DOLMANS INSURANCE BULLETIN

Welcome to the June 2021 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

Claims in the Post Enterprise and Regulatory Reform Act World

KW v Bridgend County Borough Council

Section 69 of the Enterprise and Regulatory Reform Act 2013 served to increase the burden on Claimants pursuing claims for damages arising from workplace accidents, as this sought to negate the effects of the 'Six Pack' of Regulations that had previously effectively imposed strict civil liability upon employers for certain work accidents.

Although the 2013 Act came into force on 1 October that year and applied to breaches on or after that date, some Claimants still attempt to rely upon the Regulations, even where work accidents occur much later.

This arose in the recent case of *KW v Bridgend County Borough Council*, in which Dolmans represented the Defendant Authority.

Background

The Claimant was employed as one of three cleaners at an educational establishment owned and controlled by the Defendant Authority. The Claimant alleged that she was litter picking on a steep embankment within the establishment's grounds in wet weather, when she slipped and fell, thereby sustaining personal injuries.

The Claimant pleaded that the Defendant Authority was negligent and/or in breach of the Personal Protective Equipment at Work Regulations 1992 and the Management of Health and Safety at Work Regulations 1999.

The Claimant's alleged accident occurred in 2017, well after the Enterprise and Regulatory Reform Act 2013 and, therefore, the Defendant Authority denied that the alleged breaches of the said Regulations gave rise to an actionable claim in damages, the legal and evidential burden being upon the Claimant to prove common law negligence.

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Evidence

The Claimant alleged that she was required to undertake litter picking tasks outside in all weather conditions and that she had not been provided with appropriate footwear, maintaining that she had requested appropriate footwear, but was not provided with the same. The shoes provided allegedly lasted only two months, were not waterproof and had insufficient grip.

The Claimant's witness (another cleaner) gave evidence that her shoes were leaking and that she had apparently complained about this to her Line Manager at the time, although she had not complained about the shoe grips.

The Claimant's current Line Manager did not recall the Claimant ever complaining about shoe grips or asking for different shoes, although he recalled the Claimant's witness complaining that her shoes were leaking and that he drove her to the relevant supplier to provide replacement shoes that were watertight. He confirmed that requests for appropriate equipment were never refused.

The Claimant's previous Line Manager at the time of her alleged accident, who had since retired and did not give evidence, had noted in the relevant Accident Form that he had reminded the Claimant post-accident that she was not required to litter pick on the embankment during wet weather. This was also reiterated in the Claimant's job description, although the Claimant disputed the exact wording.

Risk Assessments

There were no risk assessments in place regarding litter picking.

The Claimant argued that it was a basic requirement of every employer to assess risks and if risks were identified, to ask if the risk could be negated or controlled to reduce that risk.

The Claimant also argued that it was not good enough to say that litter picking is a basic task without risk, as it depends upon the exact circumstances of the task. By saying that employees should not litter pick outside in wet weather, the Claimant argued that the Defendant Authority had identified a risk and should have undertaken a risk assessment in respect of the same.

The Defendant Authority argued that litter picking is not complicated and did not warrant a risk assessment. There were no previous complaints regarding this task and the Claimant's current Line Manager had even undertaken this litter picking task himself, but did not consider this to present a risk that warranted any risk assessment. He maintained that the Defendant Authority relied upon the Claimant's own common sense. She had undertaken this task many times previously without any issues. Even after the Claimant's alleged accident, the Claimant's current Line Manager did not consider it necessary to undertake a risk assessment, as there were no risks, in his opinion, and he considered that the Claimant's shoes provided were suitable.

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The Defendant Authority argued that risk assessments were not required for every task. This task relied upon so much common sense that a risk assessment was not required and the task did not warrant this, according to the Defendant Authority's witness.

It was also argued that there was an element of dynamic risk assessment, with the Claimant risk assessing and deciding if the embankment was wet and slippery. The Court was reminded at this juncture that the Claimant had undertaken the same task many times previously without any issues.

