Health&Safety news

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David Robinson, Thompsons' National Professional Support Lawyer, discusses the importance of renewing health and safety policies and risk assessments and ensuring they remain fit for purpose

It is not a game

THE HIGHLY acclaimed television series "Game of Thrones" is due to air later this year. While exciting for fans of the show, what, if anything, can those operating in the workplace learn from it?

The series is adapted from George R R Martin's fantasy novels, and often focuses on good versus evil and the ability for characters to change and be redeemed.

Within the workplace there are no "good" and "evil" divisions, but there is often oversight and avoidable mistakes, and what employers and employees alike should be striving for is continuous change and development in health and safety practices.

"Had the employer taken the proper steps and applied their duty of care ... there would have been no opportunity for the electric shocks to have been generated"

I will illustrate the importance of this through a recent case which proceeded through the Courts.

Mistakes and complacency

In **Chisholm -v- D&R Hankins (Manea) Ltd**, which was decided by the High Court in December 2018, an employee with 13 years' experience driving tipper trucks for the same employer, was electrocuted.

His job involved collecting different types of material and depositing them, following which he was required to clean out the rear of the tipper truck to prevent cross-contamination of materials.

One day, in tipping the truck to clean it, as he had done for over a decade before, the tipped truck was close to an overhead power line.

The proximity of the tipped truck was enough for electrical shocks to be created (despite not touching the lines). The employee suffered extensive injuries.

The employer denied responsibility for the accident, stating its system of work prohibited the tipping of trucks to clean them. Notwithstanding this prohibition, a number of other employees gave evidence that they routinely tipped the trucks to sweep them out and clean them between loads.

All of the witnesses accepted that they should check for obstructions before tipping the truck, but all confirmed that they had not been specifically trained in how to assess this.

The Judge hearing the case held that it was reasonably foreseeable that employees would tip the trucks to be able to clean them, and that a suitable and sufficient risk assessment would have identified this. The employer had also failed to consult the readily available Health and Safety Executive guidance relevant to this task.

Such failures represented a breach in the employer's duty of care, and the Judge further decided that this contributed to the cause of the injury.

Had the employer taken the proper steps, and applied their duty of care, an exclusion zone would have been applied around overhead power lines and there would have been no opportunity for the electric shocks to have been generated.

The employer was found to be 75% to blame and the employee 25% at fault.

"But we've always done it this way"

The above case demonstrates that, just because something has always been done a particular way, it does not mean that it is safe or risk-free – it may be that the inevitable has simply not yet happened.

The only way that an employer can really know they have performed an effective risk assessment, and if their health and safety policy is working properly, is to see how things are through an employee's eyes 'on the factory floor'.

Employers, Health and Safety Representatives and Unions should, at regular intervals, undertake an audit of the type of work being undertaken. Such an audit should be undertaken with a completely open mind.

It should not be about trying to defend or challenge an existing work system, but rather it should be about objectively reviewing what factually is happening and comparing that to the risk assessments, policies and procedures currently in force. It cannot be a paper exercise, hard-hats need to be donned and a full walk around should occur.

A hands-on audit may bring to light unsafe practices that an employer was unaware of, and in turn identify a need for further training or policies that should be enacted.

Conversely, it may also highlight individuals responding to risks in a way that was not conceived by the authors of the policies and which should be incorporated in these policies to improve best practice.

Reviewing health and safety matters should be viewed positively, with open dialogue taking place between all involved. This shouldn't be an exercise of catching people out or hiding a true way of working. The ultimate aim is for a safer working environment, which results in safer employees and therefore greater productivity; it truly can be a "win-win" situation.

Low risk does not equate to no risk

Dealing with complicated and large machinery, working at a significant height, or dealing with dangerous chemicals may all seem high risk activities resulting in a higher level of assessment. However, even the seemingly low risk or mundane are not without risk.

Last year a County Court heard evidence of an employee who was accustomed to daily lifting and carrying items as part of his job description.

The activity had been properly risk assessed and training was provided. However, for a period of a couple of weeks that seemingly straightforward task

➲ became significantly more cumbersome, with the employee being required to relocate the entire property of his employer within his workplace to a new location. The intensive and repetitive nature of the task caused the employee injury.

