

HEALTH AND SAFETY AT WORK - ONUS OF PROOF

R v Chagot Ltd & ors - 2008 (HL)

The defendants appealed against their convictions for breaches of sections 2, 3 and 37 of the Health and Safety at Work Act 1974 that they had failed to ensure, as far as reasonably practicable, the health and safety of the employee of one defendant and the health and safety of a person not in the other defendant's employment. The third defendant was the officer in charge of the operation for the two defendant firms. The charges arose from an incident involving a dumper truck loaded with spoil from an excavation which overturned and buried the driver who was fatally injured. The House of Lords upheld the lower court's interpretation that it was only for the prosecution to show that there was a risk to health and safety, which was achieved by the fact that the accident had occurred. There was then a reverse onus of proof upon the defendants to show that they had taken all reasonably practicable steps to prevent the risk. In some circumstances it would be for the prosecutor to identify the obligations in question, for example in prosecutions where there had been no accident or where it was not clear on whom the duty fell, but here it was clear that the risks related to the driving of dumper trucks. It was true that the prosecutor had to give "fair notice" of the allegations where that was necessary, but where an injury had occurred there was a prima facie liability, subject to the defence of reasonable practicability.

The defendants also argued that the reverse onus of proof was in contravention of Article 6 of the European Convention on Human Rights and the presumption of innocence until proved guilty. Such a requirement would emasculate much of the 1974 Act and it was for the defendant to show that he had taken all reasonably practicable steps to prevent the risk under consideration. This was still the case even though the penalties on an individual such as the third defendant had been recently increased to a maximum of two years imprisonment and an unlimited fine.

Comment

In effect there need be only one step that an employer may have missed in considering the relevant risk for him to be convicted. This was a unanimous judgement by the five Law Lords involved and shows how difficult it is to successfully defend a prosecution under the Health and Safety at Work Act.

LIMITATION

TCD v Harrow London Borough Council & ors - 2008 (EWHC)

The recent case of *A v Hoare* 2008 changed the limitation period in cases of deliberate harm from an invariable 6 years to a period of 3 years but which the courts have a discretion to extend under section 33 of the Limitation Act 1980. The claimant had suffered assault and abuse whilst in the care of the defendants over a period of time both as a child and extending into adulthood. At the time of the proceedings she was 42 years old. At the time of the abuse the defendants had knowledge that the abuser had previous convictions for assault going back to the early 1960s but failed to protect the claimant. The sole issue was, therefore, whether she had the relevant knowledge to bring a claim more than 3 years before the proceedings and, if so, whether the court should exercise its discretion to, nevertheless, allow her case to proceed. Clearly the claimant had the requisite knowledge to bring a claim shortly after achieving her majority which was long before the proceedings were commenced. Whilst the claimant had a strong case on both liability and causation the court had to balance that with fairness to the defendant and the public interest in certainty and finality. The incidents complained of occurred between 27 and 30 years before the proceedings were brought. There were significant gaps in documentation and some witnesses were untraceable which meant that a fair trial would not be possible. The court, therefore, would not exercise its discretion to allow the case to proceed.

Comment

Since the Hoare case changed the limitation period to one where the courts have discretion to allow cases to proceed despite being out of time, potential defendants have been concerned that claimants would be allowed to bring old abuse cases to court against them. This decision eases those concerns and shows that where there is prejudice to the defendant caused by the passage of time since the events occurred, the claimant will not succeed.



EMPLOYERS LIABILITY

Ammah v Kuehne+Nagel Logistics Ltd – 2009 (CA)

The claimant worked in the despatch department where it was his job to take items from shelves. Most of the shelves were at the A level, up to six feet in height, but the claimant was attempting to reach an item on a B level shelf just out of his reach. He upturned a tote box to stand on but as he was reaching the box moved and he fell, breaking his ankle.

The judge at first instance held that the accident was not caused by any breach of duty on the part of his employer so the claimant appealed on the basis that there was a duty to warn him of the danger even if it was an obvious one. The Court of Appeal held that some risks were so obvious that no instruction was required but that this was not such a case. The instruction by the employer not to use equipment for anything other than its intended use was not sufficient but the evidence was that employees had been instructed to use a “man-riser”, portable steps or a forklift truck to reach items out of reach and that instruction was sufficient. Standing on boxes may have occurred before but it was not a standard practice and had not been condoned. The risk taken by the claimant was therefore his own and not one for which his employer was to blame.

