ordinary investor. The government did not do that when the rate was set in 2019. At that time, even with the lord chancellor's 0.5 per cent adjustment to reduce the projected level of under compensation, a third of claimants were still expected to be unable to meet their total financial losses.

One of the realities is that claimants are usually advised to invest through a discretionary fund manager who can actively manage the portfolio … The actual cost of this must be taken into account, as must the increased tax burden, with personal allowance not moving over time and with capital gains tax and dividend allowances falling back significantly since 2019.

Compensation is not a lottery win and neither is setting the discount rate a hypothetical maths problem. We are talking about unfortunate individuals – and one day any of us could be in that position …"

Meantime, the insurance industry was obviously concerned as to the impact of the Discount Rate on claims in general and on insurance premium inflation in particular, which remains a topic for discussion and debate. At the same time (April 2014), the ABI's response to the call for evidence in relation to the review indicated that it felt *"the rates in the UK should be re-evaluated to better reflect the real returns accumulated by low-risk investors of lump sums and have been working to feed into calls for evidence which will inform a decision this year."*

There was speculation, following the original announcement of the Discount Rate Review, that models from overseas jurisdictions, where multiple or differing Discount Rates are utilised for differing types of losses, might prove to be of attraction to the Ministry of Justice in the UK.

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Before and since the closure of the evidence gathering element of the process, there have been regular meetings of the Ministry of Justice Expert Panel charged with the review process. Minutes of these meetings are available via the Ministry of Justice page on the government website. A cynic might say that the author of these minutes is well versed in their art – the minutes give very little away at all, perhaps anticipating their being scoured for clues by interested personal injury practitioners on both sides of the claimant and defendant divide.

In the meantime, pending 11 January 2025, news from other jurisdictions not too far away from England and Wales has been seized upon by readers as possible indications of what may happen in the larger jurisdiction in the New Year.

On 27 September 2024, the Northern Ireland Executive announced that it had determined that the new Personal Injury Discount Rate in Northern Irish cases would be +0.5%. This is an increase from the previous rate of –1.5% which had been in place since March 2022. The new rate of +0.5% will remain in place until at least the next review in Northern Ireland in July 2029. On the same date (27 September 2024) a +0.5% discount rate was announced for Scotland (a rise from the previous rate, in place since 2019, of –0.75%).

What does this mean for England and Wales?

At the risk of stating the obvious, the decisions regarding Scotland and Northern Ireland have no direct impact on any decision as regards to England and Wales. The disparity of rates hitherto across the three jurisdictions readily illustrate that differing approaches have prevailed for some time.

However, the likelihood of a move to a positive discount rate (which would be consistent with the approach taken in both Scotland and Northern Ireland, one would think, must be increased by these decisions given that similar material is being considered and similar investment conditions prevail in all three jurisdictions. Moreover, albeit the underlying rates in Scotland and Northern Ireland were different, they both now have a positive +0.5% discount rate. Thus, it is tempting to “predict” a similar figure prevailing in England and Wales come 11 January 2025, if not before. A consistent figure across all three jurisdictions would have obvious attraction.

Any move toward a positive Discount Rate favours insurers and defendants in most, but particularly in catastrophic injury, claims as it has the effect of reducing multipliers in cases involving future losses, particularly over lengthy periods of future loss.

The below table, hopefully, provides some illustration of this:

Ogden Table (8th Edition)	Exemplar Claimant Details	Multiplier @ Minus 0.75% Discount Rate	Multiplier @ Minus 0.25% Discount Rate	Multiplier @ Plus 0.5% Discount Rate
Table 1 (Loss for life)	25 year old male	78.31	66.05	52.17
Table 9 (Loss to pension at 65)	25 year old male	45.42	41.00	35.40
Table 9 (Loss to pension at 65)	40 year old male	26.60	24.97	22.78

It is also of interest to note that both Scotland and Northern Ireland have opted to retain a single discount rate, rather than opting for multiple discount rates for differing heads of loss or periods of future loss. As above, these multiple discount rate models are favoured in other (overseas) jurisdictions and have, in the past, been seen as a solution (or one possible solution) to the perceived inherent unfairness in the system. It appears, at least for the moment, that this approach has not gained traction within the UK, and it remains to be seen if this is now repeated in England and Wales.

