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liabilityMatters

Issue 4 | November 2019

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Welcome

Welcome to liabilityMatters, the publication that looks at key case law and discusses the trends we're seeing in the liability claims we're handling, and in the wider claims marketplace.

In this fourth issue we lead with an important case for defendants on portal incubation – Cable v LV=. Whilst a motor claim it has equal applicability for liability insurers alike. The court has sent a strong message that it will not tolerate high value claims (in this case £2m+) being incubated in the portal and expects to see effective collaboration in the spirit of the Civil Procedure Rules. Claimants have been warned.

We also include a case on the administration of CPR in a hospital environment which serves as a reminder for defendants that the absence of a risk assessment is not fatal to a defence. And that claimant's must be selective when bringing in expert engineers or ergonomists.

Finally, we take a look at a developing area of claims fraud – collusion between claimant and policyholder.

We hope you enjoy this issue and, as ever, if there are subjects you'd like to see covered, or if you have any comments regarding the content, we'd be delighted to hear from you.

Simon Hiscock
Client Director

CPR – a real risk of injury?

Penelope Smith *v* The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust (2019)

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It was alleged that during the course of her employment as a nurse the claimant was obliged to carry out CPR for long periods of time over a period of three consecutive days, resulting in a left wrist injury.

The claimant relied on supportive ergonomic evidence and contended, as evidence of negligence, that the defendant had not carried out any risk assessment of the task. Both of these were key strands to the claimant's claim.

In finding for the defendant, Judge Berkley in Winchester County Court accepted the defendant's evidence that the claimant had not in fact performed CPR on three consecutive days as alleged and found the claimant's symptoms were caused by a subsequent incident whilst supporting a patient.

Aside from those evidential findings, what makes this case noteworthy is that judge also preferred the defendant's argument that little or no weight should be given to the claimant's expert ergonomic evidence.

The defendant did not consider it necessary to obtain its own ergonomic evidence and simply relied upon the joint orthopaedic evidence, which stated that the claimant's ergonomist had made a *"completely unrealistic assessment of biomechanical data"*.

The judge also accepted the defendant's argument that injury from manual CPR was not reasonably foreseeable in any event. It was accepted that manual CPR is a lifesaving procedure that is performed on tens of thousands of occasions per year, yet there is no body of evidence to suggest that its performance causes injury to practitioners.

The judge held that there was no known risk and neither breach of duty nor causation could be established by the claimant. There was no obligation on the defendant to perform an ergonomic risk assessment of the manual CPR task as contended by the claimant's counsel and had such an assessment been carried out it would in any event have concluded that manual CPR was perfectly safe.

Comment

This is a useful decision for insurers and reaffirms the view that the absence of a formal risk assessment is not in itself detrimental to successfully defending a personal injury claim.

The judgment includes reference to the Court of Appeal decision in *Koonjul v Thameslink Healthcare Services (2000)*, which the reader may recall stated that "the risk of being injured had to be a real risk which was a foreseeable possibility". In this instance the court found the administering of CPR was not a real risk.

This case also demonstrates that defendants don't necessarily require their own engineering or ergonomic expert to mount a successful defence. Courts will look at the totality of the evidence such as from medical experts and draw their own conclusions.

Collusion – 'secret or illegal co-operation or conspiracy in order to deceive others'

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The identification of fraud is a vital part of all claims investigations, not only to weed out the fraudsters but to protect the real victims and pay genuine claims quickly.

Typical attempts at fraud in a liability environment have historically centred on either claimant or policyholder fraud.

We've all experienced lots of examples of claimants being fundamentally dishonest about the extent of injury or damage sustained in an accident they argue was not their fault. And from a policyholder perspective it's nothing new to see deliberate non-disclosure of facts, or even an insurance policy being taken out post-loss.

A new trend we're starting to see however is claimants and policyholders colluding to bring a claim under a liability policy, and to share the proceeds of that crime. This will be nothing new to motor practitioners but in liability circles it has been relatively rare to date.

We've seen an increasing number of scenarios where the policyholder has been colluding with the claimant to ensure that a public liability policy covers a genuine incident, albeit one that was not due to the negligence of the policyholder.

One includes an escape of water causing substantial damage to a property belonging to the claimant. The claimant didn't carry any first party property insurance so colluded with the policyholder to invent a scenario where it appeared the damage had been caused through the negligence of the policyholder (a plumbing firm) to realise a claim against its public liability policy.

Another features the falsifying of invoices to a family member's damaged property following an uninsured event. There was never an intention for consideration to be paid between the parties but colluding on the facts of an 'accident' and invoices meant there was potential to bring the case within the ambit of the public liability policy.

Prosecutions are pending but have some advice for liability practitioners:

- Be diligent in checking key investigation indicators and where necessary carry out detailed intelligence on the back of it
- Often there isn't one single golden nugget to prove fraud, sometimes things just doesn't seem right – use your gut reaction, it's not normally wrong
- Watch out for policyholders being too ready to admit an accident was their fault and urging a claimant is paid quickly
- Look out for close associations between a policyholder and claimant, including friends and family members
- If a local contractor is working so far out of their local area, ask yourself why

We'd be delighted to hear from practitioners on your experiences in this area – if you're seeing similar trends, please let us know.

Court sends a strong signal on high value portal incubation claim

Cable *v* Liverpool Victoria Insurance Company Ltd (2019)

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The majority of personal injury claims brought are limited to £25,000 and fall within the claims portal. As all readers will have experienced, it's not unusual to see higher value claims being brought into the portal in an effort to secure a swift admission of liability. They are then dropped out on value – conduct we call portal incubation.

