DOLMANS INSURANCE BULLETIN

Welcome to the February 2025 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor:

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REPORT ON

Defects to Ironworks in the Highway - Dangerous?

MQ v Pembrokeshire County Council

In the case of *MQ v Pembrokeshire County Council*, in which Dolmans represented the Local Authority, the Claimant brought a claim arising out of an accident in November 2020, when it was alleged that as she stepped down from a kerb in order to cross a road, she stepped into a defective "drain cover" (an iron gully grating) which had a piece missing, causing her to fall.

A photograph of the defective drain cover complained of by the Claimant, as depicted, accompanied the Letter of Claim submitted to the Defendant Local Authority.

The drain cover was fitted to a standard road gully chamber which was situated at the very edge of the carriageway. Apart from the missing piece of ironwork, the cover was in good repair.

The Claimant alleged that her accident was caused by the Defendant Local Authority's breach of statutory duty pursuant to Section 41 of the Highways Act 1980 and/or by their negligence.

Causation

The first hurdle that any claimant in a civil claim must overcome is, of course, factual causation. The burden of proof is upon the claimant. In this case, there were real concerns surrounding the circumstances of the Claimant's accident and the mechanics/cause of her fall.

Firstly, the Defendant Local Authority did not have any record of the Claimant reporting her accident, either immediately after her alleged accident or at all. Although the Claimant maintained in pre-action correspondence and subsequently in her Witness Statement that she did report her accident and complain about the defect to the Defendant Local Authority directly, the Defendant Local Authority were unable to find any record of the same. The Claimant did not expand upon how she reported her accident within her Witness Statement. The Defendant Local Authority advised that if the Claimant had reported the accident directly, their call centre would have taken any details and passed them on to the relevant department to investigate.

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Secondly, when the Claimant's medical records were obtained, whilst they indicated that the Claimant attended at the A&E Department of Withybush General Hospital at 20:06 on the date of the alleged accident, at this time it was recorded that the Claimant had "***Tripped over curb*** *– FOOSH left wrist*" (***emphasis added***). The Claimant was then seen in the Fracture Clinic on 11 December 2020, following which it was recorded: "*I saw this lady in clinic today.* ***She tripped on a kerb*** *and landed on her left wrist suffering an undisplaced fracture to the distal radius*" (***emphasis added***). A letter from the Fracture Clinic following an appointment on 4 January 2021 also recorded that the Claimant had had a "***fall on a kerb***" **(*emphasis added*)**. There was no mention within the Claimant's contemporaneous medical records that she had fallen due to a defective drain cover. There was no reference to a drain cover at all in any of her medical records.

Despite this, on 15 December 2020 (just over 2 weeks post-accident), a Letter of Claim was sent to the Defendant Local Authority which reported that the Claimant was crossing the road when, as she stepped from the kerb down onto the road, she stepped onto a defective drain cover from which a piece was missing, causing her to fall.

When the Claimant was examined for the purposes of her claim in March 2023, nearly 2½ years post-accident, she maintained that her accident had been caused as a result of a defective drain cover. However, the Claimant advised her medical expert that she "*crossed the road in front of her house to visit her daughter's house opposite" and "as she approached the opposite side of the carriageway, the heel of her shoe became caught in a damaged drain cover … she fell and lost her balance and put her hand out to protect herself*". The account provided to the medical expert therefore, whilst attributing her fall to a defective drain cover, suggested that the Claimant had nearly crossed the road at the time of her fall. The Claimant's pleaded case was that she fell as she stepped down from the kerb/pavement as she was about to the cross the road.

Finally, there were no witnesses to the Claimant's accident and, therefore, there was no supporting evidence, independent or otherwise, of the accident circumstances.

Whilst the Claimant's case was that the heel of her shoe had got caught in the missing section of the drain cover, it was questioned how the Claimant knew that her heel did, in fact, go into the part of the drain cover which was missing and whether the Claimant would be able to prove this. It was also considered that there was, arguably, just as much chance of the Claimant putting her heel (depending on the size) through the part of the cover which was not defective.

