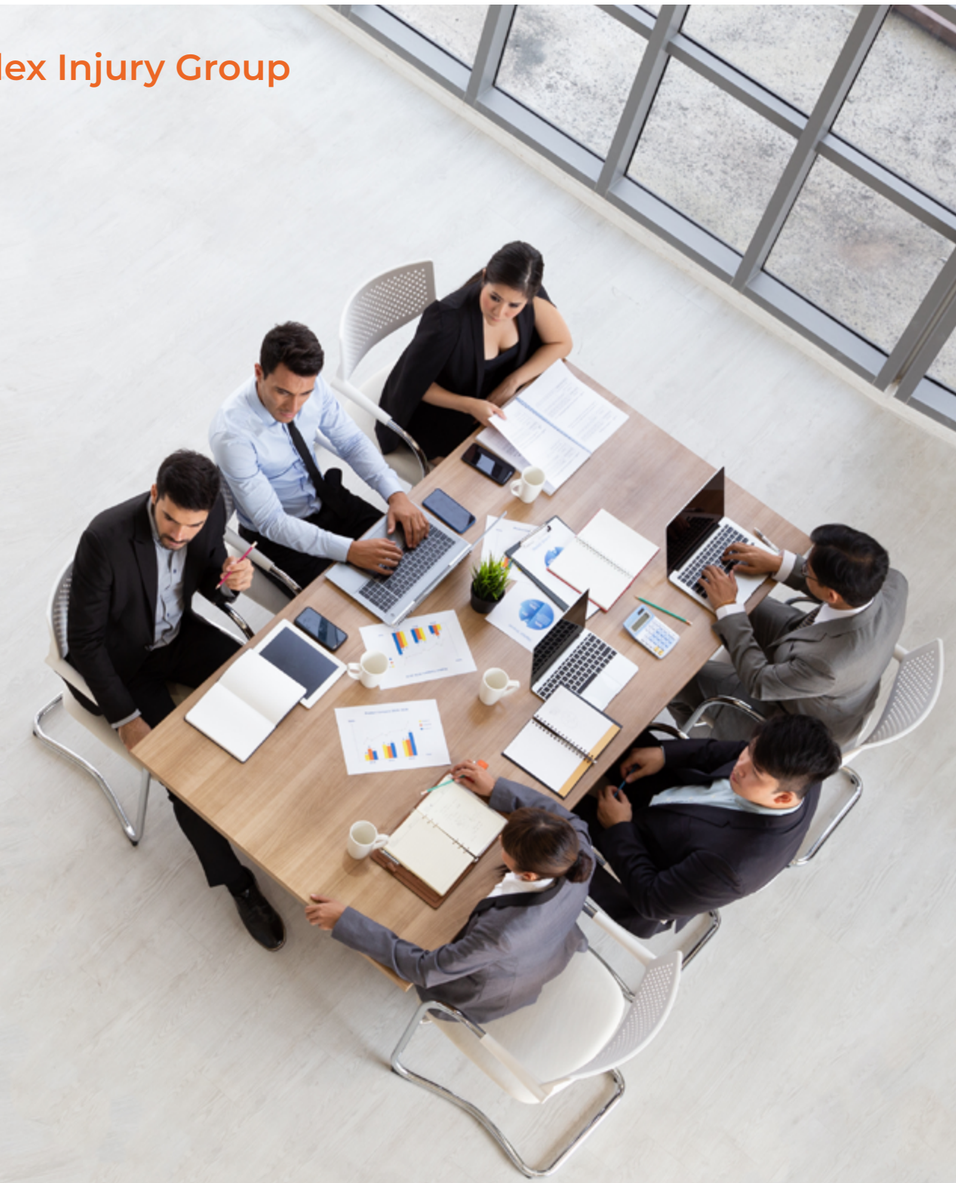
Insight 210

from Horwich Farrelly's Large & Complex Injury Group

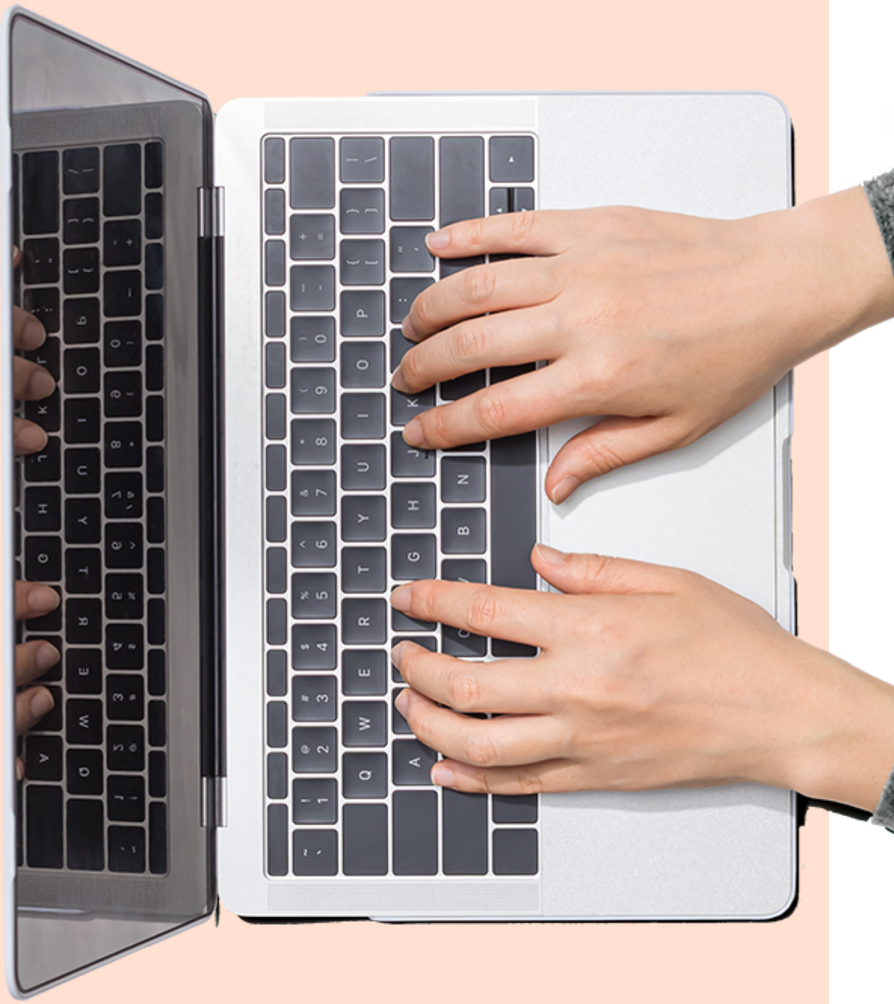


WELCOME TO INSIGHT

Welcome to this week's edition of Insight, in which we report on the recent High Court ruling in the case of Martin Savigar v Ainscough Crane Hire Limited. The High Court considered an appeal of the decision of HHJ Beech sitting at Preston County Court.

The decision considers the difficulties establishing liability when the cause of injury is not known and the application of *res ipsa loquitur* in such circumstances.

Malcolm Henké
Partner & Head of LACIG
malcolm.henke@h-f.co.uk



Two blows, no explanation, no employer negligence

Martin Savigar v Ainscough Crane Hire Limited

Background

The claimant was employed by Ainscough and suffered serious head injuries on 29 November 2014 in the course of his employment.

The claimant was found unconscious at his workplace. He had suffered a serious head injury. He had no memory of the accident circumstances. There were no witnesses to the injury. Expert evidence suggested there were two different points of impact on his head.