What's also commonplace is the lack of meaningful dialogue regarding the value of a claim following an admission. There are no time limits imposed on a claimant to submit the stage 2 settlement pack and we often see it being lodged only days before the expiry of the limitation period. Some would say this is a tactic to achieve post issue costs.

The conduct of the claimant's solicitor played a part in the appeal decision in Cable, resulting in a strike out for deliberate misuse of the portal. Whilst this involved a road traffic accident, the same considerations apply to liability claims so this is very important precedent.

The accident occurred in 2014 and was submitted in the RTA portal. Liability was admitted at stage 1. Soft tissue injuries to the neck, back and shoulders were alleged with no work-related absence referred to or rehabilitation requested. On the basis of the claims notification form submitted it would have been anticipated by the defendant that the claim would be of low value and settled swiftly.

Medical evidence was obtained and disclosed in November 2014 – mention was made of an absence from work and a report from a neurologist was recommended. An interim payment was made.

Questions were raised by the defendant regarding absence/loss of earnings but these went unanswered. In April 2015 the neurologist report obtained by the claimant noted continuing symptoms, and an inability to work. A recovery expectation of 15-18 months was provided. This report was not however disclosed to the defendant, nor was the defendant advised that the claimant's employment had been terminated. The claimant had been earning approximately £130,000 per annum, but again this had not been notified to the defendant.

The defendant made a Part 36 offer in April 2016 for £10,000. At this stage they had not seen the neurologist report and were under the impression that the claimant may still have been absent from work. The offer was not accepted and the claimant obtained a further neurologist report, which indicated the claimant would suffer permanent migraines. The claimant had not returned to work and was in a severe neurological state. Again, this further report was not disclosed to the defendant.

The claimant's solicitors issued proceedings on 25 July 2017 under Part 8, which is the portal stage 3 procedure, for limitation and applied for a stay. At this time, loss of earnings exceeded £200,000.

The claimant was ordered to serve proceedings by 20 August 2017, but did not do so until February 2018.

It was necessary for the claimant to transfer proceedings from Part 8 to Part 7 as the value of the claim exceeded £25,000. It was not until 16 August 2018 that the defendant was notified of this. Furthermore, the two reports from the neurologist were not disclosed until 17 August 2018, just before the stay was due to expire.

The defendant at first instance was successful in the application to set aside the order, reinstate the stay and strike out the claimant's claim. It was held by the judge that there had been an abuse of process with a deliberate misuse of Part 8 procedure, which kept the defendant in the dark, preventing them from progressing the claim. There was significant prejudice to the defendant.

The claimant appealed this decision. The judge at this time looked at whether the abusive conduct had been "unfair" to the other party.

It was concluded that limitation was approaching and the claimant's solicitors had made no or little effort to value the claim and consider if it was capable of remaining in the portal. Regarding prejudice, the judge was correct to consider delay, loss of opportunity for input/rehabilitation and the inability for the defendant to participate in case management or hold an adequate reserve. The claimant had deliberately misused the portal process to secure a stay and limitation extension, failed to place an adequate value on the claim and failed to inform the defendant that it was a high value case.

The judge had considered all the relevant factors and overall effect of the conduct of the claimant in relation to fairness. The correct test had been applied and the claimant's appeal failed.

Comment

This case is a stark warning to claimants that they could face strike out in cases where they deliberately misuse the portal process with a view to securing a stay and limitation extension in circumstances where the case is over £25,000.

It transpired that the case was in excess of £2 million in value, and the conduct of the claimant solicitors was clearly not in the spirit of the protocol.

Whilst it was made clear that strike out was a last resort, this case is helpful to defendants where, despite all best endeavours, they don't receive any response regarding the value of the claim and there is no attempt by the claimant to enter into meaningful negotiations prior to the expiry of the limitation period. The spirit of the protocol and cards on the table approach was not followed and whether deliberate or not, the Court has demonstrated by their decision that the overriding objective of the Civil Procedure Rules should always be in contemplation.

Case handlers should consider the conduct of the claimant's representatives and pay close attention to the conduct of the claimant's solicitor in relation to proceedings and whether they have been raised correctly.

liability**Matters**

About us

We're a specialist liability practice trusted by many of the world's leading insurers, brokers and corporate clients to protect their interests – and those of their customers – when the unexpected happens.

Leading our clients expertly through the claims process, we help mitigate risk and claims spend, protecting our clients' brands, reputations and commercial relationships.

We apply market leading technology to improve the customer experience, settle claims faster and identify fraud. Our digital thinking never stops, we're always developing new technology to make claims more transparent and easier for everyone.

Upcoming industry events with us:

- 22 November – Insurance Times Awards
- 26 November – Women in Insurance Awards
- 2 December – Airmic Academy and BLM workshop
- 10 December – Riot legislation breakfast briefing
- 10 December – Client reception

Contact us

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For more information about the work done by our liability team, download the liability claims services brochure here.

STOP PRESS

We were delighted to see a recent claim we handled appear on the BBC's 'Claimed and shamed' programme. That followed the story of bodybuilder Kurt Gorog and his 'back injury'. Ben McBean of QBE tells the story here:

https://www.bbc.co.uk/iplayer/episode/m0009n2m/claimed-and-shamed-series-11-episode-8

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