THOMPSONS SOLICITORS
THE MOST EXPERIENCED TRADE UNION FIRM IN THE UK

SPRING 2008
Issue 001

Health and Safety News

incorporating Personal Injury Law Review

www.thompsons.law.co.uk

Asbestos: a terrible legacy

Thompsons has produced an update about landmark legal cases relating to asbestos related conditions, which will be of interest to anyone concerned with claims or potential claims for members with these illnesses.

It was only in 1930, with the publication of the Merewether and Price Report, that people started to understand more about the terrible danger in inhaling asbestos dust. It is now known that even minimal exposure causes a risk – with potentially serious or even fatal consequences.

As knowledge of the disease grew regulations were introduced, but enforcement was patchy and many employers didn't reduce or prevent exposure to asbestos. The long period between coming in to contact with asbestos and developing an asbestos-related disease resulted in the situation we have today.

According to the Heath and Safety Executive, the annual number of mesothelioma deaths has increased from 153 in 1968 to 2,037 in 2005. It is possible that by 2011-2015 the number could peak at as high as 2,450. Lung cancer deaths which are related to asbestos are probably double this figure. And there are also victims of asbestosis, pleural thickening and pleural plaques.

To read the update in full, go to: www.thompsons.law.co.uk/Workplace-Illnesses-and-Diseases/landmark-legal-cases-asbestos-compensation.htm

Back to back

Training in correct working techniques and lifting equipment is widely used to manage the increased risk of back pain related to repeated heavy lifting and handling.

But following a review of a series of studies looking at workers who lift or move patients and heavy loads, a group of scientists has come to a contentious conclusion.

They found that it made little or no difference to the incidence of back injury whether employers provided advice or training about how to lift correctly.

These findings, reported in the British Medical Journal, are based on eleven studies. Eight looked at health workers who manually handled patients and three at baggage handlers and postal workers. Everyone who participated in the studies therefore had the potential to suffer from back pain and to benefit from training and advice in how to minimise it.

The researchers, however, found no difference in back pain in any of the studies where one group received training and the other did not.

They concluded that there was "no evidence to support use of advice or training in working techniques with or without lifting equipment for preventing back pain or consequent disability. The findings challenge the current widespread practice of advising workers on correct lifting technique".

The researchers say the only solution is for employers to have a "no lifting" policy.

The TUC has welcomed the study saying that it shows the importance of workers not lifting heavy weights on their own. It added that employers should not rely on employees lifting heavy weights "correctly" to prevent back injury, but should instead reduce the weight of objects that need to be lifted or moved. It has also suggested that the Health and Safety Executive review its advice on manual handling as a matter of urgency.

For more information, go to: www.bmj.com/cgi/content/full/bmj.39463.418380.BEv1?q=rss_home

Construction tools

Last year almost two million days were lost in the construction industry due to work-related ill health and nearly one million days due to accidents.

In a bid to reduce these figures, the Health and Safety Executive (HSE) has launched a new tool to provide all construction companies with practical advice on how to tackle rising occupational health issues such as dermatitis, asbestos, respiratory diseases and musculoskeletal disorders.

Known as Construction Occupational Health Management Essentials (COHME), the web-based guidance tool is designed to help large construction clients, designers and contractors. It provides a single point of access to clear guidance on managing health risks, customised for construction.

The website also provides links to further material, including other parts of the HSE website and other useful websites and case studies giving practical examples of solutions developed or adopted in the construction industry.

The COHME tool can be viewed on the HSE website: www.hse.gov.uk/construction/healthrisks/index.htm

Welcome ruling on risk assessments

The law says that employers must be proactive and carry out risk assessments to identify any hazards that might exist in the workplace and evaluate the extent of the risks involved.

They should not, according to a recent Court of Appeal ruling, wait until the risk is brought to their attention before they do something about it.

