

# Local Authority Liability update | Summer 2009

Issue 10

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## BLG opens for business in the North

**We are pleased to announce the opening of our new Manchester office, situated in Chancery Place at the heart of Manchester's business district. This office will have the unique BLG focus on the public sector.**

We have been seeking an appropriate opportunity to open in the North for many months. We were approached last year by the Casualty Team of DLA Piper LLP. Led by Rob Muttock and Mark Hemsted, who will join as partners in our office, they are a vastly experienced and high quality team specialising in defending claims brought against both the public and private sectors.

Our new Manchester office will offer the same qualities that we strive for in London, namely a commitment to the efficient and economical management of claims whilst at all times remaining aware of the wider picture.

As a consequence, our programme of publications and seminars will be extended to the North. We are convinced that our unique public sector focus in Southern England can be replicated in the North with

the same positive results for our clients. It is anticipated that the office will expand rapidly; Officials Indemnity and Property Litigation Partners from other leading firms in the North have already been recruited. We had not realised that the BLG brand was so popular!

David Knapp will be spending time there in the next few months exchanging ideas and embedding our values with the new Manchester team. We are genuinely excited by this new development. As the quality of claims and risk management by Local Authorities gets ever higher we believe that we are reflecting this by being at the cutting edge not only for Local Authorities in the South but now the North as well.

For further information please contact Rob or Mark on 0161 829 6400 or David on 020 7643 8572. ■

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# The British 'Erin Brockovich'

**Big environmental "toxic tort" cases rarely reach the UK courts, but one case - against a local authority - has just been decided.**

A "toxic tort" action is a special type of personal injury claim in which the claimant alleges that exposure to a toxic substance has led to some form of harm or disease.

From time to time, toxic tort actions allege exposure of large numbers of individuals to a chemical that has been introduced by the defendant into the environment. When these multi-party environmental toxic tort actions happen in real life, they invariably attract their fair share of headlines. The storylines of a number of Hollywood blockbuster films ("A Civil Action" and "Erin Brockovich", to name a couple) have been based on them.

In the UK at least, it is extremely rare for environmental toxic tort actions to make it to trial, and rarer still for the claimants actually to win. Evidentially, claimants often have a mountain to climb, and the cost of putting a case together (if it is possible at all) is usually prohibitive.

However, when claimants can make out a half decent case, defendants can be presented with quite a headache. The media usually instinctively sympathises with the claimants, regardless of the evidence. Settling is tricky due to the likelihood of adverse PR and the possibility of further copycat actions by other members of the public. Fighting the case often turns out to be the best option, even though marshalling the evidence required to counter the claimants' case is also prohibitively expensive and the chance of recovering costs if the defence is successful is not great.

## Corby Group Litigation v Corby District Council

On 29 July 2009, judgment was given in [Corby Group Litigation v Corby District Council](#).

The case bears all the hallmarks of classic fight-to-the-death environmental toxic tort litigation. Eighteen claimants and/or their parents gave evidence along with 20 other factual witnesses plus a host of scientific

experts. The trial lasted for 38 days. The media watched and waited with interest. Neither side backed down. The Council alone incurred legal costs of £1.9m in defending the case.

The claimants were young people and children born between 1986 and 1999 with birth defects, mostly to the hands and feet. All of their mothers had either lived in, or regularly visited, Corby during the period from 1983 to 1997 when Corby Borough Council (CBC) was undertaking demolition, excavation and redevelopment works in connection with the former Corby steelworks site. When in operation, the steelworks site extended to 680 acres and, unsurprisingly, had become home to some significant waste, pollution and contamination issues.

The claimants alleged that, as a result of negligence, breach of statutory duty (namely the Council's waste-related duties contained in the Environmental Protection Act 1990) and public nuisance on the part of the Council, their mothers were exposed during the embryonic stage of their pregnancies to toxic materials emanating from the Council's steelworks programme and that this exposure caused their birth defects.

