Health&Safety news

Autumn 2013 | issue 016

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Judith Gledhill on how a jockey's tumble has contributed to the debate about suitability of work equipment

The hazard of the guardrail

UNDER THE Provision and Use of Work Equipment Regulations 1998 (PUWER), every employer must ensure that work equipment is constructed or adapted to be suitable for the purpose for which it is used and must ensure that the work equipment is maintained in an efficient state, in efficient working order and good repair.

Similarly, when selecting work equipment, employers must have regard to working conditions, to any risks in the premises that might impact on the health and safety of individuals from the equipment and any additional risks posed by the use of that equipment.

Employers have an absolute duty to provide appropriate work equipment together with a duty to ensure that such equipment is maintained in an efficient state

What therefore constitutes "work equipment" for the purpose of PUWER? The courts have given a very wide interpretation to the definition. In the case of **Spencer-Franks -v- Kellog Brown & Root Ltd**, mechanical technician Mr Spencer-Franks was repairing a door closing mechanism.

He inspected the mechanism and decided to take it to the workshop for repair. But, as he tried to remove it from the doorframe, a screw was dislodged, causing the door arm to strike him in the face, knocking out four teeth.

Mr Franks brought a claim for compensation against his employer. The case went all the way to the Supreme Court where the Law Lords unanimously held that the door closer was work equipment and that there was some defect in the equipment that caused the accident. They confirmed that, if the piece of equipment was for use at work, then this constituted work equipment for the purpose of the regulations. Mr Spencer-Franks was successful and recovered compensation for his injuries.

Not inherently defective

In the case of **Hide -v- Steeplechase Company (Cheltenham) Ltd** and others the Court of Appeal has again considered what constitutes work equipment and what duty a defendant has, even where the work equipment is not inherently defective.

Mr Hide was an experienced professional jockey who was involved in a race at Cheltenham Race Course on 11 November 2006. After clearing a hurdle, Mr Hide's horse stumbled and fell causing Mr Hide to be thrown to the ground and into a post on the perimeter guardrail. He sustained a fractured pelvis and head injury.

He brought a claim against the race course on the basis that the hurdle had been placed too close to the perimeter railing and the perimeter railing in itself was too unyielding and/or insufficiently padded. Mr Hide contended that, as a consequence of the layout of the work equipment and the lack of padding, the work equipment was not suitable for the purpose for which it was used.

The Court of Appeal agreed, stating that, where the equipment in itself was not effec-

tive, to escape liability the defendant would have to show that the accident was due to unforeseeable circumstances beyond its control or to exceptional events, the consequence of which could not be avoided.

In this particular case, it was difficult to see what unforeseeable or exceptional events the defendant could have relied on. Additional safety measures could have been implemented – such as making the padding of the uprights for the guardrail thicker, or placing the hurdles at a greater distance from the guard rail.

When considering work equipment, an employer must accordingly review the actual layout of the equipment. Does this pose a hazard? If so, could the hazard be removed or avoided? If not, the defendant may escape liability but, if the defendant could have taken steps to improve the layout of the work equipment to make the premises safer and failed to do so, it is likely that the injured person will recover compensation.

Such a scenario is of course different to the scenario where an employee is injured as a consequence of working with equipment that is in itself inherently defective. In the case of **Stark -v- The Post Office**, postal worker Mr Stark was injured when the front brake of the bicycle he had been given by his employer snapped in two and he was thrown over the handle bars.

Reasonable system of maintenance

It was not clear from routine inspection whether the brake had snapped because of metal fatigue or a manufacturing defect. The Post Office argued that it had undertaken a reasonable system of maintenance for the bike and that it could not have foreseen that the brake would have snapped as it did.

Mr Stark lost his case at first instance, but the Court of Appeal overturned the decision, ruling that employers have an absolute duty to provide appropriate work equipment together with a duty to ensure that such equipment is maintained in an efficient state, in efficient working order and in good repair.

