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Employment Law Cases Update and Newsletter

June 2012

The scope of health and safety law is wide. It includes cases decided under the major statutes and regulations, European materials and a wide range of common law topics. The law relating to workplace stress has expanded significantly in recent years. The law dealing with health and safety is wideranging and complex. A knowledge of the developing case law is crucially important because it analyses the relationship between theoretical law and factual workplace situations. The cases illustrate the importance of compliance with with health and safety law and the lessons to be learned where employers have not complied with the law.

A brief message for those who mock "elf 'n' safety law": attend an inquest into a workplace death.

R. H. Spicer
Head of Chambers

Newsletter Contents

Coping with.... Health and Safety in small businesses

In the spirit of this month's health and safety theme newsletter, it is important that each and every employee, worker and the self-employed are up-to-date with their employment law. For larger companies, compliance with health and safety is frequently a designated role for someone. In smaller business, or with the self-employed, t he duties, while still relevant, may be more onerous to comply with. While not all of the requirements apply, a few important duties ought to be noted:

- write a health and safety policy
- provide the right workplace facilities
- provide training and information
- ensure risk assessments are undertaken
- make arrangements for first aid etc.
- get insurance to cover health and safety accidents
- display health and safety posters
- ensure all accidents are reported
- keep any/all employees informed of health and safety law.

More information can be found on the HSE website, where industry and size-specific guidance can be found. Always get advice from a suitably qualified professional if unsure – the requirements are sometimes complex and plentiful and the consequences are grave if you fail to follow them. Not only are they designed to prevent accidents, failure to comply can result in prosecutions and fines, even if no-one is injured.

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Employment Law Cases

Personal protective equipment
Police boots

Blair v Chief Constable of Sussex [2012] EWCA Civ 633, CA

Facts B, a police officer, undertook an advanced motorcycling course as part of his training. He was issued with standard boots. The course involved driving off-course. B lost control of his motorcycle and injured his leg. He claimed compensation from his employer on the basis that he had been provided with unsuitable boots, contrary to the 1992 regulations, and should have been supplied with motocross boots. At first instance, his claim failed. The court ruled that, taking into account foreseeable risks and the nature of known hazards, the regulations had been complied with. B appealed to the Court of Appeal.

Decision
1. The appeal would be allowed.
2. The court below had not adopted the structured approach required by the regulations. It was necessary to identify the risk of injury and then to consider whether the equipment supplied was, so far as practicable, effective to prevent or adequately control that risk.
3. Only if the equipment was effective was it necessary to consider whether it was appropriate.
4. The boots supplied to B had not been effective to prevent significant injury.
5. It was possible and not impractical to prevent significant injury to trainees by providing them with stronger boots than standard issue boots.

Mesothelioma
Duty of care

Williams v University of Birmingham [2012] ELR 47, CA

Facts In 1974 W, an undergraduate at UB, carried out scientific experiments in a tunnel underneath university buildings. There were central heating pipes in the tunnel which were lagged with asbestos lagging. UB admitted that W would have received some exposure to asbestos. W died of malignant mesothelioma. His estate and dependants claimed compensation from UB. At first instance, UB was found liable. The judge found that W's visits to the tunnel were such that there was a material increase in the risk of his contracting mesothelioma. UB appealed to the Court of Appeal.

Decision
1. The appeal would be allowed.
2. The test for whether UB had been negligent and in breach of duty was whether it ought reasonably to have foreseen the risk of contracting mesothelioma arising from W's exposure to asbestos fibres.
3. The question of what UB ought reasonably to have foreseen about the consequences of exposure to asbestos fibres during experiments in the tunnel must be judged by reference to the state of knowledge and practice in 1974.

Schools
Risk assessment

Hufton v Somerset CC [2011] EWCA Civ 789, CA

Facts H, a school pupil aged 15, injured her knee when she fell on a wet floor in her school hall. She claimed compensation from the local authority on the basis that on a rainy day the school staff had negligently permitted her to walk through fire doors directly into the hall, depositing water on the floor. The local authority's defence was that pupils were not allowed to enter the hall directly on wet days and a sign was placed by the fire doors on wet days, operating as an instruction to prefects to prevent pupils from entering.
At first instance, the claim failed. The school's procedures were reasonable and appropriate and the incident had been an unfortunate accident. H appealed to the Court of Appeal.

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Decision
1. The appeal was dismissed.
2. The school's risk assessment had been reasonable and identified appropriate control measures.
3. The law did not require an occupier of premises to take measures which would absolutely prevent any accident from ever occurring. All that was required was the exercise of reasonable care.
4. The evidence did not show that liquid gathering on the floor was a frequent problem or that there needed to be a special system for mopping it up.