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In light of the evidence, the Defendant Local Authority were advised that the Claimant should be put to strict proof as to the circumstances of her alleged accident; factual causation being denied. An appropriate Civil Evidence Act Notice referring to the inconsistencies in the Claimant's medical records was served at the same time as the Defendant Local Authority's witness evidence. The Claimant's Solicitors were put on notice that the Defendant Local Authority intended to rely upon the inconsistencies in the Claimant's evidence in seeking to contradict the Claimant's pleaded case.

Breach of Duty

Subject to causation being established, it was denied that the Defendant Local Authority were in breach of their statutory duty pursuant to Section 41 of the Highways Act 1980 and/or were negligent. It was denied that the defective drain cover which was alleged to have caused the Claimant to fall constituted a danger, hazard or a foreseeable risk of injury.

Whilst for the purposes of the Defence, in the alternative, the Section 58 Defence was relied upon – the Defendant Local Authority having in place a monthly system of safety inspections for the carriageway at the time of the Claimant's accident which had been complied with (and which had not identified the defect complained of) – the Defendant Local Authority were advised that if a breach of Section 41 was established, the Section 58 Defence would fail.

Evidence was adduced on behalf of the Defendant Local Authority from the Highways Infrastructure Manager and the relevant Highways Inspector. The Defendant Local Authority's witnesses accepted that the drain cover/gully grating was 'defective' in the sense that there was a section missing and it was also accepted that the cover appeared to have been in the condition complained of by the Claimant dating back to 2018, at least, based upon Google images of the area which were relied upon by the Claimant in support of her claim.

However, the Defendant Local Authority's witnesses maintained that the missing section of the drain cover did not present a hazard to normal road users. The drain/gully was at the very edge of the carriageway and vehicles and cyclists were able to traverse the drain/ gully with no adverse effect, even with the section missing. The evidence of the Highways Inspector was that he had, in fact, carried out previous inspections of the carriageway on an e-bike and he had never had any difficulties presented by the cover.

The drain cover was not on a designated crossing point. Further, in the vicinity of the cover there was no paved footway, only a grass verge, so it was considered very unlikely that pedestrians would reasonably choose to cross the road at the point that the Claimant did. There was a designated crossing point within a very short distance from the accident location.

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Although the evidence suggested that the drain cover had been in the condition complained of since at least 2018, the Defendant Local Authority had received no prior complaints in relation to the same. Further (and helpful to the Defendant Local Authority's position), the drain cover remained in the same condition as at the date of Trial. No repairs had been carried out, even following notification of the Claimant's claim. The Defendant Local Authority's Highways Inspector did not identify the defective drain cover on any of his pre or post accident safety inspections because he did not consider that it presented a hazard.

Trial

At Trial, all liability issues were fully contested.

The Claimant gave confused and contradictory evidence, and altered her Witness Statement before cross-examination regarding the circumstances of her accident to state that she had, indeed, stepped off the kerb before falling (rather than having crossed the road), contrary to her account to the medical expert and as her Witness Statement had suggested. Under cross-examination, the best the Claimant could do in terms of describing the mechanism of the accident was "I lost my balance". She agreed she could not be sure whether she caught the 2 inch heel of her boot in the other holes in the drain cover and not, in fact, in the defect complained of. Ultimately, the Claimant admitted that she did not see what she caught her heel in.

The Claimant said that she took the photographs provided in support of her claim when she returned to the scene several weeks later with her daughter (despite the location being almost directly outside her home). When Counsel for the Defendant Local Authority suggested it was only then that she decided it was the defect that caused her accident and not something else, the Claimant maintained it was the "probably" the defect, which was obviously a significantly weakened position.

The Claimant stated that she had crossed at the point that she did (which was a short distance from a pedestrian crossing) to go to her daughter's house directly across from her house, which was, in fact, less than 6 metres from the defect. Despite this, the Claimant said that she had never noticed the defect, nor had any of her neighbours notice it or had any problem with it.

