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THOMPSONS SOLICITORS
STANDING UP FOR YOU

Standing up for you

Imogen Wetton, senior serious injury solicitor, considers the correct course of action to be taken following an injury at work to ensure the member continues in employment

Rehabilitation after work injuries

AN ACCIDENT at work can have devastating and life-changing consequences for seriously injured union members and their families. The purpose of the personal injury claims process is to restore the member, as much as possible, to the position they were in before the accident.

Following an accident at work, proactive rehabilitation can positively impact on an injured member's overall health, well-being and ability to engage in the life they want to lead. But how does Thompsons makes sure that the immediate health and rehabilitation needs, as well as the immediate legal needs, of the individual victim are integrated to ensure the best possible outcomes?

Firstly, the earlier a trade union representative or family member tells us about the accident, the more we can help. We can make sure that the victim is well-informed about – and can influence as far as possible – key decisions such as hospital treatment, transfers or discharge. We can work to improve communication inside and outside hospital between the victim and the NHS clinicians, treating teams and community-based therapists.

Proactive rehabilitation can help injured people recover more quickly, have a better quality of life and return to work sooner

It is key that the individual is an active part of the decision-making process, supported by his or her family and/or trade union representative. This requires provision of specialist, accurate and relevant information – legal, employment-related and healthcare-related – all provided in a timely manner.

Following a serious injury, the victim will have immediate needs to address that he or she may never have encountered before: mortgage or rent, mobility and access, specialist therapies, childcare, money worries, work, driving, family support. The victim's ability to return to work and to provide for his or her family through earnings may be significantly impaired for a substantial period of time.

No absolute obligation

In any personal injury claim, the insurer representing the employer (the defendant) has no absolute obligation to pay for rehabilitation or other support needed for the injured person.

If the insurer admits liability on behalf of the defendant, or a judge decides that the accident was the employer's fault, then the member can request that the defendant – or more likely their insurer – provide funding for private rehabilitation and a judge can order this funding is made available.

Proactive rehabilitation can help injured people recover more quickly, have a better quality of life and return to work sooner. There is a pre-action protocol for personal injury claims and a recent Rehabilitation Code, which place obligations on personal injury lawyers on both sides to consider whether rehabilitation is appropriate in every case.

If we are contacted straight away, not only can we help to arrange rehabilitation and support, we can also intervene promptly with the insurer to maximise the chances that funding for rehabilitation is made available.

The Rehabilitation Code provides a framework for the member's lawyer and compensator to work together collaboratively to ensure that the member's health, quality of life, independence and ability to work are restored before, or simultaneously with, the process of assessing compensation.

The Code can be used as a tool to secure insurer funding for rehabilitation even if the liability aspects of the case are far from straightforward or unlikely to be resolved for some months. The Code places a duty on the injured party's lawyer to immediately consider whether additional medical or rehabilitative would improve the victim's present and/or longer-term physical and mental well being.

For less serious injuries, interventions may focus on simply treating physical needs and can involve physiotherapy, diagnostics and consultant follow-up, psychological intervention or other services to alleviate problems caused by the injury.

Immediate needs assessment

Where there is a more serious injury, the need for and type of rehabilitation assistance will be considered through an immediate needs assessment (INA) carried out by a case manager or appropriate rehabilitation professional.

Unions are best placed to secure and maintain the link between the member, work colleagues, the workplace and the employer

➲ This assessment would consider the following points:

- The physical and psychological injuries sustained by the injured member and the subsequent care received or planned
- The symptoms, disability/incapacity arising from those injuries. Where relevant to the overall picture of a member's rehabilitation needs, any other medical conditions not arising from the accident should also be separately noted
- The availability or planned delivery of interventions or treatment via the NHS, employer or health insurance schemes
- Any impact upon domestic and social circumstances, including mobility, accommodation and employment, and whether therapies including gym training or swimming would be beneficial
- The injuries/disability for which early intervention or early rehabilitation is suggested
- The type of clinical intervention or treatment required in both the short and medium term, and its rationale
- The likely cost and duration of recommended interventions or treatment, their goals and duration, with anticipated outcomes
- The anticipated clinical and return-to-work outcome of such intervention or treatment.