## The trial

Vast amounts of time were spent examining the following key areas in minute detail:

- Whether there was a statistically significant cluster of birth defects in Corby that suggested a causal factor might be at play;
- Whether toxicologically there were present on the sites the sorts of contaminant that could lead to the sorts of birth defect suffered by the claimants;

- What the Council's demolition, excavation and redevelopment activities consisted of;
- Whether the activities could have resulted in the mothers being exposed to the contaminants;
- Whether, in conducting its activities, the Council had behaved reasonably; and
- Whether it was reasonably foreseeable that harm might be caused to embryos or fetuses being carried by mothers as a result of these activities.

### The judgment

In a 919 paragraph judgment, the judge held the Council liable in public nuisance, negligence and breach of statutory duty. In so doing, he made the following findings:

- There was a statistically significant cluster of birth defects to the children of mothers living in Corby during much of the relevant period. A cluster like this would not normally arise by chance.
- Toxicologically, there were present on and from the CBC sites over the whole period from 1985 (and possibly before) until 1997 the types of contaminant which could cause the birth defects complained of by the claimants.
- There was an extended period between 1983 and 1997 in which the Council's activities at the sites were conducted in such a way that they fell below the proper standard.
- The activities led to the extensive dispersal of contaminated mud and dust over public areas of Corby and into and over private homes with the result that the contaminants could realistically have caused the types of birth defect of which complaint has been made by the claimants (save in limited respects).

Despite the very clear judgment in the claimants' favour, the claimants are not yet entitled to an award of damages. All that the court has decided so far in this group litigation are the issues that are common to each of the claimants' claims. Each individual claimant now needs to show that his/her particular condition was actually caused by the Council's shortcomings that have now been identified. There is still work to do, but

the judgment will assist the claimants considerably, although you may have heard in the news that the Council is seeking to pursue an appeal.

### The lessons

The case demonstrates that it is not just large companies that can get pulled into environmental toxic tort litigation. Local authorities are at risk too as a result of, for example, waste management or reclamation activities that they have carried out in the past.

On the one hand, it is important for local authorities not to overreact to a judgment like this. Big environmental toxic tort cases rarely get off the ground due to the complexity and cost of the technical evidence required to establish, for example, breach of duty and causation. Insurance may well cover some types of claim (but watch out for pollution exclusions). As a general rule, if the Council has behaved in line with the prevailing standards at the time, or has selected independent contractors with reasonable care and skill and supervises them appropriately, it will be difficult to make a claim stick.

On the other hand, however, it would pay to be vigilant. Falling short of appropriate standards is easy to do. As the judge recognised, it is not necessary for there to have been a "systemic" breakdown within the defendant. He said that the Council had got into this position by simply "biting off more than it could chew" on an unfamiliar project. With some commentators predicting an increase in the number of environmental toxic tort cases in the UK, and the financial, management and PR downside being so high, it is more important than ever for Councils to make sure that any activities that they undertake that might have an environmental aspect or impact are managed "by the book".

Some claimants' lawyers are highly specialised in the practice of bringing environmental toxic tort actions. Any Council with the misfortune of being on the receiving end of such an action needs to ensure that it instructs lawyers that are similarly well versed in this highly specialised area. ■

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# The thin blue line

Two recent cases examine the powers of the police, firstly to arrest when an investigation is not complete, and secondly to exercise the power of seizure.

**The Court of Appeal considers the correct approach to determining whether a police officer has reasonable grounds of suspicion for arrest.**

## Buckley v Thames Valley Police

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Alex Buckley, Luke Buckley and Simon Buckley v Chief Constable of Thames Valley Police, Court of Appeal (2009) was an appeal by the claimants from a first instance decision dismissing their claims for wrongful arrest by the defendant's officers.

### Background

On 22 January 2005, the three claimants, who are brothers, were arrested on suspicion of being involved in a hit and run incident in which a pedestrian had been killed.

