DOLMANS INSURANCE BULLETIN

Welcome to the August 2020 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,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

REPORT ON

Manual Handling in a Care Home

DN v Dorset Council

We recently represented the Defendant Local Authority in an employers' liability claim which was virtually identical to another claim, brought by a different employee, which occurred in the same care home. The Court had to consider whether the Defendant had taken all reasonable steps to ensure that the Claimant was safe at work, or whether the first accident had placed the Defendant 'on notice', such that the Claimant's accident could have been avoided.

Background

The Claimant, aged 60, suffered an accident on 18 August 2014. She worked for the Defendant as a Care Assistant at a care home in Christchurch, Dorset. The Claimant's case was that she sustained injury when lifting a resident of the care home using a Joerns Oxford Mini 180 manual host, as the overhead hoist at the care home was broken. The Claimant said that as she attempted to lift the resident with the hoist, one of the wheels became entangled in a cable that was trailing under the bed, causing the hoist to stop suddenly, jarring the Claimant's back. The claim was brought on the basis that the Defendant failed to ensure that the overhead hoist was working, failed to ensure that there were no cables beneath the bed, had not conducted a risk assessment relating to the cables being entangled by hoist wheels, failed to reduce the risk of injury posed by the cables and did not provide adequate training.

The Defendant admitted that the Claimant suffered an injury and that the overhead hoist was not working on the day of the accident. Breach of duty and causation were in dispute. The Claimant was put to proof that the accident was caused by the hoist wheel becoming entangled in cables. It was the Defendant's case that the Claimant received sufficient manual handling training in October 2013 (9 months earlier) and was fully trained in the safe use of the hoist, specifically to ensure that the area around the hoist was clear of anything that may cause an obstruction. The mere fact that the overhead hoist was not working was irrelevant because the Defendant had already requested repair of the hoist.

The claim was allocated to the Multi-Track and the parties agreed quantum, subject to liability and any deduction for contributory negligence, in the sum of £32,500, gross of interest and repayable benefits.

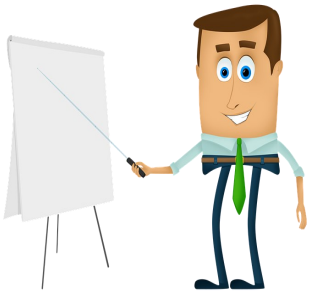
REPORT ON

The Defendant's Evidence

An overhead hoist had been installed for use in the care home. However, the overhead hoist was out of action at the time of the Claimant's accident, having developed a fault on 13 August 2014 since last being serviced (on 11 January 2014). An engineer was called to fix the overhead hoist, which was still under warranty, but was unable to attend before 20 August 2014. The overheard hoist was put back into service on 21 August 2014, after the engineer initially misdiagnosed the problem. The Claimant's accident occurred during this period (on 18 August 2014). It was the Defendant's case that it was perfectly reasonable for the Claimant and her colleague to use the manual hoist having been fully training in its safe operation and the resident in question had been manually hoisted many times before.

The Manager of the care home provided a Witness Statement as to what she was told following the accident: *"the Claimant had become frustrated and had forced the hoist (with the resident suspended from it) over the cables".* She said *"I could see no justifiable reason why the Claimant chose to do this. This is not a practice which is allowed and, in any event, the Claimant should have checked the area was clear of cables prior to hoisting."* This evidence strongly indicated that the injury occurred when the resident was being hoisted away from the bed, suggesting that the hoist was pushed underneath the bed and over the cables. Accordingly, contrary to the Claimant's training, she had failed to check that the area under the bed was clear from obstruction prior to hoisting.

The Defendant adduced evidence from another Care Assistant who confirmed that she attended manual handling training on 7 and 8 October 2013 in the company of the Claimant and other colleagues. The training was a mixture of theory and practical training, and included use of the manual hoist. A flowchart, dated May 2012, formed the basis of the hoisting training and stated that before using a hoist, the Care Assistant must consider (amongst other things) whether the area is safe for hoisting, whether there is sufficient space and the area is free from obstacles to avoid slips, trips or falls. The flowchart emphasised that if this was not possible, the hoist must not be used and the Care Assistant must consult a supervisor.



A colleague, whom was working alongside the Claimant, also provided a Witness Statement. She said that the Claimant did not report any injuries to her, but *"expressed annoyance and frustration that the cable was in the way"*. She reported telling the Claimant that she should have moved the cable out of the way prior to hoisting. The colleague's evidence was that moving cables to safety hoist a resident was *"part and parcel of our training and our job"*.

