



OLD SQUARE
CHAMBERS

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Health & Safety Update

- **“Suitable”**
Reg 12(1), Workplace (Health, Safety and Welfare) Regulations 1992
Reg 5, Provision and Use of Work Equipment Regulations 1998
Reg 3, Management of Health and Safety at Work Regulations 1999
- **“Safe”**
s.s29(1), Factories Act 1969; Baker v Quantum
- **“Reasonably practicable”**
s.s29(1), Factories Act 1969; Baker v Quantum
- **When are duties imposed on an employer in respect of equipment used at work by his employee?**
Reg 3(2), Provision and Use of Work Equipment Regulations 1998
- **The duty to assess manual handling operations which involve risk of injury**
Reg 4(1)(b)(ii), Manual Handling Operations Regulations 1992

“Suitable”

Reg 12(1), Workplace (Health, Safety and Welfare) Regulations 1992

Reg 5, Provision and Use of Work Equipment Regulations 1998

Reg 3, Management of Health and Safety at Work Regulations 1999

Workplace (Health, Safety and Welfare) Regulations 1992

12 Condition of floors and traffic routes

- (1) Every floor in a workplace and the surface of every traffic route in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used.
- (2) Without prejudice to the generality of paragraph (1), the requirements in that paragraph shall include requirements that –
 - (a) the floor, or surface of the traffic route, shall have no hole or slope, or be uneven or slippery so as, in each case, to expose any person to a risk to his health or safety; and
 - (b) every such floor shall have effective means of drainage where necessary.

The duty is strict.

The floor / traffic route surface must be suitable.

The duty is not limited to what is “reasonably practicable”

Compare with the duty under Reg 12(3)

(3) So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall.

The key cases

- **Palmer v Marks & Spencer** [2001] EWCA Civ 1528
- **McGhee v Strathclyde Fire Brigade** [2002] Scot CS (OH) 18.01.02; 2002 SLT 680; 2002 Rep LR 29
- **Lowles v The Home Office** [2004] EWCA Civ 985
- **Ellis v Bristol City Council** [2007] EWCA Civ 685; [2007] ICR 1614
- **Craner v Dorset County Council** [2008] EWCA Civ 1323; [2009] ICR 563
- **Taylor v Wincanton Group Ltd** [2009] EWCA Civ 1581

Claims are not self proving

Although the duty is strict, it does not mean that every injury due to a floor's physical structure is a breach of the duty

The duty imposes a “very high degree of liability upon the employer” – Palmer [15]

Risk to health and safety

- What is suitable involves a qualitative assessment
– Palmer [15]
- “The court is concerned with suitability from a health and safety point of view” – Palmer [13].

- Has the floor been constructed in such a way as to expose any person to a risk to his health and safety? Was the alleged hazard such as to expose any person to such a risk? – Palmer [19], Taylor [24].
- A floor may be uneven or slippery or have a hole yet not expose a person to a risk to his health and safety – McGhee [10] *cf* Gilmour v East Renfrewshire Council (2003) 2004 Rep LR 40 (OH) [54].

Foreseeability

- Foreseeability is not the touchstone, but it plays a part – Palmer [10].

Relevant Considerations

- Was the alleged hazard's presence known to the claimant? – Palmer [25].
- Was the alleged hazard obvious to the claimant? – Palmer [25].

- Was it where it was to be expected? – Palmer [25], Ellis [6] & [19].
- Were there distractions present which meant that the hazard may not be noticed? – Lowles [13] & Ellis [47].
- How long had the hazard been in place and how many people had passed it without mishap? – Palmer [25].
- Had the defendant received any complaints about it? – Palmer [25].

- Was the claimant particularly vulnerable to the risk?
– Palmer [26] & [33].
- How great was the likelihood of mishap? – Palmer [25].
- How serious would the consequences of such mishap have been? – Palmer [25].

- Did the hazard need to be there, did it serve any useful purpose? – Lowles [14].
- Was the hazard highlighted or an effective warning given of its presence? – Lowles [14].

- These factors are to be considered as they were before the accident and not with any benefit of hindsight – Palmer [27] & Ellis [44].

- What if any risk had the defendant identified in its statutory risk assessment?
- Such risk assessments are relevant but not determinative – Lowles [13].
- What risk would the defendant have identified, if it had carried out a suitable and sufficient risk assessment? – Taylor [24].