The accident

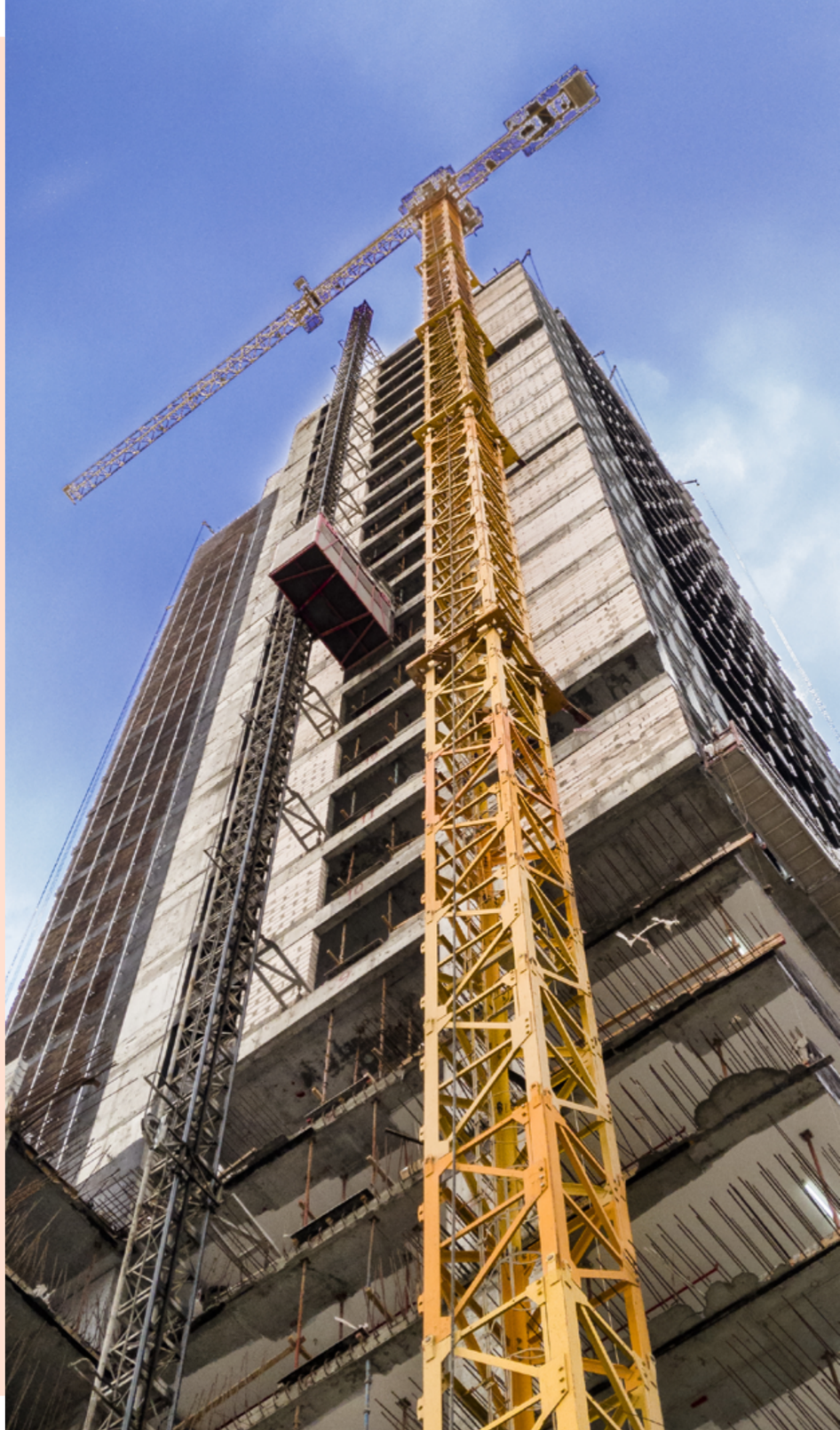
The claimant was cleaning his tractor unit in the washbay area at Ainscough's depot. A crane was parked in or close to the washbay. A hook block weighing about three quarters of a tonne was attached to the crane.