Even if there was a technical breach for no formal risk assessment, the Defendant Authority argued that the Court would not make a different finding even if there was a formal risk assessment in place.

Judgment

The Trial Judge agreed that the Regulations, as pleaded by the Claimant, were not relevant in this matter and that he was concerned only with common law negligence. The Judge accepted the Defendant Authority's argument that, as this was a 'Post-Enterprise Act' matter, then the burden remained upon the Claimant to prove her case and the common law position remained. The Defendant Authority, therefore, needed to provide a reasonable system of work to ensure that the Claimant was reasonably safe.

The Trial Judge was satisfied that, on a balance of probabilities, the Claimant had slipped and that her alleged accident had not been caused by any other means or mechanisms.

The Judge considered there to be a conflict between the Claimant's evidence and that of her witness regarding the shoes, and particularly complaints regarding these shoes. He was satisfied that complaints about water ingress into shoes had been made, but the Claimant's allegations did not revolve around this. Based upon the witness evidence, the Trial Judge was persuaded that no complaints had been made regarding the alleged lack of grip on the shoes and that the Defendant Authority was not at fault in respect of the same.

Based upon the evidence, the Judge considered that the litter picking regime was fairly flexible and was satisfied that the Claimant had been told that she need not collect litter from the embankment when wet. There were no formal targets or monitoring systems in place. The Judge was satisfied, however, that the system was sufficient and that it was reasonable to rely upon the Claimant's common sense for this particular task.

It was not enough, according to the Judge, for the Claimant to say that there was no risk assessment in this particular scenario. In any event, the Trial Judge did not consider there to have been any need for a formal risk assessment. On the Claimant's own evidence, she was able to assess that it was safe to initially walk up the embankment before her alleged accident and there were no previous issues raised.

The Trial Judge reiterated that he had to be satisfied that the Defendant Authority had acted reasonably to make the Claimant reasonably safe.

The Claimant and her witness had both worked at the same site for several years, with no previous issues. It was also significant that there were approximately 1,400 pupils on site, again with no previous issues, even though they had access to the relevant location.

The Judge was also satisfied that the practical training the Claimant had received was sufficient, although obviously limited for this particular task, and that any additional training would not have prevented the alleged accident anyway.

The Trial Judge held that there was no easy way to implement a system to ascertain if the location was safe or not in this particular matter and to seek perfection would not be workable or reasonable.

The Trial Judge was satisfied, after hearing all the evidence, that the Defendant Authority had acted reasonably to make the Claimant reasonably safe and dismissed the Claimant's claim.

Conclusion

Even though the Claimant's alleged accident occurred several years after the implementation of the Enterprise and Regulatory Reform Act 2013, the Claimant still sought to rely upon various Regulations and had specifically pleaded the same. The Defendant Authority could not just ignore these and the same care and attention was, therefore, needed to successfully defend these arguments.

This particular matter also highlighted several interesting arguments relating to risk assessments and the need, or not, for these where common sense and dynamic risk assessments should be sufficient for certain tasks.

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RECENT CASE UPDATES

Limitation Period - Computation of Time

Matthew & Others v Sedman & Others
[2021] 2 WLR 1232

The Claimants brought a claim in negligence against the Defendant's Trustees on the ground that they had failed to make a claim on behalf of the Trust under a Court sanctioned scheme of arrangement by the scheme deadline of midnight of 2 June 2011.

Proceedings were issued on Monday 5 June 2017.

At first instance, the Defendant successfully applied for Summary Judgement on the basis that the claim had been brought outside of the 6 year limitation period (Limitation Act 1980). The Judge held that the cause of action had accrued at the first moment of 3 June 2011, but that that day would, nevertheless, be counted for limitation purposes.

The Claimants appealed.

The Court of Appeal dismissed the Appeal, holding that the Claimants' cause of action had accrued at the very end of 2 June 2011, so that 3 June 2011 fell to be included in the limitation period.

The Claimants further appealed.

