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Threshold lowered for hearing damage

Employers are now liable for exposure of their workers to lower noise levels. Keith Spicer reviews the implications of the deafness test cases

UNTIL THE Noise at Work Regulations came into force in 1990 employers generally assumed that they could expose their employees to noise levels in excess of 85 decibels (dB) without fear of facing compensation claims from those who suffered damage to their hearing as a result of being exposed to noise at work.

The Court of Appeal has recently ruled in the case of **Baker -v- Quantum Clothing Ltd** that employers are liable for damage to workers' hearing where they exposed them to noise levels between 85 and 90dB before the implementation of the Noise at Work Regulations.

This is a welcome decision and one that could result in many more workers achieving justice than was previously the case.

Baker -v- Quantum Clothing

In February 2007 a number of textile workers brought deafness test cases involving daily exposure to levels of noise below 90dB under the Noise at Work Regulations.

They had all been exposed before January 1990 and the trial Judge concluded that therefore there was no common law liability in negligence on most employers for exposure to employees at noise levels between 85-90dB, nor was there any breach of Section 29 of the Factories Act 1961.

But in the case of **Baker** the appeal court Judges have said that there is.

Establishing negligence

To establish a successful claim in "common law negligence" it is necessary to prove that the employer should have known that their employees' exposure to noise in the workplace was of such a level that it could cause damage to their hearing, and that the employer could have taken steps to reduce the noise exposure.

If it can be shown that the employer knew or should have known that the noise levels were too high and took no steps to prevent injury then, subject to proof of injury, they are likely to be found liable to pay compensation for any noise related hearing loss.

Historical advice

Noise induced deafness has been known about for well over 100 years and in some jobs hearing protection was provided in the 1940s and 1950s.

In 1963, the Minister of Labour published "Noise and the Worker", the first major publication on the subject. It made employers aware of the dangers of excessive noise and recommended what they needed to do to protect their workers from exposure to excessive noise.

At that time it was not possible to be precise about measuring noise levels or the amount of damage that could be done to a work force by noise exposure. But it was suggested that employers should not be exposed to noise levels above 90dB over an eight hour working day.

Based on later research, the "Code of Practice for Reducing Noise" was introduced in 1972. Again this referred to an average noise level exposure of 90 dB but did not suggest that exposure below that level was necessarily safe.

Suggestions were made for steps that should be taken by employers to reduce the level of exposure to noise and for the provision of hearing protection.

However, no specific legislation was brought in to protect employees from noise exposure, although in 1974 some regulations were introduced covering those in the wood working industry and in tractor cabs.

It was not until 1 January 1990 through "The Noise at Work Regulations 1989" that legislation protected most employees in most industries.

This set two action levels: 85dB and 90dB. Both gave rise to steps that employers should take to reduce their employees exposure to noise.

The law was extended by the "Control of Noise at Work Regulations 2006" which gave protection against lower levels of noise exposure of 80 and 85dB.

Baker and the Factories Act

Stephanie Baker was exposed to between 85 and 90dB over a period from 1971 to 1989 while she was employed by a knitting company. ➤

It was not until January 1990 that legislation protected most employees in most industries

Photo: John Harris/reportdigital.co.uk

All factory employers have a duty under Section 29 of the Factory Act 1961 to protect their workforce against noise exposure

Her case had to rely on common law negligence and also breach of statutory duty under Section 29 of The Factories Act 1961 which was then the only breach of duty that applied since her exposure pre-dated the Noise at Work regulations.

Section 29 of the Factories Act states "There shall, so far as is reasonably practical, be provided and maintained a safe means of access to every place at which any person has at any time to work, and every such place shall, so far as reasonably practicable, be made and kept safe for any person working there."

But the first trial Judge said there was no breach of the Factories Act and, due to the state of knowledge in the textile industry in the 1970s and 80s, the employers did not have to take any special steps if the noise levels were below 90dB.

However employers with greater than average knowledge had until the beginning of 1985 to supply hearing protection.

But the appeal court Judges found that activities that lead to exposure to employees of excessive noise levels above 85dB do, under the Factories Act, make the workplace "unsafe". It was not necessary for a Judge to look at the state of knowledge at a specific time (as it is to establish negligence) to establish a breach under the act.