Finally, a Health and Safety Learning and Organisational Development Adviser of the Defendant gave a Witness Statement, in which he confirmed that the Claimant was signed off as competent following a comprehensive course of training when she started working at the care home in September 2006. All carers, which included the Claimant, had been trained to conduct their own risk assessment to ensure that they could hoist in a completely safe manner.

REPORT ON

Relevant Case Law

The Defendant relied upon the case of *EM v Dorset County Council [2017]*. This was an almost identical case, involving the same Defendant (and a former colleague of the Claimant), resulting from the use of a hoist when the wheel became entangled in cables. The claim was dismissed. We obtained a copy of the Judgment and ensured it was included in the Trial Bundle. In particular, we sought to rely upon the following comments made in *EM v Dorset County Council [2017]* which, in our view, were of direct relevance to the Claimant's claim:

"I have formed the view that it is obvious to any carer that if, carrying out a task, one encounters an obstacle, to simply continue with it without trying to find out what was going on and seeking help would be a very foolish way to proceed. And I don't form the view that this has amounted to a failure in the training to not actually tell them what common sense very clearly dictates should happen… I find that the Defendant provided good training which is properly recorded. I also find that it discharged its common law duty to provide a reasonable work environment for the Claimant. The Claimant was an experienced and trained carer and knew that she should carry out a visual risk assessment before starting a task. I find that there was no good reason for her to continue pushing against an obstacle when the hoist wouldn't go under the bed and that that was something which she did contrary to her training. I find that the workplace was reasonably safe for staff who acted in accordance with their training. I don't find that the employer could have done more to prevent this accident and, in all those circumstances, I find that the claim is dismissed."

The Trial

The Claimant's claim was listed for a 2 day Trial in the County Court at Bournemouth & Poole. The Trial concluded in under 1 day. During her evidence, the Claimant admitted that she had received training and she was aware of the flowchart. Accordingly, the evidence of the fellow Care Assistant, as well as the colleague that was working alongside the Claimant at the time of her accident, was not required and both witnesses were stood down. The Claimant also admitted that she was aware of the presence of cables beneath the bed.

Within his Judgment, the Judge said that it would have taken no time at all for the Claimant to have checked for the cables before hoisting the resident. It was held that the manual handling training the Claimant received, in conjunction with the need to carry out a dynamic risk assessment, was suitable and sufficient. The absence of a specific risk assessment for the task of hoisting residents was not causative to the Claimant's injury and would have made no difference at all. The Judge accepted the Defendant's submission that the hoist (and cables) was located in someone's home so it was unreasonable to expect equipment to be moved and each patient had to be hoisted in their own room/home. There had to be slack in the cables to allow beds to be mobile. The Judge held that the hoist was impeded by a cable and although the Claimant suffered an unfortunate injury, the Defendant had ensured the Claimant was reasonably safe at work and the claim was dismissed. Within the Judgment, the Judge made reference to the findings made in *EM v Dorset County Council [2017]*.

REPORT ON

Comment

This was an excellent result for the Defendant Local Authority. With damages having been agreed at £32,500 and the Claimant's costs budgeted at £62,421, the Local Authority made a saving in excess of £90,000. The Claimant's claim was almost entirely on all fours with a previous case that we handled for the same Local Authority. We believe that having the Judgment available for the Court - which presented its own risk of alerting the Court to the previous incident - went a long way to successfully defending the Claimant's claim.

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RECENT CASE UPDATES

Abuse of Process - Personal Injury - Costs

Barry Cable v Liverpool Victoria Insurance Co Ltd
[2020] EWCA Civ 105

The Court of Appeal overturned a decision to strike out a £2.2 million personal injury claim which remained in the RTA Portal for almost 4 years before the Claimant's solicitors sought to transfer it to the Multi-Track.

The Appellant was injured in a road traffic accident in September 2014. He instructed solicitors, but, at that stage, it was not appreciated that the claim was worth more than £25,000. The Respondent admitted liability. Due to the conduct of his solicitors, however, the claim did not progress.

The Claimant did not return to work. A neurology report in January 2017 indicated that the Claimant's condition had become chronic. In July 2017, a Claim Form was issued under Part 8, without the Stage 2 procedure under the RTA Portal having been begun. The Claim Form asked for a stay of the proceedings to enable compliance with the RTA Protocol. A stay was granted until August 2018, with the Claim Form to be sent to the Respondent by August 2017. The Claim Form was not sent until February 2018. 4 days prior to the expiry of the stay, the Appellant's solicitors said that the case was no longer suitable for the Portal. The Appellant applied to lift the stay and to proceed as a Part 7 claim. An amended Claim Form was served in the sum of £2.2 million.