In relation to the inconsistent medical records, the Claimant felt that the numerous references to tripping or falling on the kerb and being across the road when falling were errors on the part of the medical staff recording her accounts.

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Under cross-examination, the Defendant Local Authority's witnesses conceded that the missing section of the drain cover presented an increased risk to the public, but not to the extent that the Highways Inspector deemed, or should have deemed, it dangerous and in need of replacement. The Defendant Local Authority's Highways Infrastructure Manager was a commanding witness who confirmed that had any complaints regarding the drain cover been raised with him, he would have formed the view that it did not present a hazard and no repair works were required. In addition, he stated that the type of defect complained of was one which he had only seen twice (to include this one) in 32 years of working for the Highways Authority and among 43,000 drain covers across its area.

It was unclear how the drain cover/gully grating had become defective. No explanation could be provided by the Defendant Local Authority's witnesses other than, perhaps, vandalism. The Defendant Local Authority's evidence was that it was an extremely rare defect. As such, it was submitted on behalf of the Defendant Local Authority that such a defect was, quite reasonably, not included in a risk matrix which was used by the Highways Department in relation to safety inspections as a separate defect. There was no defined criteria set by the Defendant Local Authority with regards to missing parts of a drain cover/road gully and it was the Defendant Local Authority's position that it was simply not realistic to try and account for all possible scenarios.

The Highways Infrastructure Manager agreed with the Highways Inspector that although the drain cover was not in a perfect condition and presented a minimally increased risk to pedestrians, it was not dangerous for the purposes of a safety inspection as it was a long way from the pedestrian crossing and there was no other indication that pedestrians were likely to use that part of the road to cross the carriageway.

Judgment

Having considered the Claimant's evidence, the Judge found that due to the numerous inconsistencies, and particularly the Claimant's late change to her Witness Statement, her evidence as to mechanism could not be relied upon and, therefore, the Claimant did not meet the burden of proof. Unfortunately, despite Counsel for the Defendant Local Authority exploring the possibility of a finding of fundamental dishonesty on the Claimant's part, the Judge found that whilst the Claimant was not a credible witness in relation to mechanism, she was honest and "doing her best", and the Claimant's account of the drain cover being the cause was a true, if subjective, belief.

The Claimant's claim, therefore, failed on causation.

However, the Judge went on to find that the Defendant Local Authority's witnesses were very persuasive and he found the evidence of the Highways Infrastructure Manager, in that the type of defect was rare and would not have been categorised as a repairable defect, particularly persuasive. Taking into account the Claimant's evidence that she had not noticed the defective cover and the fact that nobody had complained about the defect prior to the Claimant's accident, the Judge found that the defective cover was probably not dangerous for the purposes of section 41 of the Highways Act 1980. The Claimant would, therefore, have failed in her claim, in any event, to satisfy the burden of providing a breach of Section 41.

Comment

This case emphasises the importance of considering all elements of a claimant's claim in detail, in particular the accounts of the accident which are provided by a claimant contemporaneously when initially seeking medical treatment and when examined by medical experts. The Claimant in this case was a poor witness, but the issue of credibility is always difficult to predict on documentary evidence alone and, therefore, whilst there is often merit in putting a claimant to proof regarding the circumstances of their accident, this needs to involve carrying out a forensic exploration of a claimant's pleadings and medical records, and preparing/serving Civil Evidence Act Notices where appropriate.