Before the **Baker** case, courts in other deafness cases have been somewhat inconsistent in their decisions as to whether there was a breach of Section 29 of the Factories Act when an employee was exposed to excessive noise at work. None were binding on the law or on the first trial judge in **Baker**.

But the Court of Appeal's ruling means that all factory employers have a duty under Section 29 of the Factories Act 1961 to protect their workforce against noise exposure and that, in the textiles industry, there would be liability on employers for noise exposure at levels between 85 and 90dB from January 1978.

The difference being that some industries, such as the railway and car industries had greater knowledge earlier on about the risks of noise exposure at those levels.

So, in the ASLEF backed case of **Harris -v- the British Railways Board and others**, the appeal court accepted that BRB was aware for some years prior to the implementation of the Noise at Work Regulations, that noise levels in excess of 85dB, but lower than 90dB, could damage hearing.

Common law negligence

The Court of Appeal also considered the position of common law negligence and took the view that an employer would have developed some knowledge by 1983 and, allowing time to investigate, if they then failed to provide hearing protection to those exposed to noise between 85 and 90dB by January 1988,

The regulations today

The Factories Act 1961 was abolished on 1 January 1993. Health and safety representatives now rely on the following main regulations:

1 The Control of Noise at Work Regulations 2005 came mainly into force on 6 April 2006. They provide lower action levels for noise exposure, noise risk assessments, elimination or control of noise exposure to employees, provision of hearing tests, provision of hearing protection and the maintenance and use of such equipment, information instructions and training in matters concerning exposure to employees to noise.

2 The Management of Health and Safety at Work Regulations 1993 latest addition 1999. The main regulation relates to the provision of risk assessments.

3 Workplace (Health, Safety and Welfare) Regulations 1992 Regulations 5,10,11and 12 replaced section 29 of the Factories Act.

they were also guilty of common law negligence.

The important issue on which Ms Baker succeeded was that "the safety of a work place" was to be judged entirely objectively and not by reference to what was "reasonably foreseeable at the time".

The court agreed, in considering the evidence given in the textile workers cases, that the earlier Judge's finding "that exposure to levels of noise between 85 to 90dB was in fact harmful for a significant minority of employees" meant that the workplace was not safe and that there was a breach of Section 29 of the Factories Act 1961.

Comment

The Court of Appeal's judgment will have binding effects on other claims (unless it is overturned by the House of Lords) against factory employers whose employees have been exposed to excessive noise or fumes and chemicals since 1961 and who have developed chest diseases or other medical conditions over a long period of time.

Other claims for conditions that take a long time to develop, such as hand/arm vibration syndrome, could also benefit by this Judgment. Therefore, liability upon an employer may be from an earlier date than previously allowed through court judgments if a breach of Section 29 of The Factories Act 1961 can be established.

Employer liable for worker's suicide

A landmark legal ruling has held an employer responsible for the suicide of an employee. Trevor Sterling analyses the decision

WHEN THOMAS Corr, a maintenance man employed by IBC Vehicles, was seriously injured in a workplace accident in June 1996, it led to such severe depression that he took his own life six years later.

Nearly 13 years on, the House of Lords has finally confirmed that Mr Corr's employer was responsible for his death.

"It is in no way unfair to hold the employer responsible for this dire consequence of its breach of duty, although it could well be thought unfair to the victim not to do so," the Law Lords ruled in February 2009.

Thomas Corr, a Unite member, narrowly missed being decapitated when a robot arm shot out of a prototype press line and struck him in the ear. If Mr Corr had not instinctively moved his head, he would almost certainly have been killed.

Much of Mr Corr's ear was amputated in the incident. It was later reconstructed but he also developed tinnitus, headaches and post-traumatic stress disorder (PTSD) which led to severe depression.

This was exacerbated by the constant reminder of the accident due to his appearance and the need for repeated treatment. Although he tried to return to work, he was anxious around machinery and had lost his confidence. He began to suffer the symptoms of clinical depression and made a suicide attempt in February 2002.

He was admitted to a mental health unit and subsequently discharged. But the severity of his depression increased dramatically and the evidence indicated that he began to suffer a sense of hopelessness which led him to believe that there was no way in which treatment could alleviate his suffering.

He killed himself in May 2002 by jumping off the roof of a multi-story car park.

