Legally Blonde

News & Case Law Update

Winter 2023

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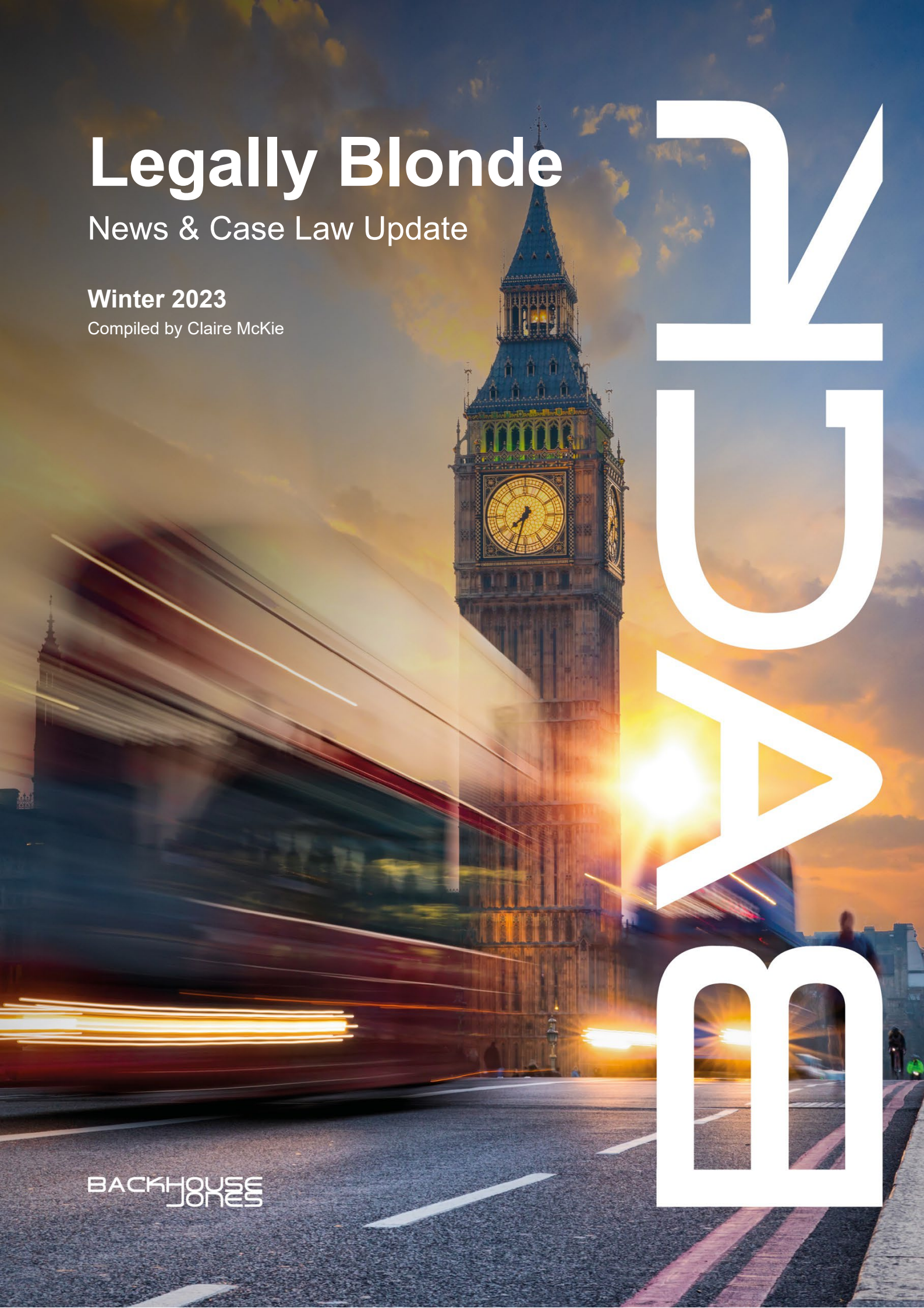


BACKHOUSE JONES

The Motor Vehicles (Compulsory Insurance) Act - Vnuk, The Reversal

The decision in this case pushed third party liability coverage provided by compulsory motor insurance into new territories, specifically that accidents on private land should be covered by policies; the Road Traffic Act only requires policies issued in the UK to cover liabilities "caused by, or arising out of, the use of a vehicle on a road or other public place".