The brief facts leading up to the arrest were that the vehicle involved in the hit and run was a white Transit van, which was found abandoned not far from the scene. Checks on the Police National Computer revealed it had been driven previously by a James Buckley. A witness to the incident reported to the police that three young men in their mid teens ran off from the van.

A police officer who heard the radio traffic relating to the incident rang in to say that he knew of several members of the "Buckley" family who would be of the right age to fit the description as reported by the witness. Another police officer was dispatched to attend the claimants' home, where he found the three brothers, together with their mother. During conversation, the claimants' mother suggested that a white Transit van had been connected with one of her other sons previously. The officer arrested all three brothers on suspicion of causing death by dangerous driving.

It subsequently transpired that none of the claimants had in fact had anything to do with the hit and run incident, nor were they related to James Buckley, the owner of the Transit van.

The claimants brought proceedings for

wrongful arrest against the defendant. At first instance, the judge found that the arresting officer did have reasonable grounds for suspicion so as to justify their arrest based on the information available to him. He referred in particular to the description given by eye witnesses, the possible connection between a Transit van and the family and the possible connection between the two Buckley families.

### The Court of Appeal decision

The Court of Appeal upheld the findings of the County Court. In the leading judgment, Lord Justice Hughes reiterated that the threshold for establishing reasonable grounds for suspicion is a low one. He found that the correct approach to making a judgment upon the lawfulness of an arrest is not to separate out each of the elements of the constable's state of mind and ask individually whether each creates reasonable grounds. Instead, the court should look at them cumulatively and ask whether they establish reasonable grounds for suspicion. In this case there were sufficient grounds to suspect when all the information was taken cumulatively and the judge's reasoning could not be faulted.

The appeal was accordingly dismissed.

### Comment

This is an essential judgment for the police. The threshold for reasonable suspicion is low. The case states that even if an officer has a number of suspicions, which individually are weak, when taken together, as of course the arresting officer will do at the time, they can still give rise to reasonable grounds for suspicion. It reverses a worrying recent trend which was diluting the power of arrest and supports the police at a time when public opinion is questioning the role of the police. ■

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## His Honour Judge Harris QC considers the exercise of the police general power of seizure under Section 19 of the Police and Criminal Evidence Act 1984.

## Stellato v Thames Valley Police

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In *Stellato v Chief Constable of Thames Valley Police, High Court (2009)*, the claimant brought proceedings for wrongful arrest and wrongful seizure of his car following his arrest on suspicion of burglary.

### Background

Police received a report of a burglary where the victim's possessions had been taken and the gas left on and a candle lit by the burglar. The victim informed police she believed the claimant was responsible and was in the vicinity of her home.

The police officer who attended the scene found the claimant's car on the street near the victim's home and noted that it was still warm. The claimant was known to the arresting officer, who also knew he had previously been convicted of arson.

When the claimant arrived at his car, he was arrested on suspicion of burglary. His car was also seized. He was ultimately released without charge and brought proceedings for wrongful arrest and wrongful seizure of his vehicle.

### Summary judgment

On the defendant's Application for Summary Judgment, His Honour Judge Harris QC the presiding judge at Oxford County Court, found in favour of Thames Valley Police. He found that the claim for wrongful arrest had no reasonable prospect of success based on the fact that the claimant was known to the

arresting officer and the arresting officer also knew of the victim's belief that the claimant was in the vicinity of her house. So far so good.

The real argument was in relation to seizure of the vehicle. Section 19 of the Police and Criminal Evidence Act 1984 gives a police officer power to seize anything on "premises" if he has reasonable grounds for believing it is evidence in relation to an offence which they are investigating. The query was whether the car was on "premises" for the purposes of that Act, if it was in fact situated in the public highway.

The judge found that in that Act, "premises" was used in its legal and not its popular connotation to mean land, whether or not there were buildings on it. The car was therefore on "premises" and the police officer had not therefore acted unlawfully in seizing it.

Judgment was given for the defendant accordingly.