Legal proceedings for compensation for personal injuries and losses were issued against IBC in June 1999. It admitted liability for the accident in November of that year. The claim continued in Mr Corr's wife's name after his death and also included a claim on behalf of his dependants for losses resulting from his death. The trial was eventually set for October 2003.

The defendant employer then amended its defence, alleging that the cause of death resulted from the clinical negligence of the psychiatrist who treated Mr Corr before his death rather than as a result of PTSD brought on by the accident.

The employer also brought proceedings against the health authority to this effect. It then further amended its defence raising new issues including contributory negligence by Mr Corr and arguing that the suicide amounted to self inflicted harm rather than being a symptom of depression. The case was transferred to the High Court in 2004.

The High Court

When the case reached the High Court in April 2005 the judge found that the duty of care owed by the employer did not extend to the prevention of suicide and so it was not liable for losses arising from Mr Corr's death.

The court also ruled that the suicide was not reasonably foreseeable and found it unnecessary to decide the issues raised by the other defences but made some observations in particular, including that there was no known risk of suicide in this case and that suicide was not the act to which the defendant's duty of care was directed to prevent.

The judge also commented that Mr Corr knew that what he was doing was wrong.

The Court of Appeal

We appealed the High Court decision. The Court of Appeal, in December 2005, overturned the High Court ruling and allowed the appeal.

One of the Court of Appeal judges concluded: *"On the evidence, the accident caused the post traumatic stress disorder, that caused the depression, and the depression caused the suicide. There is a clear causal link between the breach of duty by the defendants and the deceased's decision to take his own life."*

The accident caused the post traumatic distress disorder that caused the depression and the depression caused the suicide

Photo: Tom Parker/reportdigital.co.uk

It was also pointed out that suicide is no longer a crime and the link between what caused the depression and the suicide had not been broken.

And, if the depression was foreseeable, then it was equally foreseeable that the depressed person may take their own life

The House of Lords

The employer petitioned the House of Lords to overturn the Court of Appeal.

By a unanimous decision the Law Lords dismissed IBC's appeal and upheld the Court of Appeal judgment that the company was responsible for the death of Thomas Corr. Lord Bingham said:

"Mr Corr's suicide was not a voluntary, informed decision taken by him as an adult of sound mind, making and giving effect to a personal decision about his future. It was the response of a man suffering from a severe depressive illness which impaired his capacity to make reasoned and informed judgments about his future, such illness being, as is accepted, a consequence of the employer's [actions]."

Comment

In their judgment, the Law Lords mention, that until relatively recently, suicide was illegal. They also highlight the fact that medical knowledge is such now that it is understood that suicide can be an involuntary act if the person involved is depressed, as Mr Corr was, and so it is possible to derive a direct link from an accident that caused depression to the suicide itself.

Many injury victims who suffer from severe psychiatric conditions take intentional decisions that cause themselves loss or harm. If each intentional act had to be foreseen at the time of the employer's breach of duty, there would be no liability for any of them. For example:

- **A teenager who has suffered facial scarring in a road traffic accident and consequently suffers severe depression, becomes anorexic and refuses to eat or becomes bulimic;**
- **The mesothelioma sufferer who becomes depressed having been diagnosed with a fatal illness and commits suicide.**

Such cases are not unique to the extent that they do not require exceptions to the law. In each case, factual causation would be needed and, if established, the claimant should be able to recover compensation. These are all matters that would fail if the defendants understanding of the law had been deemed to be correct by the Court of Appeal.

Work equipment: seizing control

The circumstances in which the Provision and Use of Work Equipment Regulations 1998 (PUWER) impose obligations on an employer to protect workers have been restricted by the House of Lords, writes Keith Patten

THE LAW LORDS have decided that, in certain circumstances, an employee working away from the workplace need not have the same health and safety protection as someone based on site.

They have effectively "invented" a limitation in the applicability of the regulations that is not found in the regulations and which has the potential to restrict significantly the protections offered to injured workers.

In **Smith -v- Northamptonshire County Council [2009] UKHL 27**, a case pursued by Thompsons on behalf of UNISON, the House of Lords ruled that the PUWER obligations on an employer only apply as far as the employer has some measure of control over the work equipment, even though Regulation 3 (2) contains no such requirement.