The RTA no longer being compliant with the MID, the Act needed amending. In the absence of such an amendment, Claimants injured by vehicles on private land were left without recourse to compensation. Claimants were therefore entitled to pursue direct claims against the UK Government and also against the MIB.

In March 2021 it was confirmed that the UK would no longer follow the Vnuk decision. This was after consideration of the implementation costs. Despite these considerations, a private members bill was still a requirement.

The Bill received Royal Assent on 28 April 2022. This does not change the position in regard to s145 RTA, which deals with 'liability of death/ personal injury or damage where caused by, arising out, the use of a vehicle on a road or public place'.

The Act now contains s156a, which confirms that retained EU case law (ie Vnuk) will no longer have effect in the UK. There will therefore no longer be a requirement for motor insurers to insure against liability for accidents taking place off-road unless it is appropriate to the policy.

Agbalaya v London Ambulance Service [2022] 2 WLUK 545

The Courts considered the doctrine of causation when deciding to dismiss a claim for credit hire charges.

In this case the driver was the non-fault victim of a road traffic accident with the Defendant ambulance service. The driver made a claim for credit hire charges since her vehicle was not available for use after the accident. Her claim was dismissed because her vehicle at the time of the accident didn't have a valid MOT.

The Defendants submitted that the claim should fail due to the fact that the Claimant did not lose the use of a legally viable vehicle. Had the accident not taken place, the Claimant would not have been able to drive on the roads because of the lack of a valid MOT. Furthermore, due to a defective diesel particulate filter, it was unlikely the vehicle would have passed an MOT had it been presented for one and evidence showed that the driver would not have been able to afford to return the vehicle to a roadworthy state following such an MOT.

Since the claim for the loss of the illegal use of the vehicle would have been barred by the principle that a Claimant cannot ground a claim on illegality, the appeal was dismissed on the grounds of causation. This is because but for the accident the Claimant still would not have had access to a vehicle she could use on the public road.

Patel v Mirza [2016] UKSC 42, [2017] A.C. 467, [2016] 7 WLUK 518 and Stoffel and Co v Grondona [2020] UKSC 42, [2021] A.C. 540, [2020] 10 WLUK 387 provide the key guidance when considering the illegality defence.

Jenkinson v Robertson [2022] EWHC 756

This case confirms the need for a Claimant to have been given sufficient notice and a proper opportunity to a deal with an allegation of fundamental dishonesty prior to it being relied upon to dismiss the Claimant's claim.

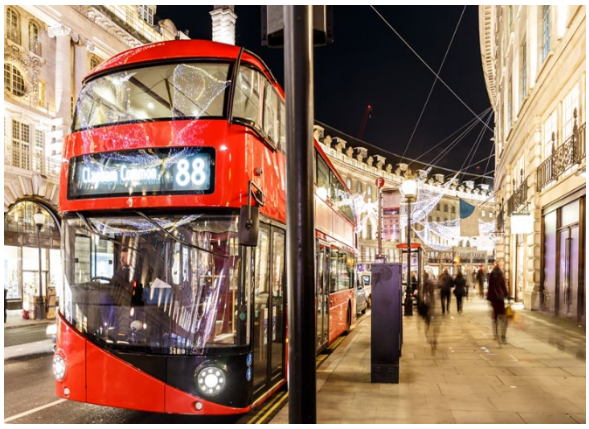
The Claimant had been injured in a car accident for which the defendant driver had admitted liability. The Defendant had accepted that they had been the cause of multiple injuries but disputed being the cause of ongoing back injuries. The Court then subsequently found the Claimant could not prove that these back injuries were caused by the Defendant.

During closing submissions, the Defendant invited the Court to find the Claimant fundamentally dishonest and dismiss the entire claim on the basis of the Claimant allegedly attempting to manipulate expert evidence, setting out matters in the schedule of loss which were not true and inflating his claim rather than moderating or reconsidering it when presented with contradictory evidence. The Court accepted the invitation and as such dismissed the claim and ordered the Claimant to pay the Defendants costs.

The Claimant Appealed.