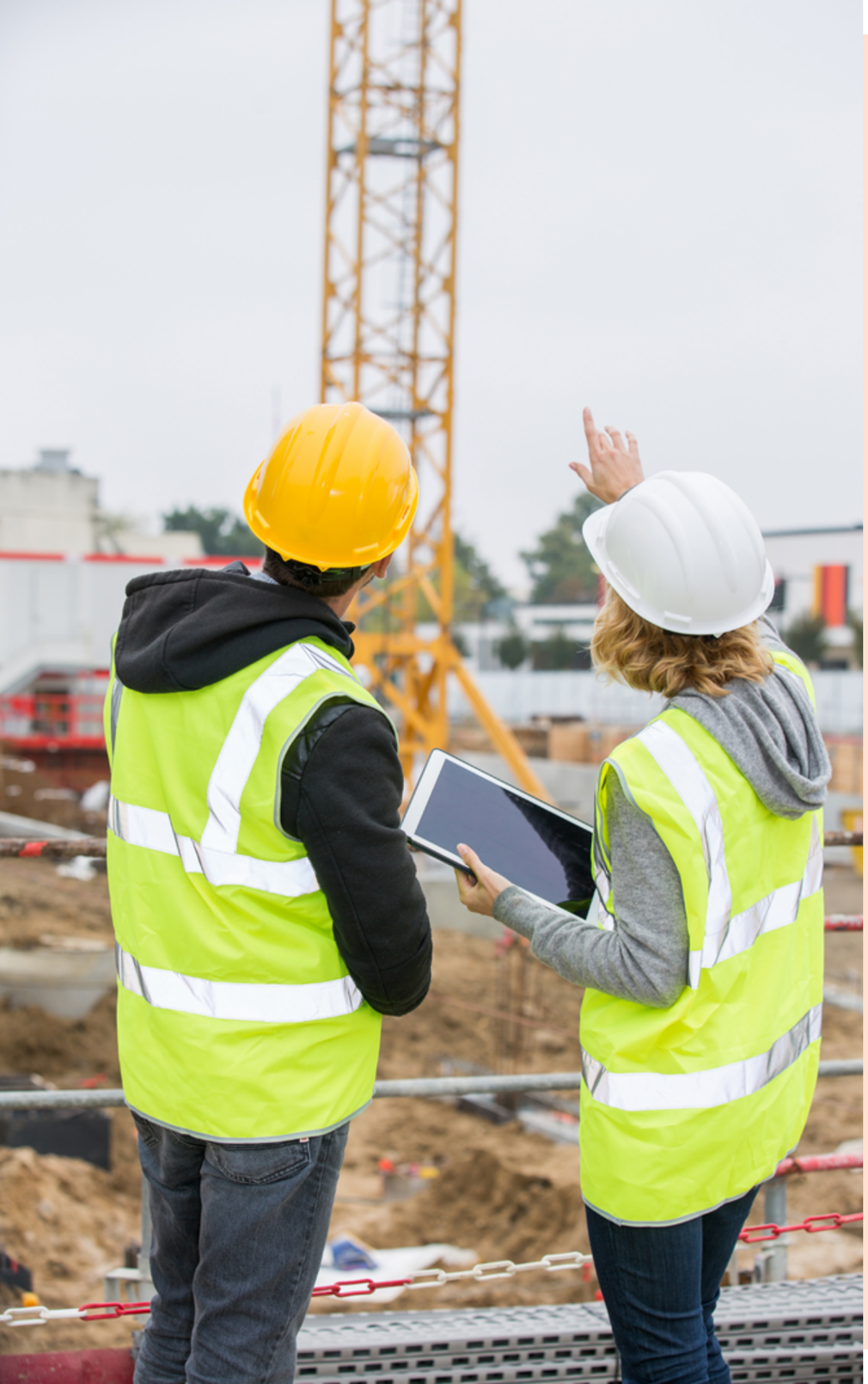
At approximately 11am the claimant used a high-pressure hose and lance to clean his tractor unit. He was wearing a safety helmet. Shortly thereafter the claimant was found unconscious in the washbay. The claimant's hard hat was on the ground. There were no marks or dents on the hard hat. No witnesses had seen the crane move. There was no CCTV footage.

The crane engine was started for three minutes earlier in the morning of the accident and then not again until around half past six that evening. Examination of the hook block by Ainscough did not reveal any disturbance of dust and dirt that had previously accumulated.

Expert evidence on behalf of the claimant concluded the claimant's injuries were consistent with a very severe blow to the back or right side of the head by a hard flat object, with a less severe blow to the front of the head consistent with being struck by a hard, flat, blunt object.

Ainscough relied upon evidence from a Consultant Neurologist who was broadly in agreement with the nature of the claimant's injuries.





The claimant's case

The claimant alleged that his injuries had on the balance of probabilities been caused by the hook block which had moved and struck the claimant's head. It was accepted that to have caused the injuries the hook block must have been moving as only then would there have been sufficient force to cause the injuries.

Both medical experts concluded the claimant's case was possible, but another possibility was an assault on the claimant.

The decision of HHJ Beech

After reviewing the evidence, the judge concluded that there was "one possible alternative explanation" for the injuries identified by the experts, namely assault. In addition, the judge concluded the crane and / or hook block did not move. The judge stated her overall conclusion was;

"Mr Savigar has failed to satisfy me on the balance of probabilities that he was struck by the hook block. In the normal course of events the court should be able to find there is, on the balance of probabilities an alternative cause for something taking place. Unfortunately, the court is unable to do so in this case."

The key grounds of appeal

1. The judge was wrong to (a) find that the crane and hook block did not move and (b) not to find that the likely cause of injury was the moving hook block.
2. The judge was wrong to find the claimant had not raised a prima facie case that he had been struck by the moving hook block.
3. The judge was wrong to find there was a possible alternative cause for the claimant's accident in the absence of evidence in support.
4. The judge was wrong not to apply res ipsa loquitur.
5. The judge had been wrong not to attach more weight to adverse inferences regarding the defence of the claim

The decision of the High Court

Grounds 1 and 2

The conclusion of the judge that the crane hook block did not move was supported by her acceptance of two pieces of evidence.