The compensator should respond within 21 days of receiving the INA report. The response should include: (i) the extent to which it accepts the recommendations and is willing to fund treatment; and (ii) justifications for any refusal, with alternative recommendations

In relation to work, there may be an immediate need for aids, adaptations and/or adjustments to employment to enable the injured person to return to their existing job, obtain a suitable alternative role with the same employer or retrain for new employment.

Unions are best placed

The specialist knowledge and workplace support provided by unions ensures that a member's representative is a key member of the wider rehabilitation team – particularly in respect of return to work outcomes.

Unions are best placed to secure and maintain the link between the member, work colleagues, the workplace and the employer. If the member is likely to be off work for many months, his or her representative, often supported by a rehabilitation case manager, a vocational rehabilitation specialist or an occupational psychologist, is best placed to work with the member and their employer to ensure that the position is kept open for them – and for as long as possible.

Ian Cross, personal injury lawyer, explains the legal anomalies that Labour MP for Middlesbrough Andy McDonald's Bill aims to correct

Fatal accidents in the workplace

FIGURES RELEASED by the Health and Safety Executive indicate that 142 workers were fatally injured at work between April 2014 and March 2015; this was an increase on the figure for the previous year.

In cases of a fatal accident, Thompsons Solicitors will work with the family to try and secure proper compensation. This will often include a sum of money to help compensate for the bereavement suffered by family members.

Compensation awards following fatal accidents are subject to rules that many may find difficult to understand, and not without good reason.

Consider these multiple choice questions:

1. How much compensation might be paid to somebody who has lost their little finger in an accident at work?
   a. Approximately £10
   b. Approximately £100
   c. Approximately £1,000
   d. Approximately £10,000

2. How much compensation is paid to the bereaved parents of a 17-year-old fatally injured through the fault of the employer?
   a. £543
   b. £5,507
   c. £12,980.00
   d. £112,300

3. Which of these can claim a bereavement award?

➲

Andy McDonald, who is introducing the Bill, was a senior serious injury solicitor at Thompsons' Middlesbrough office until he won the Middlesbrough by-election in November 2012. He is currently Shadow Minister for Rail

➲ a. The parent of an 18-year-old killed in an industrial accident on their 18th birthday.

b. The father of a child where the father was not married to the mother but had lived with the child for all of the child's life.

c. A husband for the death of his wife. They were married by an Elvis Presley impersonator in Las Vegas having been drunk. The ceremony was legally binding. They had not seen each other since but were never divorced.

d. A common-law husband. For the death of his common-law wife. They had lived together for 40 years and had raised five children and 20 grandchildren but never felt it necessary to get married.

4. Which of these might be awarded compensation following a fatal workplace accident, a consequence of which they develop a serious depressive illness?

a. A wife who was called to the hospital and comforted her husband as he died.

b. A close friend and work colleague who had worked with the victim for 40 years and witnessed the accident.

c. The wife of the victim of a massive factory explosion which she saw live on television knowing that her husband was there.

d. A husband who worked with his wife and saw the accident in which she was killed.

The wrong answers?

Incredibly, the answers are 1d, 2c, 3c, and (probably) 4d.

The answers in respect of 1-3 are absolutely clear in law. The answers in respect of 4 are not so clear but a, b and c would probably not be entitled to compensation.

Does any of this seem right? It is impossible to justify the fact that the death of a child is valued at around the same level as the loss of a little finger. It is impossible to justify that such an award could be paid to the parent of a 17-year-old child but not on the day that they reach their 18th birthday.

The law surrounding compensation needs to reflect the nature of the families' suffering, and not draw lines based on arbitrary categories.