The Appeal was granted due to Fordham J finding that it was properly arguable with a real prospect of success that the Judge's findings in his conclusion, that the Claimant had been fundamentally dishonest, were wrong.

The Court of Appeal judge decided that the first instant judge misinterpreted the facts which were key in the determination that the claimant was fundamentally dishonest. Furthermore, it was decided that although the defence of fundamental dishonesty could be raised in the closing submissions, the Claimant had not been afforded adequate notice of the alleged s57 fundamental dishonesty charge, the importance of which was highlighted in Howlett v Davies. As such there was serious procedural irregularity and the orders of the first case were set aside.



Campbell vs Advantage Insurance Co Ltd

In this case the Court of Appeal decided that a trial judge was correct when finding that the Claimant negligently contributed to their own injury by allowing themselves to be driven by an intoxicated driver.

The Claimant, Defendant and another friend went out drinking and both became intoxicated to such an extent that at one point the Claimant was no longer able to stand by himself. At this point the Defendant and his friend carried the Claimant back to the car and left him in the passenger seat asleep.

The Defendant and this other friend subsequently carried on drinking. Approximately an hour later both the Defendant and the friend went back to the car, at which point the car did not start. The third friend left to find some jump leads,

following which, the Claimant was relocated to the back seat. The Defendant then drove away and the vehicle was involved in an accident with a truck when the vehicle strayed into the other oncoming lane. The Defendant was killed and the Claimant suffered serious brain injury due to colliding with the back of the passenger seat.

The Defendant's insurer accepted liability for the accident but argued that the Claimant had contributed to their own injury by allowing themselves to be driven by an intoxicated driver.

This was analysed by the Judge at the first instance as appropriate because they considered that the actions of the Claimant fell below what an ordinary reasonable person would do when taking reasonable care for his or her own safety.

The Judge further established that the Claimant had sufficient capacity in their intoxicated state firstly by referring to the principle recorded in the Mental Capacity Act 2005 that "a person must be assumed to have capacity unless it is established that he lacks capacity" and then by examining the facts to arrive at the conclusion that for the Claimant to have been relocated to the back seat of the car he must have helped the Defendant do so and therefore having the capacity to do that, had the capacity to determine whether or not the driver was in such an intoxicated state to render driving dangerous.

The Court of Appeal agreed with this Judgement and as such upheld the decision that the Claimant was guilty of contributory negligence and allowed the recoverable damages to remain reduced by 20%.

Armstead v Royal and Sun Alliance Insurance Co Ltd – Court of Appeal [2022] EWCA Civ 497

This Court of Appeal case examined the extent to which a negligent party was liable in bailment for damage to hired equipment. The Claimant had been driving a hire car when she was involved in an accident that was not her fault. The Claimant appealed against the dismissal of her claims against the other motorist's insurer for rental charges and repair costs. The hire agreement in place between the Claimant and rental company included a collision waiver charge and declaration that the vehicle would be returned in its pre hire condition. A clause in the agreement provided that where it was damaged and became unavailable for hire, the hirer would pay an amount equal to the daily rental rate for up to 30 days. The repairs took 12 days. The hire company issued a formal demand for the repair costs and a sum of 12 days rental charges. The other motorist's insurer disputed its liability to pay either. The Claimant issued proceedings under the European Communities (Rights against Insurers) Regulations 2002. The claims were dismissed by a judge as by being a hirer, the Claimant had no proprietary interest and therefore claimed pure economic loss.

By the time of the appeal, it was common ground that the judge had wrongly disallowed the repair cost element. The appeal in respect of loss of use was dismissed as the sums claimed were relational economic loss and it was therefore not fair, just or reasonable to make the insurer liable for the Claimant's liability to the hire company. It was held that the offending motorist owed the Claimant no duty of care to avoid her incurring a contractual liability.