Inevitably, pending the decision as to the Discount Rate, there will be Part 36 offers predicated on the current Discount Rate and multipliers derived from the same “in play”. On larger cases, clearly, those offers will need to be re-evaluated, by both sides. We will, naturally, keep readers advised of further developments as necessary.

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FOCUS ON

Public Authorities - Duty of Care

Tindall v Chief Constable of Thames Valley Police [2024] UKSC 33

The Supreme Court has dismissed the Claimant's appeal against the striking out of the claim against the police. The police had attended the scene of an accident caused by a patch of black ice on a road. After they left the scene, there was a second accident caused by the same patch of black ice. A claim on behalf of the widow and estate of a driver killed in the second accident was struck out by the Court of Appeal on the grounds that no duty of care was owed. The Court of Appeal's decision was reported on in the January 2022 edition of Dolmans' Insurance Bulletin. In dismissing the Claimant's appeal, the Supreme Court has provided useful further guidance and clarification.

The Supreme Court reiterated that, as a general rule, a person has no common law duty to protect another person from harm or to take care to do so: liability can generally arise only if a person acts in a way which makes another worse off as a result. Recent case law has firmly established that the liability of public authorities in the tort of negligence to pay compensation is governed by the same principles that apply to private individuals. Many public authorities have statutory powers and duties to protect the public from harm. But failure to do so, however blameworthy, does not make the authority liable in the tort of negligence to pay compensation to an injured person unless, applying the same principles, a private individual would have been so liable. That means that to recover such compensation a claimant generally needs to show that the public authority did not just fail to protect the claimant from harm but actually caused harm to the claimant. Drawing this distinction is not always straightforward. This case raised in acute form a question about precisely where the dividing line falls between failing to protect a person from harm and making matters worse.

The Facts

The Claimant, 'C', was killed when a vehicle being driven in the opposite direction went out of control on black ice and collided head on with C's vehicle.

Approximately an hour earlier, there had been another accident caused by the black ice in which K had lost control of his car. K's car rolled over and ended up in a ditch. K, who had previously worked as a road gritter, realised that the cause of his accident was the black ice. K waved to a passing van and other traffic to try to encourage them to stop or slow down to avoid the risk of a further accident. K then called 101 and spoke to the Thames Valley Police civilian call handler. K relayed the facts of the accident, that he was injured and had tried to flag down a van which had slowed but did not stop and that there was ice all over the road. The call handler informed K that police officers were on the way and had been warned about the ice.

Police officers arrived on the scene and placed a 'police slow' sign on the carriageway. K informed them about the ice. The ambulance service arrived and K was taken to hospital. Police officers swept the road and removed accident debris and requested the attendance of a gritter. The police officers left the scene taking their 'police slow' sign with them. The fire crew who had also attended left the scene at around the same time.

C's accident occurred about 20 minutes later.

For the purposes of this appeal, the Defendant, ('D'), accepted that the Court should assume that, but for the arrival of the police, K would have continued his attempts to alert other road users. C accepted that the police did not say or do anything (either directly to K or generally) to encourage him to stop his attempts or to go in the ambulance, still less did they direct, or in any way coerce, him to stop what he was doing and leave.

The police officers' conduct was the subject of disciplinary tribunal proceedings, which found there had been errors by the police officers in the discharge of their duty to carry out an investigation at the scene of an accident as trained; and that, without knowing whether a gritter was on its way, they should have re-evaluated the situation and done more. An inquest also found the police should have done more.