Risk assessment
Sport

Uren v Corporate Leisure (UK) Ltd & Ministry of Defence and Others (2010) High Court

Facts During a relay race through an inflatable pool, organised as part of a corporate fun day, Mr Uren tried to enter the pool by launching himself over the inflatable wall of the pool headfirst. His legs were propelled upwards by the walls of the inflatable. he entered the pool at too sharp an angle, fractured his spine and is now tetraplegic.
He claimed compensation from the organisers of the event and from the operators of the inflatable. All parties accepted that a duty of care was owed at common law and under the Regulations of 1998 and 1999. The parties did not agree as to what constituted reasonable care to ensure that Mr Uren was safe.

Decision
1. A failure to carry out a risk assessment does not in itself give rise to a duty of care.
2. Such a failure is evidence that the defendants had not identified or controlled the potential risks of the activity.
3. In this case, the risks of a head-first dive were obvious.
4. Commonsense should have prevented Mr Uren from carrying out such a manoeuvre.
5. Sport should not be seen as a sterile or sanitised environment but rather played in a field of acceptable levels of risk. This risk might be the main motivator for participation.
6. Factors for assessing whether the risk would be sufficiently low included the age of the participant, fitness levels, the fun to be had, the level of challenge, the participant's knowledge of the activity and the apparatus, and the likelihood of serious injury.
7. The claim failed.

Foreseeability
Assault on teacher

McCarthy v Highland Council 2010 SLT 74, Scottish Sheriff Court

Facts M was a teacher at a school for children with special educational needs. She suffered a series of assaults by a pupil. During the period of the assaults, staffing levels for her class remained at M and one female learning support auxiliary. No behaviour management programme was drawn up. M informed her employer that she could not work until a male support worker was employed.
M was diagnosed as suffering from depression. She alleged that her illness had been foreseeable and had been caused by the employer's failure to devise, maintain and enforce a safe system of work.
For the employer, it was argued that no reasonable person would have foreseen a probability of the assaults. The conduct of the employer had not fallen below that of an ordinarily competent head teacher. Risks had been regularly assessed and reviewed. There was no evidence that the presence of a male support worker would have prevented the assaults.

Decision
1. The employer was liable.
2. The employer had failed to re-assess the risk of violence following the first assault.
3. It had failed to ensure that measures were taken to enable employees to deal with violent incidents, for example by providing training, emergency alarms and additional support and training.
4. The provision of additional staffing would have reduced M's anxiety level and avoided the series of assaults.

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Opinion

JMW Farms Limited, a Northern Irish farming company, has been fined following its conviction for corporate manslaughter.

In November 2012 Robert Wilson, an employee of JMW aged 45, was killed when working on the company's site at Tynan, County Armagh. He was washing the inside of a large metal bin. It fell onto him from a forklift truck, causing fatal injuries. The bin had not been secured or integrated with the truck. The truck was a replacement for the normal truck, which was being serviced. The lifting forks were too large and incorrectly spaced to be inserted into the bin's sleeves.

JMW had carried out a risk assessment, including instructions for workers operating the truck. It would have been apparent to any operator that it would not be possible to take the necessary steps to secure against foreseeable dangers.

The Recorder of Belfast is reported to have made the following comments:

- Yet again the court was faced with an incident where common sense would have shown that a simple, reasonable and effective solution would have been available to prevent this tragedy.
- The very definition of the offence of corporate manslaughter was an acceptance of a gross breach of duty. That is, a high and totally unacceptable breach in circumstances where the risks were high, with the more than foreseeable likelihood of serious injury or death following if the proper steps were not taken.
- This was a serious matter which required a substantial fine to be imposed to reflect the the culpability of the company, and also to send a message to all employers that their duty to their employees is daily and constant and any failure to discharge that duty will be met with condign punishment.
- It was clearly foreseeable that the failure to address the hazard would lead to serious injury and indeed that the consequences could well be fatal.
- The company had fallen far short of the standard expected in relation to such an operation.
- The operation was permitted to continue for some time. However, there was no evidence that this represented a systematic departure from good practice across the company's operations.
- The directors of a company are fully responsible for the discharge of the duty of care to their employees. In this case a director was in control of the forklift and therefore culpability went to the very top of the company.
- There was no evidence of a failure to heed warnings or advice, cost cutting at the expense of safety, or a deliberate failure to obtain or comply with relevant licences.
- The company's directors had accepted their responsibilities by the guilty plea, and the company had a good safety record.
- No penalty imposed by the court could begin to be seen as a measure of the life of the deceased. The penalty reflected the factors in the case and also the principle that where a defendant pleads guilty, the court should reduce the sentence to reflect not just the fact that no trial has to be held (with all the trauma which this can cause particularly those close to the deceased), but also as evidence of the remorse of the defendant for their actions. The amount of reduction will also reflect the strength of the case against a defendant. the stronger the case, the less the reduction.
- In 2011 JMW made £1.4 million profits and declared dividends of £200,000. This was an indication of a healthy, well-capitalised company in a good cash position. The appropriate fine would have been £250,000 but this would be reduced to £187,500 because the company had pleaded guilty. Costs of £13,000 would be awarded against the company.