They read into Regulation 3(2) some limiting factor that could be described as a requirement that the employers have some measure of control

Wooden ramp

Mrs Smith worked for the defendant local authority as a carer and driver. Part of her duties involved taking disabled people from their homes to a day centre.

She attended the home of one wheelchair user, as she had done many times before. There was a wooden ramp leading up to the door. This had been installed years previously by the National Health Service, not by the local authority.

The local authority had however inspected the ramp as part of their general duties to risk assess the claimant's work and had trained their employees to make brief visual checks on the ramp on every visit. The accident happened when Mrs Smith was pushing the wheelchair down the ramp. The edge of the ramp gave way and she was injured. She sued the local authority alleging a breach of the PUWER.

Though all sides agreed that the defect was latent and could not have been discovered on reasonable inspection, the issue was not the nature of the obligations imposed by the regulations, but the more fundamental question of when they apply and against whom.

The Court of Appeal decision in **Stark -v- Post Office [2000] PIQR P105** confirmed that liability for failure to maintain work equipment is strict – liability will arise even if the causative defect was latent and could not have been identified on reasonable inspection. When and where PUWER applies is, therefore, a key health and safety battleground.

Two issues

There are two issues in determining whether PUWER applies. First, whether the item is work equipment within the very wide definition contained in Regulation 2(1).

The House of Lords decision in Spencer-**Franks -v- Kellog, Brown & Root [2008] UKHL 46** confirmed that work equipment did indeed have the very wide meaning assigned to it by Regulation 2(1).

On that basis the defendants conceded (in the House of Lords) that the ramp in Smith was work equipment.

However, the regulations do not apply to all work equipment. They apply to a sub-set of work equipment defined in Regulation 3, and so the second issue is what is in that sub-set.

This would seem to depend on whether the defendant is an employer or someone else. So Regulation 3(2) imposes the obligations on employers in respect of work equipment that is "provided for use or used by an employee of his at work".

Regulation 3(3) imposes the obligations on non-employers only in so far as they have control over the work equipment, the way in which it is used or the person who uses it, and then only to the extent of that control.

Photo: Jess Hurd/reportdigital.co.uk

The decision in Smith

But, in **Smith**, all five law lords declined to apply the plain words of Regulation 3(2), which would have led to the conclusion that Mrs Smith was manifestly using the ramp (admitted to be work equipment) at work and was therefore covered by the regulations.

They all read into Regulation 3(2) some limiting factor that, in general terms, could be described as a requirement that the employers have some measure of control over the work equipment. Their only disagreement was at the margins as to what exactly was required to satisfy the appropriate test of control. This made no difference to the outcome.

The majority of them said Regulation 3(2) was satisfied only where there was a specific connection between the equipment and the employer's undertaking. This connection was defined as being where the work equipment has been "incorporated into and adopted as part of the employer's business or other undertaking".

The minority of the Judges accepted the need for a connection but said it was satisfied where the employer can inspect the equipment and/or instruct the employee not to use it.

The distinction is essentially between requiring the employer to have control over the equipment itself and simply having control over the employee's use of the equipment.

Comment

Regulation 3(2) was clear enough and, if followed, would produce a particular result. It seems that the Law Lords did not like this and so have re-written the regulation to make it say something it simply does not.

But even if the control test is accepted, it is still quite hard to see how Mrs Smith fails to win on the facts: the council knew she was using the ramp, had inspected it and had the power to instruct her not to use it and to provide her with an alternative.

One of the judges did say that, even if the control test was the correct test, he would have found it to be satisfied on the facts.

So, where does Smith leave the applicability of the Provision and Use of Work Equipment Regulations? The wide definition of work equipment was not in issue and appears to have been approved of.

Most items of equipment used at work will continue therefore to fall within the regulation 2(1) definition that the item in question must in some way be related to the job.

But whether the Regulations apply to an employer is now clearly subject to the test of control notwithstanding the complete absence of any reference to such requirement in Regulation 3(2).

In practice, this will mean much legal wrangling in the future. Clearly excluded will be items of equipment totally outside the control of the employer, such as items used by the travelling employee at the premises of customers about which his employer knows nothing.

What remains unclear is the position of those items of which employers are aware but do not own, but whose use they can influence.

