DOLMANS INSURANCE BULLETIN

Welcome to the September 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,
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REPORT ON

Employer's Instructions - A Conflict in the Evidence

LSS v Rhondda Cynon Taf County Borough Council

The Claimant was employed as a Teaching Assistant at an Education Centre owned and controlled by the Defendant Authority, represented by Dolmans. On the day of her accident, the Claimant alleged that she was carrying a large plastic crate containing reams of A3 paper from a classroom to the main hall at the Centre, when her foot was caused to twist on a stone in the yard. The Claimant suggested that the crate was bulky and had prevented her from seeing the stone. As a result, the Claimant allegedly suffered injuries to her foot, chest and elbow.

It was alleged that the Defendant Authority was in breach of various workplace and manual handling regulations, as well as being in breach of the Occupiers' Liability Act 1957 and/or negligent.

The Claimant alleged that she was told to pack and move the crates, as the Centre was in the process of moving to a different location. The crates had been supplied by a reputable removal company that the Defendant Authority had employed to facilitate the move.

A Robust Defence

In its Defence, the Defendant Authority maintained that the Claimant was not required to carry the packed crates and that she was, therefore, the author of her own misfortune. Indeed, the Defendant Authority's position was that the Claimant was specifically told not to move the crates.

In addition, and in response to various allegations made by the Claimant, the Defendant Authority argued in its Defence that it undertook appropriate risk assessments, but disputed that a risk assessment was required for this particular task, especially as staff were not required to carry the packed crates. Likewise, the Defendant Authority provided appropriate training, but there was no need to provide training for this particular task as, again, the Claimant was not required to carry the packed crates. The Defendant Authority provided suitable personnel and employed appropriate contractors to carry the packed crates, so there was no need for the Claimant to do so. There were no complaints and/or other similar accidents.

The Defendant Authority agreed that the Claimant was provided with verbal instructions, but disputed that these included an instruction to move the packed crates, as the Claimant alleged.

REPORT ON

Evidence

The Claimant reported her alleged accident to the school and her hospital records referred to a fall at work, although reference was made to a “slip”. Notwithstanding this, it was likely that the Claimant would prove that she had sustained an accident at work. However, factual causation remained in dispute, especially as there were no independent witnesses to the alleged accident.

Under cross-examination, the Claimant referred to an earlier meeting, which was not referred to in her Witness Statement, in which staff were apparently told not to carry the crates. She alleged that this was superseded by the new instruction to the contrary on the morning of her alleged accident, although she could not recall who gave this instruction.

The Claimant alleged that her work colleague, who gave evidence on behalf of the Defendant Authority, offered to carry the packed crate. However, the Claimant did so anyway without her colleague’s knowledge. The Claimant accepted that the crate was too heavy. The Claimant’s work colleague was adamant that he would have stopped the Claimant carrying the crate if he had seen her doing so.

The Deputy Head Teacher at the Centre also gave evidence on behalf of the Defendant Authority, as she was overseeing the move on the day in question. She totally refuted the allegation that staff were told to move the packed crates. A reputable removal company had been employed to do so and there was, therefore, absolutely no need for staff to move any of the crates. Indeed, the Deputy Head Teacher had specifically instructed that packed crates were to remain in the classrooms pending the move.

It was argued that there was no need to provide written instructions, as all staff were told the same thing in a meeting with the Deputy Head Teacher and had understood these simple instructions. Indeed, no other staff member expressed any concern or were involved in similar incidents. The Deputy Head Teacher gave evidence that she had even invited staff to speak with her if they had any queries and confirmed that the Claimant raised no such queries.

The Deputy Head Teacher went further in her witness evidence, commenting upon the footwear that was worn by the Claimant at the time of her alleged accident. Had the Claimant been instructed to undertake the alleged task, which was disputed, the Deputy Head Teacher confirmed that this type of footwear would have been inappropriate. However, it was reiterated that the Claimant was not instructed to move the packed crates in any event.

Judgment

The Claimant conceded at Trial that the alleged stone did not constitute a breach and the Judge confirmed that he, therefore, needed to decide whether the Claimant was instructed to move the packed crate, and, if she was, whether this was causative. He would then need to consider any contributory negligence on the Claimant's part, if appropriate.

The Judge was assisted by the witness evidence and referred, in particular, to the new evidence that the Claimant had introduced, alleging that there was a change in instructions and that she had been specifically told to move the packed crate on the day of her alleged accident.

The Judge preferred the Defendant Authority's witness evidence and that instructions were given before the move for staff to pack and label the crates, but not to carry the same. According to the Judge, there was no cogent evidence to suggest that there had been a change in these instructions on the day of the Claimant's alleged accident.

