

EMPLOYERS LIABILITY - WORK EQUIPMENT

Smith v Northamptonshire County Council - 2009 - HL

The claimant was employed by the local authority as a driver and carer and was required to collect people from their homes and take them by minibus to a day centre. She was required to collect a wheelchair user who had a wooden ramp to enable her to manoeuvre her wheelchair out of her house. The ramp had been installed, outside, some years earlier by the NHS and the claimant had used the ramp often but over time the edge had become rotten and on the day in question it had crumbled beneath her foot, causing her to sustain injury. The claimant sought damages, claiming a breach of the Provision and Use of Work Equipment Regulations 1998. The judge at first instance held that the ramp was work equipment that was being used at work and that there had been a breach of reg 5(1) (failure to maintain in an efficient state and in good repair). The defendant appealed on the grounds that they did not own the ramp and did not maintain it. The Court of Appeal held that, while each case turned on its own facts, the ramp was neither work equipment nor was it being used at work. In doing so it effectively read into the regulations a test that the employer would only face a strict liability (under reg 5(1) following Stark v Post Office) where it had such control of the equipment as to justify the imposition of such an onerous duty.

The real issue before the House of Lords concerned the application of reg 3(2) (that the regulations shall only apply to equipment 'provided for use or used by an employee at work'). The defendant had conceded that the ramp met the definition of work equipment under reg 2(1) and was out of repair for purpose of reg 5(1). In finding for the defendant it was held that the regulations are intended to impose absolute liability on an employer in a very wide range of circumstances but there was a need for some specific nexus between the equipment and the employer's business for the regulations to apply. What emerges is a two stage test, (1) Is the item work equipment? A broad test of 'practical and useful function' applies. (2) Do the regulations apply to the work equipment? This involves an analysis of the question of control over the equipment (not simply the way in which employees used the equipment).

Comment

There are clear limits on the scope of the regulations where an employer is not in full control of the relevant work equipment. On the facts of this case the defendant had inspected and risk assessed the ramp but this was not demonstrative of sufficient control, it seems they would have had to have been able to have taken affirmative action had they identified a need to do so. This was clearly a difficult decision for the house, their lordships were split 3/2. It is evident that they struggled with the competing concerns of protecting employees at work and the burden on employers in extending the scope of the duties. It is vital that in investigating claims that full attention is given to the reality of the situation facing the employer and determining what level of control he really has over work equipment.

EMPLOYERS LIABILITY - NOISE INDUCED DEAFNESS

Baker v Quantum Clothing & ors - 2009 - CA

The Court of Appeal has overturned the dismissal of the Nottinghamshire and Derbyshire Deafness Litigation by Nottingham High Court in 2007. The test cases sought to challenge the position that prior to the introduction of specific regulations that the action level for common law claims commenced at a noise level of 90dB(A). The High Court held that in the absence of any 'greater than average knowledge' as to the dangers of noise exposure below 90dB(A) then the common law action level was re-affirmed. Larger scale employers were fixed with an action level of 85 dB(A) from 1985 given their greater knowledge (average employer was 1989). The Court of Appeal effectively upheld this common law position but found that under s29 Factories Act 1961 (safe place of work) that safe meant safe, not reasonably foreseeably safe as to do otherwise would remove the distinction between the common law and the statutory duty and anyway the employer had the defence of reasonable practicability (the High Court felt that the statutory duty added little to the common law position). The statutory duty was to be judged objectively with the benefit of hindsight. It was held that from early 1977 an average sized employer should have sought expert advice as to the degree of risk to hearing at noise levels from 85dB(A) and in the absence of hearing protection the employer would be in breach of s29. The action date was set at 1 January 1978 to allow implementation of hearing protection. Therefore, an employer in those circumstances is liable unless he can

establish that it was not reasonably practicable for him to eliminate or reduce the risk. To succeed the employer would need to show that the time, trouble and expense of providing appropriate protection would substantially outweigh the risk involved. Whereas at common law the duty is governed by reasonableness and acceptable standards, the question of acceptable risk is not relevant to what is reasonably practicable.

Comment

This decision has specific adverse consequences for employers facing industrial deafness cases where noise levels were below 90dB(A) but also for all employers' liability claims given the application of s29. It appears likely that this matter will be headed towards the House of Lords.

UPDATE - PLEURAL PLAQUES

The House of Lords in Johnston v NEI International Combustion ruled that pleural plaques did not give rise to a cause of action. In Scotland the Damages (Asbestos-related Conditions)(Scotland) Act will come into force on 17 June reversing the House of Lords decision and providing a right to damages for people who develop pleural plaques following negligent exposure to asbestos. A group of insurers are pursuing judicial review proceedings in relation to this legislation though the Court of Session has refused to delay the legislation pending the conclusion of the judicial review process. Meanwhile, in England and Wales the Ministry of Justice confirmed that it is taking longer than expected to consider the responses to its own consultation on these issues. It is unlikely there will be any announcements until the end of July.

