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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 first issue of 2020, we lead with an article discussing the impact of The Enterprise and Regulatory Reform Act six years on. Heralded as part of the answer to address the so-called 'nanny state' approach to health and safety, has it been all change or no change?

We also include an article looking at the admissibility of evidence recorded covertly during a medical examination. And will this open a debate on whether all examinations should in future be recorded?

Finally, and in a departure from the norm we've a guest article written by our Netherlands General Manager for Personal Injury, looking at an alternative approach to the management of personal injury claims called the polder model. Evolved from a concept of collaboration during the Middle Ages, what can we learn from the polder model and the Dutch ideas?

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.

Happy New Year to all our readers, we hope it's a healthy and prosperous one.

Simon Hiscock
Client Director

The application of covert recordings during medical examinations

Alan Thomas
Technical and Audit Manager

T +44 7879 431145
E alan.thomas@uk.sedgwick.com

The case of *Mustard v (1) Jamie Flower (2) Stephen Flower (3) Direct Line Insurance (2019) EWHC 2623 (QB)*, involved an application made by the defendants to exclude covert recordings made by the claimant during a medical examination. In this case the defendant's neuropsychologist had agreed to part of the examination being recorded, but not to the recording of psychological tests designed to assess the claimant's psychological state.

The claimant alleged that the tests had been incorrectly administered and the test results therefore were unreliable. She relied upon the covert recordings in support of her allegations. The defendants objected to the claimant relying upon the recordings and applied to have this evidence excluded.

On hearing the application, Master Davidson stated *"I reject the proposition that the recordings were a breach of the Data Protection Act or the GPDR and I do not propose to give the submission detailed attention. Article 2(c) of the GPDR provides that the Regulation does not apply to the processing of personal data "by a natural person in the course of a purely personal... activity"*.

He found that the recordings were not unlawful and further commented that even unlawfully or improperly obtained evidence might still be admissible in certain circumstances.

In an Obiter statement, the Master said that it was in the interests of all sides that examinations conducted by medical experts in personal injury claims were recorded in order to provide a complete and objective record of what occurred in the event of disputes. Such recordings should be made in accordance with an agreed industry-wide protocol and be subject to appropriate safeguards and limitations on use.

Comment

In the postscript to his judgment, Master Davidson stated *"Although covert recording is a thorny topic, it falls to be decided on a case by case basis. It follows that it is not very susceptible to guidance that could be applied across the board"*.

Following the Mustard judgement, we anticipate that there will be an increase in the request for such recordings to take place and equally anticipate an increase in covert recordings in such examinations. Whether this will affect the admissibility of other recordings outside the surgery, will be open to debate. It's certainly an area to watch and may well open a debate as to whether all examinations should be recorded.

What can UK personal injury claims practitioners learn from the Dutch polder model?

Martin de Haan
General Manager Personal Injury

T +31 623228840
E martin.dehaan@nl.sedgwick.com

Polder model is the Dutch consensus model in which employers, trade unions and the government sit together around the table to negotiate employment conditions and wages.

It draws from the consensus model, which has been around since the Middle ages, when farmers, noblemen, city dwellers and other citizens had to work together to build dykes and keep their feet dry. This was only possible by collaborating, no matter their heritage or standing.

In the 1980s this concept was also introduced in the handling and settlement of personal injury claims. One of the largest Dutch insurers at that time made the statement: "the claimant (victim) of today can become our client of tomorrow".

The *Gedragscode Behandeling Letselschade* (GBL) is the Dutch code of conduct for handling personal injury claims and is set around the principle of the polder model. Put simply, the purpose is to handle personal injury claims in a respectful and honourable manner, and one that puts the victim at the heart of everything we do.

The GBL came into practice in 2007 and is a voluntary code, endorsed by most parties involved with the handling of personal injury claims. Since then the quality of the handling of personal injury claims has evolved and we settle 96% of personal injury claims without litigation, and 92% within two years.