It is also important to ensure that all other issues in relation to liability are fully investigated and evidenced, no matter how strong the concerns on causation are. Detailed witness evidence was prepared on behalf of the Defendant Local Authority and the Defendant Local Authority's position was, undoubtedly, bolstered at Trial by the performance of the witnesses in giving evidence to the Court. Following the Trial, Counsel for the Defendant commented upon the fact that he was very impressed with both of the Defendant Local Authority's witnesses who were said to have taken "just the right tone" in giving their evidence to the Court and, in particular, the evidence from the Highways Infrastructure Manager regarding the number of ironworks of this nature that there were within the Local Authority as compared to only two issues that he was aware of in respect of the same in his 32 years of experience was wholly taken on board by the Trial Judge. Therefore, had the concerns on causation not been borne out at Trial as they indeed were, the Judge, in any event, would have accepted the Defendant Local Authority's position and their Defence to the Claimant's claim.

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CASE UPDATES

Compulsory Mediation

DHK Retail & Others v City Football Group Limited [2024] EWHC 3231 (Ch)

This was a case between the owners of the 'Superdry' brand and the company which runs Manchester City Football Club's commercial operations. The claim arose over a dispute about the branding on Manchester City's kit, which uses the words "Super" and "Dry" to promote its sponsor, Asahi Super Dry 0.0% lager.

Background

At a pre-trial hearing, shortly before trial, the Judge considered an Application made by the Claimants for an order that compulsory mediation take place. The Defendant opposed the Application.

In considering the Claimants' Application, the Court noted the amendments made to the Civil Procedure Rules from October 2024 to take account of the ruling in *Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416*, when the Court of Appeal determined that the Court had had power to order unwilling parties to engage in ADR (Alternative Dispute Resolution). Since the *Churchill* case, the Civil Procedure Rules had been amended, with the revisions including an amendment to the overriding objective to include promoting or using ADR, with CPR 1.4 (which concerns the duty of active case management) now including the express power to order parties to use and facilitate the use of ADR; the Court's case management powers under CPR 3.1 now include the power to order the parties to participate in ADR; and under CPR 29.2(1A), when giving directions, the Court must consider whether to order or encourage the parties to participate in ADR.

The Claimants submitted that these changes recognised a "sea-change" in the approach of the Courts to ADR and contended that this was a case where the Court should exercise its power to order a mediation.

Whilst the Defendant agreed that the Court had the power to order mediation, it argued that the Court should only order mediation in circumstances where there was a realistic prospect of settlement. The Defendant submitted that that was not the case in this case. On the contrary, both parties wanted their position to be judicially determined. The Defendant submitted that mediation was not realistically likely to lead to settlement.

The Defendant also submitted that it was very late in the day for such an order to be made and that the parties had already spent "hundreds of thousands" of pounds, with a trial imminent. There was also very limited availability for a mediation. Ultimately, it was submitted that this was not a case where the Defendant was being obstructive, but that mediation would fail, and this was a case where a ruling was needed.

Decision

The Judge felt that there was some force in the Defendant's submission that it was late in the day to be seeking an order, but that it may also be said that there was some advantage in the parties' positions having been crystalised through pleadings and the service of witness statements. There was also some force in the Defendant's argument that the parties involved were commercial parties with experienced solicitors and that if there were realistically to be a settlement, one would have expected it to already to have been reached. However, the Judge noted that experience "*shows that bringing parties together through mediation can overcome an entrenched reluctance of parties to negotiate, even where sincere".*

The purpose of mediation was to remove "roadblocks" to settlement and the Judge did not accept the Defendant's submissions that a mediation in the case had a low prospect of success and that adjudication by a court was necessarily required. The range of options available to the parties to resolve the dispute through mediation went beyond the binary answer a court could provide.

Taking all of the circumstances into account, the Judge was satisfied that this was a case where the parties should be ordered to mediate with a view to seeking, if possible, to resolve the dispute between them and that it should take place in December 2024, ahead of the trial.

In a postscript to the Judgment, it was confirmed that, on 13 January 2025, the parties notified the Court that they had settled their dispute.

Personal Injury Claims - Abuse of Process - QOCS - Costs

Birley & Bell v Heritage Independent Living Limited [2025] EWCA Civ 44

This matter was largely an appeal about costs. The Court had considered whether the costs provisions relating to certain media claims, which at one time permitted recovery of a success fee together with an ATE insurance premium, could be applicable at the same time as QOCS was applicable to personal injury claims. The short answer was yes.

