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Issue 7

Local Authority Liability update | Summer 2008

Do we really love to be beside the seaside?

At this time of year our thoughts turn to summer holidays. A public authority, particularly in coastal regions, might also view this time of year with some concern. The increased volume of visitors to our coasts and waterways inevitably results in accidents and claims.

The question to be considered is what, if anything, can be done to make those visitors safer and prevent claims? Especially those visitors invigorated by beer and heat, determined to cool down in accordance with the latest dangerous fashions.

Tombstoning

On 7 July 2007, two middle aged men died as a result of jumping from Clacton Pier into the North Sea. The pair, together with four friends, had been drinking for much of the day according to the Deputy Coroner. They had decided to follow their four friends in carrying out a stunt known as "tombstoning"

by jumping into the sea from the elevated pier platform.

The pair struggled to stay afloat after entering the water, and coastguards were called to the scene. Both were unconscious when pulled from the water and died soon after.

A member of pier staff told the inquest how he had spent several minutes trying to prevent the two men from jumping in. He explained the obvious dangers involved and, believing they would not jump, moved away. It was then that he heard two splashes, according to his evidence.

In this case there cannot be any claim against the local authority. The individuals concerned jumped into the sea, despite warnings to the contrary, from a platform owned and operated by a private company. But, there are a number of such diving situations where the local authority can, potentially, be exposed to liability. Many claims arise from diving accidents in inland reservoirs and lakes. Happily, the reported cases show the defendant friendly approach the courts adopt.

continued...

Do we really love to be beside the seaside? continued

Tomlinson v Congelton BC (2003) provides the key defence theme for public authorities. The claimant had chosen to dive into a shallow lake at Brereton Heath Park in Cheshire. Despite numerous notices warning against swimming, the area was regularly used by locals. The claimant dived into the water, struck his head on a submerged obstruction and suffered significant spinal injuries. He alleged that the defendant owed a duty of care to those using the area. The House of Lords held against him in finding that the risk was so obvious that such a duty could simply not exist. The court found that "it would be unreasonable to impose on public authorities a duty to protect persons from self-inflicted harm sustained when taking voluntary risks in the face of obvious dangers."

This line was followed closely in *Rhind v Astbury Water Park Limited & Ors (2004)*. The circumstances were similar. The claimant dived into Astbury Mere, down the road from where Mr Tomlinson was injured the year before, and sustained severe spinal injuries. The High Court found that the risk of injury was so obvious that there was no specific duty upon the occupier to post warning notices (despite the fact that such notices were in place) or to exclude the public from the water's edge.

The important principle in these cases is the personal responsibility of the individual to take care for himself, as opposed to the duty owed by a land owner or public body.

The courts were equally robust on the issue of personal responsibility in *Hampstead Heath Winter Swimming Club v the Corporation of London (2005)*. The High Court, on considering a judicial review application, suggested that the local authority should avoid any prosecution under the Health and Safety at Work Act 1974 should a swimmer suffer injury whilst at an unsupervised session. The Corporation had controversially withdrawn lifeguard cover out of hours and prevented the Club from entering the public swimming ponds. The Corporation feared prosecution by the Health and Safety Executive (HSE) in the event that a swimmer suffered injury "out of hours".

In finding that the public ponds should remain open, the Court pointed out that "If an adult swimmer with knowledge of the risks of swimming chooses to swim unsupervised, in a pond which has no hidden dangers, the risk that he would incur would be as a result of his decision and not of the permission given to him to swim. In those circumstances there could be no conviction in accordance with s3. of the 1974 Act".

Sea walls and promenades

In the case of *Staples v Dorset (1995)*, Mr Staples fell some 20 feet from the old harbour wall, known as the Cobb, at Lyme Regis. At first instance he was awarded damages on the basis that the local authority should have posted warning notices with a view to preventing such incidents. The Cobb was covered in algae and seaweed, both notoriously slippery substances. In the circumstances, it was unsurprising that he fell, and the court found that the hazard was such an obvious one that there was no responsibility to erect signs and no liability under the Occupiers Liability Act 1957.

Contrast that with *Collier v Anglian Water (1983)*. Sea defences had been constructed in the 1920s by the original Water Board on land belonging to the local authority. Although the local authority exercised a high degree of control over the promenade area on top of the sea defences, historically all responsibility for repair fell to Anglian Water. The claimant tripped over a defect to the walkway of the promenade caused by one of the concrete surface slabs having become raised slightly over time.