C alleged that the police officers' conduct was negligent. D applied to strike out the claim as disclosing no reasonable cause of action or, alternatively, for summary judgment. At first instance, D's application was unsuccessful. The Court of Appeal allowed D's appeal. C appealed to the Supreme Court.

Legal Principles

The Court reviewed relevant case law and the useful starting point for analysis provided by a summary in an article by Tofaris and Steel, "*Negligence liability for omissions and the police*" (2016) 75 CLJ 128:

"*In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger.*"

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The Court summarised the central principles derived from the main cases, inter alia, as follows:

- There is a fundamental distinction, drawn in all the cases, between making matters worse, where the finding of a duty of care is commonplace and straightforward, and failing to confer a benefit (including failing to protect a person from harm), where there is generally no duty of care owed.

- A difficulty in drawing the distinction (between making matters worse and failing to protect from harm) is how to identify the baseline relative to which one judges whether the defendant has made matters worse. The cases show that the relevant comparison is with what would have happened if the defendant had done nothing at all and had never embarked on the activity which has given rise to the claim. The starting point is that the defendant generally owes no common law duty of care to undertake an activity which may result in benefit to another person. So it is only if carrying out the activity makes another person worse off than if the activity had not been undertaken that liability can arise.

- Another way of stating the general rule is to say that a person owes a duty to take care not to expose others to unreasonable and reasonably foreseeable risks of physical harm created by that person's own conduct. By contrast, no duty of care is in general owed to protect others from risks of physical harm which arise independently of the defendant's conduct - whether from natural causes or third parties.

- There are exceptions to the general rule that there is no duty of care to protect a person from harm, for example, where the defendant has assumed a responsibility to do so or has control of a third party.

The Court made the further point it is necessary to view the defendant's activity as a whole.

The Claimant's Case

C's primary claim was that the response of the police to the accident made matters worse. This was founded on the allegation that, but for the arrival of the police at the scene of K's accident, K would have continued making attempts to warn other motorists of the ice on the road. C contended that the police made matters worse by displacing K's efforts without taking any comparable steps of their own to warn motorists of the hazard. While the police were at the scene, the blue lights and the "police slow" sign placed on the northbound carriageway provided some warning. But once the police left, taking the sign with them, road users were exposed to a risk of injury from skidding on the ice greater than if the police had never attended at all (because in that event K would have persisted in his warning efforts).

Alternatively, it was argued that the case fell within one of the exceptions to the general rule that no duty of care is owed to protect a person from harm. In particular, it was alleged such a duty arose from the fact that the police took control of the scene upon their arrival and then relinquished control without having taken any steps to remove or reduce the hazard to which road users were then again exposed.

Did the police owe a duty of care by making matters worse?

C argued that the Court of Appeal put the test too high. It was wrong to require C to identify a specific positive act done by the police which encouraged or coerced K to stop his attempts to warn other motorists and leave in the ambulance. It was enough that the attendance of the police at the scene by itself had this effect. What was critical was that C and other motorists driving along the relevant stretch of road afterwards were exposed to a greater risk of physical injury than they would have been if the police had never attended the scene of K's accident at all.

In advancing this argument, C relied both on the submission that the police made matters worse by creating an additional danger and on the second 'exception' suggested by Tofaris and Steel (see above). The Court saw no substantive difference between these contentions: '*The "exception" relied on - that A has done something which prevents another from protecting B from a source of danger - is, on analysis, an instance of the general rule: a particular way of making matters worse by creating an additional danger.'*

The Court noted that this 'exception' is considered in more detail by McBride and Bagshaw in their book on Tort Law, 6th ed (2018), pp 213-217, under the heading "interference", who expressed the principle:

"[I]f A knows or ought to know that B is in need of help to avoid some harm, and A knows or ought to know that he has done something to put off or prevent someone else helping B, then A will owe B a duty to take reasonable steps to give B the help she needs."