We know that the death of a loved one will always be traumatic for the surviving family. Sadly, the trauma suffered can lead to mental ill-health that can be very serious, in some cases leaving a family member unable to work.

Most people would consider that this would be a foreseeable consequence of a fatal workplace accident and that the family member should be compensated. Despite this, the law is very restrictive and unreasonable; it can leave family members in a very difficult position.

Andy McDonald, a former partner of Thompsons Solicitors and current Labour MP for Middlesbrough, has introduced a private member's bill (Negligence and Damages Bill), which seeks to make the law more reasonable and consistent.

The Bill aims to place psychiatric injury or illness, arising from the death of other persons, on a similar footing to suffering direct physical harm.

The Bill's aims are in line with a Law Commission report dating back to 1999 and also similar to a number of procedures in Scotland where the legal system is very different. If introduced it will allow for different amounts of compensation to be awarded and increase the categories of people eligible to claim.

We do not, at this time, have a government that shows much interest in the rights of working people. However, its majority is wafer thin and this Bill seeks to change an unreasonable practice that indiscriminately affects all people across the political divide.

Whatever side of the House your MP sits, consider asking them whether they will give this Bill the support it deserves.

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It is important for employees to be aware of the law concerning corporate manslaughter. Senior serious injury solicitor, David Robinson explains the salient points to take into consideration

Corporate manslaughter: what you need to know

WHEN MOST hospital wards were taking down Christmas decorations and A&E departments were hoping for a brief respite from one of the busiest times of the year, Maidstone and Tunbridge Wells NHS Trust was dealing with the challenge of being the first healthcare provider to face charges of corporate manslaughter.

Although, after just two weeks, the trial collapsed in January due to insufficient evidence, the case is nevertheless a stark warning of the increasing breadth of corporate manslaughter charges, which can be levied against employers.

Given this, it is important that employees, in particular those responsible for managing workers, are also aware of the law around corporate manslaughter.

What is Corporate Manslaughter?

The Corporate Manslaughter and Corporate Homicide Act 2007 came into force on 6 April 2008 and was intended to make organisations accountable for serious management failings.

The Act removed the need for there to be an identifiable senior individual who could be held to account for an offence of gross negligence manslaughter.

The offence of corporate manslaughter is committed where an organisation causes a person's death "in the way its activities are managed and organised", and when

➲ this amounts to "a gross breach of a relevant duty of care owed by the organisation to the deceased".

The Nature of the Duty

Organisations and companies have a duty of care for their staff, which includes managing and organising services in safe and, where possible, controlled ways.

This duty is wide-ranging and, for example, impacts upon:

- training of staff
- staffing levels
- organisational structures and supervision
- resources and equipment
- premises.

The recent strike action by junior doctors has illustrated the intense current pressures on the NHS's resources. Such pressures may cause difficulties for managers who could potentially be held responsible if lack of sufficient staffing, for instance, were to lead to the avoidable death of a patient.

A safety culture should be encouraged, focussing on good practice and fostering an ethos of learning from mistakes

While the NHS is in some ways a unique case, the mounting pressures on the public sector and its workforce are being felt across the board so all should take heed of the responsibilities the duty of care requires managers to take.

A company was convicted under the Act earlier this year when a crane driver was killed after crashing into an earth bank. The subsequent investigation found that the vehicle's breaks were defective, and further inquiries proved that similar issues existed across their fleet of vehicles.

This, coupled with poor supervision and structural oversights, led the company to being charged with corporate manslaughter and fined £700,000.

What amounts to a "gross" breach is largely subjective, with the Act expecting a court to analyse how serious the failure was and how much of a risk of death it posed.

Although it is for a jury to assess this, the Act does introduce an element of objectivity as existing policies, health and safety guidance, accepted practices and other relevant documentary evidence can be assessed to reach a conclusion.

It is therefore key that any such documents are clear, simple, and kept up to date.

"What Now?" and "What If?"