This is welcome news for all workers and particularly for a London Underground train driver, Latona Allison, who developed tenosynovitis in her right wrist following the redesign of a safety brake. Ms Allison said that she was not given adequate training in the use of the brake, known as the dead man's handle, and can no longer work as a train driver as a result of her condition.

Thompsons Solicitors, who acted on behalf of the RMT union for Ms Allison, says the decision confirms that it is the duty of employers to carry out risk assessments and take appropriate action, and not to wait until a health and safety concern is brought to their attention.

Three Judges agreed that the training provided had been inadequate "in the light of what the employer ought to have known about the risks arising from the activities of the business". It was not enough to provide the training after the risks were known.

The court said that Judges have been giving insufficient attention to risk assessments in the years since the duty was introduced.

It said: "Risk assessments are meant to be an exercise by which the employer examines and evaluates all the risks entailed in his operations and takes steps to remove or minimise those risks. They should be a blueprint for action."

Henrietta Phillips, Ms Allison's solicitor at Thompsons said: "Risk assessments were intended to be a pro-active duty on employers when the requirement to carry them out became law in 1992.

Yet increasingly Judges, when asked to decide if an employer has been in breach of that duty, drift back to the common law where a risk had to be brought to an employers' attention before an assessment is carried out.

Photo: TNT MAGAZINE/Alamy

"Today's decision is extremely good news for workers and sends a clear message to employers about their duties to protect their employees' health and safety."

Ms Allison's original claim for compensation was rejected by the County Court, but the Court of Appeal has now ordered that London Underground pays her damages.

Safety link to pay

Following research by the Local Authority Pension Fund Forum (a voluntary association of 46 public sector pension funds), FTSE 100 companies are being asked to link directors' pay and bonuses more closely to non-financial measures such as the safety of employees.

The 2006 Companies Act requires companies to identify key performance indicators (KPI) that they must then use to measure non-financial issues.

The research carried out by the forum, however, showed that only seven FTSE 100 companies had built them into a long term incentive plan (which motivate executive directors to achieve high performance), although two thirds disclosed at least some type of non-financial KPI.

Last year the Forum called on its members to oppose BP and Shell's pay and bonus reports due to the lack of safety targets. This year it is concentrating on its campaign to encourage companies to demonstrate their commitment to non-financial KPIs by formally embedding them in executive long-term incentive schemes.

For more information, go to www.lapfforum.org

A dusting down

Although the occupational hazards facing bakers do not often hit the headlines, their work exposes them to a surprising number of risks. Asthma is one of the most serious but, although potentially fatal, it can be difficult to prove negligence.

Tristram Sterry, a personal injury solicitor for Thompsons, looks at the risks of asthma for bakery workers, the obligations on employers to keep them safe and advises what to do in the event of an injury at work.

Occupational asthma

Bakers suffer from the second highest rate of occupational asthma because of the large quantities of dust they inhale from the flour and grain used in their workplaces.

Flour dust is classed as a substance hazardous to health (see below) as it causes not only asthma, but also short term respiratory, nasal and eye symptoms. Workers exposed to flour dust should have a Maximum Exposure Limit (MEL) of 10mg/m3 averaged over eight hours and a Short Term Exposure Limit (STEL) of 30mg/m3 averaged over 15 minutes.

Exposure to flour dust should be reduced as far below the MEL/STEL as is possible and should not exceed either of them. Workers can get guidance on this from the Health and Safety Executive (www.hse.gov.uk).

Dusts such as grain, flour, spices and seasonings can also cause rhinitis (runny or stuffy nose), conjunctivitis (watery or prickly eyes) and other irritant effects. Exposure to these should also be kept to a minimum.

Control of Substances Hazardous to Health Regulations 2002

Given that flour dust is classed as a substance hazardous to health, employers are required by law to:

- assess the risks to their employees
- decide what precautions are required
- prevent or adequately control any exposure, if reasonably practicable
- ensure control measures are used and that safety procedures are followed
- monitor the exposure
- carry out health surveillance such as dust monitoring
- prepare plans and procedures to deal with accidents and emergencies

The risk assessment must include a consideration of the hazardous properties of the substance; the safety information provided by the supplier; the likely levels of exposure; exposure limits; and exposure monitoring and health surveillance results.