C submitted that this 'interference principle' applied in this case, substituting the police officers for "A", drivers using the road for "B", and K as the "someone else".

Whilst there was no previous case law clearly applying the principle, the Supreme Court stated that the "interference principle" articulated by McBride and Bagshaw is a correct statement of English law. It follows from first principles. It is simply a particular illustration or manifestation of the duty of care not to make matters worse by acting in a way that creates an unreasonable and reasonably foreseeable risk of physical injury to the claimant. A previous Court of Appeal decision which appeared inconsistent with the interference principle, *OLL Ltd v Secretary of State for Transport [1997],* was wrongly decided.

McBride and Bagshaw's detailed formulation of the interference principle was correct. The Court stated, 'In particular, it is not enough to show that the defendant has acted in a way which had the effect of putting off or preventing someone else from helping the claimant. Rather, in line with the well-established approach to establishing any duty of care, for a duty of care to arise it is necessary to show that the defendant knew or ought to have known (ie that it was reasonably foreseeable) that its conduct would have this effect.'

This meant that for C to succeed in this case he needed to show that the police knew or ought reasonably to have known that their conduct had or might have had the effect of putting off or preventing K from warning other motorists of the ice hazard. In this respect there was a 'fatal factual lacuna' in C's case. Whilst on the agreed and alleged facts, the attendance of the police caused K to stop attempts he would otherwise have made to warn other drivers, there was no pleaded allegation that the police were aware that, before calling 101, K had been attempting to warn other motorists of the ice hazard. There was no allegation K had said anything to the police or the call handler to suggest that he had any intention of making such attempts. Nor were there any other facts alleged from which such an intention could reasonably have been inferred. As far as the police were concerned, K was someone who had been injured in an accident and no more than that. He was a victim, not a rescuer. There was nothing in any of the evidence which provided any support for a contention that the police knew or ought to have known that K had made or was intending to make attempts to alert other motorists to the ice hazard on the road.

C sought to place reliance upon the need for a cautious approach before striking out a claim in an area of law which is uncertain and developing, and emphasising the desirability that any further development of the law should be on the basis of actual and not hypothetical facts. However, the Court made clear that the applicable law is clear and not in a state of flux. When it was clear, as it was here, that on the facts alleged taken at their highest no duty of care was owed, it would be unjust and a waste of resources to allow the claim to proceed to a trial.

C further argued that relevant evidence might emerge at trial. The Court dismissed this as unrealistic given that it was 10 years since the material events, which had been investigated in detail by the IPCC, a police disciplinary tribunal, an inquest and for the purposes of bringing these proceedings.

The Court concluded that the pleaded facts and evidence relied on by C disclosed no reasonable basis for the argument that a duty of care was owed by the police to C because the police made matters worse by displacing K as a rescuer.

A further argument was raised by C during the appeal that, even if the claim based on displacing K could not succeed, C could rely on a similar argument in relation to the fire brigade on the basis that but for the attendance of the police, the fire service would, in all probability, have taken control and remained at the scene and ensured the safety of road users until the ice hazard was cleared. This was similarly dismissed as unsustainable. There was no pleading or evidence that the police knew or ought to have known that they were displacing an activity which the fire service would otherwise have undertaken.

Did the police owe a duty of care to protect C from harm?

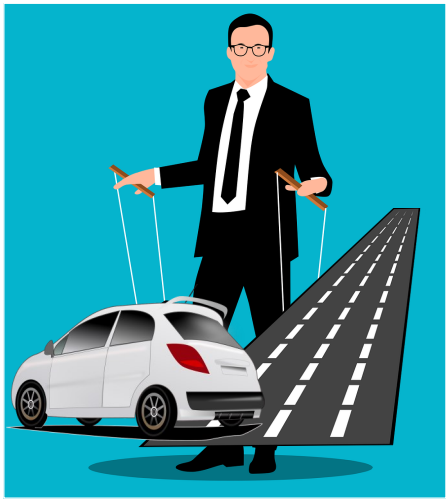
C sought to rely on all of the exceptions to the general rule identified by Tofaris and Steel (see above), albeit in oral submissions the focus was on the issue of control.