The court held that Anglian Water exercised sufficient control over the land to qualify as occupiers and the claim succeeded against them. However, if a local authority had had control of the area, they would have been liable.

Collier can be distinguished from *Staples* on the basis of the duties owed. In *Staples*, the court held that the hazard was a naturally occurring and quite obvious one, whereas in *Collier* the claimant had tripped over a defect that had arisen through lack of maintenance. Where local authorities have responsibility for the implementation,

maintenance and repair of sea defences to which the public have access on their coastlines, it is important that systems of inspection and repair are implemented and adhered to. These systems will need to be tailored to take into account the levels of pedestrian traffic and general usage in a particular area. Where there is frequent public access, frequent inspections are required, but when the area is more remote, then a much more relaxed attitude can be taken.

Conclusions

If there is an obvious risk and a member of the public chooses to take it, then he or she must bear the consequences. The duty of a local authority would not include guarding against those risks that are so obvious as to not require explanation or warning. This would include jumping from a structure into the sea or diving into a lake where you were unaware of the depth or of any underwater obstructions.

Local authorities may wish to consider whether signs warning against the danger of, say, jumping from a sea wall are really necessary in those circumstances, although many put them up out of an abundance of caution. If, however, a local authority erects a sea diving platform it should provide a means of assessing the depth of water being dived into as the tide goes up and down.

A local authority must, however, take steps to ensure that areas for which they are responsible are maintained as far as practicable. Where promenades are concerned, this is likely to extend to a Highways Act style obligation to inspect and repair on a regular basis. However, in more remote areas, the duties are much lower. Note that if a long-standing right of way exists, a defence may exist under case law.

As patterns of public use change and hazards develop, the local authority must

take early action to ensure that the public are not exposed to dangers. This might involve placing barriers or railings in busy areas to prevent people falling off a high sea wall, particularly if the problem is a recurrent one. Likewise, in the absence of complaint or accident, an authority might be justified in taking no preventative steps, again in remote areas subject to little or no visitor traffic.

This duty is a dynamic one, especially after winter months when the majority of damage to promenades will occur. A regular and documented system of monitoring is, however, likely to stand the authority in good stead when it comes to defending claims.

And finally...

But what of those unseen dangers that lurk beneath the waves abroad?

Mr and Mrs Ingram took a luxury holiday in Thailand. They paid over £6,000 for a stay at a resort run by Elegant Resorts Limited. After taking to the sea one afternoon, the claimant and his wife were set upon by shoals of jellyfish and stung repeatedly. They complained to the hotel that insufficient warning had been given to them concerning this rare natural phenomenon.

In the case before DDJ Woodcroft in the Mayors & City of London County Court, they alleged defective supply of hotel services against Elegant Resorts. The DDJ found that there had been a failure to warn about the jellyfish invasion and offer alternative accommodation despite the jellyfish swarm obviously being a freak act of nature. The subsequent appeal by Elegant was swiftly dealt with, and the Court of Appeal ordered Mr Ingram to return the £3,000 he had been awarded at first instance. ■

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A cautionary tale for children

Gabbott v Bicester Town Council serves as a timely reminder that the reasonableness of any system of inspection of an area to which the public has access by the occupying local authority should be judged against the degree of risk of injury involved. So, if the risk is low, then there may need to be no proactive system in place to detect the risk and protect the public.

It was alleged that the defendant town council had been in breach of its duty of care under the Occupier's Liability Act 1957 (the "Act") by permitting glass to be present in a recreational parkland area. The claimant minor's lawyers alleged that he had been playing in a section of the park, near to the children's play area, when he sustained serious injury to his wrist as a result of falling onto broken glass.

It was the claimant's case that there had been numerous and specific complaints about glass in, or near to, the area where the accident occurred. It was also said that the inspection system was inadequate given that the defendant knew that children played in the area where the accident occurred.

The defendant's system of inspection was primarily a reactive one for the specific accident location (the recreational grass area of the park) but there was a proactive system of weekly inspections for the children's play area which was located near to the accident location.