It was held:

- The general rule which directed that the day of the accrual of a cause of action should be excluded from the reckoning of a limitation period was that the law rejected a fraction of a day. The justification for that rule was that it would prevent part of a day being counted as a whole day for the purposes of calculating a limitation period. The 'fraction of a day' justification did not, however, apply in a midnight deadline case. The day which commenced immediately after the accrual of the cause of action was a complete undivided day, whether the cause of action was held to have accrued at the very end of one day or the very start of the next.

- There was no longstanding authority which excluded a complete undivided day from counting towards the calculation of a limitation period.

- The midnight deadline cases constituted an exception to the general rule, with the consequence that the whole day which followed a midnight deadline was not to be excluded from the calculation of a limitation period.

Accordingly, the Court dismissed the Claimants' Appeal and held that 3 June 2011 was to be included in the computation of the limitation period since it was a whole day. The claim against the Defendants was, therefore, out of time.

RECENT CASE UPDATES

Medical Agency Fees - Fixed Costs - Recoverability

Powles v Hemmings
23.04.21 St Helen's County Court

The Claimant and the Defendant resolved most of the issues between them. The sole issue for the Court to determine was whether agency fees attached or claimed as part of an overall claim for a psychology report (which was claimed in the sum of £900 inclusive of VAT) were recoverable.

The Defendant had requested a breakdown of the cost of the medical report. The Claimant's Solicitors responded as follows:

- £350.00 represented the fee for the consultation, examination and the production of the report.
- £400.00 represented such items as issuing a consent form, chasing and retrieving the completed form, issuing an instruction letter, quality checking the medical report, collection and query resolution with a costs draftsman and third parties, and so on.

The Defendant admitted liability to pay £350.00 (the sum claimable under the fixed costs regime). It contended that all the matters which made up the remainder of the amount claimed were agency fees and, as such, were irrecoverable. The Defendant's argument was that claiming these other items would amount to claiming twice for work which should be claimed within profit costs; *Aldred v Cham [2019] EWCA Civ 1780*.

The Judge found that the additional costs of £400.00 were not recoverable as they were 'part and parcel' of the fixed recoverable costs within table 6B of CPR 45.29C.

Negligence - Failure to Remove Claims - Duty of Care - s.20 Accommodation

YXA v Wolverhampton City Council
[2021] EWHC 1444 (QB)

The Claimant, 'C', brought a claim against the Defendant Council, 'D', in common law negligence and under the Human Rights Act 1998 for failure to remove him from his parents' care earlier than they did. D applied to strike out the common law negligence claim on the basis that the Particulars of Claim did not disclose any reasonable grounds for bringing the claim.

C and his parents moved to D's area in 2007. C suffered from epilepsy and autistic spectrum disorder. C's parents were substance abusers. There were concerns regarding overmedication by the parents, use of physical chastisement and the parents permitting a paedophile to babysit C. D provided regular respite care for C, under s.20 of the Children Act 1989, for one night every two weeks and a weekend every two months.

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At the end of 2009, C's parents signed an agreement for C to be accommodated long term under s.20 and a Care Order was made in 2010. C alleged that from the time the family moved to D's area in 2007, D should have investigated and/or appreciated the risk to C and should have instituted care proceedings.

C's claim in negligence was put in two different ways. A general assertion that a Local Authority that knew of sufficient to give rise to a knowledge of, or of a potential possibility of, harm or risk of significant harm to a child in its area owed a duty of care to the child to consider (or investigate the potential for) care proceedings. The Judge termed this 'the General Duty'. Alternatively, C alleged that where a Local Authority has become involved with the child to the extent of providing the child with accommodation under s.20, then that may, with other circumstances, give rise to a general duty of care to consider care proceedings (which the Judge termed 'the Respite Care Duty').

The Judge noted that this was a case involving a failure to provide a benefit. It was common ground that in such cases no duty will usually arise to simply confer a benefit, however, a duty of care can arise in four categories of case: where (i) A has assumed a responsibility to protect B from that danger; (ii) A has done something which prevents another from protecting B from that danger; (iii) A has a special level of control over that source of danger; or (iv) A's status creates an obligation to protect B from that danger.