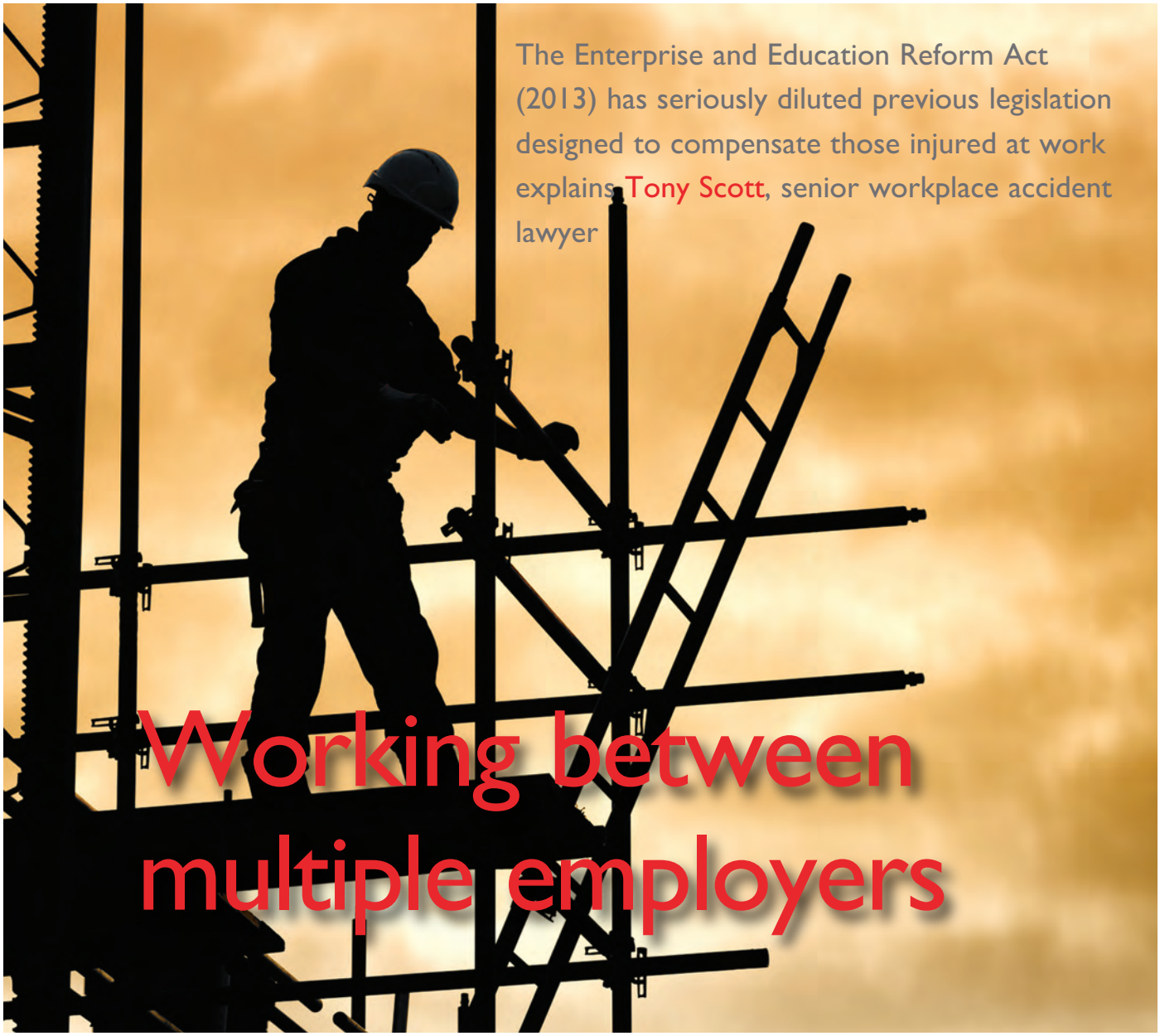
Managers and senior personnel should undertake regular audits of their safety management systems. These should be wide-ranging and include staff at all levels – managers need to know what is happening on the ground.