Submissions

The claimant placed great emphasis on the fact that the Act specifically states that an occupier must be prepared for children to be less careful than adults for the obvious reason that something which would not be a danger to an adult may very well be one to a child, and a warning sufficient for the former may be inadequate for the latter.

On behalf of the defendant, the primary submissions to the court were that there had been no complaints about glass at the specific accident location (albeit that there had been complaints about glass in other areas of the park) and that the defendant's employees had not noticed a particular problem with glass and that, therefore, the evidence suggested that the risk of injury (from glass) was low.

It was further submitted on behalf of the defendant that the responsibility for the

safety of children must rest primarily on parents. It is their duty to see that their children are not allowed to wander about by themselves, or at the least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go to. In cross examination, it had been established that if the parents had thought that the park was unsafe they would not have permitted their son to be there.

Judgment

In giving judgment, the court emphasised that the park was large and that the claimant's evidence as to complaints about glass in the park was not clear as to whether or not those complaints related specifically to the accident location.

It was held that the weekly inspections of the children's play area were likely to have covered the area of the accident. One of the defendant's witnesses had said that he would have **probably** checked the accident location in his weekly inspection (albeit that this task was not within his specific remit and that he did not have any written records to evidence his assertion). But in any event, the court accepted the submissions of the defendant that it is not possible to implement a system in a large park so that the park was entirely free of glass or rubbish. The duty under the Act is not one of strict liability. The duty is to take **reasonable** care for the safety of visitors and the scope of that duty must be commensurate with the degree of risk. In this case, the court accepted that the risk of injury was low, so a proactive

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system of inspection was not a decisive factor in any event.

Conclusions

In determining whether what was done or not done by the occupier was in fact reasonable, and whether in the particular circumstances of the case the visitor was reasonably safe, the court should consider all the circumstances, such as how obvious the danger was, warnings, lighting, the age of the visitor, the purpose of his visit, the conduct to be expected of him, and the state of knowledge of the occupier. The difficulty and expense of removing the danger is also a relevant factor.

What was particularly reassuring for defendants is that the court was persuaded that it would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land. This chimes with the principles of personal responsibility discussed in the lead article in this newsletter relating to summer holiday hazards. ■

Katrina McAteer represented the successful defendant.

Making an offer to settle a multi-defendant action: a word of warning...

A recent first instance decision illustrates the caution to be exercised when a defendant, as one of a number, makes a Part 36 offer to settle a claimant's claim. Clearly, if there is overlap in terms of damages, the claimant cannot make a double recovery, but what of the case where some of the damages remain outstanding? Is the claimant entitled to accept the offer and continue against the other defendants for any shortfall in the damages?

The case of **Gedye v Land Rover UK** in January 2008, dealt with this issue. The claimant alleged that she was injured by her defective runaway vehicle. She sued both the dealership, for breach of contract, and the manufacturer, for breach of the Consumer Protection Act and negligence. Liability was denied on the basis that the accident was the claimant's fault.

Although the dealership was entitled to seek an indemnity from the manufacturer in the event of a successful claim, it appears that no effort was made to adopt a pragmatic and cost-saving approach to defending the claim (say by the manufacturer taking over the defence).

The manufacturer made a Part 36 offer to settle the claim for only a third of its probable value. The claimant sought and obtained clarification that the offer was made in respect of the claim against the manufacturer only, and that the manufacturer was offering to pay the claimant's costs of the claim against it and not against the dealership. The claimant

accepted the offer and simultaneously wrote to the dealership, indicating her intention to continue against it.

The manufacturer refused to pay, stating that there was no valid acceptance of the offer as the claimant had neither discontinued against the dealership nor obtained the dealership's consent to its acceptance of the offer. Clearly it was not lost on the manufacturer that if the claimant was entitled to continue the claim against the dealership alone and was successful, it would be liable for the damages and costs of both settlements.

continued...

Making an offer to settle a multi-defendant action: a word of warning... continued

The matter at issue therefore was whether or not the defendants were sued severally, in which case the claimant could accept the offer and continue her claim, or jointly or in the alternative, in which case she could only accept it after discontinuing against the other defendants and with their written permission.

The CPR

CPR 36.12 provides that, where a claimant wishes to accept a Part 36 offer made by one or more, but not all, of a number of defendants, two different scenarios apply depending on whether the defendants are sued: 1) jointly or in the alternative; or 2) severally. A claimant can only accept such an offer and continue with her claim if the defendants have a several liability.