The Judge rejected C's propositions that *D v East Berkshire [2004]* held that a duty of care would arise generally once a Local Authority had taken active steps and that this holding was approved in *N v Poole BC [2019]* ('*CN*'). The Judge also rejected C's assertions that *Barratt v Enfield [2001]* went any further than deciding that where a Local Authority had assumed responsibility by taking a child into care, the Local Authority owed a duty of care to the child in relation to all matters relating to the provision of that care. That duty would be extensive as by taking the child into care the Local Authority took over parental responsibility. However, that was not the case here as, where a child is accommodated under s.20, the parents retain parental responsibility. The Judge further considered that 'dependence' (in the sense of needing another to assist because they have no other recourse) was a different matter from 'reliance' required to found an assumption of responsibility.

The Judge considered that there was nothing materially different between this case and *CN*. The Judge rejected C's assertions that D created a danger by carrying out some investigations and then doing nothing, leaving the parents to believe that they could continue to abuse C without D intervening; had control over the wrongdoers; or prevented others from protecting C. Accordingly, the Judge found that there were no reasonable grounds pleaded for the existence of a 'General Duty'.

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In relation to the 'Respite Care Duty', the Judge agreed that during the period C was provided with respite care, D owed some duty of care as D had assumed a responsibility by positively receiving C into their control. The Judge did not make any decisions regarding the extent of that duty as such matters were not before him. The issue was whether the provision of respite care went beyond merely providing the respite care accommodation for the agreed period and gave rise to a duty of care to consider and potentially bring care proceedings. The Judge divided this issue into two sub-questions: (1) whether the provision of respite care accommodation gave rise to a more general duty of care, including to consider taking care proceedings generally; and (2) whether it could give rise to a specific duty of care regarding whether C should actually be returned to the parents at the end of the agreed period of respite without care proceedings being considered and, if appropriate, taken.

The Judge held that no general duty of care arose to consider care proceedings simply because C had temporary accommodation under s.20. This remained a case where D was alleged to have failed to provide a benefit to C by protecting him from harm and there had to be a particular reason to justify such a liability being imposed upon D. The responsibility which was 'assumed' was in relation to the provision of accommodation and matters linked to or flowing from that, and not in relation to either considering and taking care proceedings or the position or the future once the provision of accommodation had come to an end. Further, the scheme of s.20 requires, and is controlled by, the consent of the parents. The duty C sought to impose appeared inconsistent with the statutory scheme.

As to whether a duty of care could exist not to return C to what was (or should have been) known to be a place of danger without first considering and, if appropriate, taking care proceedings, the Judge considered that it was possible that a duty of care not to return might arise in the presence of a clear and imminent danger on return which was a clear change from the original 'norm' when the parents handed C over to D but, in this case, there was no pleading of any specific clear or imminent danger. It was, thus, difficult to see any reason why a duty of care would arise in relation to C's return if, as the Judge had held, no duty had risen already. The imposition of such a duty of care also seemed inconsistent with the statutory scheme of D being bound to return C to his parents and the parents being entitled to remove C from D. The Judge rejected this being a situation of D creating the danger as the danger was from the parents to whom D was bound to return C as a matter of law.

Accordingly, the Judge held that reasonable grounds had not been pleaded to give rise to a duty of care at common law.

The Judge went on to consider whether he should exercise his discretion to strike out, given that a parallel claim made under the HRA 1998 would proceed in any event. The Judge did not consider this was a reason to allow the common law claim to proceed. The common law claim would still take time and the quantum arguments might be different. The overriding objective favoured achieving finality and saving resultant waste of time, costs and Court and parties' resource. The Judge concluded that the common law claims would be struck out.