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Background

The Claimants brought an action against the Defendant for breach of the GDPR Regulations, the DPA, misuse of private information and breach of confidence, after they disclosed the Claimant's criminal convictions to a colleague without her consent. A claim for personal injury was also included.

A claim was issued in August 2021. The deadline for service was 3 December 2021. The Claimant died before the claim was served. On 18 November 2021, the solicitors for the Claimant's executors applied for a stay of proceedings until 3 March 2022. The stay was granted on 14 December 2021.

The Claim Form was eventually served by the Claimant's executors by 28 February 2022. Following service, the Defendant applied to set aside service and for the claim to be struck out for late service pursuant to CPR r.3.4.

At a hearing in January 2023, a District Judge set aside the service of the Claim Form and struck out the claim as the Claimants had failed to apply in time for an extension of time to serve. The Claimants' case that the Application which had been made for a stay could be understood or treated as including an application for an extension of that kind was rejected.

With regards to the issue of costs, the District Judge held that continuing with the claim when the Claim Form had been served out of time amounted to an abuse of process. The Judge, therefore, found that the case fell within the exception to QOCS in CPR r.44.15(b). The Judge ordered the Claimant's executors to pay the Defendant's costs of the Application and the action, with QOCS disapplied.

The Claimants appealed, not against the finding that the Claim Form had not been properly served, but whether the failure to serve was an abuse of process, which was obviously the significant issue in terms of the Costs Order made, such that QOCS should be disapplied.

Appeals

On appeal, a Circuit Judge found that the District Judge had been wrong to find that there had been an abuse of process, as what would be required to justify a strike out would be inordinate or inexcusable delay, or intentional or contumelious default, or wholesale disregard for the rules in failing to serve the Claim Form in time; whereas all that had been identified in this case was, at most, a failure to serve the Claim Form in time. That did not amount to an abuse of process. The Order to strike out was, therefore, wrong, and since there was no other basis to disapply QOCS, the Circuit Judge held that that aspect of the Order was wrong too.

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The Circuit Judge found that the Claimants' claim was squarely a claim for personal injury, in respect of which QOCS applied. The Defendant had not invited the Court to treat the claim as a mixed claim under CPR r44.16. The Order for the Claimants to pay the Defendant's costs of the action and of the Application was, therefore, varied to reflect QOCS, with a declaration that QOCS applied.

The Judge also decided to award the Claimants all of their costs of the appeal, as they were the overall "winners" in the case.

The Defendant appealed, challenging the Circuit Judge's decision that there was no abuse of process. The appeal was dismissed.

Held

- Abuse of process – pre-action conduct - abuse of process could apply to pre-action conduct, but whilst the conduct of the Claimants' Solicitors was "lax", it did not step over into an abuse of process, let alone conduct justifying the remedy of striking out.

- Abuse of process – the recovery of success fees and QOCS – The pre-action correspondence did not conceal the basic nature of the Claimants' claim, which was firmly within the ambit of CPR r.53.1 concerning proceedings in the Media and Communications List. Given that the causes of action included a claim for misuse of private information, prior to April 2019, a CFA success fee was recoverable. However, at the same time, the QOCS scheme applied because personal injury damages were claimed.

- Costs – the Circuit Judge had awarded the Claimants 100% of their costs of the appeal because even though the appeal had failed on the first two grounds, the "main battleground" was the abuse of process issue and whether QOCS applied. In that regard, the Claimants had been the overall winners. The Judge had reflected on the overall fairness of the situation and had given full reasons for his conclusion and so the result was open to him on the facts.