This meant that, even though the employer could not have foreseen that the brake would snap, nevertheless they were responsible for Mr Stark's accident.

Unfortunately matters may not be so clear cut in the future as legislation has recently been passed removing the ability of injured people to rely on breach of health and safety regulations when claiming compensation (see *Health and Safety News* Spring 2013 at **www.thompsonstradeunionlaw.co.uk/information-and-resources/health-and-safety/spring-2013-enterprise-regulatory-reform-bill.htm**). In future, injured people will have to prove that the defendant was negligent in that it could or should have foreseen that an accident might happen and should have taken steps to prevent it.

Could or should the Post Office have foreseen the brake on Mr Stark's bicycle would have broken? If not, Mr Stark may not, after implementation of clause 69 of the Enterprise and Regulatory Reform Act this October, have succeeded in his claim for compensation.

Simon Dewsbury sets out the new duties on healthcare employers

Sharp practice

HEALTH "NEEDLESTICK" and other injuries from medical sharps are a significant cause of injury. Although there are no reliable sources of data on the number of sharps injuries, studies estimate that there may be as many as 100,000 a year in the UK.

A 2010 Care Quality Commission survey of NHS staff found that two per cent reported that they had suffered a needlestick injury in the previous 12 months. In addition, the number of annual significant cases doubled between 2002 and 2011. Most occupational exposures involved nursing professions; ancillary workers in healthcare are also affected.

The concern is that exposure to potentially contaminated sharps may lead to the transmission of disease such as HIV or Hepatitis

Although the physical injury from sharps is often relatively minor, the concern is that exposure to potentially contaminated sharps may lead to the transmission of disease such as HIV or hepatitis. There are also frequently psychological effects, as workers who have been injured by a potentially infected sharp have concerns about the possible effects and whether they have been infected.

As a result of European Council Directive 2010/32/EU (the Sharps Directive) the UK government has passed regulations to deal with this issue.

In the past, cases have been dealt with under existing legislation, most importantly the Control Of Substances Hazardous to Health Regulations, the Management of Health & Safety at Work Regulations, the Work Equipment Regulations and the Personal Protective Equipment Regulations. However, the Health & Safety (Sharp Instructions in Healthcare) Regulations 2013 (referred to below as the Sharps Regulations) impose additional duties in relation to sharps in healthcare.

For example, there is a general duty under the COSHH regulations to have systems to dispose of contaminated waste safely. The regulations came into force from 11 May 2013.

Definition

The regulations define a "medical sharp" as "an object or instrument necessary for the exercise of specific healthcare activities, which is able to cut, prick or cause injury".

The definition of sharps does not include kitchen knives or utility knives because these are not used to carry out specific healthcare.

To whom do the regulations apply?

The regulations do not apply to all employers, only to "Healthcare Employers" and "Healthcare Contractors".

A healthcare employer is an employer whose main activity is the management, organisation and provision of healthcare activities.

A healthcare contractor is an employer who provides services under a contract to a healthcare employer (even though their main activity is not management, organisation or provision of healthcare activities).

This will include contractors who employ, for example, laundry workers, cleaners, waste disposal workers, bank nurses and locum doctors or other healthcare staff. It applies not only to healthcare contractors' employees but also those who work under a healthcare contractor's supervision and direction. However, the regulations only apply to those employees or other persons who "are exposed to a risk

of injury from medical sharps in relation to the provision of services to a healthcare employer".

In most cases, it will be clear whether the regulations apply to particular workers. However the Health & Safety Executive (HSE) has provided some clarification on when it considers that the regulations apply.

These include where employees provide care for people in their own homes (but not to the person receiving care or their family members).

They will apply to residential care homes if the primary purpose of the home is to provide healthcare but not if the home provides only residential care. Unsurprisingly, the regulations do not impose any duty on the employers in relation to the residents.