- Not only must the floor have been constructed so as to be suitable, it must remain suitable – McGhee [10] & [12], Gilmour [54] & Ellis [62].
- If temporary conditions are frequent, the floor must be suitable for those conditions – Ellis

- Context is everything, – Lowles [13] – ...
- ... therefore a floor which is often wet ought to be of a construction so as not to be dangerously slippery when wet – Ellis
- and a step into a portacabin may be obvious – Taylor.
- or it may not – Lowles.

“Suitable” appears in other Regulations too.

Some examples are ...

Provision and Use of Work Equipment Regulations 1998

4 Suitability of work equipment

- (1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.
- (2) ...
- (3) Every employer shall ensure that work equipment is used only for operations for which, and under conditions for which, it is suitable.
- (4) In this regulation 'suitable' —
 - (a) ... means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person; ...

Robb v Salamis (M&I) Ltd [2006] UKHL 56, [2007] ICR 175

- In view of the definition of "suitable" in reg 4(4), the employer is obliged to anticipate situations that might give rise to accidents rather than wait for them to happen.
- The absence of previous accidents does not mean it was not reasonably foreseeable that equipment may be carelessly misused so as to create a risk of injury
- Equipment which was not constructed or adapted so as to eliminate a risk of injury due to carelessness was not "suitable" within the meaning of regulation 4(1).
- "The degree of foresight and the definition of the level of risk may remain matters for future consideration in the general development of the law in this area towards the greater safety of the workplace and the consequently higher levels of obligation on the employer."

-- Lord Carswell at [48]

Management of Health and Safety at Work Regulations 1999

3 Risk Assessment

- (1) Every employer shall make a suitable and sufficient assessment of—
- (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and
 - (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,
- for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions

Allison v London Underground Ltd

[2008] EWCA Civ 71; [2008] ICR 719

- A suitable and sufficient risk assessment will identify those risks in respect of which the employee needs training. Such a risk assessment will provide the basis not only for the training which the employer must give but also for other aspects of his duty, such as, for example, whether the place of work is safe or whether work equipment is suitable.
- Risk assessments are meant to be an exercise by which the employer examines and evaluates all the risks entailed in his operations and takes steps to remove or minimise those risks. They should be a blueprint for action.

“Safe”

S.29(1) Factories Act 1969

Baker v Quantum

Factories Act 1969

29 Safe means of access and safe place of employment

- (1) There shall, so far as is reasonably practicable, be provided and maintained 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

Allen v Avon Rubber Co Ltd [1986] ICR 695 (CA)

Whether or not a place is safe depends upon whether it is free from foreseeable risk of injury to anybody acting in a reasonably foreseeable way in reasonably foreseeable circumstances

Allen was consistent with previous decisions:

- Taylor v Coalite Oils & Chemicals Ltd [1967] 3 KIR 315 (CA), and
- Morrow v Enterprise Sheet Metal Works (Aberdeen) Ltd [1986] SLT 697 (IH).

Larner v British Steel [1993] ICR 551 (CA)

The duty to ensure the work place is safe is an absolute duty.

There is no requirement on the claimant to establish that any accident which occurred was a reasonably foreseeable danger.

If a risk was not reasonably foreseeable, it did not mean the place was safe but it may mean it was not reasonably practicable to make it safe.

Larner was consistent with the previous decision in Robertson v RB Cowe & Co [1970] SLT 122 (IH) and was followed by the later decision in Mains v Uniroyal Englebert Tyres Ltd [1995] IRLR 544 (IH)

Baker v Quantum [2009] EWCA Civ 499, [2009] PIQR P332

- The test of safety is an objective one and so reasonable foresight is irrelevant.
- Whether a place is safe does not change just because what is known about the risk or what can be done about it changes.
- If the regular noise levels cause deafness to a particular claimant, then his place of work is not safe for him or her.
- As an unidentified minority of the workforce will suffer appreciable harm from prolonged exposure to noise exceeding 85 dB(A), then a workplace where there are such levels is not safe for any of the workforce. They are all at risk.

Section 29 has a long history.