The second exception having already been dealt with in accordance with the interference principle above, the Supreme Court considered each of the other three exceptions.

Assumption of Responsibility

This was not considered in detail as C only sought to rely upon this insofar as it overlapped with arguments based on control. However, given the need in some situations to demonstrate reliance and the absence of any communication or interaction between the police and C, the Court commented that it was impossible to see how an assumption of responsibility could be said to arise in this case.

Control



C's case was that even if the police did nothing to make things worse, they came under a duty of care to protect motorists from the danger posed by the ice by taking control of the accident scene. Relevant case law illustrating this exception relates to control over children / young people (*Dorset Yacht Co Ltd v Home Office [1970]; Carmarthenshire CC v Lewis [1955]*). C contended that the principle of liability based on control is not confined to situations involving an assumption of parental or quasi-parental responsibility but extends to any situation where the defendant has control over a particular source of danger, whether it be a human being or an artificial or natural hazard, and the claimant is at special risk of suffering harm if such control is lost or relinquished.

The Supreme Court noted there was no clear authority supporting this broad principle, but it was not necessary for them to consider this further because, even if such a principle were accepted, it could not apply in this case. The source of danger in this case was a patch of black ice which was some distance from the scene where K's car ended up in a ditch. On the pleaded case, agreed to be correct for the purpose of the appeal, the distance from where C lost control of his car on the black ice was 184 metres from where K's car ended up. Insofar as the police could be said to have taken control of the 'scene' of the accident, the scene in question was where K's car was located. It was not alleged that the police did anything which could be characterised as taking control of the patch of ice which represented the source of danger. On the contrary, the criticism of the police was precisely that they did not nothing about the source of the danger. They did not cordon off or close the road, inspect the ice or take other necessary measures. That could not be turned around to say that there was a duty of care consequent on the police having taken control of the patch of ice.

The Court noted that the Claimant correctly did not seek to argue the existence of a power of control, without an actual exercise of control, was capable of giving rise to a duty of care, however, at times, appeared to suggest a duty of care could arise from the fact that the police took steps (i.e. attending with blue emergency lights flashing and putting up a sign) which were then terminated. The Court made clear any such argument was untenable. Case law is clear that '*taking steps which are ineffectual, whether because they are inadequate to begin with or because the defendant does not persist in them, cannot give rise to a duty of care*.'

Status

Tofaris and Steel's argument in their aforementioned article that the police have a special status and should owe a duty of care to a person who they know or ought to know is at a special risk of personal harm is irreconcilable with the Supreme Court's subsequent decision in *Michael v Chief Constable of South Wales [2015]*. In a later article, Tofaris and Steel suggested *Michael* should be overturned. The Supreme Court was not invited to do so but commented '*given the weight of that authority and the further body of authority since founded on it, this would not have been a realistic argument to advance'*. C suggested that the police's status as professional emergency responders worked in tandem with other exceptions, but the Court could not make coherent sense of the argument which was not developed.

Supreme Court's Conclusion

Accordingly, the Court concluded that on the facts agreed or alleged in this case, none of the grounds alleged for there being a duty of care owed by the police to C stood up to scrutiny. Applying the interference principle, the police could not be held liable for making matters worse; and none of the possible exceptions to the general rule that there is no duty of care to protect a person from harm could be made out.

C's appeal was dismissed.

Comment

The Supreme Court has reiterated that this area of law is clear and not in a state of flux. The Judgment provides a clear summary of the relevant case law and useful guidance on seeking to distinguish between making matters worse (where a duty of care is commonly found) and failing to confer a benefit, including failing to protect a person from harm, (where there is generally no duty of care owed). The Judgment touches on each of the exceptions to the general rule proposed in the article by Tofaris and Steel. In exploring the second exception (A has done something which prevents another from protecting B from a source of danger) in some depth, the Court concluded that it was an instance of the general rule: a particular way of making matters worse by creating an additional danger.

