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Judith Gledhill explains what steps should be followed to safeguard employees

Lifting and hoisting

THE LIFTING Operations and Lifting Equipment Regulations 1998 (LOLER) place duties on companies and individuals who own, operate or have control over lifting equipment. The Regulations apply to all businesses and organisations where workers are involved in the use of lifting equipment, whether that equipment is owned by the business or not.

The Regulations cover a wide range of equipment involving cranes, lifts, cherry pickers and other elevating working platforms and hoists. The definition of lifting equipment also includes chains, slings and eye bolts. When using lifting equipment, employers must plan the lifting operations properly, ensure that workers who use the equipment are competent and appropriately trained and that appropriate supervision is provided.

A lifting operation is defined as "... an operation concerned with the lifting or lowering of a load". A "load" is the item or items that are being lifted, and this can include a person or people.

Care assistants and other nursing staff who use hoists to lift and transfer elderly or disabled people are covered by the provisions of LOLER. Where individuals are being lifted there are additional requirements to ensure the safety of those lifting and the individuals being lifted.

What steps should employers take? Employers must ensure that the right equipment is selected. This must be of adequate strength and stability and should be positioned or installed in such a way as to reduce the risk, as far as reasonably

practicable, of the equipment or loads striking a person, or of the load drifting, falling or being unintentionally released.

Employers must, for example, ensure that crane hooks have safety catches to prevent loads falling from the hook during the lifting operation and the chains used to sling items must be of sufficient strength to lift items safely. In addition, employers must ensure that the work is undertaken safely and that workers are fully trained in the task and properly supervised.

A risk assessment should be undertaken and findings properly recorded. If the assessment highlights risks, the employer must consider measures to be taken to reduce the risk.

The court considered LOLER and systems of work in the case of **Ellis -v- William Cook Leeds Ltd**. Mr Ellis was employed with William Cook Leeds Ltd and was injured in April 2004 when he was struck in the face by a crane hook. He was knocked backwards, lost consciousness and was badly injured. When he regained consciousness, Mr Ellis could remember nothing of the accident.

Part of his job involved moving steel castings from the heat treatment area to a blast area. The castings were placed on a tray and loaded into the furnace with an overhead crane operated by a hand-held control at the end of a hanging cable. It was a fairly regular occurrence, before the accident, for castings to fall from the tray. If that happened, the castings had to be attached to the crane hook and moved into the furnace.

On the day of the accident, one of the castings had fallen from the tray. Mr Ellis went to pick up the casting using the crane. He attached the crane hook to one end ➤

If the assessment highlights risks, the employer must consider measures to be taken to reduce the risk



Photo: Rex Anderson



Photo: Rex Anderson

If the assessment highlights risks, the employer must consider measures to be taken to reduce the risk

► of the casting and pressed the button on the pendant control to put it back on the tray. At that point, he received a blow to the face and was knocked out. It transpired that the casting had jammed as it was being lifted and this caused it to fall from the hook of the crane. The defendant denied liability and Mr Ellis' case proceeded to trial.

The court found that it was foreseeable that the type of casting being lifted might become jammed and, as a consequence, using a crane with the particular hook used on the day of the accident, was unsafe. The court also found that the hook was liable to distort and so the casting fell and Mr Ellis was injured. Mr Ellis was also found to have been at fault for continuing to lift the casting when it was clear that it had jammed. He should have appreciated the risk of the casting falling.

What can we learn from this case?

The court gave a clear direction that, pursuant to LOLER, employers must ensure

that lifting equipment is of adequate strength and stability for each load. Appropriate hooks and chains must be used and hooks must contain appropriate safety catches to prevent loads from falling. Workers using lifting equipment must be properly trained and supervised.

The work must be properly planned and carried out in a safe manner. Machinery and accessories for lifting loads must be clearly marked to indicate their safe working loads. In addition, lifting equipment must be appropriately maintained and inspected on a regular basis.

The requirement of LOLER cannot be considered in isolation and must be considered alongside other health and safety regulations including the Provision and Use of Work Equipment Regulations, the Manual Handling Operations Regulations and the Work at Height Regulations.

Safety rep responsibilities

What can workers and safety representatives do when the employer's enterprise includes the use of cranes for lifting loads and the provision of mobile operating platforms and hoists?