CASE UPDATES

Police - Duty of Care - Assumption of Responsibility

Dobson v The Chief Constable of Leicestershire Police [2025] EWHC 272 (KB)

The Claimant ('C') was an insulin dependent diabetic who lived a chaotic life, using alcohol and drugs and choosing to live in an adapted outbuilding ('the shed'). On Christmas Day 2018, he took an overdose of insulin, suffering life changing injuries as a consequence. In the days prior to this, he had had a number of interactions with the Police. On 23 December 2018, police officers attended the shed, having been told that C had made a threat to take his own life by overdosing on insulin. On entering the shed, the Police noted an unsheathed samurai sword, pistol and rifle. C became aggressive. He was arrested on suspicion of possession of illegal firearms, a public order offence and a malicious communication sent to his mother. C's father, who was present, told the Police that C '*needed to be sectioned for his own good'*. C was taken to the police station. He was not detained under the Mental Health Act.

In the custody suite, it was noted that C was drunk. He had no insulin with him. He was uncooperative. Police officers obtained C's insulin from his parents' home. A mental health care professional attended to complete a mental health assessment, but C would not co-operate. A nurse bought a small pack of syringes using Police petty cash sufficient for C to have the means to administer his essential insulin over the Christmas period.

C was interviewed with a solicitor present. At 3:09pm on 24 December 2018, the custody sergeant was advised there was insufficient evidence to charge C. There was no explicit power to detain C, but the period of detention was extended to fully consider the pre-release risk assessment. C refused to see a mental health professional again. He was released without charge at 4:26pm on 24 December 2018. C's parents refused to accommodate him. C refused alternative options (e.g. hostel). Accordingly, C was released back to his shed with the insulin and syringes.

On 25 December 2018, C took a near fatal dose of insulin, as a result of which he suffered a very significant brain injury. Prior to doing so, C sent messages with a photograph of the syringes saying '*luckily the Police supplied me with the necessary equipment to finish the job'.*

C brought a negligence claim for damages against the Police. C alleged that the Police had assumed responsibility to protect him from harm and so owed him a duty of care, and they had breached that duty by, inter alia, failing to treat him as a suicide risk, failing to ensure he was properly assessed by a mental health professional, failing to detain him under the Mental Health Act 1983 or pursuant to their common law power and/or failing to take him to a safer location with a plan for the supply of insulin over the Christmas period. A claim under Article 2 of the Human Rights Act was also pleaded.

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The Police accepted that they owed C a duty to keep him safe when in custody (*Reeves v Commissioner of Police of the Metropolis [2000]*), but denied that the scope of that duty extended to the post release period.

The Judge noted that the duty to keep C safe whilst he was in custody extended to ensuring that C was released into a safe environment. The act of release is, in effect, part of detention. The real question was, therefore, whether the assumption of responsibility remained once C was released. The duty owed to protect a detained person in custody from harming themselves arises because the police have 'complete control' over the prisoner and because it is well known that there is a 'special danger' that the detained person will self-harm (*Reeves*). Once the detained person is released, assuming they have capacity, control and autonomy revert to them and they become responsible for themselves.

The Judge was assisted by an Art. 2 case, *Rabone v Pennine [2012]*, which shed light on the principle of assumption of responsibility. In that case, R was admitted to hospital, having been assessed as at high risk of suicide. She was not detained, but the decision was made that if she attempted to leave she should be assessed for detention. R was allowed home for 2 days, during which time she took her own life. The hospital admitted that it was negligent in allowing R to go home.

On an Art. 2 claim by her parents, it was held that the hospital assumed responsibility for R. She was an extremely vulnerable individual whose position, in reality, was akin to a hypothetical detained psychiatric patient. As per *Rabone*, whilst C was no longer under the actual control of the Police once released, the Judge considered that if the Police could and should have exercised their powers to prevent C from leaving, then it was arguable that he might be treated as under the Police's control.

On the facts of this case, the Judge held that the Police did not assume responsibility to protect C from self-harm after release. Once sober, C had capacity. He made no threat of suicide in custody. He ate food and took his insulin. He engaged with his solicitor. On assessment by the mental health practitioner, there was no obvious sign of mental illness. At the time of release, there was no basis for the custody sergeant to conclude that C was in immediate need of care or control, or that it was necessary to exercise s.136 MHA 1983 powers to protect C from himself. To have detained C in purported exercise of such powers would have been unlawful. At the time C suffered injury he was not actually or constructively under the control of the Police.