How to spot joint, alternative or several liability

It's not always easy, but a few examples assist. The most obvious example of joint liability is in the case of master and servant, so the servant who commits a tort is liable, but the employer is also vicariously liable and may be sued as well. Alternative liability is best illustrated by the type of motor liability case where one of two parties is

solely liable but the claimant cannot point with certainty to that person and sues both in the alternative. Several liability refers to one cause of action being alleged against one person only.

The result

In Mrs Gedye's case, she had not sued the dealership and the manufacturer jointly. Rather, there were two entirely separate causes of action. Neither had she sued them in the alternative. Accordingly, she had sued them severally and thus there had been valid acceptance of the offer. She was free to continue against the dealership for the remainder of the damages she was seeking, and therefore the dealership would be free to seek recovery against Land Rover.

Conclusions

Local authorities often find themselves embroiled in multi-party actions, for example where contractors have undertaken duties on the highway and an accident to the member of the public results. Even when dealing pre-action, the safest route is to ensure that all parties agree when a settlement is achieved in such a case and, if not, make absolutely sure on which basis the defendants are sued by the claimant. ■

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What to watch out for on the pavement

In *Harrison v Derby City Council (2008)*, the **Court of Appeal considered the adequacy of a system of highway inspection, and the extent to which local authorities should implement a more frequent and more vigorous system where special risks or hazards exist in an otherwise unremarkable section of the highway.**

The claimant's (respondent) claim arose out of a tripping accident which occurred on 7 August 2005 on a publicly maintainable highway. The defendant (appellant) local authority had a system of inspection of the footway in place on a six-monthly basis with an intervention level for "actionable" defects of 25mm.

The depression which caused the claimant to trip was caused by the collapse of a cellar roof around a grating under the highway. The area where the accident had occurred had been inspected three months prior to the accident when no such depression had been noted. The claimant claimed damages for breach of Section 41.1 of the Highways Act 1980.

The local authority conceded that the defect was a danger. However, it maintained that they had a statutory defence to the claim under Section 58 of the Highways Act in that they had a competent system of inspection carried out at appropriate intervals.

The claimant conceded at trial that the frequency of inspection was reasonable but

argued that those parts of the footway over cellar voids ought to have been risk assessed and should have been inspected more frequently.

Mr Vasco, the local authority's highways inspector, gave unchallenged evidence that such a collapse as occurred in this case was a rare occurrence, and gave evidence that whilst over 4,000 repairable potholes arose each year, only five occurred over a cellar void. The judge at first instance found that the authority had been aware of the risk of collapse over cellar voids and should have carried out a risk assessment and inspected such areas at one- or two-monthly intervals. He gave judgment for the claimant.

The appeal

The Court of Appeal reiterated that the fulfilment of the duty to maintain and repair the highway turns on the facts of each case. The Court found that it was unreasonable and disproportionate for the local authority to introduce a different inspection regime over areas of cellar voids where depressions occurred only rarely. It was agreed that the six-monthly system of inspection was reasonable and the Court held that the authority had taken such care in all the circumstances as was required to keep footways free from danger, but it clearly depended upon the extent of the potential damage. In giving the lead judgment, Sir Anthony Clarke MR said: "Once it is appreciated that "collapse" does not mean

catastrophic collapse, but collapse sufficient to cause the pit and indentation referred to here, the position is quite different. Moreover, once the evidence of Mr Vasco is accepted that only a handful of problems has been caused by cellar collapse, by comparison with some 4,000 actionable potholes which have been formed by other causes, it can, to my mind, be seen that it would not be reasonable or proportionate to introduce a different inspection regime from that which it used for the majority of potholes; at any rate, where that regime is agreed to be reasonable, as here. That is to my mind so, even if that handful of problems occurs suddenly or quickly. It seems likely to me that the same can be said of at least some of the 4,000 potholes, even if many of those form more gradually".

The Section 58 defence was therefore made out, and judgment entered for that defendant.