VICARIOUS LIABILITY - ABUSE

Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church - 2009 - QBD

This was a claim that the trustees were vicariously liable for damages arising from the sexual abuse of the claimant in or around 1976 by an assistant priest in Coventry. The claimant had learning difficulties and attended a specialist school. The claimant is now 45 years old and issued proceedings having learned many years later that another man had received damages for abuse he had suffered from the same priest. The claimant was found to be of 'unsound mind' for the purpose of the Limitation Act 1980 such that his claim was not statute barred. The trustees also sought to argue that the assaults were not so closely connected with the priest's employment that they should be vicariously liable to the claimant. There had been an association between the priest and the claimant on which they saw each other many times for the apparent purpose of doing jobs such as car cleaning, ironing and cleaning for which the priest paid the claimant. The priest had not sought to involve the claimant in the church or to engage with him on any religious level and whilst it was his position as a priest that had given him the opportunity to abuse the claimant this was not sufficient in itself to establish a vicarious liability on behalf of the trustees.

Comment

A rare success for defendants in a long line of cases dealing with an employer's liability for the acts of its employees. Whilst this case demonstrates that it is possible to argue that an act is not so closely connected with employment it must also be remembered that the test under Lister v Hesley Hall Ltd is a wide one as well as fact sensitive and many cases will still succeed.

LIMITATION - ABUSE

Raggett v Society of Jesus Trust 1929 for Roman Catholic Purposes & Preston Catholic College Governors - 2009 - QBD

It was accepted by the court that the claimant had suffered serious sexual assault by his teacher between 1970 and 1975. The school contended that the case was statute barred as it had not been brought within 3 years of the claimant's 18th birthday in 1976. The claimant argued that his 'date of knowledge' was in 2005 when he claimed to have had a 'revelation' about the nature and extent of the abuse. Alternatively the claimant requested the court exercise its discretion to allow the claim to proceed. The court found that the 'date of knowledge' had to be taken from the time the abuse had happened and the claim was statute barred. It went on to find though that it was able to exercise its discretion under s33 Limitation Act 1980. Whilst the delay was substantial (28 years) this was not uncommon in abuse cases, the school's ability to defend the case was not materially prejudiced and a fair trial was possible. The fact that the alleged abuser was no longer available as a witness did not amount to prejudice, the claimant had the benefit of supporting witnesses and was himself a reliable historian. To the extent there was any prejudice in the delay it was to the claimant as he would bear the burden of proving that his loss was caused by the abuse.

Comment

We are seeing some degree of consistency in the judicial approach to these cases post A v Hoare 2008. Claimants are unlikely to be able to argue they did not have sufficient knowledge of a serious wrong until a long time after the abuse. There appear to be real difficulties in persuading courts to exercise discretion to allow cases to proceed in cases reliant on systemic negligence rather than vicarious liability. The passage of time often results in significant prejudice in the former category of cases whereas proving vicarious liability cases is more straightforward particularly if there is an acceptance that abuse occurred or there is sufficient supporting witness evidence in corroboration of the claimant's allegations.

EMPLOYERS LIABILITY - PROTECTION FROM HARRASMENT

Dowson v Chief Constable of Northumbria - 2009 - QBD

A number of police officers sought to amend their claim in proceedings for harassment. The defendant applied to strike these out. The allegations of harassment concerned the conduct of a Chief Inspector which was said to have been aggressive, inappropriate and at times illegal. The Chief Constable sought to rely on an exception under the Protection from Harassment Act 1997 that the conduct complained of was 'for the purpose of preventing and detecting crime'. It was held for this exception to apply it is necessary to show that the course of conduct at the heart of the alleged harassment was specifically pursued for the purposes of crime prevention or detection rather than in the general context of working within a police force. This exemption requires particular evidence such that it would not be appropriate to strike out claims on the basis of this exception without hearing that evidence. The Court also confirmed that the claimants had to show an arguable case of oppression and unreasonableness to avoid the claims being struck out and the conduct had to be targeted, genuinely offensive or oppressive and calculated to produce alarm and distress.

The context of the situation in which the alleged harassment arises is also a relevant factor. The claims were all struck out and judgment given to the Chief Constable.

Comment

Following on from Majrowski v Guys & St Thomas NHS Trust and Conn v Sunderland City Council this case further demonstrates the challenges claimants face in seeking to base stress claims on allegations under the act for which an employer can be vicariously liable. It will undoubtedly be of comfort to police authorities that the context in which police officers work is a relevant factor in considering the conduct complained of.

NEGLIGENCE - RES IPSA LOQUITUR

George v Eagle Air Services - 2009 - PC

The claimant sought damages following the death of her common law husband when one of the defendant's aircraft crashed. The Privy Council held that the maxim of res ipsa loquitur was of great importance in aviation cases given a claimant's difficulty in proving negligence. The perils of air flight had led to a reluctance to apply this maxim to air crashes. With improvements in design and technology it was no longer possible to assume that such were typically responsible. Aircraft did not usually crash and certainly should not do so. If they did then it was not unreasonable to assume that their owners would inform themselves of any unusual causes and, therefore, it was not unreasonable to place on them the burden of producing an explanation.

NEGLIGENCE - BREACH OF DUTY

Palmer v Cornwall County Council - 2009 - CA

A child was injured when a stone was thrown by another child whilst on break on the school playing field. There was only one supervisor on duty at the time and the Court of Appeal said this was insufficient as she could only glance occasionally at the children playing. Had there been additional supervision it is unlikely that pupils would have been throwing stones as they knew to do so was prohibited.

List of abbreviations used:

CC	County Court
HC	High Court
QBD	Queens Bench Division of the High Court
Ch D	Chancery Division of the High Court
CA	Court of Appeal
HL	House of Lords
SCCO	Supreme Court Costs Office
ECJ	European Court of Justice
TCC	Technology and Construction Court

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