Of particular note, the Supreme Court has for the first time endorsed the 'interference principle'. The Court found this is simply a particular illustration or manifestation of the duty of care not to make matters worse by acting in a way that creates an unreasonable and reasonably foreseeable risk of physical injury to the claimant. However, as clearly illustrated by the decision in this case, it is not enough to show that the defendant has acted in a way which had the effect of putting off or preventing someone else from helping the claimant. To establish a duty of care a claimant has to go further and show that the defendant knew or ought to have known that its conduct would have this effect.

The Court has left open the issue of the appropriateness of the Claimant's contention for a broad based principle of liability based on control, but does highlight that there is no clear authority supporting it.

As is also amply demonstrated by the Supreme Court's analysis of this case, each case must be considered on its own facts.

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CASE UPDATES

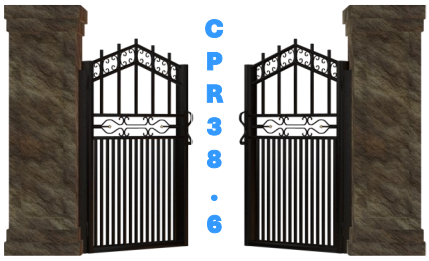
Discontinuance - Costs - Conduct After Proceedings

Elphicke v Times Media Limited (formerly Times Newspapers Limited) [2024] EWHC 2595 (KB)

The Claimant ('C'), a former MP, sued the Defendant ('D') for damage to his reputation after it published articles about rape allegations made against him. C discontinued his claim. C applied for an order that the usual costs consequences of discontinuance in CPR 38.6 (deemed costs order that the party who discontinued has to pay the costs of the discontinued claim unless the Court orders otherwise) should not apply and instead each party should bear its own costs. In seeking such an order C relied on conduct which included conduct by D which took place after the claim had been discontinued. C alleged that after discontinuance D had made wrongful use of disclosed evidence by misusing statements for a collateral purpose.

The Judge held there is nothing in the wording of CPR 38.6 or case law which fettered the Court's discretion to depart from the default costs order. There is nothing in the rule to imply that conduct after discontinuance cannot be relevant. Whilst the usual situation for application of CPR 38.6 would be where some event took place (a change of circumstances) which caused a claimant to discontinue by reason of the event or conduct prior to discontinuance, neither a change of circumstances nor a causal linkage are mandated by the rule or case authority.

The wording of the Court's general discretion on costs in CPR 44.2(5) refers to conduct including 'conduct before or during' proceedings. The Judge did not accept this was sufficient to suggest that conduct (whether for the purposes of CPR 44.2 or CPR 38.6) cannot include conduct after proceedings. However, where there has been a discontinuance the provisions of CPR 38.6 are a 'gateway'. Only if the Court decides to depart from the default rule does the Court gain its usual jurisdiction in terms of what orders to make and why about costs. Costs are not at large unless the high standard of CPR 38.6 is met.



The Judge found that D's failures to preserve evidence and the misuse of witness statements in this case opened the gateway of CPR 38.6. To mark the seriousness of these failures, the Judge made a variation of the default order and ordered C to pay 80% of D's costs on the standard basis to be assessed if not agreed.

Further, taking account of the principle in *Churchill v Merthyr Tydfil Borough Council [2023],* the Judge ordered that the parties must engage in pre-detailed assessment ADR as to the costs claimed by D.

CASE UPDATES

False Imprisonment - Fundamental Dishonesty - Section 57 Criminal Justice and Courts Act 2015

Reynolds v Chief Constable of Kent Police [2024] EWHC 2487 (KB)

The Claimant appealed against the dismissal of his claim for damages for false imprisonment and assault against the respondent Police Force.