Where there is a risk, employers must monitor the health of employees and retain the records for up to 40 years. If an employer cannot prevent exposure, they have to apply protective measures, such as using appropriate processes, systems, controls and equipment; controlling exposure at source for example by ventilation and extraction; limiting the number of employees exposed and the duration of the exposure; providing protective equipment (like face masks, respirators, protective clothing).

Employees must also be provided with information about the hazards, and given appropriate instruction in the use of the hazardous substance and adequate training.

What to do in the event of an injury

If someone thinks they have contracted asthma as a result of exposure to flour dust (or any other hazardous substance in their workplace), they should first of all seek advice from their doctor.

If asthma is diagnosed they should get advice through the union's legal advice service as soon as possible as to whether they might have a negligence claim against their employer. The union's health and safety rep or local office will be able to put them in touch.

It is important to act quickly because there is a three-year limitation period that applies from the date that the person becomes aware that they have an illness caused by their work.

Someone suffering from work-related asthma may also be entitled to Industrial Injury Benefit (or other benefits such as attendance allowance) from the government, which they should check out with an advice agency such as the Citizens Advice Bureaux.

Remember, ignorance is no excuse when it comes to making a claim.

They should make contact as soon as possible with their trade union rep to find out if they can make a claim of negligence

Speak up

Noise at work remains a problem for many employees

Employees have had to put up with excessive noise at work for well over 100 years. Indeed, many still do. Yet it was the 1960s before the government started to take any interest in the dangers facing these vulnerable employees, and did not introduce legislation for almost 30 years after that.

Keith Spicer, a personal injury lawyer with Thompsons, provides an overview of the protection available to employees now and advises what employees should do if they think they have a claim.

Government action

In 1963, the government's Ministry of Labour produced a safety booklet "Noise and the Worker" which finally acknowledged the problem of noise at work. It suggested a danger level of about 85 decibels (db) if exposure was for more than eight hours a day, five days a week. It recommended a number of safety steps that employees should take to reduce exposure, including wearing some form of protection.

Then, in 1972, the government introduced the "Code of Practice for Reducing the Exposure of Employed Persons to Noise" and suggested further and improved safety steps.

This included reducing exposure to less than 90db over an eight-hour working day, carrying out workplace noise surveys, setting control measures to reduce noise exposure and providing hearing protection.

It was not until 1990 that the government introduced legislation – The Noise at Work Regulations 1989 – to force employers to comply with the earlier guidance notes. It set two action levels for steps to be taken to reduce employees' noise exposure – 85db and above, and 90db and above.

On 6 April 2006 it introduced the Control of Noise at Work Regulations 2005 to reduce the two action levels of exposure to 80db and 85db. These also required employers to carry out audiometric testing on their employees to discover their level of hearing loss, first recommended by the 1963 safety booklet

Establishing the cause

Needless to say, excessive noise exposure is only one cause of deafness so claimants have to prove that their loss of hearing was due to noise and not some other cause, such as ageing.

So would compulsory testing, which the government is thinking of introducing for the over 55s, help in establishing the cause of the problem? Possibly, but it may not be in everyone's best interests as some employees (such as train drivers or anyone working with machinery) may lose their job if their hearing is found to be impaired. If that does turn out to be the case, though, their claim can include loss of earnings.

And in any event, most large employers in noisy workplaces started to test their employees' hearing on a regular basis in the 1970s. Indeed, this innovation was partly the catalyst, once employees knew the reason for their hearing loss, for the first deafness claims in this country.

Difficult to win

These are not, however, easy to prove. Take the recent case of 4,000 textile workers in Nottingham who tried, but failed, to show that the hearing loss of ten employees (brought as test cases) was due to noise at work.