### Comment

This case neatly shuts down a potential loophole in the law as to when the general power of seizure may be exercised and makes it absolutely clear that it can extend to a vehicle, wherever it is situated. ■

**Tom Walshaw acted for Thames Valley Police in both these cases.**

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# Social service claims - a handy guide

John Goodman examines the latest in social services law.

You probably have all manner of discount and loyalty cards in your wallet or purse. Here is another sheet to put with them: a ready reckoner of the key issues in the fast changing area of social service and abuse cases, which includes the latest case on limitation, decided by the Court of Appeal in July 2009 (*AB v Nugent*).

## Vicarious liability

Defendants have the basic problem of *Lister v Hesley Hall, House of Lords (2001)*: the test is now whether the employment is so closely connected to the tort that it would be fair to impose vicarious liability on the employer.

In *Lister*, the abuser was the warden at a children's home and the House of Lords found there was indeed a sufficient connection between his role and the abuse of the boys at the home. To say the least, this test runs counter to common sense but the justification is that if there is such a connection then this is one of the risks the employer has to bear when carrying out its business.

- RECENT DEVELOPMENT - *Maga v Trustees of Birmingham Archdiocese of the Roman Catholic Church, High Court (2009)*: this welcome case chips away at the wide interpretation of the *Lister* principle. The church was held not vicariously liable for the activities of a priest who was abusing a local boy who was not a churchgoer. It was held that the employment merely created the opportunity for the priest to meet the boy. Job related opportunity is not sufficient. There must be a close connection between the actual job itself and the tort.

## Limitation

Following *A v Hoare, House of Lords (2008)*, claimants bringing very stale abuse claims

will rarely be able to rely on the date of knowledge provision under the Limitation Act 1980. Instead, these cases will turn on the general discretion of the court under Section 33 to disapply the limitation period. The question whether the claimant, taking into account his psychological state, could reasonably have been expected to institute proceedings, is now dealt with as part of the Section 33 discretion, rather than being a discrete "date of knowledge" question.

So now the Section 33 cases turn essentially on a balancing test between assessing the reasons for the claimant's delay and how excusable/understandable it was on the one hand, and the prejudice to the defendant caused by the delay on the other. The prejudice will be much harder to establish if it is a vicarious liability case since the only breach of duty issue is whether the claimant was indeed abused. So it is irrelevant that the claimant no longer has records or witnesses available to show it had a reasonable system of monitoring.

- RECENT DEVELOPMENT - this approach has recently been upheld in the case of *AB & Ors v Nugent Care Society* and *GR v Wirral MBC, Court of Appeal (2009)*. The Court refused to interfere with the decision of the first instance judges with regard to any of the claimants. All but one had been allowed to proceed with their claim despite delays after expiry of the limitation period which ranged from 16 to 27 years. It is notable that the only claimant

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who was not granted the Section 33 discretion in his favour was alleging far less serious abuse than the others. This case illustrates the profound effect of the two key recent developments in this area: that limitation in vicarious liability claims is now dealt with on the same basis as direct liability cases and that the key test is now the Section 33 discretion and not the Section 14 date of knowledge issue. The Court also stressed in this case that an oral hearing may well be required in many cases to enable the court to undertake the Section 33 balancing test.

- RECENT DEVELOPMENT - All hope is not lost. In [Albonetti v Wirral MBC, High Court \(2009\)](#), a delay of almost 40 years where the defendants no longer had access to any documents or witnesses was considered too long to allow the claim to proceed. But in [Raggett v Preston Catholic College, High Court \(2009\)](#), the claim was allowed despite the delay being more than 30 years. This is a developing area and expect more cases from the Appellate Courts.

#### Foster parents

A local authority is still not vicariously liable for the negligence of foster parents following [S v Walsall MBC \(1986\)](#).

- RECENT DEVELOPMENT - This principle is under attack by the claimant's solicitors. Expect a case on this point in the near future.