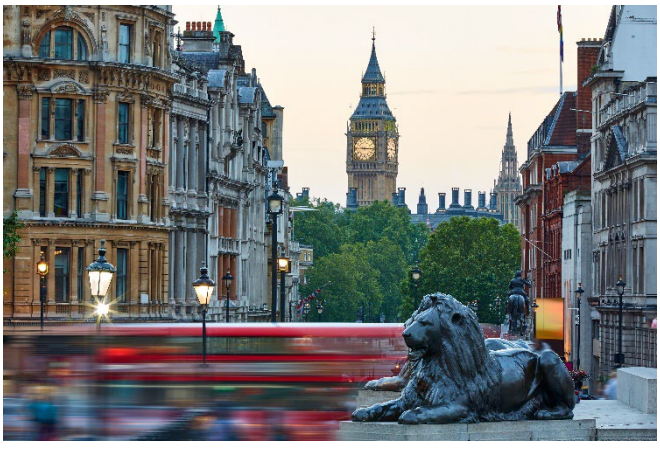
The appeal was dismissed. It was held that a Claimant had to have legal or possessory title to bring an action for the costs of

repairs and consequential economic loss to a chattel such as a motor vehicle.

McKeown v Langer – Court of Appeal [2021] EWCA Civ 1792

The Defendant to the appeal had succeeded in a trial of a preliminary issue in relation to unfair prejudice concerning the running of a number of lap dancing-entertainment clubs. The Claimant had been ordered to pay costs after the trial of a preliminary issue on liability. The payment on account of costs was to be £450,000.

In the judgment, the Court of Appeal rejected an argument that a Calderbank offer had the same effect as a Part 36 offer when a court was considering the issue of costs after the trial of a preliminary issue. The Court robustly rejected an argument that a Calderbank offer could not be equated with a Part 36 offer for the purposes of their discretion to award costs under CPR r.44.2; a global Calderbank offer had the effect of deferring a costs determination until the end of the action. To conclude that the two had the same effect would encourage strategic gameplaying.



Doyle v M & D Foundations and Building Services Ltd - Court of Appeal [2022] EWCA Civ 927

The Claimant issued a damages claim in November 2016 after suffering an injury whilst working on a construction site in the course of his employment. The claim was within the scope of the Pre-Action Protocol for low value personal injury (Employers Liability and Public Liability) Claims (the protocol). The Claimant had not responded to notification of the claim, although it disputed liability, therefore the protocol ceased to apply.

In July 2018, the parties entered negotiations to compromise. The Claimant made a Part 36 offer of £5,000 (incl. 30% deduction for contributory negligence) in full and final settlement. The Defendant's solicitors confirmed willingness to agree quantum without accepting the part 36 offer. They indicated that an order was required to finalise matters pursuant to CPR r.36. 13 (4) as the offer has been made at a late stage. They submitted a draft order providing for payment of £5,000 to the Defendant and for the Claimant to pay the Defendant's costs. The Defendant lodged a bill of costs for assessment citing the terms of the order. The Claimant disputed this approach; as an ex-protocol claim, the case fell within the fixed recoverable costs regime (as in Part 45 s. IIIA). The district judge rejected that having found that the fixed cost regime did not apply because the parties had contracted out which was reflected in the consent order. The decision was upheld on appeal.

The decision was appealed. The Claimant submitted use of the term 'subject to detailed assessment' did not indicate that the costs were to be assessed on the standard basis, particularly as the order could have specified standard costs. This term also was also apt to refer to the process of assessing the amount of fixed costs and the quantum of disbursements. In Ho v Adelekun [2019] EWCA Civ 1988,

the Court also construed the same phrase in a part 36 offer as 'not referring to conventional costs rather than fixed costs', with the result that the parties had not contracted out of the fixed costs regime, in the context of an ex-protocol claim where there was no realistic prospect of bringing the case within one of the specified exemptions to the costs being fixed. The parties had to be taken to have intended that the costs to be assessed would be fixed. The order did not reflect an agreement between the parties to disapply fixed costs regime and therefore the detailed assessment had to be read as relating to fixed costs.

The appeal was dismissed. A court's words were to be given their natural meaning and were to be construed in their context with regard to the object of the order. CPR Part 45 did not contain anything to prevent parties settling a dispute on any terms they wanted, there was no bar on them contracting out of the fixed costs regime. By agreeing a compromise and consent order settling the personal injury claim of an employee and providing payment of the employee's costs, such costs would be subject to detailed assessment if not agreed, the parties had agreed to disapply the fixed costs regime, not that the costs (to be assessed) would be fixed costs.