At first instance, it was held that there had been an abuse of process, and the claim was struck out.

On Appeal, it was held that the District Judge had wrongly applied the test for striking out the claim, and so the Court had to consider the matter afresh.

The Judge had wrongly assumed that strike-out was the primary solution. It was primarily the delay, from July 2017 when the Appellant's solicitors had sufficient knowledge that the claim should have been issued under Part 7, which constituted the abuse of process.

There was no evidence, however, that matters would have proceeded differently if the Personal Injury Protocol had been followed a year earlier. There was no evidence of any actual prejudice to the Respondent from the failure to switch to the Personal Injury Protocol in August 2017, nor did the abuse of process affect the limitation period.

Striking out the claim was not, therefore, an appropriate proportionate sanction, especially given the prejudice to the Claimant.

The appropriate sanction was that the Appellant should pay the Respondent's costs, on the indemnity basis, up to 17 October 2018 (the date of the original hearing) and was barred from recovering interest on his Special Damages for the period up to that date.

RECENT CASE UPDATES

Amount of Counsel's Fees - Claims which Exit the EL/PL Protocol

Finsbury Food Group plc v Dover
[2020] EWHC 2176 (QB)

The Court was required to consider whether CPR 45.29I(2)(c) fixes the quantum of Counsel's (or a specialist solicitor's) fee for an advice on valuation of the claim at £150 plus VAT in accordance with CPR 45.23B (read with Table 6A) or whether the fee for such an advice falls outside the fees fixed in CPR 45 and is subject to assessment.

The Claimant, 'C', submitted a claim under the Protocol. The Defendant, 'D', failed to respond within the requisite 30 days, so the claim exited the Protocol in September 2015. C obtained medical evidence and Counsel advised on quantum in March 2017. The claim settled for £70,000 in December 2017.

C submitted a Bill of Costs which included Counsel's fees for the advice at £650 plus VAT. D disputed entitlement to Counsel's fees on the basis that no such fee was payable where a claim had exited the Protocol and was incurred after the claim left the Protocol, as those costs were subsumed within the fixed fees. Alternatively, if Counsel's fees were recoverable, the costs were limited to £150 plus VAT. The Costs Officer rejected both arguments and assessed Counsel's fees at £500 plus VAT. D appealed. The Master dismissed the Appeal, but gave leave to appeal to the High Court.

Before the Judge, the only issue pursued by D was that CPR 45.29I(2)(c), which deals with disbursements recoverable in claims which start within the Protocol but no longer continue under it, limits the quantum of Counsel's fees to £150 plus VAT on the basis that CPR 45.29I (2)(c) refers to the EL/PL Protocol (*"the cost of any advice from … Counsel as provided for in the relevant Protocol"*) and it was, therefore, necessary, on a proper construction, to look at paragraph 7.8 of the Protocol, which permits the obtaining of Counsel's advice, and from there to paragraphs 7.41 and 7.44(4), which provide that where an advice from Counsel is justified under paragraph 7.8, a sum equal to the Type C fixed costs must be paid. By cross referencing to Table 6A, the cost of the disbursement is £150 plus VAT. D submitted that a purposive interpretation was appropriate as to leave the quantum of Counsel's fees outside the fixed costs regime would be inimical and inconsistent with the purpose of the scheme.

The Judge dismissed the Appeal. The Judge accepted C's submission that the grammatical meaning of CPR 45.29I(2)(c) was clear and unambiguous. The phrase *"as provided for in the relevant Protocol"* is not referring to the cost as provided for in the relevant Protocol, but is referring to the type of disbursement there provided. This was also the only logical construction as neither the Protocol nor the rules fix the cost of obtaining medical records or medical reports under (2). CPR 45.23B and Table 6A apply to claims settled at Stage 3 and have no application to claims which exit the Protocol. Paragraph 7.44 is concerned with costs recovery in a claim which settles at Stage 2 of the Protocol and has no application to claims outside the Protocol. The Judge did not consider that the plain wording of the provision led to an absurd outcome.

RECENT CASE UPDATES

Fixed Costs - Recoverability of Counsel's Fees - Settlement Before Trial

Coleman v Townsend
SSCO 13.07.20

The Claimant, 'C', commenced a claim in the Portal pursuant to the Pre-Action Protocol for Low Value Personal Injury Claims in RTAs. The Defendant, 'D', did not admit liability and the claim exited the Portal. Proceedings were issued and Directions were given, which included a Direction for Skeleton Arguments to be served 2 days prior to Trial. The claim was listed for Trial on 26 April 2018. The claim settled when C accepted D's Part 36 offer (within the 21 day relevant period) on 25 April 2018, the afternoon prior to the Trial date. C sought to recover Counsel's abated Brief fee for Trial at £852.50 and Counsel's fee for the Skeleton Argument at £370. The Costs Officer allowed the fees and D appealed.