Safety reps can identify if there is a problem with the work equipment by talking to workers and reporting any concerns to management. Ideally, such concerns should be reported in writing.

They can also ask for copies of any risk assessments that have been undertaken. Risk assessments must take account of the provisions of LOLER 1998 and the PUWER 1998 where work equipment is concerned. If a safety rep has any concerns at all about the work equipment, the workers using it or the inspection and maintenance of the work equipment, these concerns should be raised with management.

If appropriate lifting equipment is provided, the work properly planned, workers trained and supervised and appropriate risk assessments undertaken, accidents such as that involving Mr Ellis should not happen and serious, occasionally fatal, injuries should be avoided.

Accidents caused by mistakes by employees can still be the responsibility of the employer but vicarious liability is complicated, writes **Keith Patten**

Where the buck stops

MANY WORKPLACE accidents are caused by the failures of systems where the employer can clearly be regarded as at fault. But there are others where the immediate cause is something done or not done by a fellow employee.

This may be down to a failure to provide proper training and instruction that can clearly be laid at the door of the employer. But what if the cause of the accident really is the inadvertence of another worker? Is the employer liable in those circumstances?

The answer is more complicated than it first appears. The law has developed a concept called vicarious liability. In most situations this probably will make the employer liable for the conduct of a fellow employee. But there are two important questions: who is an employee for the purposes of vicarious liability and are there any kinds of inadvertent conduct for which the employer will not be found liable?

Who is an employee?

In the vast majority of circumstances this will be obvious. But many modern workplaces are complex and the concept of who is an employee for the purposes of vicarious liability may sometimes cause difficulties.

Take, for example, the position of an agency worker working in a factory. That worker is technically

employed by the agency, not by the employer running the factory. So, if an accident occurs as a result of an oversight by an agency worker, who is responsible?

Because the concept of vicarious liability applies to employees it might seem obvious that it must be the agency. But that is not always so. The courts have developed the idea of employment for these purposes to include circumstances where the worker is completely under the control of the factory employer. So, if all the direction of the agency worker's work lies in the hands of the factory owner and the agency does nothing more than pay the worker, ►

Pursuing a claim against the wrong employer can be both fruitless and expensive



Where a worker was fooling around on a trolley at work and a fellow employee was crushed by it, the employer was not found to be vicariously liable

then the factory owner may be found to be vicariously liable for the mistake of that agency worker.

At the other end of the scale may be a contractor who goes onto premises to do a particular job, an electrical contractor sent into a school to carry out lighting repairs for example. Is the school vicariously liable for his failure to carry these out correctly and any accident or incident that happens as a result? The answer is probably no. While the school will have some measure of control in the sense of telling him what needs doing, it will not be directing how he does his job. It is the contractor's own employers who would be vicariously liable for his actions.

These extremes allow for many more difficult cases that lie somewhere between them. Because it is a matter of fact and degree, outcomes can be difficult and the importance of expert legal advice is clear. Pursuing a claim against the wrong employer can be both fruitless and expensive.



What is the employer liable for?

Is the employer liable for anything and everything the employee does during the course of his employment? The answer is simple to state but much more complex to apply. An employer is liable for the oversight or slip of the employee committed in the course of his employment but not that committed outside the scope of that employment.

It would be possible to adopt a very narrow view of that idea – workers are not employed to be negligent so whenever a worker is negligent that must be outside the scope of the employment. Such a narrow approach would render the whole concept of vicarious liability worthless and the courts have not followed that line.

But, again, distinctions have become matters of fact and degree and expert advice is important. So, if someone is employed to drive a forklift truck and carelessly drives it into someone, there is unlikely to be any argument that he has done this in the course of his employment.

However, a driver permitted to use the works vehicle for private purposes will not be in the course of their employment when driving to the shops.

The courts have had particular difficulty where employees have been engaged in pranks at work. Where a worker was fooling around on a trolley at work and a fellow employee was crushed by it, the employer was not found to be vicariously liable.

Conclusion

It is clear that not everything that happens at work will be laid at the door of the employer. In particular there will be times when the conduct of a fellow employee is found to have stepped outside the course of employment. This is, however, a developing area of law and, if anything, the recent trend of the courts has been to increase the range of circumstances in which employers are held liable. Each case will need to be carefully considered on its own facts.