Facts

The Claimant was arrested at his home address for making threats to kill and for breaching a non-molestation order. The Claimant aggressively resisted the arrest. He was handcuffed and restrained on the floor, where he bit one officer's thigh and kicked a second officer, resulting in further force being applied to place the Claimant in the police van. During the journey to the police station, the Claimant continued to protest his arrest, repeatedly kicking the sides of the police van and covering the insides of the van with spit. The Claimant was later taken to hospital, where it was confirmed he had fractured his lumbar spine. He was charged with two offences of assaulting a police officer with intent to resist arrest, but found not guilty at the criminal trial.

The Claimant's Claim

The Claimant claimed damages, including aggravated and exemplary damages, for false imprisonment, assault/battery causing personal injury and malicious prosecution. Following a trial with a jury, the claim was dismissed; the Claimant having been found to be fundamentally dishonest within the meaning of Section 57 of the Criminal Justice and Courts Act ("CJCA") 2015. The jury returned their findings in favour of the police and the Judge found that the Claimant told "barefaced lies" on all matters material to his claim. The Judge concluded that based on the jury's findings, the back injury could not have been caused prior to the Claimant being placed in the police van because the factual scenarios alleged by the Claimant did not occur.

The Judge, however, found that section 28(3) of the Police and Criminal Evidence Act 1984 ("PACE") had not been complied with as the police officer had failed to furnish the Claimant with the basic grounds for arrest at the time of the arrest or as soon as reasonably practicable thereafter, and, had the Claimant's claim not been dismissed under Section 57 CJCA 2015, he would have succeeded in his claim for false imprisonment and partially succeeded in his claim for assault/battery. The claim for malicious prosecution was dismissed.

Appeal

The Claimant appealed the findings of the Judge. He appealed the ruling on fundamental dishonesty, claiming that the Judge was wrong to find that he had been dishonest simply because the jury had preferred the Defendant's version of events over the Claimant's version. The grounds of appeal also included whether the police had given him sufficient notice of their arguments on fundamental dishonesty and the engagement of Article 3 and Article 6 ECHR with section 57 CJCA 2015. The Judgment deals with these matters (the serious findings of dishonesty were held to be open to the Judge to make having heard the contradicting versions of events and the findings of the jury) and provides ancillary guidance on the practicalities of raising a defence of fundamental dishonesty and how it should be managed at trial.

The main issue for the Court to determine, however, was whether Section 57 CJCA 2015 applied, at all, to a claim for false imprisonment.

Decision

Section 57 of the Criminal Justice and Courts Act 2015 provides that:

(1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim"):

(a) The court finds that the claimant is entitled to damages in respect of the claim, but

(b) On an application by the defendant for the dismissal of the claim under this section, the court is satisfied that, on the balance of probabilities, the claimant has been fundamentally dishonest in relation to the primary or the related claim.

(2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

For the purposes of Section 57, "personal injury" includes any disease or any other impairment of a person's physical or mental health condition, and "related claim" means a claim for damages in respect of personal injury which is made in connection with the same incident or series of incidents in connection with which the primary claim is made.

CASE UPDATES

Whether or not Section 57 CJCA 2015 applied to a claim for false imprisonment was not a matter which was raised at the original trial. The Claimant was, however, permitted to raise the point on appeal (the Chief Constable did not object) because it was considered to be important for the matter to be considered by the Court so as to provide guidance in respect of other cases in which the fundamental dishonesty defence may be raised in cases of false imprisonment.

It was held that the tort of trespass falls under the general rubric of trespass to the person. False imprisonment is not a claim for personal injury; its focus is the deprivation of liberty. There will be cases where in which the circumstances of false imprisonment will also involve personal injury. However, the personal injury will not result from the false imprisonment itself, but from the assault or battery that may arise during the period in which a claimant is falsely imprisoned. Alternatively, a false imprisonment may remove the lawful justification for any touching or handling of a claimant that is associated with the imprisonment itself, but the touching or handling will constitute an assault or battery. In each of these scenarios, the claim for personal injury will not be the false imprisonment but the assault or battery.