#### Claims for mere neglect

- RECENT DEVELOPMENT - [Pierce v Doncaster MBC, Court of Appeal \(2008\)](#), received massive publicity at the end of last year for no apparent reason. The case did at least confirm that there is no problem with the claimant suing for a social worker's negligent failure to remove him from a situation of neglectful parenting with no hint of sexual abuse.

This case also highlights the crucial importance of defendants having available at trial the social worker(s) who dealt with the case at the time, rather

than seeking to rely merely on the social service records to defend the claim.

#### Parents suing for shock

Children can sue for a social worker's failure to take them into care, or for being taken into care unjustifiably. But parents of those children cannot sue for their own mental harm. The fundamental reason for this (where it is the parents themselves who were under suspicion) is because it would be wrong to expect a local authority to owe a duty of care both to the child and to the parent where there was a such a clear conflict of interest. But what about claims by parents who were never under any suspicion? Can they claim for psychiatric injuries sustained on learning about the abuse suffered by their child which the Council allegedly failed to prevent? This remains an open question and subject to further legal development.

#### Can you be liable as a Housing Authority for failing to prevent violence on your estate?

The courts are unimpressed with this new breed of claim. In [Mitchell v Glasgow City Council, House of Lords \(2009\)](#), a tenant was attacked by his neighbour and killed. The neighbour had a history of antisocial behaviour. The court rejected the argument that the Council, as social landlord, owed the deceased a duty to warn him of the danger from the neighbour.

This reluctance to extend the duty of care to the criminal acts of third parties can be seen in our recent case of [X and Y v LB Hounslow, Court of Appeal \(2009\)](#) which we have reported to you recently.

It is important to note, however, that claimants could still have a right of action under the Human Rights Act if there was a "real and immediate risk" to the life of the deceased.

- RECENT DEVELOPMENT - the claimants in [X and Y](#) are petitioning the House of Lords for leave to appeal - although you may have heard that the House of Lords is no more and our highest tribunal is now the Supreme Court! ■

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# School's out for summer

As ever, accidents in schools provide a busy source of litigation. Whilst school staff are taking a well earned break from their pupils, we review recent cases featuring the school environment.

## Orchard v Lee, Court of Appeal (2009)

### First instance

Claim by a lunchtime supervisor. The defendant was playing a game of tag in an area of the school which was not designated a no running area, when he ran backwards into the claimant. The court found that at the time of the accident the claimant was engaged in horseplay. A claim was brought against the child, and the school, alleging negligence. However, the action at trial proceeded only against the child. At first instance, the trial judge held that no prudent and reasonable 13 year old boy would reasonably have foreseen the risk of injury by virtue of the game of tag in question and the claimant's claim was dismissed.

### Appeal

Lord Justice Waller, giving the lead judgment, summarised the law in this area. He noted that whilst there was no prohibition on running at the time of the accident, subsequently the school changed the rules and the layout of the area to discourage

running - evidentially never a good point for a defendant. He said that the relevant test was "whether an ordinarily prudent and reasonable 13 year old schoolboy would have realised that his actions gave rise to a risk of injury". So it is the reasonable 13 year old schoolboy, not the reasonable man, that is the test.

The court would need to be satisfied that this 13 year old claimant was running about playing a game of tag in a way which was to a **significant degree outside the norm for 13 year olds**.

The appeal was accordingly dismissed.

### Comment

This was a brave case for the claimant to take on. In similar circumstances next time it may be that the school in question could find themselves more vigorously pursued, but the next case looks at how the courts expect staff to be protected. ■

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## Alexis v Newham London Borough Council, High Court (2009)

### Facts

The claimant teacher sustained injuries when a pupil added whiteboard cleaning fluid to her water bottle which led to both physical and psychological injury when she drank it. The policy at the school was that children should not be left unsupervised in classrooms but on this occasion a teacher had allowed three pupils, including the offender, access to a classroom unsupervised to retrieve some belongings. They took advantage of that access to taint the water, as a prank.

The duty upon the local authority was that of a **reasonable employer**, to protect from the

actions of others which would lead to injuries.