Slips on snow and ice: get a grip?

Laura Morris explains employer duties to prevent injuries caused by snow and ice



IF SOMEONE injures themselves at work as a result of slipping on snow or ice, the employer or occupier may be liable under the Health and Safety at Work Act 1974 and supporting regulations.

Perhaps the most pertinent provision relating to winter conditions is in the Workplace (Health Safety and Welfare) Regulations 1992. Regulation 12(3) stipulates that surfaces of floors and traffic routes in the workplace should, so far as is reasonably practicable, be free from any article or substance that may cause a person to slip, trip or fall.

The Approved Code of Practice that interprets this regulation states that: “arrangements should be made to minimise risks from snow and ice. This may involve gritting, snow clearing and closure of some

routes, particularly outside stairs, ladders and walkways on roofs.”

What if the employee does not slip in the workplace? What if the employee slips on snow and ice in the course of their employment in the community for example postmen/women, care workers and refuse collectors? What duties does the employer have then?

In the first instance we should be clear about the responsibilities. It is the Highways Agency and local authorities that have responsibility for clearing public highways and pavements. They are under a duty to ensure that, so far as is reasonably practicable, safe passage along a highway is not endangered by snow or ice.

There is not however, an absolute duty on the local authority or highways agency to

keep footpaths clear of snow and ice. The courts accept that no local authority could keep a pavement free from snow and ice at all times. As local authorities have limited resources, courts accept that they have to prioritise certain routes. Provided that the authority has a winter maintenance plan in place and they can provide evidence that they have taken steps to implement that plan, the courts tend to be sympathetic.

Even in cases where it has been established that the local authority failed to grit or salt a priority route in periods of extreme weather, if the authority argued their failure to grit was due to lack of resources (such as shortage of grit) then the courts may find that the local authority took all reasonable steps in the circumstances and therefore complied with their duty under the Act. In view of this, pedestrian slips-on-ice cases are extremely difficult.

Safeguards

However, if an employer expects his employees to work outside in the winter months, there will be occasions when the ground is covered in ice and snow. What safeguards should employers put in place for these workers to minimise the risk of their slipping and potentially serious injury?

In addition to statutory requirements, employers have a duty to take care of the health, safety and welfare of their employees. Employers have, for example, a duty to ensure that the workplace is safe and that appropriate protective clothing is provided. Employers have to consider what risks their employees may face and must carry out appropriate risk assessments.

Where an employee is working outside in the community, the risk of slipping on snow and ice in periods of inclement weather is foreseeable. To reduce the risk of slips on ice, frost or snow employers need to assess the risk and put in place a system to manage it.

The risk assessment should identify what the hazards are, identify who might be harmed and how, evaluate the risks, review the preventive and protective measures in

place to control the risks and consider whether further action, if any, needs to be taken to reduce risk sufficiently.

In recent cases where an employee has slipped on ice or snow when at work, we have alleged the risk of slipping could have been removed or considerably reduced by the provision of snow and ice grips.

Under Regulation 4(1) of the Personal Protective Equipment at Work Regulations 1992 every employer is under a duty to ensure that suitable personal protective equipment is provided to employees who may be exposed to a risk to their health and safety while at work, except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.

Shoe grips simply fit over existing shoes, effectively turning them into snow shoes. They are readily available for just a few pounds. We have argued snow/ice grips should be provided to all workers who are expected to work outside in ice and snow. The provision of grips is not expensive and would provide protection without major investment.

We have had success with these allegations and understand that one large local authority has ordered a number of snow/ice traction aids to help protect employees working outside

Notwithstanding the above, the crux of these claims is still what is reasonable. The concept of what steps an employer should reasonably take to safeguard the health and safety of their employees as opposed to what steps an employer has an absolute duty to take, allows employers to argue that the change isn't practical or that the cost of provision of ice grips is too high in comparison to the risks involved.

Each case will be considered on its own merits, but the relatively low cost of grips compared with the serious injuries that can be suffered as a result of slipping on ice or snow should result in more and more employers ensuring that ice grips are made available.