Comment

The initial victory was possibly a lucky win for the claimant. However, this case proves once again the uncertainties of outcome of County Court highway tripping cases. The trial judge was sympathetic to the claimant but failed correctly to balance the public and private interest described as so important by Mr Justice Eady in [Galloway v London Borough of Richmond Upon Thames](#). The Court of Appeal delivered a sensible judgment. ■

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Mesothelioma and Municipal Mutual: a very long tale indeed

Many organisations and local authorities have since 2006 found themselves in the unenviable position of being advised by insurers that their historic Employers' Liability policies do not cover them for claims brought by either victims, or the estates of victims, of mesothelioma. Bolton Metropolitan Council v Municipal Mutual Insurance Limited and Commercial Union Assurance Company Limited promises guidance on who will have to pay damages in these very historic cases, but only when many more months have passed.

Mesothelioma is a cancer which develops mainly, if not entirely, as a result of exposure to asbestos. The accepted medical knowledge is that it may take many years from the date of first exposure to asbestos to the start of the development of the tumour.

This period of time from development of the tumour since exposure can be 20, 30, 50 years or even longer. It is also an accepted medical fact that the tumour is very slow growing and probably starts to grow 10 years before the first symptoms become manifest.

The Court of Appeal judgment - 6 February 2006

This case originally was brought by the widow of Mr Green who had died from mesothelioma. He had not been directly employed by Bolton Metropolitan Council. He had worked at their premises over a period of three years when he was employed by a company, now no longer in existence so it could not be sued. He then had a period of employment with another company who were also defendants in the action. As against Bolton Metropolitan Council, the claim had been based on the fact that Bolton were the owner occupier of the premises and had a duty to protect people from exposure to asbestos. Therefore, from an insurance point of view, the claim fell to be dealt with under their Public Liability policy and not an Employers' Liability policy.

Accordingly, because Mr Green had been exposed to asbestos when working at Bolton Metropolitan Council's premises between 1960 and 1963 and his first symptoms began in September 1990, it would appear that the tumour first started to develop in or around 1980.

Municipal Mutual Insurance (MMI) was Bolton's Public Liability insurer in 1980.

Commercial Union were involved because they were the Public Liability insurers of Bolton Metropolitan Council in the 1960s and MMI argued that, if the injury was caused when exposure to asbestos occurred, then it would be for Commercial Union to meet the claim.

It was accepted that the wording in Public Liability and Employers' Liability policies is different in that, generally, the wording in Employers' Liability policies usually offered cover in respect of "injuries caused during the period of insurance" and under Public Liability the wording is normally "injuries occurring during the period of insurance".

In short summary, the Court of Appeal held that Mr Green's injury did not occur at the time he was exposed but at the time the tumour first began to develop. It was therefore an injury occurring in 1980 during the MMI policy.

As a result of that decision, MMI have sought to argue that, on the wording of its policies which were issued for Employers' Liability cover, they are entitled to maintain that the injury occurs when the tumour starts to develop and thus they are not on risk when the exposure actually occurred.

Present situation

An action is now proceeding in the Queen's Bench Division brought by Municipal Mutual Insurance Limited which names Zurich Insurance Company Limited as the first defendant and various local authorities as defendants two to 11. In that action, MMI is seeking a declaration from the court that, on

a true construction of the policies of Employers' Liability insurance issued from time to time by MMI, they are not liable to indemnify any of the defendants.

Secondly, they are seeking a declaration that, upon a true construction of the policies of the relevant Employers' Liability insurance issued by Zurich after 1992 (such policies being in force at the time the tumours developed), Zurich should indemnify the various local authorities in respect of their liabilities.

Currently both MMI and Zurich are declining cover with the result that local authorities are required to meet these claims out of their own funds which can result in payments up to and exceeding £300,000 per claim.

The present Queen's Bench Division

proceedings involve various issues, not merely the individual policy wording but also custom and practice regarding past claims handling and the effect of statements issued by MMI to would-be policyholders as to the extent to which MMI policies met the requirements of the Employers' Liability Compulsory Insurance Act 1969 even though, by Section 3 of that Act, local authorities were exempted from the requirement to effect insurance under the Act.

The future

This matter is shortly due to come before the High Court, and will be reported on in our next newsletter. However, given the importance of the issues, it will undoubtedly go before the Court of Appeal and probably the Appellate Committee of the House of Lords. ■

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Cases of interest

Infants - accidents in playgrounds - duty of care

Monsoor Ali v London Borough of Camden (2008)

The claimant was a minor who suffered two accidents whilst taking part in supervised playground activities.