This was the first time that the courts in Northern Ireland sentenced a company for corporate manslaughter.

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The Recorder therefore set out guidance for the courts to follow until the Court of Appeal had an opportunity to provide authoritative guidance. The Recorder based his sentencing on the guidelines issued by the Sentencing Council in England and Wales in relation to breaches of health and safety legislation resulting in a fatality, including corporate manslaughter. The Guidelines set out the appropriate levels of fine to be imposed, as follows:

- The offence of corporate manslaughter, because it requires gross breach at a senior level, will ordinarily involve a level of seriousness significantly greater than a health and safety offence. The appropriate fine will seldom be less than £500,000 and may be measured in millions of pounds.
- The range of seriousness involved in health and safety offences is greater than for corporate manslaughter. Where the offence is shown to have caused death, the appropriate fine will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more.
- The plea of guilty should be recognised by the appropriate reduction.

Reaction to the case included the following:

- The acting deputy chief executive of the Health and Safety Executive for Northern Ireland is reported to have commented that the judgment sent a clear message to directors in Northern Ireland, whether of a small or a large organisation, that they should take health and safety seriously.
- The new corporate manslaughter legislation clarified the criminal liabilities of companies where serious failures in the management of health and safety resulted in a fatality. He would therefore urge anyone with a managerial or supervisory role to ensure that proper management and control systems were in place to prevent another unnecessary death.
- A spokesperson from the Police Service of Northern Ireland stated that the prosecution should send a clear message that there is no hiding place for anyone that breaks the law. Robert Wilson lost his life as a result of this incident and it was hoped that the conviction was a stark reminder that legislation was there for a reason.
- A solicitor is reported to have commented that all eyes would now be on the second prosecution in England which was due to be heard in June 2012 where Lion Steel Equipment Ltd are charged with corporate manslaughter and three individual directors face charges of gross negligence manslaughter. the Attorney General recently commented that there are in the region of 50 cases under referral to the Special Crime and Counter Terrorism Division where corporate manslaughter is one of the offences under consideration. The message to UK business is to be on guard to avoid being in a similar predicament to JMW Farms.

In the four years since the Corporate Manslaughter and Corporate Homicide Act was passed, there has only been one other prosecution – that of Cotswold Geotechnical in 2011.
In contrast, the Health and Safety Executive has reported that there were 171 workplace deaths in 2010/2011. None of these resulted in charges of corporate manslaughter – most were dealt with under specific provisions of the Health and Safety at Work, etc., Act 1974.

A recent example is the 2012 case of Matthew Peter Williams, a director of Acryflor Ltd, a construction company, who was fined following an incident in which a worker suffered fatal injuries. Paul Gibbons, a self-employed contractor, was carrying out re-roofing work for Acryflor on an industrial building in Penryn, Cornwall. He fell eight metres through a fragile asbestos cement roof. He suffered fatal injuries. The work had not been adequately planned and no safety nets or crash deck platforms had been provided to mitigate the effects of a fall. The company should have employed a planning co-ordinator to develop a construction plan for the work and the project should have been overseen by someone with appropriate knowledge and experience.
Matthew Williams was fined £2500 plus £2500 costs under section 37 of the 1974 Act. He was £1.5 million in debt and his annual income was £15,000. Section 37 of the 1974 Act states in summary that where an offence is committed by a company, with consent, connivance or neglect on the part of a director, the director is also guilty of the offence. It is not known why the offence of corporate manslaughter was not used in this case.

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Chambers & Legal News

Chambers Update

**********Date change for Seminar**********
Next month's seminar will be held on July 26th 2012, not July 25th as previously arranged.

We are currently clearing old editions of law books from Chambers' library; if anyone is interested in them, please contact Emma.

While we're on the topic of books - a quick note to all those who use Bristol Law Library; the library is due to undergo substantial building works, with a number of titles going into storage. Please bear with the librarians at this busy time.

We are also expanding our range of services offered, to include seminars, teaching/presentations and legal updating. These services are aimed at small business and public bodies who need to be aware of legal developments and other provisions that affect them and their employees. If you are interested, please contact Robert at Chamberts to discuss your needs.

Bristol Update

On the 29th June 2012, it was announced that Bristol was runner up in the European Green Capital Award 2014, losing out to hot favourite Copenhagen. Considering that Bristol was by far the smallest city left in the running, Bristol has put on a great show to get that close.

Dates for your Diary

July 26th 2012	Seminar on health and safety law at 10am. All welcome. Please confirm by calling or emailing Chambers.

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