The GBL includes best practices, the key ones at the heart of GBL are:

1. **The right to representation**
   Victims should be advised by insurers to seek legal advice – the Netherlands has the *Keurmerk Letselschade* (Certification Personal Injury loss) which sets the quality standards for legal advisers.
2. **Three-way conversation, or 'tri-partite dialogue'**
   This honest, open and transparent conversation – between the victim, the representative of the victim and the liability insurer – usually takes place at the victim's home and allows all parties to discuss the victim's current medical complaints, the social and work situation (or study situation), and how this has changed post-accident. The insurer can see first-hand the day to day impact of the accident. A report is then drawn up of the conversation, usually by (the representative of) the insurer. This report is then sent to the victim and/or the advocate to agree.
3. **The action plan**
   This is usually part of the report in response to the tripartite dialogue. It contains clear arrangements about any experts to be commissioned, agreements for advance payments etc. Where there are differences of opinion, a SMART route to resolution must be agreed. Forms of alternative dispute resolution, such as mediation, adjudication or binding advice, are preferred to a lengthy judicial course.
4. **The medical course**
   The GBL contains a separate medical paragraph stipulating that without the medical course – medical records and an assessment thereof by an appropriately qualified advisor – a final settlement can't be agreed.

In the Netherlands we've developed the Dé Letselschadehulpdienst [The Personal Injury Aid Service] – this is assistance for accident victims. Instead of paying financial contributions, actual help is implemented. This involves practical aid, such as childcare, domestic help, do it yourself, dog walking service, etc.

After a serious accident the life of a personal injury claim victim changes. Paramedics (occupational therapists) are also employed by Sedgwick, to advise and mediate on the need for home adaptations, assistance devices and provisions.

Comment

As a global organisation we work closely with colleagues around the world, so have the benefit of seeing other legal systems first hand. The UK has much to be proud of, particularly with the Claims Portal resolving low value personal injury claims in England and Wales. This serves the needs of the many, offering access to justice in a cost-proportionate way.

Where the Dutch polder model has advantages is in the management of medium to high value claims. The collaborative, arguably less adversarial, approach gives direct access to victims that just isn't available in the UK. It really helps us put them first. It's a win-win, we keep litigation rates low and mitigate indemnity spend whilst victims feel treated more fairly.

In the Netherlands, Sedgwick is now looking at ways we can push the boundaries of traditional adjusting, and the employment of paramedics to help us resolve the most catastrophic injury claims is just one of those.

ERRA: All change or no change?

Timothy Deards
Complex Loss Adjuster

T +44 7771 941186
E timothy.deards@uk.sedgwick.com

The Enterprise and Regulatory Reform Act 2013 (ERRA) was introduced on 1 October 2013. Its intention was to redress a balance, which many felt had become too heavily weighted against defendants.

Some commentators considered it a vanity bill – of more political aim than practical purpose. Six years on we consider its impact, has it been all change or no change?

Prior to ERRA, employers could find themselves strictly liable to pay compensation to employees injured at work, even in situations where all reasonable steps had been taken to prevent injury.

The most commonly cited case was *Stark v The Post Office (2000)* where the claimant was injured due to a defect in the bicycle supplied to him by his employers. The defect was latent and couldn't possibly have been discovered by inspection, although the Post Office was found to be strictly liable.

Findings like Stark, and newspaper headlines about community events being cancelled for fear of litigation, led to accusations we were living in a 'nanny state' society. So ERRA was born.

By virtue of Section 69, employees can no longer sue their employers under regulations passed under the Health and Safety at Work etc Act 1974, including the key 'six pack' regulations. The regulations survive for criminal cases, but civil claims must now be brought in negligence.

The practical effect of the reform is that most employers' liability cases are now governed by the common law and not the generally more exacting standards of the regulations. That said – and here's the quid pro quo – the court will inevitably have the statutory duties in contemplation when deciding what the reasonable employer should have done.