### Findings

The pupil in question did not set out to injure the claimant but had engaged in a foolish prank and never anticipated the seriousness of the consequences. The behaviour was foreseeable. There was a duty to take such precautions as were reasonable in all the circumstances. However, the court found that the school's practice of not generally allowing students access to unoccupied classrooms was reasonable as was the decision of the teacher to allow pupils access at their discretion to classrooms which were

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unoccupied. The claimant had failed to establish a breach of any duty of care owed to her, and her case failed.

#### Comment

When removed from the stricter regime of

the Employer's Liability Regulations, judges can deliver refreshingly sensible decisions for employers. Schools must put together convincing and detailed evidence as to their systems, and then may be able vigorously to defend themselves at court. ■

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## Patricia Louise Kern v Bridgend County Council, Bridgend CC (2008)

#### Facts

The claimant was a school kitchen assistant. She had been provided with a protective jacket designed to be secured at the wrist by a popper button. But the sleeves of the claimant's jacket were too long so she rolled the sleeves up to avoid material bunching at the wrist and getting into the food being handled.

She burnt the exposed skin whilst using a steamer. The claimant claimed breach of Personal Protective Equipment at Work Regulations as the protective jacket did not fit her correctly without adjustment. The defendant argued that they had provided a protective jacket, and told the claimant to wear the sleeves rolled down, and buttoned up.

#### Findings

- The defendant did not assess the suitability of the jacket for protection from scalding water contrary to Regulation 6 of the Protective

Equipment Regulations and that led to a breach of Regulation 4.

- The jacket was not suitable because it was not adjusted to fit the claimant despite the fact that it was obvious that the sleeves were too long for her.
- It was foreseeable that the claimant would roll her sleeves to avoid contaminating food and for her to be able to undertake her duties and tasks.
- The defendant was liable.
- The claimant was contributorily negligent to the extent that she had mishandled the steamer. Damages were reduced by 15 per cent.

#### Comment

Beware of thinking that you can defend a case on the basis that an employee has interfered with their issued equipment, and they have been told how to wear it, or that they have persisted with the use of the equipment when it is blindingly obvious that it is wrong - the broad shouldered employer, under the Regulations, must sort it all out. ■

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## Palmer v Cornwall County Council, Court of Appeal (2009)

Lord Justice Waller has been busy of late - on 21 May 2009 he also gave the lead judgment in [Palmer](#).

#### First instance

This case arose out of an accident when the claimant, during his lunch break at school, sustained an eye injury when another pupil threw a rock which struck him in the eye. It seems that such rock throwing is a common pastime in Cornwall where a seagull is attracted by a food allurement and then pupils throw rocks at it. This case turned on the question of supervision. At first instance the claimant's claim was dismissed. There was conflicting evidence as to the number of pupils in the playground at the time of the

accident. The defendant had only one dinner supervisor outside but the judge at first instance held that that was acceptable.

#### Appeal

The appeal succeeded, and Waller LJ stated:

"there were 300 pupils out on the field at the time of the incident, of which it would seem clear that well over half would be years 7 and 8... to ask one supervisor to supervise well over 150 year 7 and 8 pupils was quite inappropriate and, since that led to one supervisor only being able to glance occasionally at years 9 and 10,

continued...

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## Palmer v Cornwall County Council, Court of Appeal (2009) continued

that left those age groups effectively unsupervised".

The defendant had been negligent and the appeal was allowed.

### Comment

The court commented that the purpose of appropriate supervision was to deter children from taking part in dangerous

activities as well as to stop such dangerous activities as did occur, and the level of supervision had to achieve that.

When dealing with this type of case it is always difficult to obtain precise evidence as to which supervisors were on duty and where they were positioned and so on, and how many children were actually present. Attention to detail is vital. ■

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## Lovell v Leeds City Council, High Court (2009)

### Facts

The claim arose from a road traffic accident which occurred close to the site of a new school within the city. The claimant was the driver of a vehicle who, upon rounding a corner, noted the presence of a large queue of traffic. In taking late avoiding action, the driver swerved into the opposing carriageway and was involved in a collision which rendered the passenger severely injured and paraplegic. The claimant's insurer, acting under its subrogated powers, brought a claim for a contribution against the City Council as highway and planning authority.