In most cases, the level of noise exposure was below 85db and all cases involved exposure before the 1989 regulations came in to force. Only one case is being appealed.

Still worth trying

However, it is always worth trying to bring a claim if an individual thinks they have suffered hearing loss due to noise at work. They should contact their union rep or union's legal advice service. Remember, claims must be brought within three years of the person becoming aware that their hearing has been impaired.

Danger – company at work

A new law relating to corporate manslaughter comes into force this April

After a protracted passage through parliament, the Corporate Manslaughter Act finally comes into force on 6 April this year.

Mick Antoniw, a personal injury partner at Thompsons, outlines the main provisions of the new law and consider some of its implications.

Scope of the new law

The Act creates a new criminal offence of "corporate manslaughter", which can only be brought against a company, as opposed to an individual.

It states: "An organisation is guilty of the offence if the way its activities are managed or organised by its senior management amount to a gross breach of a relevant duty of care and causes a person's death."

It is therefore mainly concerned with major breaches of duty and serious negligence arising from the decisions and activities of senior management, or indeed anyone who played a significant role in the management of a company or in organising any of its activities.

As the new law does not abolish the common law offence of gross negligence manslaughter, it may still be possible for charges to be brought against an organisation as well as individual directors (or other managers) for manslaughter.

Charges can also be brought against individuals including directors under the Health and Safety at Work Act 1974.

Duty of care

The duty of care set out in the Act covers the duties of an employer to its employees and the duties applicable under the law of negligence.

It specifically includes:

- the duties of an occupier of premises
- duties in connection with the supply of goods and services
- the carrying out of construction and maintenance operations, plant and vehicle maintenance and in effect any other commercial activity.

The Act also covers deaths in custody or detention including during transportation in a vehicle. It applies to deaths in England, Wales and Scotland but not to the deaths of workers employed by UK companies abroad.

Proving the offence

Prosecutions will be brought by the Crown Prosecution Service not the Health and Safety Executive, and trials will take place in the Crown Court in front of a jury that will have to decide if the conduct of the company falls far below what could reasonably have been expected in the circumstances. They will consider the seriousness of the failure and the extent of the risk of death.

The jury will be entitled to take into account anything they consider relevant such as company attitudes, policy, systems and practices which may have encouraged failure or produced a tolerance of it.

The Act specifically invites the jury to consider breaches of any health and safety guidance that relates to the breach. The Act is therefore likely to give a legal status to a whole plethora of documents and guidance notes such as the Institute of Directors or HSE voluntary guidance on health and safety aimed at directors of companies and board members.

Crown immunity

In the past it has not been possible to prosecute Crown bodies because they enjoyed Crown immunity. For most purposes the Act has abolished this immunity and the Crown can now be charged with corporate manslaughter.

There are some important exceptions that relate to the military, police, emergency services and child protection and probation functions. These are mainly excluded from the law except in respect of employer/employee duties and duties as occupiers of premises. Public and government policy making processes are also excluded.

Penalties

During the passage of the bill through parliament, there was considerable

thought given to the sort of penalties that could be imposed. Although the main penalty is seen as an unlimited fine (see below), it is likely that the powers given to the court in respect of remedial orders will become increasingly important.

Courts have been given virtually unfettered power to make orders requiring companies to take such steps as they consider necessary to remedy a fault and to remedy any other deficiencies to prevent other deaths in the future. It represents a limited form of corporate probation, but is a nevertheless welcome innovative addition to the health and safety arsenal of penalties.

An unlimited fine: Until guidance is available it is not clear how financial penalties under this Act will differ from penalties under the Health and Safety at Work Act 1974 and guidelines set by existing case law. A government consultation is underway and the suggested level of fine is in the region of five to ten per cent of turnover.

Publicity orders: This is a naming and shaming provision. While no court has yet used the powers, they will have unlimited power to order a company to publicise the fact of conviction and the circumstances leading to the conviction. This could consist of public advertisements in newspapers, on radio and on TV. This power will come into effect in autumn 2008 when guidelines will be made available.