CONTRIBUTORY NEGLIGENCE – CYCLE HELMETS

Smith (Protected Party) v Finch – 2009 (EWHC)

The claimant had suffered a severe head injury in a road traffic accident whilst riding his bicycle. The defendant who was found to be entirely responsible for the accident argued that the 2004 edition of the Highway Code advises cyclists that they “should wear a cycle helmet which conforms to current regulations” and as the claimant had failed to do so the damages should be reduced if the wearing of a helmet would have reduced the severity of the injuries. The case of *Froom v Butcher 1976* which dealt with contributory negligence for the failure to wear a seatbelt was referred to as authority for this proposition. The judge confirmed in his judgement that the same principle should apply to the failure to wear a cycle helmet where the injury could be shown to have been more severe as a result. In this case the defendant had not demonstrated that a helmet would have reduced the severity of the injury and was held fully liable to the claimant. This might be a difficult fact to prove depending on the circumstances of the accident but, nevertheless, the principle has now been established in the High Court.

NOTIFICATION AND CONDITION PRECEDENT

(1) Aspen Insurance (2) Brit Insurance (3) David Constable v Pectel Ltd – 2008 (EWHC)

The claimant insurance companies sought a declaration that they had no liability under their insurance policy to a claim for indemnity from the defendant in respect of a fire that had occurred in a deep tunnel in which the defendant had been

working. The fire occurred in March 2004 and in October 2004 the defendant received a document showing that the materials they had used did not meet the British Standard ignitability requirements. In January 2007 the defendant received a letter confirming an intention to make a claim against their principal and recommending that they inform their insurers. In March 2007 it was formally alleged that the defendant was liable for the fire and 2 weeks later the letter was handed to the agent of the insurers. A condition of the policy required that the defendant should give the agent “immediate written notice with full particulars of any occurrence which may give rise to indemnity under this insurance”. A further condition stated that the insurer’s liability was conditional upon the defendant observing the terms and conditions of the insurance.

It was agreed that notification was required of a real and not a fanciful risk of the insurer being required to provide an indemnity and the court held that a reasonable man would not consider the risk of a claim as fanciful in circumstances where the defendant had been working in the area where the fire occurred. Consequently, they should have given the insurers immediate notification of the possibility of a claim being made against them. The commercial purpose of the condition was to enable the insurers to investigate a potential claim at the earliest opportunity and this justified compliance with the condition. The notification condition was a condition precedent to any liability of the insurers and as such the declaration was granted and the insurers were not liable to provide an indemnity.

RETROSPECTIVE CFA/SUCCESS FEE

Birmingham City Council v Rose Forde – 2009 (QBD)

Following challenges to similar conditional fee agreements (CFAs) by the defendant the claimant had taken out a second conditional fee agreement in case her first one was held to be invalid. The second CFA contained a retrospective success fee whereas the first CFA had contained no success fee at all. The defendant appealed against the lower court’s finding that the second CFA and the retrospective success fee were valid. The court held that there was a proper retainer and that the consideration consisted of the solicitor continuing to act for the claimant. Although the success fee was an additional liability it was subject to assessment as to its reasonableness by the costs judge. There was no prohibition on CFAs being retrospective and no reason why it should be contrary to public policy. Neither was it invalid because the retrospection extended to before the CFA Regulations were revoked.

Comment

It would appear unjust to defendants that a CFA which is invalid under the CFA Regulations 2000 can be replaced by a retrospective CFA taken out after November 2005 when the CFA Regulations were revoked. However, the claimant’s solicitors in this case did not seek to recover the success fee so whether it was reasonable or not wasn’t decided by the court.



COURT SPECIAL ACCOUNT RATE

With effect from 1st February 2009 the Court Special Account rate of interest will be reduced to 3% so that from that date the calculation of interest on special damages, which is normally at one half of the full rate, will fall to 1.5%. The full rate has stood at 6% since 1st February 2002.

AMENDMENTS TO THE CIVIL PROCEDURE RULES

There are three changes to the CPR which take effect from 6th April 2009. Under CPR 3.1(4) when giving directions the court *will* now take into account whether or not a party has complied with any relevant pre-action protocol. The word “will” has replaced “may” meaning that the court is now required to consider pre-action conduct in all cases where there is a relevant pre-action protocol. The Fast Track limit is increased from £15,000 to the new £25,000 limit as has been widely advertised. Finally, amendments have been made to Part 44.18 setting out the factors that will be taken into consideration when the court considers applications for Costs Capping Orders. Contrary to expectations these factors are not specifically restricted to certain types of case.

ACCESS TO SCOTTISH LEGAL AID

The Scottish Parliament has announced changes to the eligibility criteria for Legal Aid. The financial limits which restrict those eligible have been relaxed by a considerable amount with the result that approximately 75% of the population of Scotland will now be eligible, although there will be a tapered system of contributions for those with a disposable income of between £10,306 and £25,000. Applicants will still have to demonstrate that their case has a basis in law and that legal aid is reasonable in the circumstances. It remains to be seen whether these changes will result in an increase in the numbers of claims in Scotland.

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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