Although the task was the same, the context was very different and it was held that the existing assessment of risk was not fit for purpose for the intensive, albeit short-lived, office relocation. The employer was therefore found to be at fault.

> *"The powerful have always preyed on the powerless. That's how they became powerful in the first place"*

Whether it is cleaning a tipper truck, or moving furniture, both cases should act as a warning to all employers and health and safety representatives to be aware of changing circumstances, and to ensure assessments are revised and adapted so that they remain fit for purpose.

Challenging the status quo

Hopefully this article highlights the importance of change and redemption as envisaged by the author whose work was adapted into the "Game of Thrones" series. A character from the series, Tyrion Lannister, states: "The powerful have always preyed on the powerless.

That's how they became powerful in the first place." However, employees should feel empowered, through their health and safety representatives and their union officials, to challenge the status quo and identify flawed working practices.

That same character also says: "It's easy to confuse what 'is' with what 'ought to be', especially when what 'is' has worked out in your favour". An employer should be looking in health and safety for "what ought to be", aspiring for the highest safety standards reasonably possible, and not simply continuing with the status quo because nothing catastrophic has yet happened.

Serious injury specialist Philip Liptrot discusses the little-known syndrome and what claimants and lawyers alike need to know about it

A guide to chronic regional pain syndrome

CHRONIC REGIONAL Pain Syndrome (CRPS) is a debilitating condition that normally develops after a trauma to a limb. The condition usually affects the injured limb but it can also affect uninjured parts of the body. In extreme cases, it can result in amputation and other serious complications.

Despite these potentially life-threatening consequences, CRPS often goes undiagnosed because the symptoms are not recognised by the injured person or their GP.

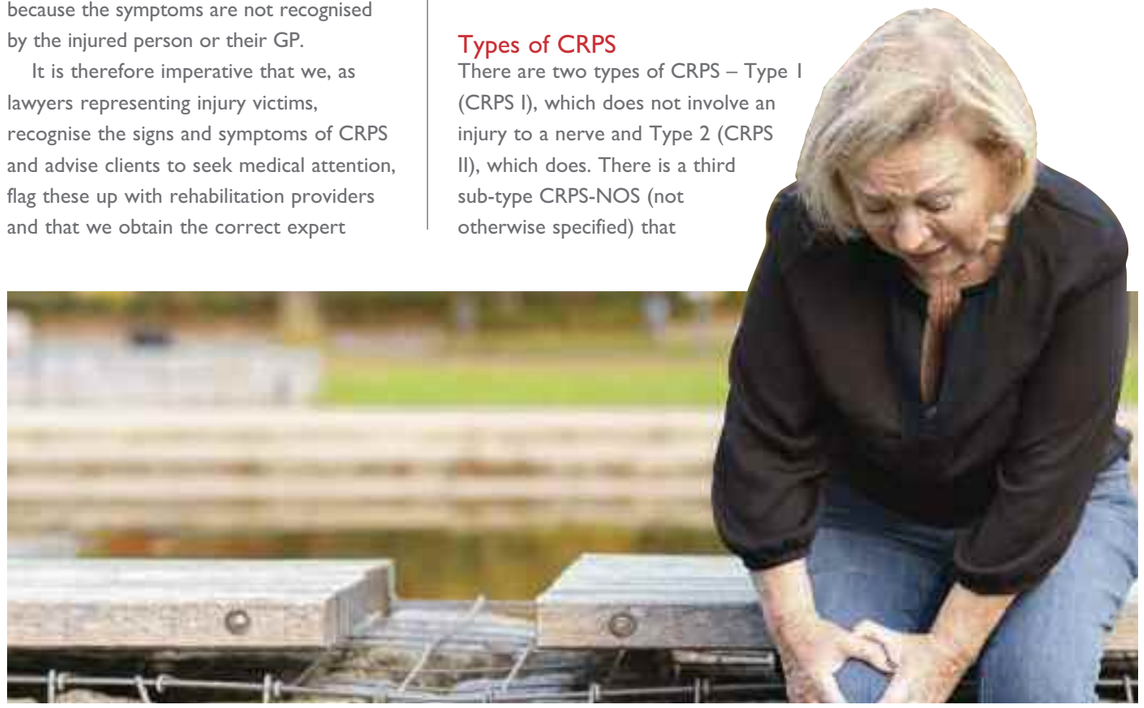
It is therefore imperative that we, as lawyers representing injury victims, recognise the signs and symptoms of CRPS and advise clients to seek medical attention, flag these up with rehabilitation providers and that we obtain the correct expert evidence in their case so that the appropriate treatment and compensation are obtained.