It was alleged that the Council owed a duty of care as both highway and planning authority when considering the siting and impact of new developments. Further, that they had been negligent in siting the new school and in failing to take account of the likely level of traffic when designing the surrounding highway alterations. It was alleged that the breach of duty or negligence had resulted in the nuisance of the queue of traffic around which the claimant had to swerve to avoid collision.

### Findings

- Stationary vehicles could be found in the

road at any time for a variety of factors. This may or may not be as a result of carelessness.

- The claimant did not show to the court that the number of cars arriving at or near the school at the time of the accident was greater than the number which had been predicted when planning consent was given for the development.
- It was likely that the internal layout of the school was one cause of the blocked roundabout, and therefore the traffic queue. Once that layout was changed the queues disappeared.
- Nonetheless, the burden to prove that the cause of the queue, and therefore the cause of the accident, arose from the act or omission of the Local Authority lay with the claimant.
- She had not discharged that burden and the case was dismissed.

### Comment

- Courts generally dislike attempts by commercial insurers to recover their outlay from the public sector.
- This decision from the High Court is a welcome confirmation of this. ■

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# The curious tale of the Lord Justices and the ramp

Smith v Northamptonshire County Council, House of Lords (2009)

In **Smith**, the House of Lords has given guidelines as to the extent of liability imposed on employers under the Provision and Use of Work Equipment Regulations 1998, for defective work equipment which is not owned, or under the immediate control of a defendant employer.

It is ironic how the most prosaic of incidents lead to important cases which develop the law. From swigging ginger beer developed the famous snail in bottle case, and from pushing a wheelchair across a ramp we get the latest case on interpretation of the Work Equipment Regulations from the House of Lords.

## The facts

Mrs Smith was employed as a carer/driver by the defendant Council. As part of her duties, she was required to collect a client from her home and take her by minibus to a day centre. The client in question was confined to a wheelchair. There was a wooden ramp leading from the living room of the client's house to a patio area outside. It had been installed by the National Health Service about 10 years previously but had been subject to inspection by the defendant Council subsequently and was not in an obvious state of disrepair prior to the accident.

Unfortunately there was a hidden defect with the ramp and, whilst wheeling the client to the minibus, the claimant stepped on the edge of the ramp which gave way, causing the claimant to stumble and injure herself.

Encouragingly for defendants, the claimant's claim failed both before the first instance trial judge and the Court of Appeal.

## The House of Lords

Before the House of Lords, the sole issue was whether or not the ramp in question was Work Equipment so that the defendant Council would be fixed with strict liability pursuant to the 1998 Regulations. The Regulations only impose strict liability "in respect of work equipment... provided for

use or used by an employee".

By a majority of 3–2, Their Lordships found for the defendant Council.

There was little difficulty in deciding that this was work equipment "provided for use" at work.

It was recognised, however, that if the phrase "used by an employee" was given a literal interpretation, the breadth of possible liability was unacceptably wide. The question was where the boundary should lie, and how to limit the extent of the regulation.

The court's answer to this was to look to the purpose for which the regulations were implemented. The answer to this question was to give effect to European Union law, namely the Work Equipment Directive which indicated that liability should only be imposed for "work equipment made available to workers in **the undertaking and/or establishment**". On this basis, Lord Mance, supported by Lords Neuberger and Carswell, considered that for liability to attach under the UK Regulations there had to be a clear and specific connection, which went further than the mere fact of use, between the work equipment and the employer's undertaking.

Lord Mance felt that the relevant test should be whether the defective work equipment giving rise to a claim had been provided or used in circumstances that it was incorporated into and adopted as part of the employer's business or other undertaking. In this case, he did not consider that it could

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## The curious tale of the Lord Justices and the ramp continued

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be said that the ramp which gave way was either incorporated into, or adopted by the defendant Council, and as it was not under the Council's control to any material extent, there was no liability. In the circumstances, the claim was dismissed.