Students on clinical placements internships or other workplace training will be covered by the regulations, which will apply to the health care employer responsible for providing their training. Even if the student is not formally employed, they will be deemed to be an employee by virtue of the Health Safety (Training Employment) Regulations 1990.

The regulations apply to employees of the healthcare employer carrying out trials involving sharps on behalf of the clinical research organisation or pharmaceutical company. By contrast, employees of a pharmaceutical company will not be covered by the regulations unless they enter healthcare premises to carry out a trial (and if they do, especially if they make use of the host's facilities).

It will not apply to High Street pharmacies but will to pharmacies that are part of a hospital or NHS run service.

- It will apply to medical staff employed by the NHS providing care in prisons (this only occurs in Scotland) but not to medical staff providing care in prisons employed by the prison itself.

It will not apply to school nurses employed directly by school but will apply to an occupational health nurse attending a company premises to administer vaccinations. Unless the company where the vaccinations are taking place is a healthcare business, the regulations will only apply to the occupational health nurses' employers, not to the business.

Employees whose businesses are contracted to provide non-healthcare services to healthcare employers (for example caterers, building or plant maintenance workers in hospitals) will only be covered by the regulations if they might be exposed to medical sharps while working on the healthcare employer's premises.

Employers' new duties go beyond the existing general duty of care under other regulations and also provide specific duties in relation to particular aspects of sharps use

Employers' duties

The regulations follow the expected format in health & safety legislation these days, with the usual hierarchy of duties, risk assessments, information and training. Employers' new duties go beyond the existing general duty of care under other regulations and also provide specific duties in relation to particular aspects of sharps use.

The main duty is to avoid the use of medical sharps at work so far as is reasonably practical. When their use at work cannot be avoided, safer sharps must be used, again so far as is reasonably practical.

Employers should identify which procedures do not need the use of sharps. If there is a safer method, then it should be used.

Obviously, needles, scalpels and other sharp instruments will remain in use in healthcare. If these cannot be avoided, then

safer sharps must be used where practicable.

A safer sharp is defined in the regulations as: "a medical sharp designed and constructed to incorporate a feature or mechanism which prevents or minimises the risk of accidental injury from cutting or pricking the skin."

This will include syringes with a shield or cover that slides on pivots to cover the needle after use. The HSE has given guidance on other factors that should be considered:

- The device must not compromise patient care.
- The reliability of the device.
- The care-giver should be able to maintain appropriate control over the procedure.
- Other safety hazards or sources of blood exposure that use of the device may introduce.
- Ease of use (taking into account the existing clinical practices commonly in use by the relevant health professionals – but not assuming custom and practice is safest).
- Is the safety mechanism design suitable for the application? Is it straightforward? Is the safety mechanism integral to the device so that it cannot be lost or misplaced)? Is it single handed or automatically activated? Is there any signal that the mechanism has correctly activated?
- The safety mechanism is not effective if it is easily reversible.

Capping needles

There are also specific duties limiting the capping of needles after use at work. This is because two-handed recapping (where a healthcare worker holds the needle in one hand and attempts to place a cap on the needle with the other hand) is a known cause of injuries.

Under the regulations this must not occur unless there is a risk assessment and this shows that the recapping is itself required to prevent a risk. In those circumstances, there must be an effective control on the risk "by the use of a suitable appliance, tool or other equipment". This would include, for example, needle blocks that allow safe one-handed recapping.

Non reusable medical sharps

The regulations require that, for non-reusable medical sharps, employers must provide clearly marked and secure containers close to the area where medical sharps are used at work. There must also be written instructions for employees on the safe disposal of sharps in the same areas.

The HSE Guidance suggests that this should include portable sharps containers in places such as patients' homes.

Information and training

Employers must provide any employees exposed to a risk of injury for medical sharps with information on:

- the risk of injury from medical sharps
- legal duties on employers and workers
- good practice in preventing injury from medical sharps
- the benefits and draw backs of vaccination and non-vaccination in respect of blood-borne diseases and support provided to employees who are injured at work by a medical sharp.