As a matter of principle, and on the particular facts of the case, the Claimant's claim for false imprisonment was not itself "a claim for damages in respect of personal injury". Accordingly, the Judge was not empowered by Section 57 to dismiss the false imprisonment claim and, therefore, the damages for that tort. The appeal in respect of the decision to dismiss the false imprisonment claim, therefore, had to be allowed because where a claimant is found to have been fundamentally dishonest only the causes of action that relates to their claim for personal injury can be dismissed pursuant to Section 57.

Section 57 would apply, however, to the assault claim, and it was open to the Judge to dismiss that claim if the judge had found that the Claimant had been fundamentally dishonest in respect of the assault claim.

The Claimant's appeal was, therefore, allowed in part. The Judge was wrong to dismiss the claim for false imprisonment. As a consequence, the question of damages for false imprisonment needed to be addressed and the Claimant's claim was to be remitted to the County Court, in respect of damages and the costs of the false imprisonment claim, if this matter could not be agreed between the parties.

CASE UPDATES

Fundamental Dishonesty - Section 57 Criminal Justice and Courts Act 2015

Senay v Mulsanne
[2024] EWCC 12

This decision is similar in outcome to *Reynolds v Chief Constable of Kent Police*. Although the Judgment has only recently been reported, it was handed down in May 2024, at which time the Judge noted there was no clear and binding authority on the issue of whether dishonesty in a personal injury claim meant that the whole claim should be dismissed.

Facts

The Claimant was a taxi driver who was involved in an accident with the Defendant's vehicle. He made a claim for losses arising out of the damage to his vehicle and for damages for personal injury. The Judge found that the claim for personal injury was fundamentally dishonest.

The issue for the Court to determine was whether the finding of fundamental dishonesty impacted the Claimant's claim for damage to his vehicle.

Decision

The Judge considered previous decisions (which were only available on barristers' websites, and which indicated that there had been decisions on the issue going either way) and parliamentary material, in particular, the parliamentary debates in relation to Section 57 CJCA 2015.

The Court held that the question was one of the construction of the words in Section 57, which states that it applies to "proceedings" on a claim for damages in respect of personal injury and defines that as the "primary claim". It then states that where the court finds that a claimant is entitled to damages in respect of *the claim* (which means damages for the primary claim), but that the claimant has also been fundamentally dishonest in relation to the *primary claim or a related claim* (so the personal injury claim or a claim related to it), the court must dismiss the primary claim (the personal injury claim), unless the claimant would suffer substantial injustice. The duty to dismiss includes the dismissal of any element of the primary claim (the personal injury claim) in respect of which the claimant has not been dishonest.

The Court found that it was notable that the provisions of Section 57 did not provide that parts of a claim, other than the primary claim (being the personal injury claim), must be dismissed. This is because the section defines the primary claim as the claim for damages for personal injury and then provides that it is the primary claim which is to be dismissed where fundamental dishonesty is found to be present.

If any other meaning to the words of Section 57 were to be correct, the effect would be to abrogate the property rights of claimants whose vehicles were damaged in accidents caused by negligent defendants. Whilst the policy behind section 57 is self-evidently to penalise claimants who bring dishonest personal injury claims, the court found that it would be expected that clear words would be used if parliament had intended to deprive claimants of their property rights as well as damages for personal injury. The parliamentary material which was considered by the Court made it clear that the intention of the legislature was that the dismissal of a claim consequential on a finding of fundamental dishonesty would apply to the personal injury claim and claims related to the personal injury only. That intention coincided with the Judge's interpretation of the words of Section 57.

It, therefore, followed that the Claimant's claim for personal injury was dismissed, but his claims in respect of damage to his vehicle, its recovery and storage and for loss of use were not.

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

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