Corporate probation: This appears under the heading of remedial orders but is in fact a form of corporate probation and is probably the most innovative and progressive part of the Act.

A company convicted under the Act may be required by order of a court to take specified steps to remedy any matter that appears to have resulted from the breach and to have been a cause of death and to take steps in relation to any deficiencies in health and safety matters. Those deficiencies may be in the organisation's policies, systems and practices.

This power represents a new proactive approach to safety and involves looking at the cause of an accident including a company's system of management, culture, approach to safety, training and systems of operation. This may extend to looking at the system of senior management of a company including the role of company directors.

One consequence of the Corporate Manslaughter Act is the effect it is likely to have on the investigation of deaths at work. As charges can only be brought under the Act by the CPS, the police are more likely to be committed and focused on the investigation of deaths at work than in the past.

Failure to investigate properly may result in an increasing use of judicial review. Inquests are already becoming more important in such cases and where there are findings of unlawful killing, the CPS will be expected to give serious consideration to the inquest evidence and the bringing of charges under the Act, at common law and under the Health and Safety at Work Act.

This may result in a greater use of that Act and increasing numbers of charges being brought against directors of companies. Another consequence where there are convictions may be the increased use of the Company Directors Disqualification Act 1986.

Comment

The Corporate Manslaughter Act is a good start, but the government will have to be held to promises made during the parliamentary debate to look at the issue of directors' duties and to consider amending existing legislation or introduce new legislation.

The gap whereby directors of companies can be imprisoned for corporate fraud offences, but not for health and safety offences, which lead to the death of a worker has to be filled by a Labour government (as it certainly won't be by a Conservative one).

Difficulty in securing convictions against large companies after deaths at work fuelled calls for the new law. Existing health and safety law required the identification of one individual as a "controlling mind" whch played the key part in a decision or failure which led to a person's death.

New legislation was therefore needed to be able to hold employers to account for deaths at work due to gross negligence. It became clear early on during the parliamentary progress of the Act that there were many different views as to what the legislation could and should achieve.

In part the differing views refracted along political lines. On the one hand, the Conservatives were opposed to anything that would upset the business community and intent on watering it down where possible. On the other, there were those who were intent on extending it to cover deaths in custody (an important issue but not one this law for workplace deaths was originally intended to cover), and Labour MPs who simply wanted to ensure it had real teeth.

The Act as it now stands is undoubtedly a compromise and does not deal with the important issue of directors' legal duties and accountability for company safety. Promises were made during the course of the legislation to review this aspect of health and safety legislation. The Act can therefore be seen as bringing the law to the half way stage. Needless to say, there is still more to do.

Safety in the workplace

Who is really in charge?

In November 2007, the government published a consultation paper called "Improving outcomes from health and safety: the call for evidence". In reality, it was a rallying cry to employers to complain about so-called workplace health and safety "red tape".

Tony Lawton, a personal injury partner with Thompsons, suggests that the real problem with health and safety at work is not the legislation regulating it, but a failure to resource the organisation set up to enforce it – the Health and Safety Executive (HSE).

Health and Safety Executive

Set up just over 30 years ago following the introduction of the then revolutionary 1974 Health and Safety Act, it is now increasingly clear that the HSE is simply not up to the job. It has neither the staff nor the resources to do what it is supposed to do – investigate accidents at work and ensure that employers obey the law.

Latest figures suggest it only has the resources to investigate about 20 per cent of the most serious accidents at work. Given the emphasis of this latest government consultation, things are unlikely to change.

In 2004, the Health and Safety Commission (set up at the same time as the HSE but with a more strategic role) published "A Strategy for Workplace Health and Safety in Great Britain to 2010 and Beyond" requiring both the HSE and local authorities to "manage their priorities rigorously". This involved providing channels of advice and support "that could be accessed without fear of enforcement action while allowing the regulators to continue to be tough on those who wilfully disregard the law."