Causes of CRPS

The actual cause of CRPS is still unknown but it involves a complex interaction between the central nervous system (brain and spinal cord), the peripheral nervous system (nerves outside of the brain and spinal cord) and the immune system.

Types of CRPS

There are two types of CRPS – Type 1 (CRPS I), which does not involve an injury to a nerve and Type 2 (CRPS II), which does. There is a third sub-type CRPS-NOS (not otherwise specified) that



➲ covers a CRPS condition that does not fit into either category.

Symptoms

The main symptoms to look out for are:

- pain that seems disproportionate to the severity of the original injury
- allodynia (sensitivity to touch and/or temperature)
- skin colour changes (mottling) and changes to skin texture (can appear shiny)
- changes in skin temperature
- unusual sweating and hair growth in the affected area
- weakness and decreased range of movement/function.

A diagnosis is made on the basis of reported symptoms but also on what is found on examination, and only if there is no better explanation for these symptoms. There are strict criteria, known as the Budapest criteria (which last year superceded the Orlando criteria of 1994) that apply based on whether a combination of symptoms are present.

Depression and anxiety, as a result of the pain and debilitating nature of the condition, is common.

Prognosis and treatment

Unfortunately, for most people who develop CRPS, there is no cure but treatments are available to control and manage the pain. In more minor cases, with appropriate treatment and rehabilitation, sufferers can return to their pre-accident activities. The earlier the diagnosis, the more likely the chance of minimising the impact of CRPS.

Treatment ranges from pain relief medicine, physiotherapy, and therapy for psychological symptoms (ideally as part of a holistic pain management programme that can be either as an inpatient or outpatient) to invasive treatment, including the implantation of a spinal cord stimulator or neuromodulator.

“Depression and anxiety, as a result of the pain and debilitating nature of the condition, is common”

Legal cases

Thompsons has represented many clients who appeared to have had seemingly innocuous injuries but then developed CRPS, leading to huge changes in their lives. For example, one client suffered a shoulder sprain after a car accident which then required minor surgery. This resulted in CRPS and ill health retirement from her job as a paramedic. Another, a porter who suffered a soft tissue injury to his arm when a 1kg strip light fell onto him, was unable to return to work due to the CRPS which he subsequently developed.

Rehabilitation and experts

Rehabilitation should always be considered at an early stage to assist with recovery. This can be paid for by the defendant's insurers under the Rehabilitation Code or by way of an interim payment.

Not only is it important to obtain early treatment and rehabilitation, but it is also crucial that appropriate expert evidence is obtained as part of the legal case. Normally, reports from an orthopaedic surgeon, pain consultant and a psychiatrist are needed but an occupational therapist may also be necessary if the injured person needs regular help and aids or equipment that might assist them.

CRPS is a relatively little understood condition and people diagnosed with it can face years of pain and debilitation, particularly if left untreated. Early rehabilitation is paramount. Treatment costs can be high. It is therefore vitally important that the signs and symptoms are recognised and appropriate steps taken by the injured person, their medical provider and their lawyer if a compensation claim is being made.

Senior serious injury solicitor, Karl De-Loyde, examines the positives and drawbacks of the rehabilitation code for those who have suffered siginifcant injuries

Rehabilitation and litigation: an overview

REHABILITATION IS defined as the restoration to effectiveness. Anybody who has been injured in an accident will undergo a process of rehabilitation, whether that is informally by getting themselves up and moving again, or whether that is more formal, with third-party intervention such as physiotherapy.

Whichever way people do it, most people wish their accident had not happened and want to return to normal life as quickly as possible. This article will look at the role of rehabilitation in the context of litigation and making a claim after an accident.

Rehabilitation in litigation – what is it?