### Key points for defendants

- The decision in *Smith* identifies the extent to which the regulations apply to equipment which is not within the direct sphere of an employer's undertaking or control. It is a crucial, and welcome, decision.
- The decision recognises that there must be a limit to the extent of strict liability imposed by these regulations, and that they are not to have a literal interpretation.
- The correct mechanism to limit the extent of liability is to consider whether there is a connection, beyond the fact of use, between the work equipment and the employer's business undertaking.
- Equipment which has not been provided or used in circumstances in which it can reasonably be said to be incorporated into and adopted as part of an employer's business or undertaking, will not attract strict liability under the regulations.
- This area of the law is complex, and careful thought must be given to each case to identify potential defences. But this is another case which cuts back the concerns about strict liability within the Workplace Regulations. ■

## Who's a Pretty Polly?

Noise induced hearing loss claims may not be the type of claim you expect to be worthy of comment, but this one raised a very interesting point. It will affect claims in general.

The appeal was brought by Stephanie Baker and the respondents to the appeal were Quantum Clothing Group, Meridian Limited and Pretty Polly Limited. The appeal arose out of a judgment in a group of seven claims heard by His Honour Judge Inglis, in Nottingham in February 2007. The claimants had been employed over many years by different employers in the knitting industry in the East Midlands. All had been exposed to noise in excess of 80db(A)Leqd but less than 90db(A)Leqd.

At the heart of this judgment was the issue of whether there had been a breach of duty at Common Law and whether Section 29 of the Factories Act 1961 imposed the same duty as the Common Law duty.

### First instance decision

The Common Law duty is to take reasonable care for the health and safety of employees.

Section 29 of the Factories Act 1961 provides as follows: "There shall, so far as is

reasonably practicable, 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."

The judge at first instance thought that the duty under Common Law and Statute were the same, but the Court of Appeal did not agree.

### Court of Appeal

They found that it is necessary to look at the duty under Common Law in a different way to the duty imposed by Section 29 of the Factories Act.

### Common Law

The employer must be shown by the claimant not to have acted reasonably. If the employer has acted reasonably, then no liability will attach to the employer under Common Law.

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## Meridian Limited & Pretty Polly Limited, Court of Appeal (2009)

## Who's a Pretty Polly? continued

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### Statute and Section 29

Firstly, the claimant must show that his place of work was not safe. If he proves that, the burden passes to the employer to show that it was not reasonably practicable for him to eliminate the risk of harm.

### Applying the test

The Court of Appeal held that if noise had caused damage to the hearing it could not be said that the workplace was safe. It is the employer's duty to make it safe. So, we then have to consider whether it was reasonably practicable for the employer to eliminate the risk of harm?

The Court held that it was not sufficient for any employer to show that it had relied upon the accepted standards that applied in the industry regarding the level of noise to which employees were to be exposed. If there was evidence to suggest that there were greater safety measures which should have been installed to reduce the level of exposure, then the employer should have sought advice from a suitably qualified expert about that. If that advice was that the generally accepted standard did not provide safe working conditions, then the employer could not avoid

liability under Section 29 even though liability may have been avoided under Common Law.

### Comments

At Common Law, if you act in the same way as the rest of the industry, you will probably escape liability. But where a claim is brought under Section 29 of the Factories Act it will no longer be sufficient for a defendant to rely upon the standards or custom and practice adopted at the time within the particular industry. The employer has to show instead that there was nothing it reasonably could have done to eliminate the risk.

Insurers always need to carry out research into practices used in industries in the UK or abroad at the time. Now they must look for any references in Factory Inspectors' Reports or Draft Regulations to flag the potential changes in standards which their insured should have done something about at the time and which could land them with liability.

The defendants are seeking permission to appeal to the Supreme Court. ■

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