Greyson v Fuller [2022] EWHC 211 (QB)

The Court interpreted the Pre – Action Protocol for Low value Personal Injury Claims in Road Traffic Accidents from 31 July 2013 which requires disclosure of medical reports in soft tissue injury claims, where a Claimant sought to rely on more than one report. The sanction for simultaneous rather than sequential disclosure gave rise to the risk of not recovering costs at the end of the process, not exclusion of the evidence. The disclosure had not amounted to a failure to properly serve in accordance with CPR PD 8B Para 6.

James Waste Management LLP v Essex County Council [2022] 7 WLUK 392

The Court gave permission for the Defendant to adduce witness evidence as hearsay, despite late service of the hearsay notice. The trial had been adjourned due to the ill health of the witness. The witness' ill health had amounted to a valid reason for the late notice. Although there was a reason for anticipating that the witness would not be fit to give evidence at trial, the medical evidence was insufficient as it offered no prognosis of his condition or when he would be fit to give evidence. The witness had previously filed a full statement and the Defendant had now served a hearsay notice under Civil Evidence Act 1995.

The Court gave permission under CPR r.33.4 for the Claimant to call the witness to be cross-examined on the contents of his statement. In the exercise of the Court's discretion, it was clear that if the witness's evidence was adduced only as hearsay, that would cause prejudice to the Claimant who would not be able to cross examine the witness. However, the witness's evidence provided his perspective in relation to documentary evidence and the case turned on documentary evidence rather than witness evidence and was therefore a good reason to admit it. If the witness failed to attend, it would be a matter for the court to decide what weight to give his evidence and that would bring into play any further medical evidence which the defendant might serve in relation to the witness's condition.

Mega Trucking Co Ltd v Highways England Co Ltd [2022] EWHC 2099 (QB)

This case involved an unfortunate accident that occurred on the M25 motorway. A Scania lorry was travelling on the motorway, using the hard shoulder whilst roadworks were being carried out to create a smart motorway. The nearside wheels strayed from the carriageway onto the

verge area and over a filter drain. The driver attempted to regain control of the lorry which had then tipped onto its nearside and slewed across all three lanes into the central barrier. The central barrier then became detached and three construction workers were trapped, including one who sustained life changing injuries. His claim against the driver's employer was settled in the sum of £8m at trial in 2018. The drivers' employer, Mega Trucking Ltd, subsequently sought a contribution from the Highways Agency on the basis that the state of the highway verge and motorway layout was in disrepair and not properly maintained. Once proceedings had commenced, the Highways Agency sought to join Connect Plus (M25), a group of companies contractually responsible for the roadworks, pursuant to an indemnity.

The case examined the duties of highway authorities and those responsible for motorway construction beyond the statutory responsibility under the Highways Act.

The judge held that the claim for a contribution was pursued on a very narrow basis. He discussed the 'special defence' in s58 to the obligation in s41 Highways Act 1980. He explained if there is no actionable defect, in the sense that the highway is in repair and no danger is present, then the question of the statutory defence does not arise. He held that whilst the duty to maintain and repair is absolute, there is an objective approach to the standard of care that is required. A highway authority is not obliged to repair any defect which might arise nor is foreseeability of harm a measure of the standard. On behalf of the Claimant, Counsel disagreed with the Defendant's contention that the design of the highway and the combination of the drainage verge was outside the section 41 obligation of the highway authority. The Judge explained the actions of the driver did not come within those which might be expected of an ordinary user of the highway. Whilst the straying of vehicles from the carriageway to the verge was likely, the overrunning and extreme braking and turning was such a rare occurrence that it did not require any different design of the filter drain to prevent the consequences. There is not a requirement on a Highway Authority in discharge of its statutory duty to guard against such rare events.

Achille v Lawn Tennis Association Services Ltd [2022] EWCA Civ 1407

A Claimant appealed against a decision that a costs order could be enforced against him in proceedings involving the qualified one-way costs shifting regime (QOCS).

The Claimant had brought proceedings against the Defendant claiming damages for alleged psychiatric injury and injury to feelings. A district judge had struck out his personal injury claim on the ground that his statement of case disclosed no reasonable grounds but the claim of alleged injury to feelings continued.