Safe means of access

Section 26(1) Factories Act 1937
in force 1 July 1937

Safe place of work

Section 5 Factories Act 1959
in force 1 December 1959

- Section 29 was repealed by the Workplace (Health, Safety and Welfare) Regulations 1992
 - as from a date between 1 January 1992 and 1 January 1996,
 - differing dates for different workplaces,
 - depending upon the age of the workplace or any modification, extension or conversion

Other historic duties to make safe:

Shipbuilding:

Reg.1, Shipbuilding Regulations 1931

Reg.6, Shipbuilding and Ship-Repairing Regulations 1960.

Construction:

Reg.5, Building (Safety, Health and Welfare) Regulations 1948

Reg.7, Construction (General Provisions) Regulations 1961,

Reg.6, of the Construction (Working Places) Regulations 1966

“Safe” still exists in present day legislation:

- Workplace (Health, Safety and Welfare) Regulations 1992
- Provision and Use of Work Equipment Regulations 1998
- Lifting Operations and Lifting Equipment Regulations 1998
- Confined Spaces Regulations 1997
- Work at Height Regulations 2005

Workplace (Health, Safety and Welfare) Regulations 1992

17 Organisation etc of traffic routes

(1) Every workplace shall be organised in such a way that pedestrians and vehicles can circulate in a safe manner.

Provision and Use of Work Equipment Regulations 1998

28 Self-propelled work equipment

Every employer shall ensure that, where self-propelled work equipment may, while in motion, involve risk to the safety of persons — ...

- (f) if provided for use at night or in dark places —
 - (i) it is equipped with lighting appropriate to the work to be carried out; and
 - (ii) is otherwise sufficiently safe for such use;

Provision and Use of Work Equipment Regulations 1998

32 Thorough examination of power presses, guards and protection devices

(1) Every employer shall ensure that a power press is not put into service for the first time after installation, or after assembly at a new site or in a new location unless —

(a) it has been thoroughly examined to ensure that it —

(i) has been installed correctly; and

(ii) would be safe to operate; ...

Lifting Operations and Lifting Equipment Regulations 1998

6 Positioning and installation

(1) Every employer shall ensure that lifting equipment is positioned or installed in such a way as to reduce to as low as is reasonably practicable the risk —

(a) of the lifting equipment or a load striking a person; or

(b) from a load —

(i) drifting;

(ii) falling freely; or

(iii) being released unintentionally;

and it is otherwise safe.

Confined Spaces Regulations 1998

4 Work in confined spaces

(1) No person at work shall enter a confined space to carry out work for any purpose unless it is not reasonably practicable to achieve that purpose without such entry.

(2) Without prejudice to paragraph (1) above, so far as is reasonably practicable, no person at work shall enter or carry out any work in or (other than as a result of an emergency) leave a confined space otherwise than in accordance with a system of work which, in relation to any relevant specified risks, renders that work safe and without risks to health.

Work at Height Regulations 2005

4 Organisation and planning

- (1) Every employer shall ensure that work at height is —
- (a) properly planned;
 - (b) appropriately supervised; and
 - (c) carried out in a manner which is so far as is reasonably practicable safe.

The appeal in Baker will be heard by the Supreme Court in November 2010

“Reasonably practicable”

S.29(1) Factories Act 1969

Baker v Quantum

the burden of proof

Nimmo v Alexander Cowan & Sons Ltd

[1968] AC 107 (HL)

- The claimant has only to prove that the place of work was unsafe.
- The burden of pleading and proving the defence of reasonable practicability then lies on the employer.

Grossly disproportionate

Edwards v National Coal Board [1949] 1 KB 704 (CA)

“ ‘Reasonably practicable’ is a narrower term than ‘physically possible’ and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.”

per Asquith LJ at p 712

Baker v Quantum [2009] EWCA Civ 499, [2009] PIQR P332

- It is only reasonably practicable for the employer to avoid a danger if he is, or ought to be, aware of the danger and its magnitude.
- If the employer ought to have known of the risk but did not and had never applied his mind to it, the burden is on the employer to show that it would not have been reasonably practicable for him to avoid or reduce the risk even if he had thought about it.

Baker v Quantum (continued)

- The balancing exercise is not done with a view to seeing whether the scales just tip. There must be a gross disproportion between the quantum of risk and the cost of removing that risk.
- ‘Quantum of risk’ refers to both
 - the likelihood of injury, and
 - how severe the harm would be if the risk eventuated.