We have had success with these allegations and understand one large local authority has ordered a number of snow and ice traction aids

Simon Dewsbury explains a new Court of Appeal benchmark

Two steps may still be a staircase

WE LAST looked at staircase accidents and the vexed question of Regulation 12(5) of the Workplace (Health Safety & Welfare) Regulations 1992 in Health & Safety News in Spring 2010.

This states: “suitable and sufficient handrails and, if appropriate, guards shall be provided on all traffic routes which are staircases except in circumstances in

which a handrail cannot be provided without obstructing the traffic route.”

This has provided numerous occasions for dispute over what constitutes a “staircase”, what is “suitable and sufficient”, whether handrails are needed in all circumstances and what level of protection is appropriate.

The Court of Appeal had considered staircases in a judgment in 2004 (**Jaguar Cars -v- Coates**) and been quite restrictive in their interpretation of the Regulations.

When is a staircase not a staircase?

It was held that a series of steps where there were only four steps could not be properly described as a “staircase”. Since they were the “sort of steps that one sees everywhere” they did not pose any real risk and there was no duty to provide a handrail.

Staircases have been considered again by the Court of Appeal in the case of **Broadfield -v- Meyrick Estate Management Limited**. The response was in some ways more favourable to the claimant – but the

Court of Appeal nevertheless managed to find against her, although they had found that there was a breach of regulations.

The case also shows the court will take into account the guidance given in an Approved Code of Practice (ACoP) when considering regulations and the way they should be interpreted.

Mrs Broadfield worked in an office in an old fashioned cottage. As she stepped out of her office door there were two steps directly beneath her. These led to a small landing. This then led to a staircase, which had a handrail. However, there was no handrail next to the top two steps or first landing.

Lack of handrail

Mrs Broadfield stumbled as she left her office and fell down the steps. She could not explain the reason for this. In the circumstances, there was no evidence that the staircase itself was defective, apart from the lack of a handrail at the top.

The case went to the Court of Appeal because the trial judge found that there was no breach of the regulations, which did not require a handrail going right up to the top of the steps. The defendant argued the regulations could not have been intended to cover every inch of every staircase and every landing when assessing what was sufficient.

The HSE Guidance (available to download free at the HSE website at www.hse.gov.uk/pubns/books/l24.htm) states: “a secure and substantial handrail is to be provided and maintained



on at least one side of every staircase except at points where a handrail will obstruct access or egress...”

The Court of Appeal accepted that the Code of Practice could give practical guidance on how the regulations are to be complied with and also gave important general guidance on how the regulations are to be interpreted.

The judgement said: “The overriding objective of the regulations is to protect the employee at work. In this case, where there are two possible and reasonable constructions of a regulation, to my mind, the construction which best promotes the safety of the employee is to be preferred.

“Stairs are inherently dangerous places, even if modern and straight. The regulations are designed to provide a safe place of work if at all possible, and the Code and Guide explain how that can best be done.”

The Court of Appeal therefore read the regulation and the Code of Practice together and decided that there was a duty in this case to provide a handrail that went all the way to the top of the stairs.

There was an issue as to whether the “statutory exception” (which allows an employer to argue that a handrail would obstruct a traffic route) applied but the Court of Appeal did not consider there was sufficient evidence of this.

There was therefore a breach of duty and a handrail was necessary.

Handrail irrelevant

So why did Mrs Broadfield not receive damages? This was because the court went on to consider the question of causation.

In the particular circumstances of the accident, there was evidence that, even if a handrail had been present at the top of the stairs, Mrs Broadfield would not have been in a position to use it.

The breach of duty therefore did not cause injury.

All that Mrs Broadfield was left with was the rather cold comfort that taking her case to the Court of Appeal may have assisted other injured employees who will now be able to rely on the Court of Appeal’s view of the way ACoPs may be interpreted.

Godric Jolliffe explains why consolidation of health and safety regulations has been rejected

The Matthews report: the road to confusion

CONSOLIDATING HEALTH and safety legislation could lead to confusion rather than clarity and savings for employers, a report commissioned by the Health and Safety Executive has concluded.

The author, Richard Matthews QC, says work to simplify and improve guidance should continue, but that consolidation of general health and safety requirements should not be pursued.