RECENT CASE UPDATES

Sexual Abuse - Limitation - Vicarious Liability

AB v Chethams School of Music
[2021] EWHC 1419 (QB)

The Claimant, 'C', spent one academic year at the Defendant school, 'D', in 1996/1997. C alleged that during that year she was sexually abused by her violin teacher, 'L'. C claimed damages against D on the basis that D was vicariously liable for the tortious conduct of L. The issues before the Court were whether the Court should exercise its discretion to allow the claim to proceed under s.33 of the Limitation Act 1980; whether L had sexually abused C as alleged; and whether D was vicariously liable for any assaults which occurred away from school premises.

C was an overseas student. L had been C's violin teacher at another school in the UK between 1993 and 1996. L took up a position at D's school in the summer of 1996. C transferred to D's school in September 1996 to continue being taught by L. D required all overseas pupils to have a UK based guardian to act in loco parentis who was expected to have the pupil to stay with them at 'free' weekends and during half-term holidays if the pupil was not returning home. It was agreed between L and C's parents that L would be C's guardian. In 2013, C made a complaint to the police of sexual misconduct by L. L was charged and a criminal trial date set for April 2016, however, shortly before the trial the CPS decided not to proceed. C then instructed solicitors to commence this civil claim.

The Judge decided that C had discharged the burden of showing that it would be equitable to allow the claim to proceed. C was able to give a convincing reason for the delay and there was no relevant substantial prejudice or unfairness to D due to the delay.

The Judge found that L had been sexually assaulted by L, including one or more incidents of sexual intercourse.

The Judge noted that the test for vicarious liability involves two stages: (a) firstly, asking whether the relationship between Defendant and perpetrator is capable of giving rise to vicarious liability; (b) secondly, asking whether the connection that links that relationship with the perpetrator's conduct is such as to establish liability on the Defendant's part. It was common ground that the first stage was satisfied on the basis of the employer-employee relationship. The second stage required consideration of: (i) what functions (field of activities: the nature of the job) had been entrusted by D to L; and (ii) whether there was a sufficient connection between the position in which L was employed and L's wrongful conduct to make it right for D to be held liable for L's conduct ("the close connection test"). In sexual abuse cases a more tailored version of the close connection test is applied.

D alleged that, in this case, the question was whether assaults occurred (i) because L was misusing authority conferred by D as employer or (ii) because L was misusing authority conferred by C's parents under the guardianship arrangement or (iii) both. D submitted the answer was (ii), but not (i), and, therefore, not (iii). Accordingly, no vicarious liability arose. Leaving aside assaults in the practice room at D's school, which D accepted attracted vicarious liability, all of the acts of sexual assault – in L's car and flat – were at a time when L was hosting C as her guardian. D alleged that at such time L was not conferred with authority vested in him by D, but by C's parents. The guardianship role was a distinct role. It was an arrangement made with C's parents and D had nothing to do with C's parents' choice of guardian. Accordingly, D submitted, there was "no real connection" between L's employment relationship with D and assaults committed in his home or his car in the school holidays or over free weekends.

The Judge rejected D's submissions, finding that the connection that linked the employment relationship between D and L in this case was such as to establish liability on D's part for the sexual assaults by L not only in the practice room at school but also in L's car and flat while L was acting as host under the guardianship arrangement with C's parents. There was the necessary close connection. This was supported by features including the following: the functions entrusted by the school to L included the pastoral responsibility owed to C as a teacher. The school had conferred on L authority over C which he had abused both at the school and in private. The employment relationship between the school and L caused him to have access to C in circumstances where sexual abuse was facilitated; provided L with the opportunity, incidental to his functions as the school's employee, to abuse his power; facilitated the commission of the sexual abuse by placing L in a position where he enjoyed both physical proximity to C and the influence of authority over her; and entrusted L with responsibility for C's care. There was a strong causative link between the employment relationship and the sexual assaults, which could be seen in the fact that the school's deployment of L, in the furtherance of the school's operations, as C's principal teacher was done in a manner which created, or significantly enhanced, the risk that C would suffer the relevant abuse. The sexual assaults in L's car and flat, whilst he was acting under the guardianship arrangement, flowed directly from actions of control and manipulation by L at the school and in the teacher-pupil setting.

Accordingly, Judgment was given for C.

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

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