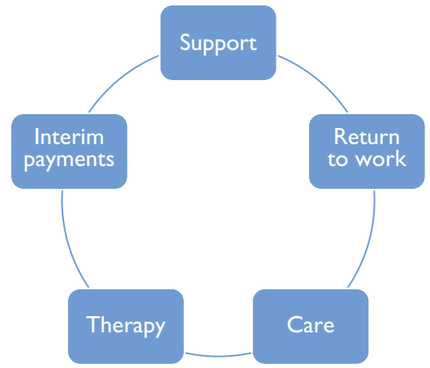
Essentially it is a written code of practice between the parties; the mechanism of how it works varies depending on the severity of the injury/injuries suffered. In broad terms, rehabilitation is split between three categories of case value:

- Claims with a potential value up to £25,000
- £25,000 to £250,000
- Above £250,000

Where the value of the claim is likely to be less than £25,000, rehabilitation will usually be limited. It may involve some therapy (such as physiotherapy or counselling) and these cases are usually concluded using an online portal system, rarely going to trial.

A rehabilitation code applies in cases where the value of the claim exceeds £25,000. The latest (3rd) edition of the rehabilitation code was drawn up by both claimant lawyers and insurers. In, 2017 "A Guide to the conduct of cases involving serious injury", was published, again a combined publication following collaboration between lawyers and insurers. The guide applies specifically to cases with a value exceeding £250,000.

The rehabilitation code is voluntary, neither party can force the other to agree that it applies to a case, and it operates outside the court.



The process of rehabilitation

How does it work in practice?

The concept is quite simple. The lawyer for the claimant is expected to notify the defendant (who is usually an insurer) that a claim is being made and to share information about the client and their injuries. The opponent (or more usually their insurer) is then under a duty to consider rehabilitation.

> *"The rehabilitation code is voluntary, neither party can force the other to agree that it applies to a case, and it operates outside the court"*

- An assessment is then undertaken, usually referred to as an immediate needs assessment (INA), involving a suitable assessor/case manager (usually medically qualified) meeting with the client and making recommendations, which can be for short or long term goals.

An example might be an INA recommendation that the injured person should have a taxi account, paid for by the defendant, to enable the client to be as mobile as they were before their accident so they can attend medical appointments etc.

> *"As litigators we must remain alert to the drawbacks of rehabilitation, and in particular of the code, and be ready to go down a different path if that best suits our client's needs"*

The INA might identify the need for additional therapy, be that physiotherapy, occupational therapy or speech and language therapy. Typically, the greater the injury, the more detailed the package of support.

The report is then sent to both parties and, at this stage, the insurer is required to confirm whether they are willing to pay for the recommendations made. Where funding is agreed, the case manager will then coordinate the support package and monitor its progress.

Advantages of the code

A bespoke package of support can fit around the injured person, and means they are not reliant upon another person.

Successful rehabilitation can mean a quicker return to work. It can also resolve issues between the parties sooner and with greater certainty than having to press on with litigation and wait for a trial date.

For example, the current state of uncertainty regarding accommodation claims makes it very difficult to resolve this type of issue at trial, and the parties can use rehabilitation as a vehicle to resolve the client's accommodation needs.

Drawbacks of the code

The code is voluntary and an insurer cannot be compelled to pay for rehabilitation. In our experience, insurers will only tend to agree when there is something in it for them, such as a potential saving to be made.

In the past, some insurers have used the INA as nothing more than a fishing exercise to obtain as much information about the claimant as possible, and have then refused to agree to fund any of the recommendations, or only agree to some of them. On occasions, armed with information from INA, some insurers have attempted to then settle a claim at a very early stage.

Some insurers insist on only using certain rehabilitation providers from their panel. In our experience, these are less independent and often of lower quality.

Alternatives

One alternative is for the claimant to fund their own rehabilitation via interim payments. This gives the client more control over the appointment of their case manager and the implementation of the rehabilitation package. The costs of the rehabilitation are then claimed from the opponent as a separate head of loss in the schedule of damages.

Does rehabilitation in litigation work?

In the writer's experience, mostly yes. It is an additional tool to achieve a client's recovery goals but it requires the parties to cooperate in an otherwise adversarial system.

As litigators we must remain alert to the drawbacks of rehabilitation, and in particular of the code, and be ready to go down a different path if that best suits our client's needs.

However, given that many of our clients who need rehabilitation will have suffered catastrophic injury and face the prospect of being kept out of their damages for a long time as litigation grinds on, rehabilitation can be vital.

It has been in place for over a decade, and is finding its place in the options available to litigators.