Arrangements in the event of injury – post accident investigations

The regulations require that, where there has been any incident at work where an employee has suffered an injury from a medical sharp, the employer must:

- record the incident
- investigate the circumstances and cause of the incident
- take any necessary action to prevent a recurrence.

The HSE Guidance is that any post accident investigations should be proportionate to the potential severity of the incident.

Injuries from a clean needle will need less investigation and consideration than injuries involving a used needle. The purpose of any post injury investigation should be to ➲

The purpose of any post injury investigation should be to establish whether existing risk control measures are adequate and ... is accident prevention not blame

- establish whether existing risk control measures are adequate and look at underlying and root causes as well as the immediate factors leading to an accident; the purpose of the investigation is accident prevention not blame.

The HSE says: "Any lessons to be learned should be applied across an organisation… not just in the location or department where the accident occurred."

Investigations may also involve establishing where there was a used sharp and a potential for infection and the infection status of the source patient.

The HSE does mention that this may cause problems with patient confidentiality but makes the point that if the information is promptly shared with the medical professional treating the injured worker, this can assist in ensuring they receive the right treatment, including not having to take unnecessary anti viral treatments for example.

Arrangements in the event of injury – care of the injured person

Where the injury from a medical sharp has exposed or may have exposed the employee to a biological agent (and thus to a risk of infection, typically from a used needle) the employer must:

- Take immediate steps to ensure the employee receives medical advice.
- Ensure that any treatment suggested by a doctor is made available, including post exposure prophylaxis (any measures necessary to maintain health and prevent the spread of disease).
- Consider providing counselling.

The HSE Guidance is that if employees are working out of hours or not on premises, then there should be "sufficiently robust arrangements" to allow workers to receive treatment quickly. They should have clear training as to where they should go for treatment.

Duties on workers

Any employee or other person working under the supervision and direction of a healthcare employer or healthcare contractor who has suffered an injury from the medical sharp has a duty to notify their employer, or a fellow employee with specific responsibility for health and safety of persons at work.

They also have to provide sufficient information about the accident to enable the employer to record and investigate the circumstances.

As is usual with health and safety regulations, there is a duty on employers to review their arrangements to ensure that policies and procedures remain up to date and effective.

Those workers not protected by the sharps regulations remain covered by other regulations. There is Regulation 7 (6) (c) of the Control of Substances Hazardous to Health, for example, which requires systems to dispose of contaminated waste safely.

The HSE Guidance cited above is available on the HSE website, document HSIS7 as a free download at **hse.gov.uk/pubns/hsis7.htm**

There is also a leaflet *Blood borne viruses in the workplace* **hse.gov.uk/pubns/indg342.htm** which gives more general guidance but predates the Sharps Regulations.

Ian McFall on why the Mesothelioma Bill lets down those the government claim it is meant to support

Bill of wrongs?

THE GOVERNMENT'S Mesothelioma Bill will deprive hundreds of people with the fatal asbestos-related cancer of compensation and will short-change those who are eligible.

The Bill establishes a scheme of last resort for untraced employers' liability insurance claims.

Understandably, the government has received praise for it in some regional newspapers. The impression is that the Bill is a genuine move to end the injustice that many injured workers and their loved ones experience on learning that they will be unable to recover compensation because the negligent employer has gone out of business and its insurer cannot be traced.

Instead of providing protection for all industrial disease victims, the Bill limits support to mesothelioma only, imposes an arbitrary eligibility cut-off date of and is expected to pay only 70 per cent of average compensation

But instead of providing protection for all industrial disease victims as unions had called for – the type of scheme that the last Labour government consulted on – the Bill limits support to mesothelioma only, imposes an arbitrary eligibility cut-off date of 25 July 2012 and is expected to pay only 70 per cent of average compensation.