The first accident occurred on 13 September 2005 when the claimant fell from a bicycle and sustained a fractured tibia. The second accident occurred on 21 November 2005 when he had been running and tripped over, fracturing the lower part of his left fibula.

The claimant claimed that the local authority was negligent in providing inadequate supervision.

The judge held that whilst he accepted the claimant's evidence regarding the accident circumstances in relation to the first accident, it was a mere accident and there was no negligence on the part of the local authority.

So far as the second accident was concerned, whilst it was apparent that the local authority was on notice having been specifically informed by the claimant's mother to exercise caution given his previous fracture, the judge took the view there was no specific agreement to limit his level of activity, so it was reasonable and appropriate for the claimant to have used the equipment as part of his growing process. In the words of the judge "it was impossible to wrap him in cotton wool".

The judge found the level of supervision was suitable. ■

Hazel James acted on behalf of the successful defendant.

continued...

Cases of interest continued

Care home - fall - duty of care

(1) Geoffrey Sandford (2) Maureen Lydia Scherer (Executors of the Estate of Lydia Ellen Rose Sandford, Deceased) v Waltham Forest Borough Council (2008)

The claimants were the executors of the estate of a deceased woman who had originally brought a claim in her lifetime in respect of an injury sustained, and consequential losses, when, on 21 April 2003, she fell in the bedroom of her house.

The basis of the claim against the Council was that they, through Social Services, had failed to provide the deceased with "cot-sides" to her bed. The defendant had carried out an assessment on 26 February 2003 identifying the need for cot-sides, but failed to provide them until 24 April 2003, three days after the deceased's accident. In consequence, the claimants alleged that the deceased, who fractured her hip, was no longer capable of independent living and sought to recover from the defendant a sum equivalent to the estate's statutory liability to pay a contribution to the nursing home fees subsequently incurred, together with damages for pain and suffering.

The defendant disputed whether the accident occurred in the manner alleged, and further alleged that the deceased would have required nursing home care in any event. However, the key dispute was whether or not the defendant owed the claimant any duty of care at all.

Finding for the defendant, the court held that the defendant's duty to assess the

deceased's needs and to provide aids and equipment to meet those needs pursuant to the National Assistance Act 1948, Section 29, and Chronically Sick & Disabled Persons Act 1970, Section 2, did not give rise to any statutory duty actionable by a private individual. The claimants' argument that the defendant had voluntarily assumed responsibility for the deceased, and therefore had a common law duty of care to her, was rejected.

The court ruled that the undertaking by a public body of a task that it was compelled by statute to perform could not of itself found a duty of care at common law. This is because the body undertaking the task was not voluntarily assuming responsibility to any party. The court ruled that the claimants were effectively contending for a position that a defendant should be found to owe a duty of care in common law in precisely the same terms as the statutory duty on the defendant to act, in circumstances where that statutory duty was not actionable by a private individual. The court decided that this could not be right.

It accordingly followed that the local authority did not owe the claimant the duty of care alleged. ■

Andrew Sheppard acted on behalf of the successful defendant.

Workplace regulations - caretaker slipping - contractors and level of control

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Wilkinson v London Borough of Enfield and Oakray Heating Limited (2008)

The claimant was employed by the London Borough of Enfield as a school caretaker. On 4 November 2003, the claimant slipped on cutting oil left on the floor of the school boiler room. The claimant alleged that the oil leaked from the cutting machine which was, at the time, being operated by the second defendant, who were contracted by the London Borough of Enfield to repair and replace four boilers within the boiler room.

He sued Enfield as his employers, but also the heating company as the company responsible for the spillage. Enfield defended the case on the basis that the spillage was no fault of theirs.

The judge awarded the claimant damages, to be assessed. Enfield, he found, had control of the area and were the claimant's employer, but since the heating company caused the spillage, and had day-to-day control of the area, and the equipment, the judge found them 100 per cent liable for the accident. He ordered the heating company to pay the claimant's damages and the costs of all parties. Significantly, since they were a reputable company, there was no duty on Enfield to check the quality of their Health & Safety procedures on a regular basis. ■

Hazel James acted on behalf of the successful first defendant.

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