Compensation claims threatened

Tom Jones, Thompsons' head of policy and public affairs, examines the possible impact on union legal services of the Jackson review of civil litigation costs

UNIONS ARE facing a potentially devastating attack on their legal services under proposals being considered by one of Britain's top Judges.

One of the options being considered by Sir Rupert Jackson would deter thousands of union members from making claims against employers and their insurers.

As part of his review of civil litigation costs, Sir Rupert is considering whether to increase the "small claims" limit from £1,000 to either £2,500 or even £5,000.

What may seem a minor technicality, could have huge consequences for union members and anyone else making a "small claim".

Anyone making a claim in the small claims court has to pay legal costs out of their own pockets, even if they win. As a consequence many of them do not have legal representation.

In cases where compensation is above the small claims limit, courts can award costs to the winning side. This is the so-called "loser pays" principle. Because union lawyers usually win the cases they run, the principle makes it much easier for unions to fund litigation.

Increase in small claims

If the proposal is implemented, there would be a huge increase in the number of potential claims regarded as "small". That would mean far fewer claimants taking their cases to court for fear of incurring legal costs.

We estimate that an increase to £2,500 would free insurers from paying costs in around 50 per cent of union-backed personal injury cases.

Just because an injury claim is valued at less than £5,000 or £2,500, it doesn't mean that it requires less work to prove that someone such as an employer was liable for an injury.

And who says £1,000 is a "small" amount, let alone £2,500 or £5,000? The answer is well-paid Judges and insurers!

Lower value claims are as hotly contested by defendants as high value ones. Even now in the small claims court defendant insurers routinely engage lawyers. They take the risk of having to pay the costs themselves out of their own deep pockets if they lose.

The claimant is very unlikely to be able to afford to do the same. To deny the injured party legal representation in this way would be a denial of access to justice and means there would be no equality between the parties.

Sir Rupert, a judge in the Court of Appeal, is carrying out the review because of what he says are "mounting concerns" that legal costs are too high.

Blocking tactics

But claimants' legal costs are often made much higher by the blocking tactics used by insurance companies' lawyers. Too often they delay the process, or even fight cases where they are clearly in the wrong.

And if the court believes that costs are too high in any particular case, it can demand an explanation – and if necessary a reduction. So why the fuss?

The review, carried out at the request of the Master of the Rolls, follows the media myth that there is a compensation culture in the UK. In fact, insurance companies, which helped to whip up the myth, are trying anything to stop accident victims and those made ill through their work from receiving compensation. Fewer cases means bigger profits for insurance companies.

Sir Rupert acknowledges that unions have said that they would not have the resources to deal with the huge increase in the number of claims their members would bring in the small claims court should the upper limit be increased. We believe that any significant rise in the small claims limit, would be a gift to employers and their insurers and a disaster for both union legal services and access to justice.

Sir Rupert's preliminary report also appears to have accepted insurance companies' arguments that there should be more take-up of before-the-event (BTE) insurance.

This is the legal expenses insurance that is added to motor and domestic insurance policies and which trade union members don't need.

The document suggests that it could become compulsory, like motor insurance.

BTE enables insurers to gain control of cases brought against them because the claimant who uses BTE to fund their legal claim is referred to a solicitor on an insurer's approved list. This means

> Any extension of BTE will considerably undermine independent legal services and will also be bad for unions and their membership

injured people will be herded off to lawyers who are reliant on insurers for their work.

Any extension of BTE will considerably undermine independent legal services and will also be bad for unions and their membership.

Union members already have a legal service dedicated to fighting for the maximum compensation. Why should they be made to pay for a service that is beholden to the insurance industry? They shouldn't be forced to use BTE.

The report is also enthusiastic about electronic (software based) assessment of damages. These computer programmes have been developed by insurers for insurers – and the only data on which they are based, comes from insurance companies.

Substantially lower

Defendant insurers are inevitably reluctant to admit when they have used such a programme, but it is often possible for Thompsons to spot when they have. The compensation offer is almost always substantially lower than our calculation and any increased offers appear to follow low and formulaic amounts.

There is a big business agenda at play here and Sir Rupert will need to show he has genuinely listened to all sides.

One thing is for sure, if some of the ideas and proposals in Sir Rupert's preliminary report are repeated in his final report (due in December) then there will have to be a serious fight to mitigate the impact on trade union legal services specifically and access to justice generally.

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