The Judge considered that the pre-release risk assessment was broadly adequate. C was released to the safest place available. There was no reason not to release C with the insulin. It belonged to C and there was no reason to confiscate it. Further, C plainly needed it and there was no reason to suspect he would use it in the way he did.

The Judge indicated that in the event that he was wrong, and a duty was owed, there was no breach of duty.

C accepted that consideration of Art. 2 brought nothing new. The Judge commented that Art. 2 was not engaged because, on the facts as known at release or just before, there was no evidence of a real and immediate risk of C taking his own life.

C's claim was accordingly dismissed.

Without Prejudice - Disclosure - Unambiguous Impropriety

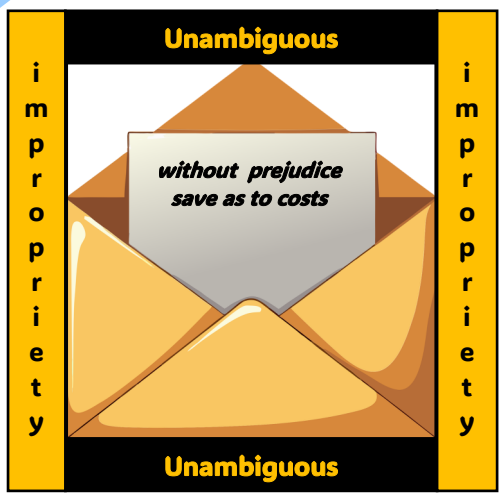
Morris v Williams
[2025] EWHC 218 (KB)

The Claimant ('C') brought a claim for damages for personal injuries which he alleged were sustained in a road traffic accident in 2018. The Defendant ('D') admitted negligence and that C suffered some injury. In an Amended Defence served in April 2023, D made clear that he was alleging fundamental dishonesty on the basis that C was seriously exaggerating the effect and extent of his injuries. Surveillance evidence was relied upon.

This Judgment related to an Application made by D in December 2024 for an order compelling C to respond to a Part 18 Request and that a letter, dated 12 May 2023, written by C's former solicitors to D's solicitors, be adduced as evidence despite being marked 'Without Prejudice Save as to Costs'. The Letter comprised a Calderbank offer by C to pay a sum in settlement of a previous interim payment and a contribution towards D's costs, and that C '*will admit that he was fundamentally dishonest in respect of some of the representations made in respect of his claim*' but only on the basis that such admission be contained in a non-disclosure agreement.

The Judge noted that the starting point was that without prejudice correspondence is inadmissible. That rule applies to exclude all negotiations genuinely aimed at settlement. That rule is not absolute. One of the exceptions relates to situations where to exclude material marked as without prejudice would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'.

CASE UPDATES



D submitted that the letter fell squarely within the unambiguous impropriety exception as it demonstrated that C accepted he had been fundamentally dishonest in relation to at least some aspects of his case and he should not be allowed to pursue a case where he disputed that he had been fundamentally dishonest. C disputed that the letter, properly analysed, contained such an admission or that, if it did, it was not so clear as to come within the exception.

The Judge concluded that the letter, which had been written by experienced solicitors, contained a clear admission that C had been fundamentally dishonest and fell within the unambiguous impropriety exception. If the letter was excluded, there was more than a risk of C perjuring himself and a certainty that C's pleaded case was being put forward on a (at least partly) false basis. The latter was sufficient to bring the exception into play. This was an example of where public policy arguments in favour of litigating disputes with full disclosure trumped the policy argument in allowing parties to speak candidly, and with protection of the contents of the discussions, to encourage settlement.

Accordingly, the Judge made an Order allowing the letter to be adduced as evidence.

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

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- 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
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- Public liability claims update

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