Yet, in the same report, the commission accepts that: "enforcement or the fear of enforcement is an important motivator for some employers. Our evidence confirms that enforcement is an effective means of securing compliance and promoting self-compliance." It gave no clues, however, as to how the HSE might fulfil its role of enforcer without the necessary resources.

Safety reps

But if not the HSE, then who is looking out for the health and safety of workers? The answer – union safety reps. And it's not just Thompsons and the unions who think so. In June 2005 the HSE produced research to back up this assertion.

It showed that the presence of safety reps improves not only employees' general awareness of health and safety at work, but also their performance (employers please note). It showed that the reps encouraged worker participation in risk management and improved the working environment.

Indeed, our experience shows that, without the involvement of union appointed safety representatives, managers are very much left to their own devices in deciding health and safety priorities and spending. Time and again, thanks to safety representatives highlighting risks, employers have made changes, giving workers more protection and possibly saving lives.

Better training

Nor is this entirely surprising. Generally, union safety representatives have better training than many company safety officers, and are far better informed.

They are able to take advantage of union training courses on health and safety, and have plenty of available back-up information from the union and its legal advisors.

Safety reps are also empowered and protected by the Safety Representatives and Safety Committees Regulations 1977 and have the right to demand copies of relevant documents about health and safety issues in the workplace. These regulations give a good safety representative the ability to dig deep into the way employers operate their health and safety policies, deal with risk assessments and investigate injuries.

But we need more

But we need more safety representatives to carry out this important role in preventing accidents, ensuring that risk assessments are carried out properly, that employers know and understand their obligations under the law and, where appropriate, taking action against them to enforce the law.

> Union safety reps have better training and are better informed

Accidents abroad

People working outside the UK face less sympathetic laws

An increasing number of people are going abroad to work, but unfortunately more and more of them are having accidents at work.

Tony Lawton, a personal injury partner with Thompsons, warns that it is complicated enough pursuing a claim for compensation against UK-based employers, but almost impossible against foreign employers.

UK-based employers

Employers based in this country are responsible for the health and safety of their employees, even if they are working abroad. That means they have to assess the risks facing their employees, and take reasonable steps to ensure that they have a safe place of work.

For instance, if an employer sent their employee to the tropics and did not advise them to immunise themselves and they contracted malaria, the employee might be able to pursue a claim in those circumstances.

However, even these cases are difficult to prove as the employer does not have an "absolute" responsibility. If, therefore, the employer could show they did what they could and that the injury was caused by someone else, then the claim would not succeed.

Foreign employers

Things are even more difficult for employees working for a business without a registered office or place of business in this country. Their only hope is to try to pursue a claim in the country where the injury happened.

That means finding a lawyer in that country who specialises in personal injury to lodge a claim within the relevant time limit. This country has a limitation period of three years, but it is much shorter in many foreign jurisdictions.

And legal systems elsewhere often cannot recover the legal costs of the claim, so anyone instructing a foreign lawyer will need to pay them upfront, unless they can agree a contingency arrangement (whereby they pay up after the damages have been recovered).

Given all these obstacles, employees should generally try to bring their claim here rather than abroad, with the exception perhaps of the USA where more generous damages can be awarded.

Forum shopping

Because compensation awards in England are generally bigger than most other jurisdictions, some employees have tried to bring their claims in England even though the accident occurred abroad. This is known as forum shopping.

In **Harding -v- Wealands**, for instance, an English woman was allowed to bring proceedings in the UK, although she was a passenger in a road traffic accident in Australia. Although it was decided that the issue of liability and the types of damages were governed by Australian law, the House of Lords held that the assessment of her damages was governed by English law.

The point can also be argued the other way, however. In **Roerig -v- Valiant Trawlers Limited**, the Court of Appeal found in favour of a Dutch woman whose Dutch partner was killed on an English registered trawler owned by an English company. It tried to argue that Dutch law should apply as the matter was "substantially" more connected with Holland than England – the deceased and his dependants were Dutch and the trawler had been sailing from a Dutch port. The Court of Appeal said that was not enough to warrant a finding that Dutch law was "substantially" more applicable.