A safety culture should be encouraged, focussing on good practice and fostering an ethos of learning from mistakes; minor failings can quickly become significant, so addressing them early can prevent them from escalating.

Early preparation and preservation of evidence is key, should you find yourself involved in a corporate manslaughter case. Ensure that first accounts are recorded and medical records are preserved.

Given the length of time that criminal cases can take, it is important to retain policies that were in force at the time of the incident; demonstrating clear processes and audit trails removes the scope for a jury to apply a more subjective interpretation of events.

Make sure you also have a spring clean and ensure that all your policies and procedures are in good order, understood by staff and followed.



The Enterprise and Education Reform Act (2013) has seriously diluted previous legislation designed to compensate those injured at work explains Tony Scott, senior workplace accident lawyer

Working between multiple employers

PURSUING PERSONAL injury cases on behalf of union members where more than one employer may be to blame, which tends to affect construction workers in particular, can be a complicated process.

Prior to the introduction of the Enterprise and Regulatory Reform Act 2013 (ERRA) an accident victim had a civil right of action for breach, for example, of the Construction (Design and Management) Regulations 2007, which placed overall responsibility for health and safety on any site with the main contractors.

The rationale was that the main contractors would usually be responsible for the sub-contracting work to various other smaller employers and would be better able to monitor overall health and safety.

Sadly, the impact of these regulations, along with virtually all other workplace regulations, has been significantly diluted under the ERRA, which came into effect on 1 October 2013.

While the regulations provide evidence as to what the applicable standards are, the ERRA has removed a civil right of action for breaches of them; they are,

The Employers Liability (Defective Equipment) Act 1969 is useful where the member's own employer hires plant and equipment from another employer

➲ therefore, regulations without teeth. The overall effect of the ERRA has therefore been to make it more difficult to progress personal injury cases on behalf of claimants, especially where there are several employers.

There are other pieces of legislation available to support investigations involving multiple employers.

For example, the Employers Liability (Defective Equipment) Act 1969 is useful where the member's own employer hires plant and equipment from another employer. If that piece of equipment is defective while in the hands of the claimant's employer, then his own employer is still strictly liable.

A second piece of legislation unaltered by the ERRA is the Occupiers Liability Act 1957. This is useful where, for example, the claimant works at the premises of another company who is not his employer.

If that company causes a substance or an obstruction to be left on the floor and fails to warn the claimant of this hazard, then the company is still obliged by duty to keep the claimant safe; under Section 2 (4) (a) of the Occupiers Liability Act 1957 there is a duty on the part of company to adequately warn the visiting worker of any particular danger to ensure that any visitor is reasonably safe.

Independent contractor

Where a member is injured at their own workplace due to the faulty repair work from an independent contractor, then their own employer will not be liable under Section 2 (4)(b) of the Occupiers Liability Act 1957 where it was reasonable to entrust that work to the independent contractor.

If, however, the work for the independent contractor is of a relatively basic standard so that the employer could easily have done it itself and checked to see that it was safe, then in those circumstances the employer would still be liable for the faulty maintenance of an independent contractor at its premises.

Control

One of the key issues in determining whether an employer has any liability for the actions of an independent contractor on its premises is that of "control".

For example, if an employee of an independent contractor accidentaly spilt some oil on the floor and a worker slipped on that oil a few minutes later, then the employer of that worker would not be liable as it has no real control over that issue.

A claim could only then be framed against the independent contractor who employed the individual who dropped the spillage.

The unfortunate but inevitable effect of the ERRA in removing a direct civil right of action for much of the European health and safety legislation is that health and safety standards have slipped.

They are unlikely to be as high as they have been in the past, and this in turn will make it more difficult for victims of workplace accidents to pursue accident claims involving multiple employers.

At the start of any such claim, it will be important for members to give as much information as possible as to the responsibilities of all the employers involved to assist in determining who should ultimately be held to account.

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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. This publication is not intended as legal advice on particular cases.

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