Although the Judge did not need to go further, he agreed that the stone did not constitute a breach and he could not find that the alleged accident would have been avoided if the Claimant had not been carrying the crate.

As such, the Claimant's claim was dismissed.

Conclusion

This case demonstrates how a robust, carefully pleaded Defence, coupled with strong witness evidence, can assist the Court when having to consider opposing arguments and decide upon conflicting evidence between the parties.

In this particular matter, the conflicting evidence as to the nature of the alleged instructions provided to the Claimant was at the root of the case and, as such, was also vital to the successful Defence of the same.

This particular matter was heard during 'lockdown' as a 'hybrid' Trial, with Counsel for both parties, the Claimant and one of the Defendant's witnesses attending Court in person and another of the Defendant's witnesses, as well as Dolmans' representative, attending virtually by way of the Court's 'Cloud Video Platform' (CVP) in order to comply with the social distancing measures communicated by the Court. Again, clients can be assured that Dolmans is well placed to engage with the Courts and others utilising the ever increasing variety and range of virtual platforms, having embraced and invested in the technology required to do so for a considerable period of time.

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RECENT CASE UPDATES

Civil Procedure - Personal Injury - Expert Evidence

Peter Griffiths v TUI UK Ltd
[2020] 2268 (QB)

The Claimant appealed against the dismissal of his breach of contract claim against the Defendant travel company.

The Claimant booked an all-inclusive package holiday. Two days into the holiday, the Claimant fell ill with symptoms of gastric illness. He had eaten exclusively at the hotel prior to being taken ill. He was admitted to hospital, where he provided a stool sample which tested positive for a number of parasitic and viral pathogens.

The Claimant obtained a report from a Consultant Microbiologist. The Defendant failed to obtain a report from its own expert (despite having been given permission). The Claimant's expert was not called to give evidence at Trial. The expert's evidence was uncontroverted, yet the Claimant's claim was dismissed at Trial. The Judge concluded that the expert report had gaps in its reasoning and contained statements which were bare ipse dixit. She relied on *Wood v TUI Travel Plc (t/a First Choice) [2017] EWCA Civ 11* in concluding that causation was not proven.

The Claimant appealed.

On appeal, it was accepted that there was a distinction between those gastric claims in which a Claimant relied upon the occurrence of the outbreak of illness at the hotel as proving causation and those claims where a Claimant relies on expert evidence to prove causation. In the latter case, lack of evidence of others falling ill was clearly of less significance than in the former. A Court would always be entitled to reject an expert report, even when uncontroverted, where it was a bare ipse dixit or an assertion without proof. However, where a report was uncontroverted, the Court was not entitled to subject to the same kind of analysis and critique as if it were evaluating a controverted report. Once a report was truly uncontroverted, that role fell away and all the Court needed to do was decide whether the report fulfilled the minimum requirement set out in CPR PD.35 para 3. It need not set out the chain of reasoning leading to the expert's conclusion, nor need it deal with any gaps in that chain.

The Defendant's failure to challenge the expert evidence by way of its own evidence or by way of cross-examination enabled the Claimant to succeed in his claim, notwithstanding the brevity of the expert's report and the criticisms made of it by the Trial Judge. It was not fair to characterise the expert's opinion as bare ipse dixit.

Appeal allowed. Judgment for the Claimant.

RECENT CASE UPDATES

Expert Evidence - Single Joint Expert - Adjournment of Trial

James Hinson v Hare Realizations Ltd
[2020] EWHC 2386 (QB)

The Claimant appealed against a Recorder's refusal to adjourn his Trial and permit him to rely on an expert acoustic engineering report in place of a report from a single joint expert.

The Claimant's claim related to Noise Induced Hearing Loss. Three days before the Trial, the Claimant applied for the Trial to be relisted for a 2 day Trial, reallocated to the Multi-Track and be given permission to rely upon a new expert report. The Recorder dismissed the Application having noted that although the Claimant had, for genuine reasons, lost confidence in the single joint expert already instructed in the proceedings, the case was not one where the single joint expert's opinion was obviously lacking in cogency, having regard to the overriding objective and the fact that considerable cost had already been incurred in the case.

On appeal, Mr Justice Spencer held that the correct approach to Applications by parties to abandon a single joint expert and adduce their own expert evidence was set out in *Bulic v Harwoods [2012] EWHC 2657 (QB)*; namely, that if, having obtained a joint expert report, a party, for reasons which were not fanciful, wished to obtain further information before deciding whether that report should be challenged, then they should, subject to the discretion of the Court, be permitted to obtain that evidence. The Judge in *Bulic* emphasised the importance of the overriding objective and that the Court had to have regard to the overall justice of the parties.