The Claimant was ordered to pay the Defendant's costs of the personal injury claim. The District Judge found that the

requirements of CPR r. 44. 15(1) were satisfied and the costs order could be enforced without the Court's permission. The Claimant appealed against the striking out of his claim and against the costs order. The regime was intended to promote access to justice in personal injury cases. Rule 44. 14 placed a cap on a Claimant's liability to pay the Defendant's costs.

The rule was qualified by r. 44. 15 and r. 44. 16 to avoid promoting access to the courts for frivolous claims. Rule 44. 15 allowed a Defendant to enforce a costs order made against a Claimant without needing the court's permission in three categories of cases, one of which was where the Claimant had disclosed no reasonable ground for bringing the proceedings.

The Defendant contended that the costs order could immediately be enforced because the words "the proceedings" in r. 44. 15 referred to a Claimant's claim for personal injury, and that part of the claim had been struck out. The Claimant argued that "the proceedings" referred to the entirety of the claims brought against a Defendant in one action and the proceedings as a whole had not been struck out. Therefore, it was premature for the costs order to be enforced. The judge found that construing "the proceedings" in r. 44. 15 as referring to the personal injury claim alone was consistent with and furthered the purpose of the regime.

The appeal was allowed. The starting point was that "proceedings" was synonymous with an action which was not concluded until all matters before the court had been concluded. However, "proceedings", as used in the QOCS rules, required some qualification. The issue was whether "proceedings" in r. 44. 15 should be given a different meaning from that which it bore elsewhere in the QOCS rules. "Proceedings" could only have a different meaning in r. 44. 15 to that elsewhere in the QOCS rules if it was necessary to give effect to the purposes of those rules.

Orders under r. 44. 16 - The QOCS protection which would have been available for the personal injury claim if it had stood alone would be a relevant and often important factor to take into account when exercising the r. 44. 16 discretion in a mixed claim case.

Causing Serious Injury by Careless Driving

On 28 June 2022 the new criminal offence of Causing Serious Injury by Careless or Inconsiderate Driving came into effect.

In 2017 the Government had held a consultation to consider whether there was a gap in the law and whether a new offence was needed beyond the two existing: Causing Serious Injury by Dangerous Driving and Causing Serious Injury when Driving Disqualified. One of the key considerations being that cases of serious and often permanent injury can have devastating impacts on the victims. Without the new offence drivers that did not meet the high standards of Dangerous driving would only be prosecuted for Driving without Due Care and Attention [careless driving]. The offence of careless driving does not necessarily reflect the seriousness of any injury that is caused.

For the new offence to be charged, the following elements must be met:

1. it concerns a person who causes serious injury to another person;
2. such injury is caused by the driving of a mechanically propelled vehicle on a road or other public place; and
3. the element of carelessness is then introduced by such driving being performed without due care and attention or without reasonable consideration for other persons using the road or place.

The new offence is an either-way offence, meaning it can be heard in the magistrates' court or Crown Court. Conviction of the charge comes with a maximum penalty of 2 years' imprisonment (if heard at the Crown Court), dropping to a maximum of 12 months' imprisonment when dealt with by the magistrates' court.

The introduction of Causing Serious Injury by Careless Driving is likely to offer victims greater recognition of the significant harms they have suffered.

Hassam v Rabot [2023] EWCA Civ 19

The Court of Appeal has ruled that Claimants of personal injury can recover whiplash and non-whiplash injuries.

The court determined the proper approach for assessing damages for pain, suffering and loss of amenity where the Claimant suffered a whiplash injury which came within the scope of the Civil Liability Act 2018 s.3 attracting a tariff award stipulated by the Whiplash Injury Regulations 2021 reg.2, but also suffered additional injury which fell outside the scope and did not attract a tariff award.

The appeals concerned quantum claims in the respect of the Claimants' whiplash injuries falling within the tariff and non-tariff injuries. The Judge explained that to uphold the appeal could lead to Claimants not pursuing a claim for whiplash as it would reduce any award for compensation for the non-tariff injury. It was held that there was no violation of s.3 by a Claimant asserting a claim for other injuries to be assessed by reference to common law principles. It has been ruled an important principle of access to justice that injured parties are able to access the full compensation to which they are entitled.

If you would like any advice on any matters raised, please contact Claire McKie on 01254 828300 or claire.mckie@backhouses.co.uk.

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