Matthews was asked by the HSE to investigate to what extent the recommendations of The Löfstedt Review [see Health and Safety News Spring 2012] could be achieved to provide clarity and “help businesses, particularly new ones, understand their duties better and reduce apparent duplication by having all related requirements... in one place”. The HSE board is now expected to advise the government that consolidation should not be pursued.

The broad options considered by Mr Matthews were to:

- consolidate all UK safety regulations implementing EU occupational health and safety directives and other occupational health and safety regulations into one overarching regulation (not just those enforced by the HSE) (Consolidation A)
- bring together UK regulations implementing EU directives and other health and safety regulations that are within the HSE's remit (Consolidation B)
- consolidate only UK regulations imple-

menting EU directives of general application and other necessary general health and safety regulations or a smaller subset that relate to general management (Consolidation C).

Consolidation A is seen as “wholly unfeasible” and “any resulting set of regulations would require printing in a multiple volume work”. This “would appear to make the task of and responsibility for enforcement and issuing guidance to explain the duties more challenging rather than easier”.

On Consolidation B, the Matthews report says there are many provisions “that are entirely focused upon specialist parts of particular sectors, where the consolidation of these with other health and safety regulations... could do nothing to achieve an aim of improving the ease of understanding of businesses as to their health and safety duties”.

He adds that, as some regulations would be missing, this would not be the only source of health and safety related regulations that some businesses would be affected by, which could be confusing.

While Consolidation C is seen as being more feasible, it will be difficult to identify or define the sets of regulation that apply to all businesses. Matthews points to a consolidation of the health and safety regulations of general application in the Republic of Ireland that has not succeeded in providing a single source of provision for general health and safety matters.

Of this option he adds that there is also a risk that this “would be capable of mislead-

ing those who relied upon it to be fully informed of their duties”.

The report also considered the suggestion by Professor Löfstedt that there should be consolidation by common provisions in legislation. After looking at Regulation 3 of the Management of Health and Safety at Work Regulations 1999, Matthews concludes that consolidating every UK health and safety provision where risk assessment is referred to would “create, at best, a misleading list of non-exhaustive hazards that may have to be considered by an employer; at worst, a non-exhaustive but voluminous provision”.

While there is some scope for simplifying and merging some regulations by theme or related topics, the report says that beyond this there is no benefit to bringing together all of the relevant duties to a particular business or hazard in one place.

It suggests that clearly demarking those regulations that do create positive health and safety duties from the group of “administrative” regulations may be a more effective way of providing a source to help employers easily understand the extent of their duties.

Finally, Matthews considers merging specific legislation by looking at the Provision and Use of Work Equipment 1988 and Lifting Operations and Lifting Equipment Regulations 1998. He concludes this would only lead to a larger consolidated ACoP and guidance and that business would be better served by specific guidance.

Stakeholder consultation

Although the Matthews report, which was published at the end of December 2012 without publicity, received broad support at a follow up stakeholder workshop, where delegates supported the need for sectoral consolidation but could see little value or benefit of bringing together more general health and safety requirements, it cannot be assumed that the government will now drop the idea.

Ministers, determined to achieve targets for repealing regulations as part of the so-

**CONSOLIDATION:
THE PRACTICABILITY AND
EFFECTS OF THE OPTIONS
FOR CONSOLIDATING
HEALTH AND SAFETY
REGULATIONS**

Richard Matthews QC

December 2012

The Löfstedt review

An independent review of health and safety legislation...
call for evidence
May 2011

DWP Department for Work and Pensions

called red tape challenge and the “one in, two out” policy, may yet ignore the HSE Board's recommendation.

But both business organisations and trade unions agreed at the workshop that they favoured simple, clear and specific guidance.

Consolidation: the practicability and effects of the options for consolidating health and safety regulations can be obtained from www.hse.gov.uk/legislation/consolidation-of-regulations.htm

The HSE paper can be obtained from: www.hse.gov.uk/aboutus/meetings/hseboard/2013index.htm

Simon Dewsbury says the government is taking workplace health and safety back to Victorian times

Reform threatens employer liability

IF GOVERNMENT amendments to the Enterprise and Regulatory Reform Bill, which is currently going through Parliament, make it onto the statute book, health and safety law in place since 1898 will be overturned.

Injured workers will be unable to rely on their employer's breach of statutory duty to claim compensation for injury.