> The moral of the story is: beware when travelling abroad to work

Accidents in the EU

Things are easier if the accident is in the European Union, however. If someone is involved in, say, a motor accident, the law says that they can issue court proceedings against the insurer of the person responsible for the accident.

And if the employer or organisation against whom the employee wants to claim has no registered office or place of business in this country, they can refer to the directory of the Pan European Organisation for Personal Injury Lawyers which lists personal injury lawyers in each jurisdiction.

Beware

So the moral of the story is: beware when travelling abroad to work. You may still have the right to pursue a claim for compensation, but it is likely to be a much more difficult process than if you had stayed at home.

Whose fault is it anyway?

Trying to prove negligence is not easy

Some employers (or more usually their insurers) will stop at nothing to avoid taking responsibility. As a way of offloading some of the blame, many often try to argue that it was really their employee's fault. This is called contributory negligence.

Judith Gledhill, a personal injury partner with Thompsons, outlines some of the more outrageous arguments that she has heard from employers, and looks at a few of the most recent (sometimes rather inconsistent) court decisions.

Tales that employers tell

When someone tripped over an obstacle in the dark because the lights were not working, an employer tried to argue it was the employee's fault for not eating carrots to see in the dark. Okay, I made that one up, but the next two – although hard to believe – really are true.

A man fell about 20 feet while working on a construction site. The defence alleged: "as an experienced parachutist, he should have fallen in such a way as to minimise his injuries."

Even better, a man who caught his hand in an unguarded machine was blamed by his employers who said: "the claimant should not have been operating the machine at the time of the accident, as he was in a state of anxiety, having had a curse put upon him by a witch."

Give and take

Given the weakness of some of these arguments, it is then hard to believe that some insurers have the nerve to argue there should be "a bit of give and take". Their line is that, as they have admitted fault, the claimant ought to do the same and accept some degree of responsibility.

But why should an injured employee accept responsibility in a case where the employer has admitted that it was their fault and where there is no real strength in the allegations against the employee? Just consider some of the following examples and marvel at the inconsistency of the judgements.

Dodwell -v- Tarmac Ltd

In the case of **Dodwell -v- Tarmac** the claimant was working with a large sleeper grab, which could move 56 sleepers in one go. The grab then had to be guided in the last few inches manually, with the result that the employee's hands would be close to the gate into which it had to be guided.

The company accepted liability but would only offer 85 per cent of the value of the claim on the basis that their employee should have stood clear of the grab and

not guide it in. This was despite the fact that the company's own evidence showed that employees habitually stood close and did just that. Their witness even admitted that this helped and confirmed that no training or warning had been given to employees.

The Judge found 100 per cent in the employee's favour saying that he had a lot to concentrate on and was undertaking the work in a way and according to the standards operated by the employers and his actions were "mere inadvertence" and not negligence.

Lee -v- William Cook Defence Ltd

Some Judges' decisions are not so rational, however, as the case of **Lee -v- William Cook Defence** shows.

Mr Lee stepped on the gate of a crane while it was moving. His coat caught on the cage door and his foot was crushed by the crane's steps. He explained that it was common practice to release the control button of the crane and step off before the crane came to a complete stop.

Mr Lee said that he had just copied the person who normally operated the crane and that he had not been given any practical training. The Judge accepted that it was common practice to do what he did, but then went on to say that it was not something condoned by the employers. Although he said the employers were liable, he decided that Mr Lee should also take 50 per cent of the responsibility for the accident.

Other Judges seem to base their decision about how much an employee is to blame purely on the impression that the claimant makes on them

Mallet -v- Derwentside District Council

Other Judges seem to base their decision about how much an employee is to blame purely on the impression that the claimant makes on them, and whether they prefer their evidence to that of the employer.