Baker v Quantum (continued)

- The claimant must show that his place of work was not safe. If he achieves that, the burden passes to the employer to show that the burden of eliminating the risk substantially outweighed the quantum of risk.

“I cannot see how or where the concept of an acceptable risk comes into the equation or balancing exercise ...

In that respect, it appears to me that there is a significant difference between common law liability where a risk might reasonably be regarded as acceptable and statutory liability where the duty is to avoid any risk within the limits of reasonable practicability”

Smith LJ at [89]

When are duties imposed on an employer in respect of equipment used at work by his employee?

Provision and Use of Work Equipment Regulations 1998, Reg 3(2)

- Many Regulations impose a duty upon the employer but limit it to matters within the employer's control
- The Regulations also impose duties on others, again limited to matters within their control

Workplace (Health, Safety and Welfare) Regulations 1992

4 Requirements under these Regulations

- (1) Every employer shall ensure that every workplace, modification, extension or conversion which is under his control and where any of his employees works complies with any requirement of these Regulations which —
 - (a) applies to that workplace or, as the case may be, to the workplace which contains that modification, extension or conversion; and
 - (b) is in force in respect of the workplace, modification, extension or conversion.

- (2) Subject to paragraph (4), every person who has, to any extent, control of a workplace, modification, extension or conversion shall ensure that such workplace, modification, extension or conversion complies with any requirement of these Regulations which —
 - (a) applies to that workplace or, as the case may be, to the workplace which contains that modification, extension or conversion;
 - (b) is in force in respect of the workplace, modification, extension, or conversion; and
 - (c) relates to matters within that person's control.

Construction (Design and Management) Regulations 2007

25 Application

- (1) Every contractor carrying out construction work shall comply with the requirements of regulations 26 to 44 insofar as they affect him or any person carrying out construction work under his control or relate to matters within his control.
- (2) Every person (other than a contractor carrying out construction work) who controls the way in which any construction work is carried out by a person at work shall comply with the requirements of regulations 26 to 44 insofar as they relate to matters which are within his control.

Work at Height Regulations 2005

3 Application

...

- (2) The requirements imposed by these Regulations on an employer shall apply in relation to work—
 - (a) by an employee of his; or
 - (b) by any other person under his control, to the extent of his control.
- (3) The requirements imposed by these Regulations on an employer shall also apply to —
 - (a) a self-employed person, in relation to work —
 - (i) by him; or
 - (ii) by a person under his control, to the extent of his control; and
 - (b) to any person other than a self-employed person, in relation to work by a person under his control, to the extent of his control.

The legislation seems carefully drafted so as in some cases to require control and in others not

Consider then ...

Provision and Use of Work Equipment Regulations 1998

3 Application

- (1) ...
- (2) The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work.
- (3) The requirements imposed by these Regulations on an employer shall also apply —
 - (a) to a self-employed person, in respect of work equipment he uses at work;
 - (b) subject to paragraph (5), to a person who has control to any extent of—
 - (i) work equipment;
 - (ii) a person at work who uses or supervises or manages the use of work equipment; or
 - (iii) the way in which work equipment is used at work,and to the extent of his control.

Note the clear absence of any reference to “control” in sub paragraph 2

For a non-employer to be liable, he needs need to be in control of the equipment or its use

But what about an employer?

Couzens v T McGee Co Ltd
[2009] EWCA Civ 95, [2009] PIQR P14

“Parliament extended the scope of the regulations to items of equipment which the worker himself had provided and used. I do not think it conceivable that Parliament could have intended to impose strict liability on an employer in respect of an item of equipment about which he did not know and could not reasonably have been expected to know.”

Smith LJ at para [33]

Smith v Northamptonshire County Council
[2009] UKHL 27, [2009] ICR 734

The facts

Whilst the employee was pushing a patient in a wheelchair along a wheelchair ramp at the patient's home, the ramp collapsed due to a concealed defect and the employee was injured.

- The employee needed to use the ramp to be able to move the patient in and out of the house.
- The employer knew the employee needed to use it.
- The employer did not supply the employee with a ramp
- She used one supplied by a third party.
- The employer knew this.