Firstly, the evidence of the defendant's witness that a non-forensic examination of the hook block did not reveal any disturbance of the layer of dust and dirt that had accumulated and secondly that the available stop / start records for the crane could be relied upon.

These were matters for the trial judge and her acceptance of them would not ordinarily be open to appellate challenge. The suggestion the stop/ start records were not reliable had been considered by the judge and she had accepted they were reliable.

Ground 3

In relation to the possibility of an assault, on behalf of Mr Savigar it was emphasised that there was no evidence of defensive injury and no weapon was found. Neither of these points were conclusive to rule out the possibility. The judge drew attention to the evidence of the medical experts that defensive injury might not be present if an assault was rapid, forceful and unexpected. As regards the absence of a weapon it might have been taken away by an assailant or the search for the weapon may have been imperfect.

The claimant contended the court should have excluded the possibility of assault as;

- The medical experts agreed that the injuries could be consistent with an assault however they also agreed that such assault could not have been minor in nature. Rather it would have needed to have involved the use of a weapon or weapons to import severe blunt trauma to the claimant's head.
- No weapon was found and there was no evidence to indicate an assault.
- The police treated the injury as an industrial accident and not a crime scene.
- The medical experts agreed there were no wounds to Mr Savigar's head making an assault less likely.
- The medical experts agreed the lack of defence injuries made an assault less likely.

The judge dealt with these submissions, saying:

"These do not support the proposition that "the court was able to exclude the possibility" of assault, and in my view do not advance that proposition. Rather they accept the possibility but argue about likelihood. That some (including police) did not consider or treat this as an assault in their early assessment does not conclude the matter, for the question remains whether they were right to do so. And the final judgment is that of the judge rather than the witnesses of fact or expert witnesses.

The claimant submitted there were only two possibilities assault or the hook block. The judge did not accept this submission;

"In the present case the judge did not decide there were only two possibilities. Some further sequences of events had been ruled out by the parties. The important thing is that much was unknown. The judge ruled out as a result of evidence at the trial the possibility of the moving crane block. That left an assault as the remaining known possibility and the judge was entitled to decline to express a view on that possibility when it was no longer material to the outcome of the case.

Ground 4

The claimant contended that were a court to find that the claimant's injuries were caused by the moving hook block "the fact speak for themselves" or res ipsa loquitur.

This was not accepted by the court;

“The judge’s first main conclusion that assault was “one possible alternative explanation” for the injuries must also be the end to the argument based on res ipsa loquitur because it reveals a plausible explanation that is not of the negligence on the part of Ainscough …If Mr Savigar had proved that the hook block had moved then quite a separate argument might have been available to the effect that against the background and surrounding facts, the fact of the hook block moving spoke itself of the negligence of Ainscough. But that is not this case”.

Ground 5

The claimant alleged adverse inference should be drawn due to;

- The defendant indicating initially that CCTV footage was available and then subsequently alleging the CCTV was not working.
- The defendant not calling the crane driver as a witness.
- The defendant failing to report the incident to HSE.
- The defendant not calling other material witnesses.

The trial judge declined to accept the criticisms levelled at the defendant stating the issue to be decided was whether the claimant was struck by a moving hook block.

On appeal the judge stated "It is crucial to be clear what the inference would be. The inference that Mr Savigar needed was an inference that the reason for the failure was because the document or witness supported Mr Savigar’s case that the hook block moved. At minimum it was properly open to a judge to decline that inference. In the present case in my judgment there was not enough for any other outcome”

Conclusion

The High Court found the judgment of HHJ Beech to be sound and the appeal was dismissed.

Commentary

This appeal failed due to the finding of fact made by the trial judge that the hook block did not move. The judge was entitled to make that finding based on her assessment of the factual evidence which was not open to challenge. The finding was fatal to the claimant’s claim.

The claimant’s case was based on the assumption that, because he was found close to the hook block and suffered severe injuries consistent with being struck by the hook block, the court should accept on the balance of probabilities the claimant was struck by it.

Res ipsa loquitor was of no assistance to the claimant as there were other potential causes of injury to the claimant which were not due to the negligence of the defendant. In this case assault.

If the trial judge had found on the evidence that the hook block had moved and excluded assault as a possible explanation the res ipsa loquitur argument may well have succeeded.

Thus, where a claimant is unable to identify the cause of injury res ipsa loquitur will not assist if there are possible alternative explanations for the injury which are not due to the defendant’s negligence.

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