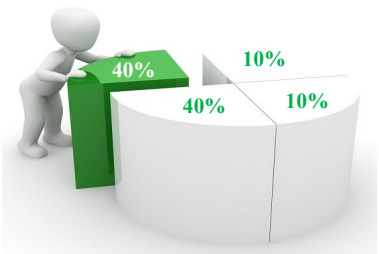
Mr Justice Spencer found that the Recorder's approach had been 'impeccable' and had taken full account of the overriding objective and the interests of justice generally. Whilst the Claimant would be aggrieved not to be allowed another expert, the Defendant would also be aggrieved if the Trial was vacated, again at considerable cost, in a case where the single joint expert had been proposed by the Claimant.

Appeal dismissed.

Fatal Accidents Act 1976 - Dependency Claims

Rix v Paramount Shopfitting Co Ltd
[2020] EWHC 2398 (QB)

The Claimant's husband, 'R', died of mesothelioma contracted from his exposure to asbestos while working for the Defendant, 'D'. After leaving D's employment, R had built up a successful business in which he and the Claimant, 'C', each held 40% of the shares, with their two sons each holding 10%. R took a salary and a dividend. C did not work for the business, but was a director and took a salary and a dividend. C inherited R's shareholding.



RECENT CASE UPDATES

The sons took over the business after R's death and the business became more profitable. C made a financial dependency claim. D denied that there was any claim for financial dependency because the business had been more profitable after R's death than before. D submitted that C's interest in the business was akin to capital or an income producing asset which negated any claim for financial dependency, and that her salary and dividends did not count towards any dependency because they were her own income.

The Judge held that C was entitled to a financial dependency award. Under s.3 of the 1976 Act, a dependant can only recover damages if they have suffered financial injury resulting from the death. C had suffered such a loss, notwithstanding that the business was more profitable after R's death. C was clearly dependent on R. R's business produced an income for the family which was the result of his skill, energy, hard work and business flair. Although C was a director and shareholder, in reality R was responsible for the success of the business. At the time of R's death, C had a *'reasonable expectation of pecuniary advantage from the continuance of the life of the deceased*' because, had R lived, his management of the business would have continued to produce an income for C; *Pym v Great Northern Railway* applied. The value of the dependency was fixed at death, therefore, the profitability of the business after R's death was irrelevant. C and R's shareholdings in the business at the time of R's death could not be regarded as an income generating asset independent of R's work and labour or as a capital asset. The Court had to look at the practical reality in relation to financial dependence, not the corporate or tax structures that were used in family arrangements. On that approach, it was clear that the income received by C as director and shareholder was entirely the result of R's work. The correct approach in this claim was to quantify the claim by reference to the earnings C would have continued to receive from the work done by R had he survived, with no discount for the fact that the company had continued to thrive.

Noise Induced Hearing Loss (NIHL) - Limitation - Dissolved Companies

Holmes v S & B Concrete Ltd
[2020] EWHC 2277 (QB)

The Claimant, 'C', was employed by the Defendant, 'D', between 1986 and 1993. C issued a claim for damages for NIHL in May 2018. D was dissolved in August 1995. In August 2018, C applied to restore D to the Register of Companies for the purpose of bringing his claim against D's insurers, and an Order was made restoring D to the Register and ordering that the company do continue in creditors' voluntary liquidation. The Application was not served on D's insurers. C then served proceedings. A preliminary issue trial was ordered on limitation. The Judge found that C's date of knowledge for limitation purposes was mid 2007 and that it would be inequitable to exercise discretion to disapply the limitation period pursuant to s.33 of the Limitation Act 1980.

Before the Judge, C had further averred that the action was not statute barred. The effect of the restoration was that D was deemed to have been in creditors' voluntary liquidation since at least May 1995. C relied on *Financial Services Compensation Scheme Limited v Larnell (Insurances) Limited (in liquidation) [2005]*, in which it was held that *"if [a claim] is not time-barred at the commencement of the bankruptcy or winding-up, it does not become time-barred by the passage of further time thereafter".* C, therefore, submitted that for his claim to be statute-barred, his date of knowledge would have had to have been before May 1992 (3 years prior to the date when D was deemed to have been in liquidation). The Judge dismissed this argument, distinguishing the *Financial Services* case and holding that the correct approach was that in *Smith v White Knight Laundry Ltd [2001]*. The company should not have been restored until limitation issues were resolved or conditions should have been imposed on the restoration. C appealed.

On appeal, the first instance decision was upheld and the appeal dismissed. The Judge also encouraged the Rules Committee to give consideration to a change in the rules so as to require notice to be given to a relevant insurer upon the making of an Application for restoration.

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

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