This amendment has been drawn up on the back of the Löfstedt review of health and safety which was commissioned by the government as part of its drive to reduce red tape and the so called burdens on business.

Professor Löfstedt, who had little practical knowledge of UK health and safety law, suggested, in just a few paragraphs, that the safety law of strict liability might be unfair to employers who had done nothing wrong.

This failed to consider the unfairness of penalising workers injured through no fault of their own.

New Clause 62 of the Bill (as it was numbered as HSN went to press) goes far beyond Professor Löfstedt's suggestion. It will remove the ability for anyone to sue in the civil courts for any breach of any health and safety regulations. This means that employers will no longer be automatically liable in a personal injury action when, for example, a piece of machinery is left unguarded and someone suffers a traumatic amputation, or when electrical equipment is

faulty and someone suffers a fatal or near fatal electrocution.

Strict liability for breach of statutory duty means the injured worker doesn't have to prove the employer was at fault. They simply have to say, "the law says you should have done this and you didn't".

If the government succeeds in making the change, union members injured through no fault of their own will always have to demonstrate that their employer knew or ought to have known the equipment they were using or a particular working practice was unsafe if they are to receive compensation for their injury.

Indeed, most or all of the regulations referred to on other pages of this publication may be rendered useless. Manual handling cases, slipping and tripping at work and many occupational disease cases will be affected. A large number of the cases we have reported on in recent years would have failed in the courts.

HSE prosecutions could be left as the only means of enforcing breaches of the regulations, at a time when the HSE has dwindling resources to prosecute a tiny minority of cases.

The causes of workplace accidents can be complex and down to many factors. Employers may argue that faulty equipment was due to the manufacturer or the service company but, by not providing employers with an excuse, the strict liability provisions in the Health and Safety at Work Act mean an injured person doesn't have to find out which of them was responsible.

Instead, their employer has to show that they have complied with their health and safety duties and are not in breach of the regulations.

This requirement provides a better level of protection for employees because it focuses an employer's attention. Regulations encourage good behaviour.

Good health and safety should, of course, be a priority for employers irrespective of what it costs or the benefits it brings. But there is also plenty of evidence that it is very valuable, both by reducing days lost to sickness absence and in maintaining good employment relations.

The changes proposed by the government will not only set health and safety law back over 100 years, they will encourage poor employers to pay lip service to health and safety generally – the opposite of what Professor Löfstedt suggested.

Indeed, Löfstedt himself says, in his one year on review, that the government's approach "is more far-reaching than I anticipated in my recommendation and, if this amendment becomes law I hope that the Government will carefully monitor the impact to ensure that there are no unforeseen consequences." www.dwp.gov.uk/policy/health-and-safety

Civil justice reforms

They also come at a time when civil justice funding rules are changing, making it more difficult for injured people to find a lawyer to take their compensation claim unless it is going to be very straightforward, they can pay lawyers fees themselves or they are a trade union member.

This is as a result of the civil justice (Jackson) reforms contained in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act. From this April, no win no fee arrangements will effectively end. Because the guilty party (usually the employer or their employer liability insurer) will no longer have to pay the insurance premium that the injured person takes out to cover the cost of things like medical reports should they lose, even those able to suc-



Could the Bill see a return to Victorian factory values?

cessfully pursue a claim may not be able to get back the costs of doing so.

And because most work-related accident and disease cases are complex and require investigation and reports, solicitors are less likely to take the risk of running them because of the risk of not getting paid. The end of strict liability will make claims even more difficult as every case will turn on whether it is possible to prove fault by the employer.

We are seeing blow after blow to injured people. The government is also consulting on increasing the small claims limit for whiplash injuries and, possibly, all road traffic accident personal injury claims.

This means that many injured people whose claims are worth less than £5,000 will have to go to the small claims court to claim compensation, which will make getting legal representation difficult.

Thompsons is working with the TUC, trade unions, health and safety campaigners and Labour MPs to oppose the dangerous amendments to health and safety laws and further erosion of access to justice for injured people.

Thompsons is the most experienced personal injury firm in the UK with an unrivalled network of offices and formidable resources.

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Health and Safety News aims to give news and views on developments in health and safety issues and law as they affect trade unions and their members.

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