Table 6B under CPR Part 45 deals with the fixed costs payable where a claim no longer continues under the RTA Protocol and Rule 45.29I(2) deals with disbursements. D submitted that Table 6B only permits recovery of the Trial advocacy fee where the claim is disposed of at Trial.

As regards the Court's discretion to award any other disbursement reasonably incurred due to a particular feature of the dispute under CPR 45.29I(2)(h), D submitted neither fee was reasonable or proportionate in the circumstances. C submitted that both disbursements were recoverable under CPR 45.29I(2)(h) as they had been reasonably incurred. Skeleton Arguments had been served in accordance with a Direction of the Court and Counsel had inevitably already been briefed when the case settled the day before Trial.

The Master allowed D's appeal and disallowed both fees. Table 6B sets out the recoverable costs for each stage of a claim which no longer continues under the RTA Protocol and includes all work which could reasonably be expected to be carried out at each stage. Stage C, '*If the claim is disposed of at Trial'*, specifically includes the Trial advocacy fee and, implicitly, the costs of preparing for the Trial, including a Skeleton Argument, but that stage had not been reached in this case as the day of the Trial was not yet at hand.

Fundamental Dishonesty - Dismissal of Claim - Costs Orders

David Craig Pegg v David Webb (1) Allianz Insurance (2)
[2020] EWHC 2095 (QB)

Somewhat unusually, the Second Defendant in this case appealed against an Order dismissing the Claimant's claim at Trial, but on the ground that, despite dismissing the claim, the Judge ordered the Defendants to pay 60% of the Claimant's costs. The reason for the unusual Costs Order was that the Second Defendant (who had conduct of the Defence) had run a case of Fundamental Dishonesty against the Claimant, and this had meant that what would otherwise have been a 1 day Fast Track Trial became a 2 day Multi-Track claim.

RECENT CASE UPDATES

The Claimant was the front seat passenger in a vehicle which was involved in a collision with the Frist Defendant. The collision was wholly the fault of the First Defendant. The claim was for the injury and losses alleged by the Claimant to have been suffered as a result of the accident. At Trial, the Claimant relied upon a medical report from a Dr Shakir, in which Dr Shakir gave a longevity to the injuries of 6 months post-accident. This evidence was adopted by the Claimant in his Claim Form and Witness Statement.

The principle line of the Defence was that this was a bogus claim based upon a collision which never happened or, if it did occur, was contrived between the parties. Having heard the evidence, the Trial Judge concluded that the Claimant had proved his case and that there was a genuine collision. He found it was not a dishonest claim. However, the Judge acceded the Defendants' submissions that there had been a failure on the part of the Claimant to give Dr Shakir relevant information and what he had told Dr Shakir about the longevity of the injuries was inconsistent with his own evidence at Trial, such that no reliance could be placed upon Dr Shakir's report and, without medical support, the Claimant's claim had to fail. Despite this, the Trial Judge did not make a finding of Fundamental Dishonesty.

On Appeal, it was found that there were factors which pointed strongly, if not inextricably, to the conclusion that the Claimant had been dishonest in his presentation of his injuries to Dr Shakir and also to the Court. The Trial Judge had failed to deal with these factors, either adequately, or in some cases at all:

- The Claimant sought no medical assistance at all after the index accident.
- A month after the index accident, the Claimant injured his back after having a fall when he "rolled his quad bike"; the Claimant failed to inform Dr Shakir of this.
- The position was aggravated by two positive lies told by the Claimant to Dr Shakir; that he was still feeling the effects of his injuries and his treatment was ongoing.
- The Claimant compounded his dishonesty towards Dr Shakir by lying in his Claim Form and Witness Statement.

The Appeal Judge, therefore, concluded that no Judge could reasonably have failed to come to the conclusion that the claim for damages as presented by the Claimant was fundamentally dishonest. Accordingly, he agreed that the Claimant's claim should be dismissed.

The original Costs Order was set aside and the Claimant was ordered to pay 70% of the Defendant's costs on the indemnity basis. The claim was reduced from 100% because a significant part of the evidence and Court time had been spent determining whether the accident was bogus (and the Defendants had not succeeded in these allegations).

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

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