In **Mallet -v- Derwentside DC** the claimant (who was a plasterer) fell from a wooden board resting on two trestles. The council alleged that Mr Mallet was at fault because the board was not properly supported when he stood on it as the distance between the trestles was too big.

Fortunately, the Judge preferred Mr Mallet's evidence, saying that he had placed the trestles the correct distance apart. He also accepted that the board had simply broken and that this was unsafe work equipment within the Provision and Use of Work Equipment Regulations. He said, therefore, that Mr Mallet could not be held responsible in any way.

Walker -v- G F Tomlinson Buildings

Yet there are still get Judges who like to "knock a bit off". In **Walker -v- G F Tomlinson Buildings**, the claimant (a building inspector) was visiting the defendant's site when he trod on a plywood cover and fell into a manhole.

Despite the fact that he was only a visitor to the site, the Judge said he should have looked where he was going. It was obvious, apparently, that there was a manhole from the position of the plywood and the concrete surrounding it. On that basis, he reduced the award by 20 per cent and refused Mr Walker leave to appeal.

Effectively, the Judge decided that, as Mr Walker normally walked over pieces of plywood (common on building sites), he should know to be more careful. Presumably the same rationale would apply if he fell again. This is a particularly harsh decision and hopefully one that will not be followed by other Judges.

Quinn -v- St Helens Metropolitan Borough Council

In **Quinn -v- St Helens Metropolitan BC**, a learning assistant at a school was using a chair to stand on a table to put a display on a classroom wall. She fell as she was coming down from the table to the chair.

The employers alleged substantial contributory negligence saying that she failed to use step ladders that were available and of which she was aware.

Ms Quinn was supported by witnesses who said that it was common practice to do what she did when putting displays on a wall, and that they were not aware that stepladders were available for this purpose. Nevertheless the Judge held that she was 20 per cent liable and deducted that amount from the award.

Comment

The reality is that for many employers, attack is the best form of defence. So when launching a claim of negligence, claimants need to be aware that their employer may well try to turn the tables and argue that they were either wholly, or partly responsible, for their own misfortune.

But equally defendants should know that, as solicitors acting for injured claimants, Thompsons will always challenge their allegations and take cases to court when the employer admits their own liability. In short, we will fight them all the way when it is necessary to do so.

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

HEAD OFFICE
Congress House,
Great Russell Street,
LONDON WC1B 3LW
020 7290 0000

BELFAST
028 9089 0400

BIRMINGHAM
0121 262 1200

BRISTOL
0117 304 2400

CARDIFF
029 2044 5300

CHELMSFORD
01245 228 800

EDINBURGH
0131 225 4297

GLASGOW
0141 221 8840

HARROW
020 8872 8600

LEEDS
0113 205 6300

LIVERPOOL
0151 2241 600

MANCHESTER
0161 819 3500

MIDDLESBROUGH
01642 554 162

NEWCASTLE UPON TYNE
0191 269 0400

NOTTINGHAM
0115 989 7200

PLYMOUTH
01752 675810

SHEFFIELD
0114 270 3300

SOUTHAMPTON
023 8021 2040

SOUTH SHIELDS
0191 4974 440

STOKE-ON-TRENT
01782 406 200

SWANSEA
01792 484 920

Download a copy of Health and Safety News
at www.thompsons.law.co.uk
For more information about Health and Safety News
email hsn@thompsons.law.co.uk

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

To join the mailing list email hsn@thompsons.law.co.uk

Contributors to this edition:
Mick Antoniw, Judith Gledhill, Tony Lawton, Keith Spicer, Tristram Sterry

Editor: Jennie Walsh
Acting Editor: Alison Clarke
Design: www.rexclusive.co.uk
Cover picture: Martin McElligott
Print: www.dsigroup.com/talisman

THOMPSONS
SOLICITORS

THE MOST EXPERIENCED
TRADE UNION FIRM IN THE UK