That means hundreds of people with mesothelioma diagnosed before that date, who are unable to trace their employer's insurer, will lose out altogether, while others will see average compensation cut by 30 per cent.

The Bill is unlikely to complete its passage through the House of Commons before the summer recess. As *Health and Safety News* went to press, it was estimated it would go before MPs after the recess in September 2013 and become law later this year.

Asbestos justice campaigners believe the Bill was set up as a response to the exemption given for mesothelioma claims from the clauses in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) that ended success fees and after the event insurance (ATE) from April 2013 [see Health and Safety News Autumn 2011 at **www.thompsonstradeunionlaw.co.uk/information-and-resources/health-and-safety/autumn-2011-new-bill-benefits-insurance-industry.htm**].

Not an exemption

This was not an outright exemption. Rather it was a temporary reprieve. The then justice minister Jonathan Djanogly said that LASPO clauses in respect of mesothelioma claims would be implemented "at a later date, once we are satisfied on the way forward for those who are unable to trace their employer's insurer".

This involved a review of the likely effect of the LASPO clauses on mesothelioma claims. It was promised that a report of the conclusions of that review would be published "before the clauses are implemented".

It seemed to many that the government was either genuinely confused about, or deliberately conflating, the issues between tracing insurers and the impact of removing success fees and ATE from mesothelioma claimants. It was fairly clear that ministers would use the review to conclude that the answer to both issues would be to introduce a DWP scheme for untraced insurance and for the MOJ to consult on implementing procedural reforms for civil claims.

During the House of Lords committee stage of the Mesothelioma Bill, Labour and

crossbench peers put forward a number of amendments. These included that the cut-off date should be 10 February 2010 – the publication date of Labour's consultation. The 25 July 2012 cut off is arbitrary, based on when the coalition finally got round to announcing the outcome of the consultation, which ended the day before the 2010 general election.

This delay of over two years was caused no doubt by the government's desire not to announce anything until it had reached a deal with its insurance industry financial backers that they could live with. Indeed Lord Freud, leading for the government on the Bill in the Lords, justified the cut off date as providing insurers with "legal certainty" and a "sufficient level of confidence" to account for the levy in their business plans.

But as Labour's Lord Howarth pointed out, putting the date back to February 2010 would not prevent insurers reserving against an event they could "reasonably foresee". That's what insurance is about and in any case, the insurers benefitted from the interest they earned by investing the premiums collected in a compulsory market on policies that, due to incompetence, they have either lost or destroyed.

Palpable contradiction

Lord Howarth also identified the "palpable contradiction" between the government's justification for the scheme not paying 100 per cent compensation – that it is not designed to be an alternative to civil damages or a compensation scheme – and the fact that there will be the same 100 per cent deduction by the Compensation Recovery Unit of benefits received by claimants. Deductions should at least be proportionate to the scheme payment.

"There may be difficulties in the government seeking to have it both ways," Lord Howarth said.

Other issues with the Bill include that it proposes legal costs are arbitrary and fixed. The experience of how fixed costs impacted on the coal health scheme suggests that many lawyers settle early for lower average damages to increase their profit.

Secondary exposure, such as to those responsible for laundering the clothes of a worker (usually family members) whose overalls were contaminated by asbestos fibres, remains excluded from the scheme, which is limited to employer liability exposure only.

The government is even resisting attempts to raise £1.5m from a scheme membership fee to fund medical research into mesothelioma. Lord Freud suggests that funding medical research is a matter for the Department of Health and should not be contained in a Department for Work and Pensions Bill.

The Bill is a result of a deal struck behind closed doors between the government and the insurance industry without equivalent consultation with claimants, support groups or trade unions. Unless it is improved to provide better protection and full compensation, it will let insurers off the hook and leave victims and their families paying the price for insurers losing or destroying the policies they profited from for decades.

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Printed & Distributed by DST Peterborough