Six years on there are very few cases reported which specifically involve ERRA. Two of the exceptions are the 2018 cases of *Cockerill v CXK and Another*, and *Tonkins v Tapp*.

Cockerill arose from an incident whereby the claimant, upon visiting unfamiliar premises in the course of her duties, fell down a doorstep, suffering injury to her ankle giving rise to chronic disability. Of some considerable legal significance was that the accident happened on the same day ERRA came into being!

The parties agreed that the effect of Section 69 of ERRA was that the only route open to the claimant against her employer was common law negligence. In finding for the defendant, the Judge held that the step was adequately lit and that reasonable steps had been taken to keep visitors reasonably safe: warning of the steps with signs when the door was closed and ensuring that it was clearly marked with hazard tape when open.

The Judge did not consider that the claimant was assisted by Regulation 12 of the Workplace (Health, Safety and Welfare) Regulations 1992 as that provision is directed to the construction and surfacing of floors, which is not easy to apply to the existence of doorsteps.

An argument was put forward by the claimant that employers can and should be expected to insure against accidents of the sort that befell the claimant. Mrs Justice Collins Rice was clear that, even if this argument had any weight before 1 October 2013, it cannot survive ERRA:

"In relieving employers of no-fault liability to claimants in the field of health and safety, the Act no doubt intended to relieve them of some of the legal burden of insuring against no-fault liability. Parliament's intention that claimants must prove that their accidents were someone else's fault before they are entitled to compensation must presumably mean just that."

Tonkins concerned a self-employed carpenter who fell from a tower scaffold suffering severe spinal and head injuries. He claimed against the owner of the scaffold, another self-employed contractor, whom he said erected it and supplied it for his use.

In dismissing the claim, the court decided that the claimant had erected the scaffold himself without the defendant's permission and was therefore the author of his own misfortune.

The judge went on to make observations about the effect of ERRA reiterating that it prevents a civil action being brought but it does not abolish the Regulations. They remain in force (for criminal cases). The question remains: how relevant the Regulations are to an action in negligence?

In Tonkins, which was heard following Cockerill, the judge said:

"Accordingly I would not be prepared to find, without much more analysis and argument, that the effect of section 69 was to deprive an accident victim of entitlement to rely upon a finding that breach of statutory duty constituted "ipso facto negligence"... even if no civil right of action was available for its breach".

Comment

It's surprising that six years on we haven't seen more cases considering ERRA. There were concerns at the time that it lacked teeth and would have little practical effect.

Where it has had a positive impact is on work equipment claims like that in Stark. It would be very much more difficult now to establish liability in a Stark scenario where the defect was latent and couldn't have been reasonably discovered. So that's something for defendants to latch on to at least.

There is of course one key exception to ERRA, namely the Employer's Liability (Defective Equipment) Act 1969 remains in force, meaning that where a defect in equipment provided for use at work causes injury, and the defect is wholly or partly due to the fault of a third party, then the injury is deemed to be primarily the employer's responsibility. We expected to see more claims pleaded under this Act, but we've not found that the case, perhaps surprisingly.

So, all change or no change? From what we're seeing it certainly hasn't been a game changer, but we'd be keen to learn of your experiences. We'll also be sure to keep practitioners appraised of any further developments in ERRA within future editions of liabilityMatters.

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:

- 31 March – I Love Claims Building Repairs Conference
- 13-14 May – BIBA Conference & Exhibition
- 8-10 June – Airmic Conference
- 10-13 June – NAGS 2020
- 21-23 June – ALARM Conference

Contact us

Simon Hiscock
Client Director, Liability Claims Services

T +44 7880 780505
E simon.hiscock@uk.sedgwick.com

Mark Gilbert
Client Partnerships Director

T +44 7703 203768
E mark.gilbert@uk.sedgwick.com

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

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