- The employer inspected the ramp to ensure it was suitable.
- The employer benefitted from the employee using the ramp as it enabled its work to be done.
- If the third party did not supply the ramp, the employer would have needed to supply its own or make alternative arrangements.

- The employer admitted that:
 - the ramp was "work equipment".
 - the employee "used" the ramp "at work."

3 Application

...

- (2) The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work.

- All five Law Lords agreed that that Reg 3(2) cannot have been intended to impose liability in the unrestricted terms which its wording suggests.
- They all agreed that there was a limit to the circumstances in which the employer was liable for defective equipment.
- They differed as to what that limit was.

Lord Hope of Craighead

- Before the employer can be liable, he needs to have control.
- There needs to be a nexus between the work equipment and the undertaking that the employer is carrying on.
- Authorisation and control of the employee's use of it by the employer provide that nexus.
- So does the employer's consent to and endorsement of the employee's use.
- Incorporation and adoption of the equipment into the employer's business is not required.
- On the facts, there was a sufficient nexus between the ramp and the employer's business. The claim should succeed

Baroness Hale of Richmond

- The words “for use . . . at work” import limitations.
- Mainly that the employer knew of the use at work ...
- ... and authorised it
- The use must be for work, not just at work
- The employer must either control the equipment or the employee’s use of it, otherwise there is no liability
- On the facts, the employer did have control and the claim should succeed.

Lord Mance

- The duties would make no sense if they are imposed on an employer who has no control over the equipment and therefore no means of even trying to comply.
- The equipment must have been provided or used in circumstances in which the equipment was, as between the employer and employee, incorporated into and adopted as part of the employer's business or undertaking.
- Such incorporation can be as a result of the equipment being provided:
 - by the employer for use in its business, or
 - by a third party and being used by the employee in the employer's business with the employer's consent and endorsement.

Lord Mance (continued)

- Mere use by the employee is not enough.
- That the employer:
 - was careful and inspected the equipment
 - could have provided its own equipment, but didn't
 - could have forbade the employee from using the equipmentdoes not mean the employer has incorporated or adopted it.
- The time is long past when legislation, especially legislation implementing European Directives, is given an entirely literal, as opposed to a purposive, effect.
- On the facts, the employer had not incorporated or adopted the ramp and the claim should fail

Lord Neuberger of Abbotsbury

- The Regulations would make no sense if they imposed a duty on an employer in relation to equipment over which he has no control.
- The Work Equipment Directive focuses on equipment "selected" by the employer and "made available to workers in the undertaking" and the Regulations should be interpreted accordingly
- Therefore the employer must have control
- To take care and inspect the equipment to ensure it is safe is not to have control of it
- On the facts, the employer did not have control of the ramp to be able to maintain it and the claim should fail

Lord Carswell

- There has to be a limit to the circumstances in which the employer would be liable for equipment or its use.
- The Work Equipment Directive focuses on equipment which are part of the employer's undertaking and the Regulations should be interpreted accordingly
- It remains to be seen if they cover the tool borrowed by an employee on a building site from another contractor
- To inspect equipment not to have control of it and control is required
- On the facts, the employer did not have control of the ramp and the claim should fail

The duty to assess manual handling operations which involve risk of injury

**Manual Handling Operations Regulations
1992, Reg 4(1)(b)(ii)**

Manual Handling Operations Regulations 1992

4 Application

(1) Each employer shall —

(a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or

(b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured —

(i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that Schedule,

(ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable, ...

Egan v Central Manchester & Manchester Children's University Hospitals NHST

[2008] EWCA Civ 1424; [2009] ICR 585

- The duty to take all appropriate steps to reduce the risk of injury to the lowest level reasonably practicable is a distinct duty, independent of the duty to assess the risks.
- Where there has been no risk assessment, there is still a duty to take positive action to reduce the risks.
- It is not relevant that an employer who did not carry out a risk assessment would not have acted any differently even if he had carried out a risk assessment.

Egan (continued)

- Once it is shown that an operation carried some risk of injury, the burden of proof is on the employer to prove that it had taken appropriate steps to reduce the risk so far as reasonably practicable.
- There is an evidential burden on the claimant to identify steps which could have been taken to reduce the risk but the legal burden remains on the employer to prove that it was not reasonably practicable to take those steps or that they would not have prevented or reduced the injury.

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